

a "form of insurance for the retailer * * * [which] reduce, and perhaps eliminate his risk—or at least transfer some of it to the producer—by charging a fee that, essentially, provides indemnification from the loss of profits that would arise if the new product fails to sell well." Statements submitted by retailers opposing ATF's proposals on slotting fees corroborated that slotting fees do serve the function of shifting the risk of loss back to the supplier/wholesaler.

Kaplan (page 13) describes "failure fees." "These fees are being paid if a 'new product does not meet sales expectations.'" Kaplan's example described a grocery chain which reportedly asks its suppliers to agree, under contract, to cover the retail cost of merchandise remaining unsold after a 120-day introductory period if the product has not met its weekly volume target. The supplier "has the option" of removing the remaining inventory.

Bloom (page 17) said "a manufacturer which performs poorly is often able to 'pay to stay,' and make up for the shortfall in profits contributed." Bloom went on to describe slotting fees in the grocery industry as "a form of 'insurance' for retailers. It is well-recognized that retailers have reduced the risk of carrying new products by charging slotting fees. Indeed, several [interviewees] suggested that many supermarkets may not be in the risky grocery business anymore. Instead, they see some supermarket chains as essentially being in the real estate business, selling and leasing shelf space to manufacturers."

In view of these comments, ATF believes the purported use and purpose of slotting fees clearly demonstrate that a sale which involves a slotting fee is "not a bona fide sale." Proposed § 11.24 is retained in the final rule, but amended to reflect the broader description of slotting fees adopted in § 6.152(b).

Slotting Fees as Commercial Bribery or Exclusive Outlet

Although there was no formal request for inclusion of slotting fees under the commercial bribery part of the regulations, a number of commenters characterized slotting fees as bribery or "payola." As discussed earlier, the FAA prohibition of commercial bribery relates to the offering or giving of a bribe, bonus, premium or compensation to any individual officer, employee or representative of a trade buyer, and not to the trade buyer entity. As slotting fees have been described in the comments, they appear to be transactions with the entity, and not with an individual. If an

investigation disclosed payments to an individual for influencing the display or stocking of a product, ATF would pursue that as a case of commercial bribery, if the other necessary criteria were met.

Coors Brewing Company suggested adding a new section to Part 8—Exclusive Outlets, to prohibit slotting allowances, saying a slotting allowance "necessarily involves a requirement imposed upon a retailer by a voluntary agreement." ATF disagrees; slotting allowance agreements appear to be limited to manner of display or stocking of product, not to exclusivity of purchase, which is the focus of the exclusive outlet rules. Certainly, if ATF found an industry member was requiring a retailer to purchase its products to the exclusion of similar products sold or offered for sale by other industry members as part of a slotting fee arrangement, ATF would also pursue the exclusive outlet aspect of the case.

Other Proposed Changes

ATF proposed to revise or add regulations in 27 CFR Parts 6, 8, 10, and 11, in areas suggested by the industry petition and in areas identified by ATF as appropriate for rulemaking. The proposed revisions and additions are discussed below.

In 1988, ATF designated an agency task force to review the trade practice regulations and ATF's enforcement experience, since 1980, and determine whether revisions were needed. ATF determined that certain regulations could be modified or clarified to provide guidance to the industry on ATF's interpretations of the trade practice statute. Such guidance has been provided by rulings and industry circulars. Notice No. 794 proposed incorporating these rulings and industry circulars into the regulations.

In addition to changes identified in the Bureau's own review, this notice responded to changes suggested in a February, 1992, petition filed by representatives of the Distilled Spirits Council of the United States, Inc. (DISCUS), the National Association of Beverage Importers, Inc. (NABI), Wine and Spirits Wholesalers of America, Inc. (WSWA), the National Licensed Beverage Association (NLBA), and the National Liquor Stores Association, Inc. (NLSA). This petition superseded an earlier petition filed by DISCUS and NABI with ATF. ATF suggested that DISCUS and NABI work with all segments of the alcohol beverage industry to reach a consensus concerning the various proposals to revise the trade practice regulations.

The 1992 petition reflects a culmination of that effort by the supplier, wholesaler, and retailer organizations noted above.

Scope of Parts 6, 8, 10 and 11

ATF proposed to revise §§ 6.1, 8.1, 10.1 and 11.1 to reflect the recodification of the Federal Alcohol Administration Act which included renumbering the trade practice section from section 5 to section 105 and to better reflect the function of the proposed regulations. No commenters objected to these changes, and they are adopted as proposed. DISCUS suggested removing the sentence "This part does not attempt to enumerate all of the practices which may be a violation * * *" from each of these sections, but gave no reason for this suggestion. This sentence was retained in each part because it is an accurate statement; each part does not list all of the practices which can result in a violation. The deletion of this sentence would mislead a person into believing that each part constitutes a complete or exhaustive list of every practice within the trade practice proscriptions.

Sections 6.3 and 8.3, Application

Although ATF had proposed no change to § 6.3(b) or § 8.3(b), the National Alcohol Beverage Control Association (NABCA) renewed its request (originally aired during the last trade practice rulemaking in 1980) that all control states be categorized as wholesalers, even if they meet the definition of retailer contained in sections 6.11 and 8.11. NABCA states in the comment submitted on its behalf by Tendler, Goldgerg, Biggins & Geltzer, that this simplification is needed because Control State arrangements vary widely from State to State and create a confusing "patchwork" of rules. ATF maintains its 1980 position that there is no statutory authority for such a change. Therefore, no change is made in these sections in the final rule.

Administrative Provisions in Parts 6, 8, 10 and 11

Section 102(c) of the FAA Act (27 U.S.C. 202(c)) incorporates by reference the provisions of sections 49 and 50 of Title 15, U.S.C. of the Federal Trade Commission Act which vests in ATF investigative subpoena authority and the right to examine and copy relevant data subject to an FAA Act investigation. In addition, section 102(d) provides authority to require such reports as are necessary to effectuate the purposes of the statute. ATF proposed adding new regulations at 27 CFR 6.5, 8.5, 10.5 and 11.5 delegating these