

and the Circle K corporation both argued that slotting fees are simply reimbursement for the expenses incurred by a retailer when it stocks a new product or moves a product already in stock to a more prominent location, including rearranging warehouses, changing accounting and inventory control systems, and planning new displays and shelf arrangements. No specific examples or data were submitted. NACS cited the high number of new products introduced each year and argued that slotting fees enable the products to be available to consumers at the retail premises. However, no marketing data or studies were submitted in support of this purported effect. MLBA and the Chapter House both noted that consumers, by their purchases, ultimately control the retailer's purchasing decisions, whether or not slotting fees are paid.

#### *Evaluation of Comments on Slotting Fees*

In examining slotting allowances or fees, also called "display fees," "introductory allowances," "pay-to-stay fees," "stocking allowances," "annual renewal fees," "up front fees," "maintenance fees," "push money," and "failure fees," ATF has relied heavily upon the aforementioned statements by Bloom, Kaplan, Goodale and Gundlach, since so little objective data was submitted with the other comments. Where material from these statements is cited, ATF will include a reference to the author and page number.

In his statement, Bloom (page 15) notes that slotting fees "have become entrenched, with both grocery manufacturers and retailers expecting these fees to be a part of every transaction involving a new product." Since these fees have become so commonplace in other industries and are not being treated as illegal in those industries, it is appropriate to review ATF's reasons for believing they should continue to be prohibited in the alcoholic beverage industry.

*Fedway* directed ATF to consider the benefits of legitimate competitive practices in evaluating whether a practice is exclusionary. Several of the statements addressed this aspect of slotting fees. One expected benefit of fair competition is that it will result in better quality, selection or prices for consumers. Goodale (page 8) says slotting allowances "do not benefit consumers. Retailers do not pass on the proceeds from slotting allowances in the form of lower prices for the favored products. Moreover, competition by slotting allowances may actually tend to displace competition in other forms

more likely to be passed on to consumers, such as lower prices to retailers, special promotions, or coupons. To the extent that they reduce the availability or visibility of competing products, slotting allowances also reduce consumer choice."

Many commenters expressed concern that allocation of shelf space to products under slotting fee agreements is not based on perceived consumer demand, but on money factors. These concerns appear to be borne out by the expert statements and the published material attached to them. Several made the distinction between "pull" marketing, in which the supplier uses advertising, coupons, and other means to create consumer demand, and "push" marketing, in which the supplier essentially pays the retailer to "push" the product by guaranteeing its availability and prominence at retail outlets. Slotting fees, sometimes called "push money" fall into this latter category. In *Fedway*, the court acknowledged the "general belief that cheap and plentiful alcohol is not an unmitigated social good (as opposed, say, to cheap and plentiful home heating oil or shoes) suggest[s] that the alcohol industry requires special oversight and regulation." There is at least a perceived danger in allowing slotting fees in the alcoholic beverage industry that heavily promoted products would be overrepresented or "pushed" at the retail level.

Bloom (pages 4 through 6 and page 23) points out that "the channels of distribution through which an industry member may market its beverages are far more limited than those faced by a manufacturer of other beverages or of other unregulated consumer products." Availability of retail outlets for alcoholic beverages is "restricted in number and location, by state licensing requirements" and "manufacturers in this industry may not sell their goods through mail order in many states." Bloom states the argument that there are alternative retail outlets (that is, that a supplier barred from selling to one customer may sell to others) does not apply in the alcoholic beverage industry because of these factors.

One of ATF's proposed criteria for determining retailer independence, that is, whether the practice has a discriminatory aspect, also has a bearing on the evaluation of the impact of this rulemaking on small businesses under the Regulatory Flexibility Act. Bloom (page 11) states that "some argue that slotting fees may be beneficial to small business, by offering the opportunity for an untested product to 'buy' its way into a retailer. I consider this view somewhat

naive, since, even if such an opportunity exists in theory, it is not a realistic or practical one for most small or start-up businesses. These are precisely the companies that cannot win the bidding war for retail space because they do not have the funding to pay hundreds of thousands of dollars in up-front fees. It is highly relevant that small food manufacturers have been among the most vocal opponents of slotting fees." Bloom further notes "since slotting fees usually bear little relation to the costs of a retailer or wholesaler, often causing manufacturers to pay different amounts to different resellers to stock the same item, such fees can adversely affect small *retailers* as well." (page 25—emphasis in original.) Goodale (page 6) makes a similar observation: "Individual stores and smaller chains have considerably less or no leverage and consequently receive disproportionately less in 'slotting allowances,' if any at all."

Kaplan (pages 18 and 19) discusses competition and performance in the beer and wine industries. "By any standard, both industries have exhibited healthy competition and excellent performance under a regulatory regime in which slotting allowances were clearly prohibited. The healthy level of industry performance strongly suggests that material alterations to the regulatory treatment of slotting allowances and other long-prohibited trade practices should be approached cautiously." Bloom (pages 5 and 6) also notes, despite "the vigor of competition in the industry, however, the \* \* \* regulatory structure, by directing competition and creating entry barriers, can sometimes make it more difficult to market products in the alcoholic beverage industry than in others. Accordingly, marketing practices which may be benign in other industries may have severe adverse consequences in this one."

Kaplan (pages 4 and 5) performs a comparison between ATF's criteria to determine whether a practice places retailer independence at risk and the characteristics of slotting allowances. Kaplan states, "[i]n my opinion, the payment of a slotting allowance by a supplier restricts or hampers the retailer's choice of which products to purchase (during the time period in which the shelf space has been purchased or rented), represents a continuing obligation on behalf of the retailer to purchase and stock the supplier's product, represents a commitment by the retailer not to terminate its relationship with the supplier with respect to purchase of the supplier's products, reduces the amount