

TTB Cracks Down on Pay-To-Play, With Historic \$750,000 Offer In Compromise

By: Valerie L. Haber, Miami Liquor Lawyer, Alcohol Law and Food Law Attorney

The Federal Alcohol and Tobacco Tax and Trade Bureau (“TTB”) announced yesterday that it accepted an [offer in compromise](#) in the amount of \$750,000 from the Craft Beer Guild, LLC. According to the TTB’s [press release](#), this is the largest monetary offer in compromise that TTB has collected from a single industry member for trade practice violations. The Craft Beer Guild is a licensed wholesaler owned by Sheehan Family Companies, a multi-state beer distribution company operating in 13 states.

The Craft Beer Guild allegedly paid “slotting fees” to retailers from January 1, 2013 to October 14, 2014, in exchange for favorable product placement on retailers’ shelves, in violation of several provisions of the Federal Alcohol Administration Act (the “Act”), including 27 CFR 8.21, 8.22, 8.51 and 27 CFR 6.35, 6.56 and 6.152(b). A “slotting fee” is a monetary fee paid to retailers to encourage them to stock a particular alcohol beverage product, or to feature that product more prominently on store shelves. Related “pay-to-play” activities also involve a retailer like a bar or restaurant awarding limited tap handles to the highest bidding wholesaler.

The Act generally makes it unlawful for a wholesale distributor like The Craft Beer Guild to require that a retailer purchase their product to the “exclusion” of other products. The Act sets forth circumstances indicative of “exclusion,” including when a wholesaler “places . . . retailer independence at risk by means of a tie or link” between the two parties, and those acts result in the retailer purchasing less than it would have of a competitor’s products. Section 8.55 of the Act lists criteria for determining whether a retailer’s independence is at risk, including:

- “(a) The practice restricts or hampers the free economic choice of a retailer to decide which products to purchase or the quantity in which to purchase them for sale to consumers.

- (b) The industry member obligates the retailer to participate in the promotion to obtain the industry member's product.

- (c) The retailer has a continuing obligation to purchase or otherwise promote the industry member's product.

- (d) The retailer has a commitment not to terminate its relationship with the industry member with respect to purchase of the industry member's products.

- (e) The practice involves the industry member in the day-to-day operations of the retailer. For example, the industry member controls the retailer's decisions on which brand of products to purchase, the pricing of products or the manner in which the products will be displayed on the retailer's premises.

(f) The practice is discriminatory in that it is not offered to all retailers in the local market on the same terms without business reasons present to justify the difference in treatment.”

A particular trade practice does not need to meet all of these criteria in order to place a retailer’s independence at risk.

This federal enforcement action comes at the heels of earlier state action initiated by the Massachusetts Alcoholic Beverages Control Commission, or ABCC, which similarly alleged that the Craft Beer Guild violated state law by engaging in “pay-to-play” activities. In February, the ABCC issued a ninety (90) day suspension notice to the Craft Beer Guild for allegedly engaging in “a pervasive illegal enterprise involving numerous retailers and corporations that spanned at least five years.” In lieu of suspension, the Guild paid a fine rumored to be upwards of \$2 million to the ABCC.

In its press release, the TTB warned that it would continue to investigate trade practice violations in an effort to encourage lawful competition by market entrants, stating that “pay-to-play activity is incompatible with fair competition and will be actively investigated by TTB. We are committed to ensuring a level playing field for law-abiding industry.” When [discussing the issue with the *Boston Globe*](#), Director of TTB’s Trade Investigations Unit [Robert Angelo](#) “vowed his agency would now take a ‘hard stand’ against pay-to-play,” wrote the *Globe*. Angelo warned: “This is not something I intend to walk away from. You’re going to see further investigations in this area. I don’t want industry members to consider getting caught the cost of doing business. I want them to realize there are significant consequences if we catch you.”

What does this mean for craft brewers and distributors, and other industry members? This record-setting offer in compromise underscores that TTB will not turn a blind eye to slotting fees, and will actively enforce reported allegations of foul pay-to-play. It also signals that we are likely to see more instances of Federal investigations piggybacked on state alcohol beverage enforcement actions in the future.