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FEBRUARY 10th - 12th, 2014

LATE BREAKING BEVERAGE ALCOHOL REGULATORY NEWS

Vince O'Brien
Nixon Peabody

Vince O'Brien – Senior Counsel



- Assists beverage alcohol clients around the world in dealing with the complex regulatory restrictions governing the production, distribution and sale of beer, wine and distilled spirits
- Helps vintners, distillers, brewers, importers and retailer of beverage alcohol products deal with the maze of international, federal and state laws, rules and regulations applicable to the most regulated consumer products in the world.
- Inducted into the Irish Legal 100 in 2013

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WHO MANAGES MY BAR?

SUPPLIER/WHOLESALER RELATIONSHIP ISSUES

LEGACIES OF PROHIBITION



- Saloons and supplier dominance led to Prohibition
- Rockefeller report promoting control or clear separation under a license system
- Three tier system
 - › Exclusive outlets/consignment sales
 - › Tied house
 - › Trade practices
- Limited federal retail and beer jurisdiction

TRADE PRACTICES

- **Examples of prohibited activities:**
 - **Furnishing things of value (including indirectly)**
 - **Advertising or display services**
- **Some of the exceptions**
 - **Product displays**
 - **Point of sale and specialties**
 - **Beverage lists**
 - **Equipment and supplies**
 - **Samples, education and tastings**
 - **Coupons and rebates**
 - **Stocking, pricing and rotating**
 - **Outside signs**



TTB LAS VEGAS CASINOS INVESTIGATION – 2011

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- Looked at pay to play activities at Harrah's casinos in NV
- Slotting allowances
- Third party marketing agency issue
- Biggest ever fines - \$1.9 million
 - Diageo \$650,000
 - Pernod Ricard \$300,000
 - Moet Hennessey \$275,000
- Inducements including permitted exceptions
- No retailer penalties



ARIZONA – BEER DISTRIBUTORS – 2013

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- Retailers pushing for payments
- Big fines for distributors involved in programs
- Payments for retail placement:
 - Advertising, gift cards
 - Furniture, draft systems
 - Special events
 - Retailer IRCs



ILLINOIS – SAM'S WINE & SPIRITS – 2009

- Investigation completed in January 2009
- The TTB collaborated with Illinois to assess trade practice violations
- Payments were made to the retailer and a third party agent for advertising as well as preferred shelf space
- TTB levied fines against 10 wholesalers/ importers of \$803,000
- The state fined the retailer and its third party agent \$300,000, the largest ever fine issued by the Liquor Commission



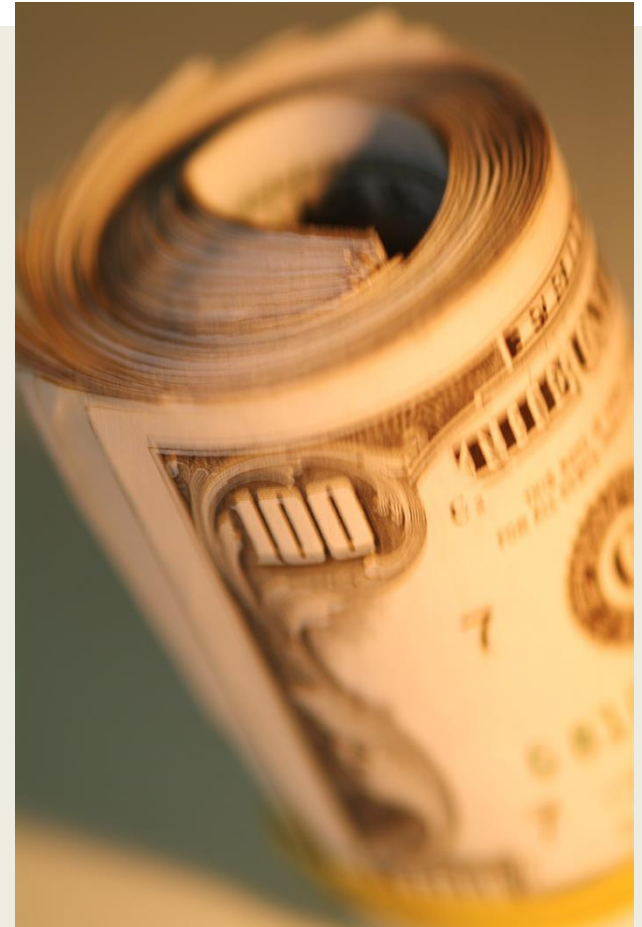
NY – STATE INVESTIGATION – 2006



- New York AG Investigation – Consent orders – 2006
- AG’s office led investigation into the industry
- Found more than \$59 million in illegal benefits paid to retailers between 2003 and 2005
- Charges brought in three separate cases against suppliers, wholesalers and retailers – cream of the industry
- Consent orders filed
 - › Fines of over \$2 million for suppliers
 - › Fines of over \$1.5 million for wholesalers
 - › Fines of over \$0.5 million for off premise retailers
- Current SLA Chairman
- Applied universally: “Death penalty”

NY – CONSENT ORDERS

- Issue of payments to retailers, AMEX checks, credit card swipes
- No payments unless expressly legal
- Restricts ability to pay retailer for any type of supplier event



CATEGORY MANAGEMENT – WHAT IS IT?

