# Pay-to-Play Schemes Keep TTB Busy

© Parliquia Nossa Senhora Rainha | *Subterfuge is well and truly alive with little sweeteners proving all too effective.*

## How to stay out of trouble in the US wine sales business.

By Liza B. Zimmerman | Posted Saturday, 14-Apr-2018

A host of so-called "pay-to-play" infractions have become one of the Alcohol and Tobacco Tax and Trade Bureau's (TTB) top legal, investigative targets in the past couple of years. These schemes all involve payment or bribery of an operator to increase sales of specific alcoholic-beverage products or to obtain preferential shelf or promotional space in the store or restaurant that will lead to greater sales.

What suppliers, importers or distributors may get in exchange for paying retailers may be preferential shelf or display space for their brands, says former TTB chief consul Robert Tobiassen, who is now a legal consultant in Virginia.

These infractions, he adds, can "include on-premise and off-premise retailers. The preferred shelf space at an off-premise retailer may be the space near the check-out counter or the eye-level on the aisle shelves .... For an on-premise retailer, it could be the draft beer taphead, the well product or, again, some shelf or display space that traditionally captures the eye of the consumer who may then order that brand."

These types of interactions – often also called slotting fees – can include "furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other things of value", according to Tobiassen.

They can – to elongate the list – also include paying or crediting the retailer for advertising and displays; repaying a store or a restaurant's financial obligations; or extending credit to an operator beyond the period of time allowed by various state laws.

The list of illegal, financial offences that have been committed by suppliers and wholesalers is a long one. "Your article isn't long enough to list all the practices going on," jokes John Hinman, a partner in the San Francisco-based, alcoholic beverage law practice, Hinman & Carmichael.

**The background on pay-to-play**

Both the funds and manpower focused on uncovering and prosecuting these cases has increased at the TTB for a number of reasons.

"The emphasis on trade practice investigations declined over the years at ATF," says Thomas Hogue, a spokesperson for the TTB when it was part of the Bureau of Alcohol, Tobacco and Firearms. The bureau was later reorganized to become part of the Department of the Treasury – because of its tax-collecting functions – and the TTB was officially created in 2003.

The agency's funding – according to Hogue – has also increased, which has allowed it better leverage to go after these infractions. The "significant increase in our enforcement and outreach efforts is the result of directed funding from Congress. In Fiscal Year 2017, Congress provided TTB with $5 million in funding specifically to increase our trade practice enforcement and outreach," he adds.

And the agency's outreach also now goes beyond just enforcement. Hogue says the TTB is also engaging in education outreach to industry members and will be doing trade practice seminars in a handful of key US cities starting this month.

Many in the wine industry have directly witnessed the positive results of these new investments in terms of how they are reducing the number of pay-to-play cases.

"The TTB seems to be showing more willingness to try to tackle this problem. At the end of the day, we all want a system that is based more on a brand's consumer pull than on a supplier's ability to have competitors excluded," shares Stephen Rannekleiv, global sector strategist for beverages at Rabobank's New York City-based RaboResearch Food & Agribusiness.


© Wikimedia Commons | *Distributors put a lot of effort into securing the best shelf positioning for their products.*

The TTB has settled a number of high-profile, pay-to-play cases over the past close to a decade, according to Tobiassen. Companies implicated include big names like Bacardi, Diageo and Pernod-Ricard, according to documents provided by Tobiassen.

The amounts the companies paid to settle the cases vary from $225,000 by Gallo to $650,000 by Diageo for an aggregate record $1.9 million in payments received from six industry members – including Bacardi, Diageo, Gallo, Future Brands, Moët Hennessy and Pernod Ricard – for a pay-to-play arrangement with Harrah's, a Las Vegas casino.

The funds, according to Tobiassen, are then deposited into the US Treasury. The TTB and the "Treasury get no direct share of it. It goes to help pay the Federal budget."

"We currently have 50 active trade practice cases," shares Hogue about the agency's pay-to-play caseload. He adds that they involve beer, wine and spirits and manufacturers, importers and wholesalers. He adds that they range in scope from outright commercial bribery to what is called "exclusive outlet", a situation in which a supplier or wholesaler requires that a retailer purchase its alcohol beverages, to the exclusion of others, among other charges.

Pay-to-play payments can be made in cash or falsely put on a credit card to look like potentially expensive drink purchases that never actually occurred. They can also, according to Tobiassen, be in the form of a "'discount' price which is really a subterfuge to pass the money to the retailer rather than a product-purchase discount".

Another way pay-to-play infractions can be used is as a way to entice a retailer to carry a new product, according to Hinman. "The purpose would be to induce the account to carry the brand or item of the supplier. The thing of value can be anything [cash, credit or taking back product that doesn't sell, free services, etc] that isn't permitted. There are a lot of permitted exceptions. That's what makes this area so hard. However, [the use of] cash is always prohibited and that is classic 'pay to play'."

**What the fallout is**

The motivation for using these payment schemes has long been to build and solidify wholesalers' relationships with retailers and to increase sales of that wholesaler's wines by the retailer who is being paid.

Open states – meaning those without a control state system, such as the one that exists in Pennsylvania – are the most vulnerable to these scams, according to Hinman. They also tend to happen more in the more populous states, such as California, New York, Illinois, Texas and Florida, he adds.

"Nevada is also a state with issues," he notes. These same states are almost all monopolized by two large wholesalers, with Southern-Glazer's Wine & Spirits estimated to have more than two-thirds of the Las Vegas market, according to insiders.

Having so few companies doing the bulk of the sales in these states also makes it easy for these types of scams to go undetected. Enforcement of the full range of pay-to-play schemes is difficult and expensive, according to Hinman, and this is a major reason why they have continued to proliferate in the wine business.

Recent infractions have even included outright bribery, according to Hinman; a pay-to-play move that many had thought was no longer in use. In 2016, the Craft Beer Guild paid a $750,000 settlement for having paid for taps in various bars in Massachusetts.

Bottom line is that these schemes are "bad for the industry because more often than not, you are penalized for playing by the rules," concludes Rannekleiv.