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Howard A. Tyler  
Director

Notice

TO: All Georgia Malt Beverage Licensees

FROM: David Dyal   
Chief of Operations

RE: Tier Relationships and Representation

DATE: July 25, 2011

This notice addresses a concern regarding certain industry practices related to relationships between manufacturers and wholesalers of malt beverages. The Revenue Department recognizes that manufacturers of malt beverages employ sales personnel to provide information and facilitate relationships with retailers. The Department does not take issue with manufacturers' authority to engage in such activities. The Department's concerns regarding such personnel and their activities relates to ensuring that the activities do not involve any actions that could potentially violate or lead to violations of Georgia law.

O.C.G.A. § 3-5-33 provides relevantly that:

No brewer, broker, or importer shall:

(1) Induce or coerce, or attempt to induce or coerce, any wholesaler to accept delivery of any malt beverage which has not been ordered or agreed upon by the wholesaler, provided that recommendation, endorsement, exposition, persuasion, or argument shall not be deemed to constitute inducements, coercion, or requirements prohibited by this Code section; . . .

(3) Fix or maintain the price at which a wholesaler may resell beer, whether by the terms or requirements imposed on the wholesaler under an agreement or otherwise; or

(4) Require or prohibit any change in the management or supervisory employees of a wholesaler unless the current or proposed employees fail to meet essential, reasonable, and nondiscriminatory requirements imposed by an agreement's express terms.

The Department's general concerns largely focus on three practices that appear to take place on some level in the malt beverage industry.

The Department is concerned about any practice whereby manufacturers provide information regarding a specific product to retailers, obtain information from the retailers regarding the amount of the specific product that the retailers intend to purchase and provide that information to wholesalers without regard to whether the wholesalers have ordered, agreed to order or are even aware of the product. While recognizing that manufacturers' representatives have responsibilities for geographic areas covered by multiple wholesalers and that some retailers' employees may have similar areas of responsibility, the Department is inclined to consider that the better practice is for the manufacturer to discuss products with wholesalers to determine wholesale interest prior to promoting such products with retailers. Manufacturers cannot take orders directly from retailers and should avoid creating the impression that a specific product will be made available in wholesale territories without some prior communication with the impacted wholesalers. This practice would appear to avoid the difficulties of creating false expectations on the part of retailers as well as avoiding the possibility of any concern that manufacturers are seeking to induce or coerce wholesalers to order specific products. See O.C.G.A. § 3-5-33(1).

Another concern relates to a practice whereby manufacturers advise retailers of the price at which wholesalers will offer certain products. As you know, wholesalers set their own prices and manufacturers are not permitted to fix the price at which wholesalers sell their products. If manufacturers are providing information to retailers indicating that wholesalers will offer certain products at specific prices without consulting wholesalers, a concern is created that manufacturers are seeking to set the price at which wholesalers may resell malt beverages. See O.C.G.A. § 3-5-33(3). The Department recognizes that discussion of price ranges and the intended price point for specific products is merely part of normal business activities. However, the Department wants to avoid any situations in which retailers are given a specific expectation regarding the price at which wholesalers will offer products for sale prior to the wholesalers setting their prices.

An additional concern relates to the independence of a licensed wholesaler in freely choosing its managerial and supervisory personnel. The Department recognizes that equity agreements provide for varying degrees of input from a manufacturer concerning certain key personnel within a wholesale organization. The Department does not take issue with manufacturers' authority to include "essential, reasonable and nondiscriminatory" criteria concerning these personnel and for wholesaler's to agree to those criteria upon entering into the agreement. However, the Department is concerned about any further attempts to influence the independent decision of a licensed wholesaler in choosing its managerial and supervisory personnel. See § 3-5-33(4).