

Public Service Announcement: The TTB is stepping up enforcement

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This is a public service post for people in the U.S. wine (and spirits, and beer and cider) industry. The TTB is stepping up enforcement, and might be coming to look at your records soon. And they won't be as friendly about it in the past.

Starting in fiscal year 2017, Congress gave the TTB (the federal Alcohol and Tobacco Tax and Trade Bureau) \$5 million per year specifically for enforcement. At the beginning the agency mostly used that money for educational seminars, to try to warn industry members against breaking the law. But lately the TTB is cooperating with state law enforcement agencies in an aggressive manner that the industry is not accustomed to.

Beverage attorney Kim Corcoran told me that agents seized 30 boxes of records from one winery.

"The TTB and the industry have had a pretty healthy relationship over the years," Corcoran said. "They come, they look at the books, and they say, 'Hey, don't do this.' And then if you do it the next year, you get fined. This is really changing the relationship between the TTB and the wineries. It's going to set up a much more adversarial relationship."

Corcoran also said that the TTB is now cracking down on practices they let slide in the past, especially in the area of wineries providing kickbacks to distributors or retailers. It's illegal in the U.S. for a winery to pay a distributor or retailer to carry its product, but many of them do under other guises, such as delivering 110 cases while charging for only 100 (this is called a "heavy pallet.")

"That is something that the TTB has known about for years and years and for whatever reason, allowed to be carried out for many years," said Jeremy Little, Corcoran's partner at the Santa Rosa law firm CPMR. "The consolidation of that side of the business has allowed distributors to write the rules. To get your wine into Chicago or Phoenix, you have to play by the rules that the distributors set."

"Because if you don't, there's another winery next door that will do that," Corcoran said. "Unless you've got 100% DTC (direct to consumer), you have to deal with this. You do what the distributors tell you to do."

TTB spokesman Thomas Hogue said the TTB is indeed stepping up enforcement, and moreover that it's something that members of the alcohol industry asked for.

"We definitely have a bigger presence than we used to," Hogue said. "Enforcement has increased, and that is a direct result of Congress getting involved. They said, we want you to take a more active role out there. Go give us a level playing field. This was not in the President's budget. This was something the industry asked for. We've been hearing for

some time from industry members who are upset about things going on in the marketplace. All these industry members coming online are small players who can't afford to pay to play to get their product in front of the consumer."

Tracy Genesen, Wine Institute Vice President and General Counsel, said, "We obviously believe the TTB should be actively enforcing against any industry member that is running afoul of federal law. But we certainly haven't, as the Wine Institute, encouraged them to do this. If this is coming from 'the industry,' it may be coming from individual industry members who have contacted them. Our policy is, the TTB should enforce the law."

Now I'm going to tell you something from my time of working in the wine industry, rather than reporting about it: sales incentives like this happen, and companies like the one that I worked for that don't pay them are at a disadvantage. Some distributors and retailers flaunt the goodies they received and ask why they should carry your Cabernet when they get a better deal on this other one. And some of the goodies are quite good: cash, vacations abroad, World Series tickets.

"Unfair trade practices is not a victimless crime," Hogue said. "It hurts the consumer. Wouldn't you rather go into a store and know that the products are there because other customers have driven that choice, rather than somebody paid to have them there?"

The stepped up enforcement by TTB also involves regulations against so-called consignment sales. It has targeted small businesses, a disturbing situation, says John Hinman with Hinman & Carmichael LLP.

If the TTB's goal is to "clean up" the practice of consignment sales in the marketplace, then the TTB must define what is, and is not, a permissible consignment sale. The TTB does not understand that extended payment terms with no right of return of the goods are not consignment sales ...

Hogue said that the predecessor agency to the TTB, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), didn't often enforce trade practice laws in alcohol because its priorities were on firearms and explosives. In 2003, regulation of alcohol and tobacco was spun off into the TTB, but alcohol law enforcement was still low priority in the tense days not long after 9/11.

"I have heard some folks complaining about the fact that our investigators behave like investigators," Hogue said. "Some of them maybe because of the way ATF used to do it. But you've got to treat it seriously. Why wouldn't we treat it seriously? It's our bread and butter. We do go after it."

A number of wineries have already signed settlements, officially called "offers in compromise," either paying a fine or having their license suspended for a day. These include:

* A&M Wines, Napa, one-day suspension

- * B Wise Vineyards, Sonoma, one-day suspension
- * James Johnson Vineyards, Napa, one-day suspension
- * MarcoWine, Calistoga, one-day suspension
- * MB Vogelzang Vineyards, Santa Barbara, one-day suspension
- * Modus Operandi, St. Helena, one-day suspension
- * Monticelli Brothers, Napa, one-day suspension
- * Retro Cellars, Angwin CA, one-day suspension
- * Rubissow Family Wines, Napa, one-day suspension
- * Pavi Wines, St. Helena, one-day suspension
- * Samantha Sheehan Imports, Napa, one-day suspension
- * Six Sigma Winery, Lower Lake CA, one-day suspension
- * Tamber Bey Vineyards, Calistoga, one-day suspension

Wineries are actually getting off easy so far. Heineken USA agreed last month to pay a \$2.5 million fine. A Miami distributor, Eagle Brands (aka QAC LLC), agreed in December to pay a \$1.5 million fine.

To be completely accurate, these are not technically "fines:" they're what these companies agreed to pay.

"We do not have fining authority," Hogue said. "We have basically one remedy. If we build a case against you, we're building a case against your permit. What's been happening, industry members, when they feel like we're building a case against them, they can come to us with a settlement agreement. It's entirely voluntary on their part. It's also entirely voluntary on our part. When we look at one of those, we're looking at it from the perspective of, what are we trying to do. Congress told us to go out and create a level playing field. If we're going to accept offers in compromise, it has to actually help us do what we're trying to do."

I asked Hogue what the point of a one-day suspension is. Wouldn't it just be a nice extra holiday for the employees?

"I think it sends a message," Hogue said. "If an industry member that had an agreement does it again, it shows that that wasn't effective. If we accept a settlement agreement, and it turns out to be just the cost of doing business, we haven't done what we set out to do in stopping this behavior."

One last point: if the TTB comes for your records, they have the right to do that. Corcoran and Little suggest that you offer to make them copies, or ask them for a detailed receipt so that you know what records they took. But you cannot refuse to give them the records.

"They're not coming and saying, 'Here's your fine'," Corcoran said. "They're coming and saying, 'We're taking you to trial.' One of our clients was told on a Monday that he must be at the investigator's office on Thursday, if he knows what's good for him. Don't think you're alone. Call a lawyer and get some help."