

In the case of commercial bribery, the risk to the wholesale or retail trade buyer's independence is evaluated using similar criteria in section 10.54. A number of commenters expressed concern that ATF's application of these criteria to wholesaler trade buyers was overly broad and could disrupt legitimate franchise arrangements or "promotional partnerships" between industry members and their wholesaler trade buyers. In response, ATF wishes to emphasize that the only "practices" being evaluated in section 10.54 are commercial bribery or the offering or giving of a bonus, premium, or compensation to any individual officer, or employee, or representative of the trade buyer. Transactions with the trade buyer entity are not in question here, unless circumstances indicate the trade buyer entity is merely a conduit between the industry member and the individual.

In their comment, DISCUS proposed an alternative to these criteria, which they called "guidelines for evaluating exclusion." To some extent, these guidelines paraphrased the general principles enunciated in proposed §§ 6.152, 8.52 and 10.52, but stated them in terms that narrow their application to specific factual situations. The final rule retains the general principles in its criteria rather than the more limited guidelines proposed in the DISCUS comment, since the industry is provided clearer guidance by the use of principles of general application rather than more narrow factual characterizations.

The FTC staff also addressed the criteria ATF will apply in evaluating a promotional practice not otherwise covered in another regulation. In general, the FTC staff criticized the criteria since they feel that each one of the criteria could be a feature of a normal commercial relationship under the right circumstances. Rather than recommend different criteria, the FTC staff again returns to their view that the factor of market share or "market power" is the proper approach.

For the reasons discussed under "Exclusion, in general" above, a market share or "market power" approach is not consistent with the statutory language of the FAA Act or Congress' intent in enacting the unfair trade practice provisions. Rather, ATF has developed these criteria based on the factors stressed by the various Federal courts that have addressed violations of the unfair trade practice provisions. No one factor is determinative. To the extent that applying a particular factor in a particular case will result in restricting a pro-competitive practice,

the factor will not be applied in evaluating that practice. This is clearly a case-by-case determination. However, the FTC staff suggestion that a criterion does not in all cases demonstrate a tie or link that threatens retailer independence does not render the factor irrelevant in those cases where it is evidence of such a tie or link.

After reviewing the FTC staff comments, ATF determined, for reasons of clarity, that criterion (a) in §§ 6.153, 8.54 and 10.54 should read "which products or what quantity" (the proposed rule read "which products and what quantity"). ATF has changed the final rule accordingly.

Slotting Fees

In Notice No. 794, ATF proposed adding slotting fees to two areas of the regulations: first, as an example of a practice which has the potential to threaten a retailer's independence (proposed section 6.152), and second, as "other than a bona fide sale" (proposed section 11.24). Slotting fees were described in Notice No. 794 as fees paid to a retailer in order to obtain premium shelf space. ATF sought comments on whether slotting fees should be addressed in tied-house and/or consignment sale regulations. In the notice, ATF requested data and information on the effect of such fees, rather than solely statements of preference by a particular commenter.

Slotting fees, also referred to as slotting allowances, are not specifically addressed in the current FAA Act regulations. In the past, ATF interpreted such fees as "things of value" given to retailers or as "paying or crediting the retailer for any advertising, display or distribution service" and investigated slotting fee arrangements as potential violations of the tied-house provisions of the FAA Act, 27 U.S.C. 205(b)(3) or 205(b)(4).

ATF received 1,347 letters of comment on Notice No. 794, containing a total of 1,593 signatures; of these, 1,309 letters (1,554 signatures), expressed support for ATF's stated position on slotting fees. Several trade associations who supported ATF's proposed treatment of slotting allowances enclosed substantive and detailed analyses on the subject by authorities outside the alcoholic beverage industry in addition to their own comments. The Wine Institute submitted a statement prepared by Paul N. Bloom, Professor of Marketing at the University of North Carolina at Chapel Hill ("Bloom"). The Beer Institute submitted statements prepared by David P. Kaplan, President of Capital Economics, a Washington, D.C.,

economic research and consulting firm ("Kaplan") and Robert Goodale, Deputy Secretary of Commerce for the State of North Carolina ("Goodale"). The Brewers Association of America submitted a statement by Gregory T. Gundlach, of the College of Business Administration, University of Notre Dame ("Gundlach"). Most other commenters who supported the ATF proposal commented with conclusory statements that slotting fees are anti-competitive, but submitted no accompanying data in support of these conclusions.

The commenters supporting the proposed rule did so from a number of different perspectives. Approximately 1,130 of the letters written in support of ATF's proposed rules on slotting addressed only that issue. Most of these letters came from beer wholesalers, and many stated simply that slotting fees should continue to be considered a potential violation in both the tied-house and consignment sales regulations. The reasons given included the statements that slotting fees will hurt competition, reduce consumer choice, discriminate against small businesses and raise costs in an already tight market. However, no supporting evidence was furnished in most of these letters. A few of these commenters went on to describe likely costs in terms of money, lost jobs, or product failures from their experience with soft drinks or snacks.

Of the commenters who wrote only about slotting, 71 requested that ATF expand its definition of slotting to encompass "purchasing, renting or maintaining display and storage space as well as shelf space."

ATF also received four comments from individual consumers who expressed concern that slotting allowances may have the effect of dampening innovation, especially in the fledgling domestic craft brewing industry, by making the cost of introducing a new product prohibitively high.

In identical letters, six commenters identifying themselves as small retailers expressed concern that "slotting fees would give giant retailers more money to drive me out of business."

Five commenters argued in favor of a change in ATF's proposed treatment of slotting fees. These commenters were the National Association of Convenience Stores (NACS), the Minnesota Licensed Beverage Association, Inc. (MLBA), The Kansas Retail Liquor Dealers Association, Inc., the Circle K Corporation, which owns and operates convenience stores, and The Chapter House, a brewpub. NACS