- Major Chain Off Premise Retailers have abdicated to suppliers much of their responsibility for managing different grocery product selections, including their beverage alcohol sections.
- Suppliers now routinely station full time employees either within or in close proximity to the retail headquarter/regional offices of the nation's largest 50 off premise chains; often as replacements for retail employees.



WHY SHOULD I CARE?

- **Category management is extremely common in chain grocery stores.**
- **It is something which is developing in other retail chains, including restaurant and bar chains.**
- **Relying heavily on support from suppliers and wholesalers, for work that needs to be done to run your business, is an illegal trade practice and can put your liquor licenses in jeopardy.**
- **Although TTB has no jurisdiction over you, we are seeing more and more fines against retailers by state liquor authorities. The FTC and the Justice Department also have jurisdiction.**
- **There is a major investigation by TTB at the moment into category management practices and likely to be an advisory or rulemaking soon.**

RECOMMENDED SHELF PLANS ATF- 1995 TRADE PRACTICE REGULATIONS

- Industry Members allowed to provide a recommended shelf plan to a retailer (27 CFR 6.99).
- Preamble- ATF (TTB) will revisit this exception if
 - it is abused by giving additional services
 - creates a situation in which the retailer becomes dependent on single Industry member for purchasing advice.



CURRENT PRACTICES OF SUPPLIER CATEGORY CAPTAINS IN THE GROCERY SECTOR

- **Category Captains** analyze and interpret data for the retailer using data on average product sales, retail brand profitability, brand velocity, and national brand support. They frequently recommend approved/cancelled/new item lists.
- **Obtain and provide to the retailer at no cost sophisticated software & sales data** from Nielsen and IRI (Information Resources Inc.).
- **Retail Product Presentation and Sales Meetings.**
 - Category Captain participates in and sometimes controls the product presentations and sales meetings with competitors.
 - Some retailers will not meet face to face with IM sales representative unless Category Captain present
 - Competitor must disclose and submit confidential & proprietary information in presence of Category Captain.

CURRENT PRACTICES OF SUPPLIER CATEGORY CAPTAINS (CONT'D)

- The Category Captain, not the retailer, usually handles any issues prior to the meeting, or follow up issues related to the meeting (selection of products, **product shelf/display location**, obtaining competitor product samples, etc.).
- The Category Captain provides valuable retail administrative services. The Category Captain frequently provides all administrative duties related to product choice, retail pricing, new product introduction, advertising (print media and in store), **shelf and display location**, and product addition/deletion. Many, if not all, of these services are duties that would normally be associated with the responsibilities of a retailer.

WHY?

- **Why would IMs provide these costly services at no charge?**
- **Influence or control retail product purchases & secure premier shelf & display space (slotting) for their products**



2001 FTC CONCLUSIONS FOLLOWING INQUIRY INTO CATEGORY CAPTAINS

- **“A Category Captain should not receive confidential information about its rivals or bias its advice to retailers in order to exclude or disadvantage rivals.”...**
- **“A retailer must be responsible for competition, make its own decisions, and require firewalls to limit the information about its rivals that passes to the captain.”**



FEDWAY DECISION & RETAILER INDEPENDENCE

- ***Fedway* Decision in the DC Court of Appeals (DC Circuit 10/23/1992) .**
 - Emphasized that ATF must have a “factual showing that retailer independence is potentially threatened”.
 - Suppliers’ current actions as Category Captains are of a continuing character, restrict the retailer’s free economic decision on product purchase, and project the Category Captain into the day to day operations of the retailer **including selection of in store product shelf and display space.**
 - **This is the definition of restricting retailer independence.**

STEIN CATEGORY MANAGEMENT CASE

- **Competing beer wholesalers of Stein were required to make their sales presentations to Stein in order to sell product to a retail chain. In addition, Stein supplied retailers with shelf plans and the labor to implement such shelf plans. This ATF trade practice case, which determined such practices to be trade practice violations, was upheld by the 9th Circuit Federal Court of Appeals in 1986.**



CONWOOD AND USTC MOIST SNUFF MARKET

- 2002 Decision
- \$1.05 billion award to competitor in moist snuff (smokeless tobacco Category Captain) market
- Anti-competitive category management activity
 - Exclusive rack displays and removal of competitor racks
 - Plan-o-gram information
 - Control and limitation of introduction of competing products
 - Misuse of monopoly powers
 - Providing misleading and inaccurate Category Captain sales data
- Retailers relied on USTC to manage the moist snuff category and did not employ their own managers for the category



CONCLUSIONS

- Anything that your business receives for free from a supplier or wholesaler of alcohol should be carefully reviewed.
- Any situation where your suppliers and wholesalers of alcohol are able to find out pricing and marketing information about their competitors should be avoided
- Make sure that you know the danger areas for trade practice issues under the three tier system and that you have trained your sales, marketing and retail managers



QUESTIONS?

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