

BRAZIL

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VEIRANO ADVOGADOS

Is there case law or any statutory regulation governing advertising and promotion incentives? Are there any special consumer protection laws? What role do free gifts, tie-in offers, sweepstakes, rebates and other benefits, play in this context?

Law 5.768/71 governs the free distribution of prizes as advertisement, especially through sweepstakes/draws, coupons and/or contests. This law establishes that these promotions shall be authorized by the Ministry of Finances. Furthermore, only the authorized company may enjoy the profit achieved with the promotion. The authorization will only be granted if some requirements are fulfilled, such as a precise indication concerning the destination of the financial results to be achieved with the promotion. If the law is breached, some sanctions are applicable, such as fines and prohibition of realizing these sorts of promotions for 2 years. This law is regulated by Decree 70.951/72, which provides that the deadline for the delivery of the prize is up to 30 days, except in case of coupon prizes, which shall be delivered in the act of the presentation of the coupon. Consumers Protection Code (Law 8.078/90) determines that any sort of advertisement/promotion binds the advertiser to what it was promised. Furthermore, it forbids the delivery of any products and/or the rendering of any services which were not previously required by the consumer.

In your jurisdiction, are there any industry sectors which are subject to special regulations for advertising and promotion incentives (for instance the health products and pharmaceutical industries in some countries)? Please name applicable statutes and self-regulatory codes.

The Brazilian Advertising Self-Regulation Code ("CONAR") establishes ethical guidelines to be observed by every advertiser. This code specifically foresees that firearm advertisements shall not offer free gifts for the acquisition of the product. Moreover, the already mentioned Decree No. 70.951/72 provides that medicines, weapons, ammunition, fireworks, tobacco and alcoholic beverages shall not be subject to promotion by means of free distribution of gifts.

Does industry self-regulation replace or supplement government and legislative regulation of advertising and promotion incentives? Is self-regulation an effective tool?

Breaching CONAR's guidelines will lead to a presumption of fault since CONAR is not an official agency and its decisions are not legally binding but simply ethically binding. Therefore, although self-regulation does not replace government and legislative regulation, it may be considered an ethical parameter which must be observed, and Brazilian Courts have already recognized the Self-Regulation Advertising Code as an interpretative tool for advertisements. Procedures before CONAR are quick and effective, although they do not substitute, but only supplement, court decisions.

To what extent do promotional incentives extended to staff in public institutions pose legal issues in your jurisdiction (i.e., paying for travel and accommodation costs on the occasion of conferences, personal entertainment, hidden education sponsoring, sponsoring of school snacks for promotional purposes)?

The Administrative Improbability Law (Law 8.429/92) establishes that any economical advantage granted in the form of gifts, resulting in an unlawful enrichment of a public employee in the exercise of his/her public function, constitutes an act of administrative improbity, when the person who gives the present is somehow interested in some act of the respective public institution. The sanctions applicable may be the restitution of

the goods or amounts given, loss of the public function, suspension of political rights, and payment of a fine, amongst others. The Code of Conduct governs the acceptance of presents and free gifts, and, although directed to public officials in a first place, it also applies to other public servants. Examples: (i) a director of a public institution must not accept any presents to be drawn among public employees of such institution, even if this director is not participating of the draw; (ii) if a public authority is invited for concerts, sport events etc., the invitation can only be accepted by institutional reason and if the ticket costs up to R\$100.00 (approximately US\$ 60.00). The rationale of the Code is to create a limited relationship between private and public sectors. The Criminal Code, which foresees the crime of passive corruption, must apply if a public employee accepts any undue advantage as a "gift".

Are there any formal disclosure requirements for promotional incentives (i.e., rule of separation of procurement from personal dealings, rules of employer consent requirements, written form requirements, adequacy of consideration granted for a service)?

The Code of Conduct establishes a difference between presents and free gifts. The acceptance of presents given by a person or entity interested in some act of the public authority or institution is forbidden. The existence of interest is determined objectively: (i) when the person/entity is under the regulatory jurisdiction of the public institution; (ii) when there is personal/professional interest in a decision that may be rendered by the public institution; (iii) when there is a commercial link between the person/entity and the public institution; and (iv) when it constitutes a third-party interest, acting in representation of the person/entity mentioned previously. The acceptance of presents is permitted under two circumstances: from a relative or friend, on their own cost and expenses, and from foreign authorities, in the exercise of diplomatic functions. Free gifts, on the other hand, are souvenirs given as a matter of courtesy or advertising, and their distribution is permitted (i) if the cost of each souvenir does not exceed R\$100,00 (approximately US\$ 60.00); (ii) if not directed exclusively to a certain authority; and (iii) once a year, if given by the same person/entity.