



STATE OF INDIANA
ALCOHOL AND TOBACCO COMMISSION

302 West Washington Street
IGCS Room E114
Indianapolis, IN 46204
Telephone (317) 232-2430
Fax (317) 233-6114
www.IN.gov/atc

Advisory Opinion 24-02:
Advertising of Primary Source of Supply & Retailer Permit Premises

I. Background

In 2019, a primary source of supply¹ (“primary source”) entered into a sponsorship agreement with the owner (or its affiliate) of an Indiana concert venue (“concert venue”) at which a retail alcohol permit is issued to a third-party concessionaire (“concessionaire” or “retailer”) who conducts alcohol sales on the licensed premises. Under the terms of the sponsorship agreement, the primary source made a series of payments to the concert venue (or its affiliate) and, in exchange for such payments, the primary source was made the exclusive sponsor of certain concerts and performances of the concert venue, as well as in “exclusive business categories” of alcoholic beverage products specifically domestic, import, craft, non-craft, hard cider/seltzer, and flavored malt beverage/malt beverages.

As part of its sponsorship agreement with the concert venue, the primary source conducted a concert sweepstakes. In 2024, the primary source submitted a request to the Indiana Alcohol and Tobacco Commission (“ATC” or “Commission”) for approval of the sweepstakes which was sponsored by the primary source, conducted by a third-party administrator, open to all Indiana residents aged twenty-one (21) and older, and not contingent upon the purchase of an alcoholic beverage. Those wishing to enter the sweepstakes were instructed to visit a specific website hosted by the primary source either by entering the web address provided directly into an Internet browser or by scanning a QR code included on certain point-of-sale advertising materials. Each sweepstakes winner received four (4) codes worth \$100.00 for eligible concert tickets and the sweepstakes had a total of twenty (20) winners over the span of three (3) drawings—eight (8) winners in the first drawing, eight (8) winners in the second drawing, and four (4) winners in the third drawing. The total approximate retail value of the sweepstakes was \$8,000.00.

As the sponsor of the sweepstakes, the primary source wished to have certain point-of-sale advertising materials approved by the ATC. Although not required, the advertising materials were not submitted to the U.S. Department of Treasury’s Alcohol and Tobacco Tax and Trade Bureau (“TTB”) for federal approval. Upon review, the advertising materials were not approved by the ATC because they contained the name and image or likeness of the primary source and the concert venue permit premises and were thus considered cooperative advertisements in violation of a rule of the Commission. In response, the primary source submitted an advisory opinion request to the ATC seeking further clarification and justification regarding the advertising materials in question.

¹ The term “primary source of supply” means: (1) an artisan distiller or distiller of an alcoholic beverage; (2) a producer of an alcoholic beverage; (3) a vintner of an alcoholic beverage; (4) a rectifier of an alcoholic beverage; (5) an importer into the United States of an alcoholic beverage; (6) an owner of an alcoholic beverage at the time it becomes a marketable product; (7) a bottler of an alcoholic beverage; (8) a brewer of an alcoholic beverage; or (9) an agent of a person listed in subsection (1) through (8) authorized to make sales to an Indiana wholesaler. See IC 7.1-1-3-32.5.

II. Legal Authority

A. Federal Laws & Regulations

According to the Federal Alcohol Administration (“FAA”) Act, it is unlawful for an industry member² to directly or indirectly require a retailer of distilled spirits, wine, or malt beverages to purchase any such products from the industry member to the exclusion of alcoholic beverages sold or offered for sale by other industry members in interstate or foreign commerce, whether by agreement or otherwise. 27 U.S.C. § 205(a). Additionally, the FAA Act makes it unlawful for an industry member to directly or indirectly induce a retailer of alcoholic beverages to purchase such products from the industry member to the exclusion of alcoholic beverages sold or offered for sale by other industry members in interstate or foreign commerce. 27 U.S.C. § 205(b). In the case of malt beverages, 27 U.S.C. § 205(b) applies to transactions between a retailer in one State and a brewer, importer, or wholesaler of malt beverages inside or outside such State only to the extent that the laws of such State impose similar requirements with respect to similar transactions between a retailer in such State and a brewer, importer, or wholesaler of malt beverages in such State. 27 U.S.C. § 205 (penultimate paragraph); 27 C.F.R. 6.4(b) and 8.4(b).

