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DECLARATORY RULING

Amazon – tied-house
Agenda # 2022-00964

Introduction

The State Liquor Authority (SLA) has received a request for a declaratory ruling on behalf of Amazon. Amazon owns subsidiaries like Whole Foods Market, Inc. and Amazon Retail LLC, which in turn hold multiple retail licenses to sell beer and wine products for off-premises consumption in New York under the Whole Foods, Amazon Go and Amazon Fresh names. The letter requests a Declaratory Ruling on whether the NYS Alcoholic Beverage Control Law's (ABCL) tied-house provisions allow Amazon to accept payment for advertising alcoholic beverage brands, including licensed New York manufacturers. None of the advertising would appear on the premises or e-commerce sites of alcoholic beverage retailers, whether owned directly or indirectly by Amazon or by a third-party. Amazon also represents that it will establish a corporate and financial firewall between its advertising and its retail functions.

Questions Presented

Would Amazon, admittedly the holder of an indirect equity interest in licensed retailers, become the illegal holder of an indirect interest in licensed manufacturers if such manufacturers pay Amazon to advertise their alcoholic beverages?

Would payments by licensed manufacturers to Amazon for advertising their alcoholic beverages on Amazon's platforms constitute an unlawful gift or service to a retailer, given Amazon's indirect ownership of licensed retailers?

Statutes Involved

ABCL Section 101(1)(a) provides, in part, it is "unlawful for a manufacturer or wholesaler licensed under this chapter to be interested directly or indirectly in any premises where any alcoholic beverage is sold at retail; or in any business devoted wholly or partially to the sale of any alcoholic beverage at retail by stock ownership, interlocking directors, mortgage or lien or any personal or real property, or by any other means."

Reciprocally, *ABCL Section 106(13)* governs retail licensees, providing that "no retail license for on-premises consumption shall be interested, directly or indirectly, in any premises

where liquors, wines or beer are manufactured or sold at wholesale, by stock ownership, interlocking directors, mortgage or lien on any personal or real property or by any other means.”

ABCL Section 101(c) provides that it is unlawful for a licensed manufacturer or wholesaler to “make any gift or render any service of any kind whatsoever, directly or indirectly, to any person licensed under this chapter which in the judgment of the liquor authority may tend to influence such licensee to purchase the product of such manufacturer or wholesaler.”

Analysis

With respect to the tied-house issue, what does it mean to have an “interest,” direct or indirect, in a business? Amazon holds an “indirect interest” in licensed retailers because it has equity/ownership interests in subsidiaries that hold retail licenses. This is not the type of “indirect interest” prohibited by the tied-house laws. Amazon does not claim that it holds any equity or debt interest in a manufacturer. Compare the NYS Court of Appeal’s holding in *Matter of RIHGA Intl. USA, Inc. v NYSLA*, 84 NY2d 876 (1994), where the tied house violation arose because individuals held indirect equity interests in licensed manufacturers and a licensed retailer.

To our knowledge, the SLA Board has not previously issued guidance on whether the phrase “indirect interest” would apply to contractual arrangements between a licensed entity and third party that do not convey an equity or debt interest, like an employment arrangement with a salaried manager.¹ We do know, however, that the SLA has in the past interpreted the term “indirect interest” broadly to include many types of commercial arrangements. However, the Board today finds that the term “indirect interest” need not extend to any business arrangement between a manufacturer and a retailer. Such a broad interpretation is not required by the statutory language, by the *Rihga Intl.*, case, or by any other authoritative judicial precedent interpreting these statutes.

We thus interpret the term “interest” in a licensed business, for purposes of the tied house laws and this declaratory ruling request, to be limited to equity/ownership interests, debt/lending interests, or their equivalents. For example, if Amazon was to be compensated for providing advertising to a manufacturer by being given a percentage of the manufacturer’s revenues or profits (instead of with a flat fee for the services provided), the compensation would be similar to an equity interest in the manufacturer. But under the facts presented by Amazon, it would not have an ownership/equity or debt interest in a manufacturer simply by virtue of advertising its products on Amazon’s platforms and receiving flat fee compensation for providing such advertising. As long as Amazon is not compensated for its contractual relationships with manufacturers by receiving a percentage of the manufacturers’ revenues or profits, it would not have an “interest” in a business on that tier for tied-house analysis purposes.

With respect to the gifts and services issue, since Amazon would be paid by manufacturers for the advertising services it provides, money will be flowing from a manufacturer

¹ We are, however, simultaneously issuing a Declaratory Ruling in another case, involving a retailer who seeks to employ a manager who holds an equity interest in a manufacturer, that requires consideration of the same question.

to an entity that holds interests in retailers. In such circumstances, the possibility of an unlawful gifts and services violation exists. The possibility of such a violation is significantly minimized as long as the advertising is being purchased by the manufacturer at the market rate.

However, it is possible that a manufacturer might seek to pay Amazon significant sums of money for advertising at market rates for the purpose of inducing Amazon's subsidiaries to purchase the manufacturer's products: for example, a beer manufacturer gives all of its advertising business to Amazon to enrich it in return for a decision by Whole Foods to begin selling the manufacturer's products. The Board has not been given facts sufficient to determine whether particular arrangements like these would violate gifts and services restrictions and, thus, cannot rule that Amazon advertising business would never create a gifts and services issue, even if its advertising was always sold at market rates.

We understand, based on representations made at the Full Board meeting at which this matter was discussed, that Amazon will not only maintain a corporate and financial firewall between its advertising and retail functions, but will also issue a memorandum to the supervisors and employees of those functions (whether in separate companies, divisions, businesses, or otherwise) which explains the New York statutory restriction on improper gifts and services and requires vigilance against allowing any retail purchasing decisions to be influenced in any way by Amazon's advertising business with manufacturers. Assuming such a memorandum is actually provided, at the outset of engaging in such advertising business and periodically thereafter, our concerns about gifts and services violations will be minimized. However, the business arrangement contemplated hereunder will always remain subject to the gifts and services law; if it appears that any undue influence is occurring, enforcement of the law will be taken.

Determination

The Members declare that the ABC Law does not prohibit Amazon, as the indirect equity holder of licensed retailers, from contracting with a licensed manufacturer for commercially reasonable market-rate advertising of the manufacturer's alcoholic beverage products, so long as the compensation for such advertising is not a share of the manufacturer's revenue or profits (such that it would constitute a prohibited equity-like interest), so long as Amazon maintains a corporate and financial firewall between its advertising and retail functions, the advertising at issue otherwise complies with all other ABCL and SLA Rules restrictions and requirements, and the advertising relationship is not used to influence Amazon's indirectly owned retail licensees to purchase the products of the advertising manufacturers.

This matter was heard and determined by the Members of the Authority at a Full Board meeting held on June 8, 2022 before Chairman Vincent Bradley, Commissioner Lily Fan and Commissioner Greeley Ford. The above written ruling was approved by Chairman Bradley on behalf of the Members on June 24, 2022.

Dated: 06/24/22



Donald Roper
Secretary to the Authority