

Brand Building: A Regulatory Perspective



By Sara Schorske

MY COMPANY assists alcoholic beverage industry members in a variety of ways, but the vast majority of our work is helping businesses obtain or update their state and federal licenses. This year we've seen a big increase in people entering the business as wholesalers. Now don't get me wrong! We are not seeing a reversal in the trend toward consolidation among the kind of wholesalers who act as middlemen between suppliers (manufacturers or importers) and retailers: The three-tier system is just as hourglass shaped as ever. What we are seeing almost qualifies as a fourth tier, because the *wholesalers* we are putting into business are so unlike traditional wholesalers. This new breed of wholesalers will conduct their businesses very much like members of the supplier tier.

Brand-Builders: A Fourth Tier?

I would call this imaginary fourth tier the *brand-builders* because they sell only a single brand of their own, or perhaps a small handful of labels which they themselves conceived, financed, and promoted. In contrast, the

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traditional wholesaler represents many suppliers, dividing his attention between the large number, sometimes hundreds or thousands of brands he represents. The traditional wholesale business also functions very differently from a brand-builder's as a warehouse, delivery service, sales force, taxpayer, and collection agency, in varying proportions. Although many traditional wholesalers have recently begun to act as suppliers themselves on a small scale (for example, acting as national importer for a favored foreign brand, and occasionally developing a domestic proprietary brand of their own), they are first and foremost distributors for others.

Although the wholesale brand-builder segment of the industry is small in number, modest in finances, and entirely without solidarity such as their own trade organization, their impact on the wine business is significant. The brand-builder style of operation provides a home for excess grapes and wine, a use for excess production or bottling capacity, added competition in the marketplace, and a lot more variety for consumers.

If you operate a winery, chances are you'll have brand-builders for customers from time to time. If you aspire to start a winery someday, entering the industry as a brand-builder is a low cost, low commitment way to prove your concept and test your mettle as a marketer.

Who Are the Brand-Builders?

Some brand-builders are grape-

growers, others are bulk wine artisans, and still others are winemakers who, for whatever reason, are not ready for prime time. The urge to build a brand arises from a variety of sources, including the desire to showcase exceptional vineyards by vinifying the grapes separately and marketing the wines with vineyard designations and/or proprietary labels, the need to find a stable home for grapes, the natural evolution of a good home winemaker who is ready to come out of the closet, the ambition of a wine professional who sees an empty or sparsely populated market niche, the vision of a wine lover who wants to leverage his palate into a prestigious and possibly lucrative business, the economic necessity of a winery which needs to operate with volumes bigger than its own production can fill.

Regulatory Realities for Brand-Builders

Licensing. Although aspiring brand-builders are sometimes surprised to hear it, they do need licenses of their own—even though both their suppliers and their customers are also licensed. Brand-builders are invariably licensed as wholesalers by both BAITF and their state ABCs. Wholesale licenses allow them to buy wine for resale to other licensees. Depending on the state they're in and the privileges of the license they get, a brand-builder's legal customers can include producers, other wholesalers, and retailers.

In California, but in very few other places, brand-builders can also hold

off-sale retail licenses, allowing sales of bottled wine to consumers. In a few states, such as California and New York for example, additional licenses are required if the brand-builder plans to purchase grapes.

Trade names. Brand-builders are completely dependent on wineries to vinify grapes grown or purchased by the brand-builder, to blend and bottle wines bought in bulk by the brand-builder, or to label wine purchased as "shiners" (bottled unlabeled wine). But the ownership of the brand name and any trade names used by the winery on your behalf remains with you if you handle them properly.

What Is the Difference Between a Brand Name and a Trade Name?

Brand names are exactly what you think they are: the prominent identifying product name on the bottle. Trade names (also known affectionately as DBAs) are names, other than a business' precise legal name, that the company uses in operations. On a wine label, the bottling trade name is the name following the words "Bottled by" or "Cellared by" etc.

Both Winery and Wholesale Permittees Add Trade Names to their Permits

Wineries are required to add trade names to their permits before using those trade names in the mandatory text on labels. When a brand-builder adds a trade name to his wholesale permit, it simply establishes the name as his. For this reason, adding trade names to their BATF permit helps protect brand-builders' names from being used by others.

Admittedly, the procedure of adding names to BATF permits is nowhere near as effective protection as obtaining federal or state registered trademarks or service marks for the names. However, BATF does keep track of which permittee owns which trade name, and will not allow one permittee to use a trade named owned by another without the owner's permission.