Subject to certain exceptions, 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 FAA Act. 27 CFR 6.41. Similarly, 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 flow to individual retailers, is indirectly furnishing of a thing of value to retailer within the meaning of the FAA Act and is prohibited. 27 CFR 6.42(a). To be fair, there are some exceptions to this general rule, such as in cases where the thing of value is furnished to the retailer by a third party without the knowledge or intent of the industry member and where the industry member did not reasonably foresee that the thing of value would have been furnished to the retailer by a third party. 27 CFR 6.42(b). Additionally, there are limited exceptions to the prohibition on furnishing things of value such as product displays, point of sale advertising materials, consumer tasting or sampling at retail locations, limited equipment and supplies, and product management (e.g., stocking, rotation, pricing) services. However, any exception to 27 U.S.C. 205(b) must generally be of little value.

Under the FAA Act, the TTB regulates the advertising of alcoholic beverages to prevent consumer deception, to provide consumers with adequate information about the identity and quality of product(s) advertised, to identify who is responsible for the advertisement, and, in the case of distilled spirits, to disclose the alcohol content and/or use of neutral spirits. 27 U.S.C. 205(f). At the federal level, an advertisement is defined as “any written or verbal statement, illustration, or depiction which is in, or calculated to induce sales in, interstate or foreign commerce, or is disseminated by mail, whether it appears in a newspaper, magazine, trade booklet, menu, wine card, leaflet, circular, mailer, book insert, catalog, promotional material, sales pamphlet, or any written, printed, graphic, or other matter accompanying the container, representations made on cases, billboard, sign, or other outdoor display, public transit card, other periodical literature, publication, or in a radio or television broadcast, or in any other media.” 27 CFR 4.61, 5.232, and 7.232. Although advertisements for alcoholic beverages do not require prior approval from the TTB, it offers a voluntary pre-clearance service to industry members in which it will review advertisements for compliance, potentially helping to avoid additional costs or expenditures incurred by needing to revise or withdraw a noncompliant advertisement.³

² The term “industry member” is defined as any person engaged in business as (1) a distiller, brewer, rectifier, blender, or other producer; (2) an importer or wholesaler of distilled spirits, wine, or malt beverages; or (3) a bottler, or warehouseman and bottler, of distilled spirits. See 27 CFR 4.60, 5.231, and 7.231.

³ <https://www.ttb.gov/business-central/advertising/alcohol-beverage-advertising> (last visited on November 22, 2024).

B. State Laws & Administrative Rules

Indiana imposes similar requirements to the federal laws and regulations discussed above. First, 905 IAC 1-5.1-1 provides that, except as provided in 905 IAC 1-5.2, it is unlawful for a primary source of supply or wholesaler to induce (directly or indirectly) any retailer or dealer to purchase any alcoholic beverages from a primary source of supply or wholesaler to the exclusion, in whole or in part, of alcoholic beverages sold or offered for sale by another primary source of supply or wholesaler by doing any of the following:

- (1) Acquiring or holding any interest in any retailer or dealer permit.
- (2) Acquiring any interest in real or personal property owned, occupied, or used by the retailer or dealer in the conduct of its alcoholic beverage business, except to the extent a lien or other security interest is acquired to secure payment of goods sold on credit if permissible under IC 7.1.
- (3) Furnishing, giving, renting, lending, or selling to the retailer or dealer, any equipment, fixtures, supplies, money, services, or other things of value.
- (4) Paying or crediting the retailer or dealer for any advertising, display, or distribution service.
- (5) Guaranteeing any loan or the repayment of any financial obligation of the retailer or dealer.
- (6) Requiring the retailer or dealer to take and dispose of a certain quota of any alcoholic beverages.

Likewise, 905 IAC 1-5.1-1 also makes it unlawful for a retailer or dealer to purchase (or offer to purchase) alcoholic beverages from a primary source of supply or wholesaler to the exclusion, in whole or in part, of alcoholic beverages sold or offered for sale by another primary source of supply or wholesaler, if the primary source of supply or wholesaler has done (or is requested by the retailer or dealer to do) any of the prohibited activities above.

