

or Act) provides for Federal regulation of the alcoholic beverage industry. The FAA Act contains particular restrictions that are unique to the alcoholic beverage industry and reflects Congress' concern with a variety of trade practices and abuses that took place before, during and immediately after Prohibition. This final rule amends regulations under four parts of the statute, Exclusive Outlet (27 U.S.C. 205(a)), Tied-House (27 U.S.C. 205(b)), Commercial Bribery (27 U.S.C. 205(c)), and Consignment Sales (27 U.S.C. 205(d)). The supplementary information is divided into two sections. The first section deals with the subject of exclusion, and the second section covers other changes implemented as a result of an internal review of trade practice regulations and an industry petition.

Exclusion

One element which is necessary for these practices (other than consignment sales) to result in violation of Federal law is "exclusion, in whole or in part, of distilled spirits, wine, or malt beverages, sold or offered for sale by other persons."

Although exclusion is not defined in the FAA Act or in the current implementing regulations at 27 CFR Parts 6, 8 and 10, ATF has, in the past, held that "exclusion in part" includes simply causing retailers to purchase less of a competing brand than they otherwise would have bought.

In *Fedway Associates, Inc., et al. v. United States Treasury, Bureau of Alcohol, Tobacco and Firearms*, 976 F.2d 1416 (DC Cir. 1992) (*Fedway*), however, the United States Court of Appeals for the District of Columbia Circuit held that Congress had intended something more than just a retailer purchasing less of a competing brand than it otherwise would have. For a violation to occur there must also be a tie or link between a supplier and retailer that at least threatens the retailer's independence (that is, in addition to affecting the retailer's purchasing pattern).

The court based this conclusion on several points. The court said "exclusion" means to exclude a rival product from the marketplace by some direct action of the violator. Merely taking some action which influences a retailer not to purchase a rival product is not exclusion under the Act if the retailer's response is the result of a free economic choice. This interpretation of exclusion as meaning the shutting out or expelling of a rival's product, according to the court, is consistent with conduct addressed by the Act such as tied-house, commercial bribery and exclusive

outlets. Any broader interpretation would, in the view of the court, likely result in restriction of pro-competitive activities.

The *Fedway* court was concerned that ATF enforcement actions could hinder legitimate competitive activities. Consequently, the opinion states that if ATF suspects a particular practice places retailer independence at risk then the agency must provide substantial support backing up its suspicion. The court recognized the utility of the rulemaking process to provide evidence which substantially supports the conclusion that a particular practice either actually or potentially threatens retailer independence.

Factual or substantive proof is necessary, the court stated, to ensure that the Government does not take an overly-broad enforcement posture in its efforts to prevent potential threats to retailer independence and risk outlawing conduct that fosters a competitive alcohol market. In the *Fedway* proceeding, the court held this factual basis was not met because the only datum or evidence presented was the fact that certain retailers purchased less of a rival product.

In summary, the court offered the following guidance about this statutory element:

Congress, we are satisfied, used "exclusion" to indicate placement of retailer independence at risk by means of a "tie" or "link" between the wholesaler and the retailer or by any other means of wholesaler control.

[We demand] a factual showing that retailer independence is potentially threatened * * *.

[ATF should] take reasonable account of both policy interests underlying the [trade practice] provisions * * * that the alcohol industry requires special oversight and regulation * * * and the value of pro-competitive wholesale promotions. This value derives not only from the traditional benefits of competition in terms of lower prices and improved quality, but also * * * from the fact that a competitive alcohol market helps deter the formation of a corrupt black market.

Finally, in arriving at a reasonable interpretation of "exclusion" * * * the Bureau must take care to distinguish rationally between those promotions it decides are lawful and those it decides are not.

Notice of Proposed Rulemaking

On April 26, 1994, ATF published Notice No. 794 (59 FR 21698), proposing amendments to the trade practice regulations to address the concerns of the *Fedway* court and to make other changes suggested by its internal review and the industry petition. Notice No. 794 solicited comments on these

proposed changes by June 27, 1994. The comment due date was extended to July 27, 1994 by Notice No. 796 (59 FR 29215).

ATF emphasizes that the revision of the trade practices regulations is an ongoing process. Any interested person may petition ATF under 27 CFR 71.41(c) for a rule change.

Comments on Notice of Proposed Rulemaking

ATF received 1,347 letters of comment on Notice No. 794, containing a total of 1,593 signatures. Comments were submitted by alcoholic beverage producers, importers, wholesalers, retailers, trade associations, related businesses, consumers and government agencies.

National trade associations who commented on trade practices include: American Brandy Association
American Vintners Association (AVA)
Beer Institute
Brewers' Association of America (BAA)
Distilled Spirits Council of the United States (DISCUS)
Institute for Brewing Studies
National Alcohol Beverage Control Association (NABCA)
National Association of Beverage Importers (NABI)
National Association of Beverage Retailers (NABR)
National Association of Convenience Stores (NACS)
National Beer Wholesalers Association (NBWA)
Presidents' Forum of the Beverage Alcohol Industry (the Forum)
The National Wine Coalition
Wine and Spirits Wholesalers of America (WSWA)
Wine Institute

Summary of Proposals, Comments and Changes Incorporated in this Final Rule

The following paragraphs provide a summary of ATF's original proposals, the comments received on each as a result of Notice No. 794, and an explanation of ATF's decision concerning each issue. Proposals which concern a general topic will be addressed first, followed by discussion of proposals concerning individual sections of the regulations.

Proposed New Subparts on Exclusion

ATF proposed amendments and additions to the regulations on the subject of exclusion which follow a framework which ATF believes is consistent with the statutory interpretation of exclusion adopted by the *Fedway* court as well as similar concerns previously raised in *Foremost Sales Promotions, Inc. v. Director*,