

of shelf space available for competing products, and generally results in a reduction in the sales of the displaced products." Goodale (pages 6 and 7) performs a similar analysis, with similar findings. He adds that "[s]lotting allowances involve manufacturers in the day-to-day decisions of the retailer regarding what products the retailer will purchase and how products will be displayed in the store. Payment of slotting allowances is almost always discriminatory among retailers in any given area."

With particular reference to the continuing character of the obligation, and the danger of a tie or link between the industry member and the retailer, Bloom (page 7) states that "manufacturers often make continuing payments to retailers and wholesalers either to keep a product on the shelves or in the warehouse when the product does not sell in the volume expected by the retailers, or to obtain preferential display space. In other words, manufacturers may be required to make ongoing payments even after they have paid the entry fee and even if the product sells well. These are referred to as 'pay-to-stay' fees."

Goodale (page 6) noted "Manufacturers pay slotting allowances only with the agreement of retailers to provide their products some benefit or favorable treatment. A slotting allowance is part of a mutually binding contract between manufacturer and retailer. Thus, a retailer that accepts a slotting allowance is obligated to fulfill the terms of its agreement with the paying manufacturer. Moreover, retailers do not treat this obligation lightly. A retailer that did not fulfill its part of a slotting allowance agreement would quickly acquire a reputation as a 'welcher' that would damage its ability to collect slotting allowances in the future. Thus, retailers have a strong incentive to honor their commitment to favor the paying manufacturer's product." Bearing out this notion of an incentive to favor a supplier who pays slotting fees, Bloom attached an article from *Journal of Public Policy and Marketing* by Joseph P. Cannon and Paul N. Bloom, called "Are Slotting Allowances Legal Under the Antitrust Laws?" The article noted:

Whether slotting allowances have served as anticompetitive weapons or insurance fees, grocery chains have benefited from their existence. Historically, profits rarely exceeded 1 percent of sales, but the last several years have seen profits in the 2 percent range [Sullivan 1989].

Although the article noted there were other contributing factors in this striking increase in profitability, a retailer would

be reluctant to give up any practice which contributes to such an increase. Goodale (page 6), stated that, for large retailers, "slotting allowances are a major source of revenue, accounting for perhaps more than 10% of after-tax profits." This underscores the potential for a retailer to become dependent on a slotting fee arrangement, thus creating the tie or link which is an element of exclusion.

#### *Nature and Effect of Slotting Fees*

The proposed description of slotting fees in § 6.152(b), read, in part, "purchasing or renting specific shelf space \* \* \* where such purchase reduces the availability of other shelf space for the distilled spirits, wine or malt beverages of another industry member."

As noted earlier in the discussion of the comments on slotting, a number of commenters requested that this definition be expanded because slotting fees cover more than just the purchase of specific shelf space.

Goodale (pages 8 and 9) states "in my view, the slotting allowance provision in § 6.152(b) of the NPR is too narrow. The reference to 'purchasing or renting specific shelf space' would not include many of the slotting allowance arrangements discussed above that have the same adverse effect on retailer independence. The draft regulation should be modified to make clear that all forms of slotting allowance arrangements will be treated as putting retailer independence at risk, as in fact they most certainly do." The slotting practices listed by Goodale (pages 2 through 4) were:

Payments made by manufacturers to retailers and wholesalers to set up a new item in their store or warehouse.

Payments made by manufacturers to retailers in return for an obligation to, for some agreed-upon period of time:

Allocate a specified quantity of shelf or refrigerator space to the manufacturer's product;

Allocate a favorable shelf or display position to the manufacturer's product (aisle end or eye level, for instance);

Feature the manufacturer's products in advertising and displays during times of peak demand, such as holidays;

Set aside warehouse or backroom space on the retail premises for storage of the manufacturer's product, to reduce the number of deliveries and facilitate restocking of the store shelves;

In some product categories (greeting cards and light bulbs, for example) the retailer may carry one manufacturer's product exclusively.

Based upon the evidence noted, ATF believes that slotting fees put retailer independence at risk, and proposed

§ 6.152(b) is adopted in this final rule, with two changes. In the final rule, ATF has expanded the description of slotting fees to more accurately reflect the variety of practices which come under this category. ATF also dropped the condition that the purchase of shelf space reduce the availability of space for competitors' products from § 6.152(b), since that factor must always be shown within the framework discussed in § 6.151(a)(2).

#### *Slotting Fees as Consignment Sales*

In Notice No. 794, ATF proposed to classify payment of slotting allowances as "not a bona fide sale" in the consignment sale regulations in Part 11. This classification grows out of the description of consignment sales in 27 U.S.C. 205(d), "to sell \* \* \* on consignment or under conditional sale or with the privilege of return or on any basis otherwise than a bona fide sale." ATF argued the practical effect of "slotting allowances" is to refund, in whole or in part, the purchase price of a product that has not been sold, in proportion to the period of time that it remains unsold.

At a minimum, payment of "slotting allowances" may reimburse the trade buyer for the cost of shelf space occupied by the industry member's products. In addition, it may also compensate the trade buyer for the lost opportunity cost of having capital tied up in inventory acquired from the industry member. Ultimately, the amount refunded by this mechanism can, over any specified period of time, be the economic equivalent of simply buying back a product at the end of that period of time.

ATF believes that its regulations should address all arrangements that clearly embody the substance of the "consignment sale" practice proscribed by Congress, and not merely particular forms of that practice. Therefore, ATF proposed to amend its regulations to specify payment of "slotting allowances" from an industry member to a trade buyer is a form of consignment sale.

NACS, in its comment, stated that slotting allowances cannot be equated with consignment sales. They argue that it is unlikely that, even over time, the slotting allowances would be the equivalent of the wholesale price, and that ATF cannot presume "that slotting allowances would have this effect in all circumstances."

Other commenters offered contrasting views on this subject. E. & J. Gallo Winery cited remarks by FTC Commissioner Deborah K. Owen on the subject of slotting fees. She called them