

Alcohol Provisions Relating to Sponsorship

Pay to Play and Tied House

Presenter



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- Worked in a law firm in Australia and then with the International Wine Organization in France, with regulators from around the world before joining Nixon Peabody in 2008
- The Beverage Alcohol Group at Nixon Peabody works with large to small scale suppliers, importers and retailers from around the country

Introduction

- Prohibition
- The three tiers and the control states
- Tied house
- Downstream > upstream
- Pay to play

Federal system – TTB

- Exclusive outlet
- Tied house
- Commercial bribery
- Limited jurisdiction
 - Producers and wholesalers
 - Limited for retailers

TTB Regulations

- Examples of prohibited activities:
 - Interest in retail license/property
 - Furnishing things of value (including indirectly)
 - Advertising or display services
 - Tie-in sales
- 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

The current investigation

- It was announced at the NCSLA Board meeting that the TTB are currently in the middle of a significant trade practices investigation
- They are looking at pay to play activities by a number of casinos

Illinois – “Of Value”

- Suppliers and wholesalers cannot give anything of value to retailers
- In reverse, retailers cannot accept anything of value
- Retail license subject to suspension or revocation

Illinois – pay to play

- Payment for floor or shelf space expressly determined to be “of value”
- Use of third party pass-throughs remains a violation by the retailer

Sam's Wine & Spirits

- 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

New York

- Variety of sources
 - ABC law
 - State regulations
 - Divisional Orders
 - SLA Bulletins
- Major investigation into the industry concluded in 2006-2007

New York AG Investigation

- AG's office led investigation into the industry
- It 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 retailers

Consent Order – Suppliers

The largest fines in the order:

Bacardi U.S.A., Inc.	\$175,000
Brown-Forman Corporation	\$200,000
Constellation Brands, Inc.	\$200,000
Diageo North America, Inc.	\$225,000
EJ Gallo Winery	\$200,000
Future Brands LLC (also includes The Absolut Spirits Company, Inc.; Jim Beam Brands Co.)	\$175,000
Moet Hennessey USA, Inc.	\$175,000
Pernod Ricard USA, LLC	\$175,000
Remy Cointreau USA, Inc.	\$175,000
Skyy Spirits, LLC	\$175,000

Consent Order – Retailers

The largest fines in the order:

33 Union Square West, Inc.	\$35,000
Beckendorf Liquors, Inc. d/b/a Holbrook Liquors	\$35,000
East River Liquors, Inc. d/b/a Brooklyn Liquors	\$35,000
Westbury Liquors, Inc.	\$40,000
PJ Wine, Inc. a/k/a PJ's Liquors, Inc.	\$40,000
Prime Wines Corp. d/b/a Prime Wine & Spirits a/k/a Premier Center	\$50,000
Prestige Wines Corp. d/b/a Prestige Wine & Spirits	\$30,000
Jonmark Corporation d/b/a Premium Wine & Spirits	\$30,000
Warehouse Wines & Spirits, Inc.	\$50,000

Application of consent orders

- To date, the SLA has taken the position that the terms of the orders apply to the whole industry
- Penalties for subsequent violations by the parties to the orders are particularly high and include automatic fines and revocation, suspension or cancellation of their license

Law Revision Commission Report

- A report was issued in December 2009 by the Commission, recommending changes to the state's laws
- No structured revision to tied house laws in over 40 years
- Recommends:
 - Clear, uniform rules and regulations, setting out impermissible trade practices (including adoption of the terms of the consent orders); and
 - Solid enforcement bureau – for response to complaints as well as random audits

California

- Mirror image laws
- Criminal, misdemeanor offence
- Active investigations
- Same sanctions applicable to retailers
- Formal actions and substantial fines

ABC case – Schieffelin

- On-premise retailer solicited sponsorship for an athletics contest
- Suppliers' logos were displayed on advertising, including in store
- Disciplinary proceedings issued by ABC against suppliers and the retailer
- Confirmed that third party promotional payments were equally illegal

Current landscape

- Subpoenas have been issued by the TTB to a number of on-premise retailers, including casinos, in a new, major investigation
- Collaborating with states
- Increased state activity, with high profile investigations and elevated fines
- New York in particular could change considerably in the short term and other states are likely to pick up its lead

Conclusions

- You need to be very careful about any gifts and services provided by wholesalers and suppliers
- Aside from enumerated exceptions, the base standards revolve around anything which you receive that is “of value”
- Broadly construed
- Third party promotional or marketing company payments are equally illegal
- Your license is on the line and you can be subject to significant penalties



Thank you!