Best Practices in Trade Practices

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Introduction

After the Prohibition was repealed by the 21st Amendment, a complex web of alcohol beverage laws created a "three-tier system" in which independence must exist between alcohol beverage manufacturers, distributors, and retailers. The ways in which these three tiers can interact is strictly controlled by federal and state laws. Armed with an increased budget due to a 2017 congressional appropriation, the U.S. Alcohol and Tobacco Tax and Trade Bureau (the "TTB") intensified its trade practice enforcement efforts, resulting in several permit suspensions and high fines for industry members (the latest was $1.5 million). This presentation provides some practical advice on how to limit trade-practice enforcement exposure for hospitality clients.

What is a "Tied-House," and Why is it So "Evil"?

A "tied-house" refers to an impermissible tie between an alcohol beverage retailer, wholesaler, and supplier. The "evils" associated with these ties refer to the post-prohibition fears that cozy relationships between these tiers, or "houses" could lead to less consumer product choice, or to the type of "evils" that existed during and pre-prohibition, like consumer overconsumption, predatory marketing practices by alcohol manufacturers, or dominance by a single producer in the marketplace. The essence of federal and state tied-house laws is that a supplier or distributor cannot exert undue influence over a retailer, and generally cannot pay or credit the retailer for any advertising, display, sponsorship, or distribution service. Similarly, suppliers and distributors are generally prohibited from owning retailers (thus becoming tied-houses). There are general exceptions to these laws that allow a supplier or distributor to market their products to retailers, but those exceptions are extremely limited. For example, in most states a supplier can do a consumer wine tasting at a bar, restaurant, or supermarket, and provide free samples to consumers to encourage a consumer to buy its product. Suppliers and wholesalers can also provide things of nominal value to a retailer, like branded napkins, banners, keychains, etc.

Are things so "Evil" right now?

In order to drive sales and increase profitability, industry members are constantly trying to strike the delicate balance between respecting tied-house laws and making the margins work. At the state level, we have seen heightened action by local agencies to enforce tied-house laws,

including a 2017 Pennsylvania Liquor Control Board action that resulted in fines of $9 million paid by two large distributors, a Maine distillery, and an importer, after these industry members purportedly took Liquor Control Board members on lavish vacations, dinners, etc., in exchange for favorable treatment of their products. More notably, the TTB has been visibly present in various markets across the country since 2017, conducting comprehensive investigations at retail accounts in Florida, Illinois, California, and other states.

Best Practices

Retailers can steer clear of trouble in a number of ways:

1. **Know the Law on Tied-House Exceptions**. This gets tricky, because each state has a separate list of what a retailer can lawfully accept from a supplier or distributor. The details matter. For example, some state laws do not allow an alcohol beverage manufacturer or distributor to do "bar spends" at licensed retail accounts, or only allow them in limited circumstances. In New York, a manufacturer can spend no more than $700 in a retail account to buy rounds of drinks for consumers. In other states, bar spends have no monetary limits, and some states outright prohibit them.
2. **Document, Document, Document.** When a regulator questions a retail account about having received certain "things of value" from a supplier or distributor, having proper documentation is imperative. As an example, retailers should keep track of every time a supplier or distributor conducts an on-site sampling event or promotion, including time the time of arrival/departure, the types of drinks that were sampled, the total amount spent on the drinks, tip left, etc. Always include a copy of the itemized receipt in your records. Regulators will be looking to the retailer to justify the financial support or item received.
3. **Quid Pro NO!** Retailers cannot accept even allowable items from an upper-tier industry member, like branded napkins or bar mats, when the gift is conditioned on bar or menu placement, shelf space, etc. This is called a "slotting fee," and is a classic example of a tied house violation.
4. **Management Companies & Event Venues**: Even if they don't hold the retail liquor license themselves, hotel management companies cannot violate beverage law without subjecting themselves to great risk. The TTB is increasingly scrutinizing payments by alcohol brands to unlicensed third parties, where the benefits are clearly passed through

to the retail licensee. Not only could these types of violations result in steep fines, but criminal action is also possible, including conspiracy and money laundering charges. At venues like concert or sports arenas, sponsorship agreements with alcohol beverage brands' need to be carefully scrutinized. The TTB's current position is that the sponsorship should be for legitimate brand advertising only, but cannot be tied to the food and beverage concessionaire's activities at the venue. Branded bar areas or lounges are often viewed unfavorably by regulators.