I always recommend that permittees add to their permits not only the trade names they plan to use, but also several similar variations just to create more of a buffer zone around the name. For example, instead of only adding

"Compliance Vineyards" I would also add "Compliance Cellars," "Compliance Wine Cellars," "Compliance Vintners," etc. In addition, although BATF protects only trade names, but not brand names, it never hurts to add brand names to a BATF permit, if only to prevent another permittee from using your brand name as their trade name!

Because brand-builders are dependent on wineries to bottle and label their wine, they have two choices when designing their labels. Either the label can say, Bottled for ABC Brand Builder by XYZ Winery, or it can say Bottled by ABC Brand Builder. Most brand-builders prefer the latter; it better hides the fact that the brand-builder does not have of winery of his own. But this choice requires that the brand-builder give the bottling winery permission to use his trade name.

Operating Trade Names

I offer two cautions in this regard: First, if you haven't added the trade name to your permit before allowing a winery to use it for your wine, be very careful that the winery specifies your company as the owner of the name. If BATF adds the name to the winery permit as if it belonged to the winery instead of belonging to you, it may be lost to you forever! Most wineries would not intentionally steal your name (although I know of some cases of name-theft!), but the confusion and complication that results from even an unintentional mix-up takes significant time and effort to undo.

Secondly, many permittees don't realize that the BATF makes a strong distinction between the permittee's operating trade name and all other trade names added to its permit. The operating name is the principal trade name on the permit; BATF uses this name for its filing system. Often a brand-builder wants his operating trade name to appear in the mandatory text of his labels, and then he is in for a rude surprise. BATF will not allow another permittee to use your operating trade name for any purpose, even with your permission. When you run across a conflict like that, you have two avenues of escape. The first solution is to literally go to the trouble of changing your operating name on your permit to another name, thus liberating the old name for others' use on your behalf. Fortunately, this is just a paperwork issue; you do not have to change your checking account,

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signage, stationery, or anything else—you just have to change your BATF permit. The second solution is to redesign your labels to use a variation of your name that is not your operating name.

Labeling Issues

Although the bottling winery is legally responsible for labeling and label compliance, brand-builders invariably design and print their own labels. That makes perfect sense. However, brand-builders can't rely on regulations to make perfect sense, and here's a case in point.

A brand-builder who is also a grape grower will often want to mention the ownership continuity from grape to bottle on his label. Of course he does: Highlighting a particular vineyard is sometimes the brand-builder's principal motivation, as I noted above. However, it is not legal for a brand-builder to say on his label "Grown, produced, and bottled by." Can you see what's wrong with the picture? The brand-builder grew the grapes, all right, but he contracted with a winery to produce and bottle the wine. So no one entity can claim to have done all three functions. The separation of functions among more than one company makes

it challenging to figure out how to legally express who did what on the label.

Furthermore, the statements on the wine label are construed to apply to the bottling winery, which is responsible for the labeling of the wine. Once you realize that the label mandates speak for the winery, not for the brand owner, you see why the winery cannot say grown and bottled—it's not true!

Tax Issues

Another awkward regulatory moment in a brand-builder's life comes when he branches into interstate sales. In California, where most of the brand-builder tier operates, brand-builders generally take possession of their wine in a taxpaid status and store it in a commercial warehouse. The bottling winery pays the state and federal excise tax when releasing the case goods to the brand-builder, and the brand-builder reimburses the winery.

Later, when the brand-builder starts shipping to customers in other states, he becomes eligible for a state excise tax refund, since the state only taxes wine that is sold for consumption within the state. But how does the

brand-builder get his refund, when he didn't pay the taxes in the first place? In California, the state tax agency insists on issuing credits and refunds to the taxpayer even if another company became the ultimate taxpayer by reimbursing the actual taxpayer. In order to save almost \$0.50/case, the brand-builder must go back to the winery with his hat in his hand and his bills of lading in his briefcase, and ask the winery to claim the exemptions for him and reimburse him when the refund arrives.

Rewards and Challenges of Brand-Building

Life in the brand-builders' tier is significantly less expensive than operating a winery, and significantly more exciting than operating as a traditional wholesaler. But because it doesn't fall neatly into one of the three time-honored tiers, brand-builders have special considerations when it comes to licensing, trade names, labeling, and taxes. Hopefully, this article will help both the brand-builders and the wineries that provide them services better understand the complex needs and requirements of the fourth tier. 