As set forth in IC 7.1-5-5-11(a), it is also unlawful for a manufacturer or wholesaler to give a gift such as services or supplies to another permittee who purchases alcoholic beverages from the manufacturer or wholesaler unless a valid exception applies. Even then, the exceptions to Indiana's prohibition on gifts between permittees carry their own limitations and restrictions as well. For example, IC 7.1-5-5-11(e) states that a manufacturer or wholesaler may provide entertainment and "professional and educational expenses" such as advertising specialties⁴ and consumer advertising specialties⁵ to another permittee as long as they are not provided in exchange for an agreement to directly or indirectly purchase alcoholic beverages from a manufacturer or wholesaler to the exclusion, in whole or in part, of alcoholic beverages sold or delivered by another manufacturer or wholesaler. However, by definition, an advertising specialty that is provided to another permittee cannot have a fair market value of more than one thousand dollars (\$1,000), and a consumer advertising specialty that is provided to another permittee cannot have a fair market value of more than three hundred dollars (\$300) without prior Commission approval. Additionally, the definition of professional and educational expenses in IC 7.1-1-3-32.7 states that a primary source of supply may not:

⁴ IC 7.1-1-3-3.5 defines "advertising specialty" as an item having a fair market value of not more than one thousand dollars (\$1,000) that is designed to be used within a retailer or dealer establishment to attract consumer attention to products of a manufacturer which bears conspicuous and substantial advertising about the product, manufacturer, and/or wholesaler that is permanently inscribed or securely affixed.

⁵ IC 7.1-1-3-12.5 defines a "consumer advertising specialty" as an item that is designed to be carried away from the retailer or dealer establishment by the consumer which bears conspicuous and substantial advertising matter about the product or the manufacturer or wholesaler that is permanently inscribed or securely affixed. The term includes items such as trading stamps, nonalcoholic mixers, pouring racks, ash trays, bottle or can openers, cork screws, shopping bags, matches, printed recipes, pamphlets, cards, leaflets, blotters, post cards, pencils, shirts, caps, and visors.

(A) add the name or address of a retailer or dealer to an advertising specialty or consumer advertising specialty; or (B) pay or credit a retailer or dealer, directly or indirectly, for distribution services.

According to IAC 1-5.2-1, a primary source of supply or wholesaler may only furnish supplies and services to a retailer or dealer permittee that are specifically authorized by 905 IAC 1-5.2 ("Rule 5.2"), and if a primary source or wholesaler chooses to provide supplies or services authorized by Rule 5.2 to retailers or dealers, they may not be conditioned upon the purchase of alcoholic beverages and must be offered on a nondiscriminatory basis. As provided in 905 IAC 1-5.2-13, contest prizes, premium offers, or similar promotions such as sponsorships may be offered by a primary source of supply or wholesaler directly to consumers so long as the prizes or offers are not conditioned on the purchase of a product. However, contest prizes, premium offers, and similar promotions that are offered by a primary source of supply or wholesaler to employees of a retailer and/or dealer permittee are subject to prior written approval of the ATC.

Indiana also has similar requirements related to the advertising of alcoholic beverages which relate back to the prohibitions on providing (or offering to provide) gifts and other things of value to other industry members. Under IC 7.1-2-3-16(a), the Commission is authorized to regulate and prohibit advertising, signs, displays, posters, and designs intended to advertise an alcoholic beverage or a place where alcoholic beverages are sold. However, in the case of advertising by a brewer, distiller, rectifier, or vintner in or on a facility such as an entertainment complex⁶, IC 7.1-2-3-16.5(d) states that the Commission may regulate, but not prohibit, such advertising.

In accordance with 905 IAC 1-5.2-3, a product display, advertising specialty, advertisement, illuminated or non-illuminated sign, poster, or label which complies with the rules contained in 27 CFR is generally considered approved by the ATC. However, according to 905 IAC 1-5.1-6, a primary source of supply or wholesaler is prohibited from furnishing outside signs to retailers or dealers which advertise the retailer or dealer premises because such an act is considered furnishing a thing of value to another permittee in violation of IC 7.1-5-5-10 and 905 IAC 1-5.1-1. Similarly, 905 IAC 1-5.1-7 states that an arrangement in which a primary source of supply or wholesaler participates with a retailer or dealer in paying for an advertisement of the retailer or dealer constitutes paying the retailer or dealer for advertising and is prohibited. To that end, a primary source of supply or wholesaler is prohibited from participating in advertising with a retailer or dealer and/or paying for the advertisement of a retailer or dealer premises because such an act is deemed to be cooperative advertising.

Lastly, IC 7.1-1-2-5 states that "whenever a person⁷ is prohibited from doing a certain act or holding a certain interest directly, he shall be prohibited also from doing that act or holding that interest indirectly."

III. Analysis & Conclusion

As stated above, the concessionaire at the concert venue conducts all alcohol sales on the licensed premises pursuant to a concessionaire agreement with the concert venue owner (or its affiliate) and holds

⁶ The term "entertainment complex" is defined in IC 7.1-1-3-16.5 and includes sites for the performance of musical, theatrical, or other entertainment where at least six hundred (600) individuals may be seated at one (1) time in permanent seating.

⁷ IC 7.1-1-3-31 defines the term "person" as a natural individual, a firm, a corporation, a partnership, a limited partnership, a limited liability company, an incorporated or unincorporated association, or other legal entity, whether acting by themselves or by a servant, agent, or employee.

the alcohol permit issued by the ATC for the licensed premises⁸. As part of the sponsorship agreement between the primary source and the concert venue, the primary source conducted a concert sweepstakes which was approved by the ATC in accordance with 905 IAC 1-5.2-13⁹. As part of the sweepstakes, the primary source sought to have point-of-sale advertising materials approved by the ATC. However, because the advertising materials contained the name of the concert venue and image or likeness of the retail permit premises, they were denied by the ATC as cooperative advertisements in violation of 905 IAC 1-5.1-7.

Although the Commission may not prohibit certain advertising at the concert venue because the licensed premises is deemed to be an entertainment complex, it does have the authority to regulate advertising in or on the premises in accordance with IC 7.1-3-1-25. In this case, the advertising materials in question were not approved by TTB, so it is unclear whether they comply with the provisions of 27 CFR. As such, there is no presumption under 905 IAC 1-5.2-3 that they are deemed approved by the ATC, and we must turn to the relevant state laws and administrative rules for guidance.

Regardless of who holds the retail alcohol permit for the concert venue in this scenario, the advertising materials were properly denied as cooperative advertisements because they contained advertising for both the primary source and retail permit premises in violation of 905 IAC 1-5.1-7. Furthermore, to the extent that the advertisements may be considered outside signage by virtue of the licensed premises being an outdoor concert venue, the advertising materials may also be deemed to be in violation of 905 IAC 1-5.1-6 which prohibits a primary source from furnishing outdoor signs to retailers or dealers which advertise the retailer or dealer premises because it is considered furnishing a thing of value.

Even more, the direct-indirect prohibition set forth in IC 7.1-1-2-5 also applies to the matter at hand, meaning the primary source and concessionaire cannot engage in acts that are directly prohibited by state laws or rules by doing so in an indirect manner. In this case, the concert venue owner (or its affiliate) is seemingly acting as an intermediary between the primary source and the concessionaire as retail permit holder because it has contractual agreements with both parties. However, this arrangement between the parties does not authorize the primary source or the concessionaire to disregard applicable state and federal laws, rules, or regulations. Keeping this in mind, the primary source is prohibited from directly or indirectly furnishing outside signs to the concessionaire which advertise the licensed premises as set forth in 905 IAC 1-5.1-6, and is prohibited from directly or indirectly participating in and/or paying for an advertisement of the licensed premises as set forth in 905 IAC 1-5.1-7.

Finally, although the sponsorship agreement in this case explicitly represents that the purchase of advertising rights by the primary source is in no way conditioned upon or intended to induce any retailer's purchase of any alcoholic beverages produced, sold, or offered for sale by the primary source, the agreement also provides for category exclusivity. To that end, although this advisory opinion is primarily intended to address questions raised regarding advertising, it is important to highlight the state and federal laws prohibiting exclusivity and unlawful inducements which are also applicable to the sponsorship agreement in this case. As such, the primary source, concert venue owner, and concessionaire, who is operating as a retail permit holder, should be mindful of how the sponsorship agreement may impact their business decisions and potentially interact with state and federal law because, if the existence of the sponsorship agreement directly or indirectly induces or requires the concessionaire to purchase or sell the primary source's products at the licensed premises which then results in the concessionaire purchasing fewer of competitors' products than it would otherwise, the parties may run afoul of the state and federal laws prohibiting exclusivity and unlawful inducements in the sale of alcoholic beverages.

⁸ IC 7.1-3-1-25(e) authorizes the Commission to issue a civic center permit to a person that is the proprietor, as owner or lessee, of an entertainment complex, or otherwise has an agreement with the owner(s) or lessee(s) of an entertainment complex to act as a concessionaire for the entertainment complex for the full period for which the permit is to be issued.

⁹ Although the concert sweepstakes was not open to employees of the concessionaire, the ATC would like to thank the primary source for seeking prior approval of the sponsorship in this case.

DISCLAIMER: The purpose of this advisory opinion is to provide guidance and information concerning the position of the Commission on particular issues or topics and is not intended to serve as business or legal advice. All opinions expressed herein are fact-sensitive, limited to the information and circumstances presented, and based on the 2024 version of the Indiana Code and Indiana Administrative Code.