

authorities to specific officials. There were numerous comments on these two proposals, and they will be addressed separately below:

Examination and Subpoena

Pursuant to 15 U.S.C. 49 and 50 as made applicable by section 102(c), ATF may examine, at all reasonable times, any documentary evidence which is necessary to determine whether the person, partnership, or corporation being investigated or proceeded against violated the FAA Act. The right to examine includes the right to copy any such documentary evidence. In addition, section 49 authorizes the issuance of a subpoena for any person, partnership, or corporation to produce records or give testimony relevant to an investigation of a violation of the FAA Act. ATF proposed to delegate the authority to examine and copy records to the Director or any ATF officer, and to delegate the authority to issue subpoenas to the Director. Sixty two commenters (many using similar language, as if following a sample letter) questioned the need for this provision and ATF's interpretation of the statute. Other commenters requested that ATF explain the reasons for its authority for using the subpoena power in investigations.

Many of the commenters cited *Serr v. Sullivan* 270 F. Supp. 544 (E.D. Pa. 1967), aff'd 390 F. 2d 619 (3d Cir. 1968) (*Serr*), for the proposition that ATF does not have the authority to use subpoenas in connection with any type of investigation prior to the issuance of an order to show cause against a basic permit.

Subsequent to the *Serr* decision, in consultation with the Department of Justice, ATF concluded that it would not follow the decision outside the 3rd circuit and planned to litigate the issue in another circuit. ATF has continued to use its subpoena power in other circuits and has not been challenged.

In *Serr*, the court narrowly interpreted the incorporation by reference in 27 U.S.C. 202(c) of the investigatory subpoena authorized under the Federal Trade Commission Act. The *Serr* decision held that Congress provided no express investigation power to the agency administering the FAA Act and, therefore, the subpoena authority could only be used in an administrative proceeding against a basic permit pursuant to 27 U.S.C. 204. The court based this conclusion on the fact that other Federal statutes containing similar incorporations of the Federal Trade Commission Act subpoena power contained express provisions authorizing investigations and,

additionally, Congress had expressly rejected an investigation provision in the FAA Act.

A review of other Federal statutes cited by the court reveals that the power to conduct investigations into possible violations is granted either in conjunction with the broader power to call for general fact finding investigations, or supplemental to a third party complaint system of enforcement, or both. The court's summary conclusions about these investigation powers did not entail an analysis of the types of "investigations" contemplated by these other provisions. ATF does not conduct these types of general fact finding investigations or use a third party complaint system. Instead, ATF traditionally conducts investigations into specific violations by specific industry members.

Likewise, the investigation provision rejected by Congress authorized the agency to make investigations and studies with reports to the President and Congress on the production, distribution and consumption of alcoholic beverages. The provision did not address the power of the agency to conduct specific investigations into whether an industry member violated a specific provision of the FAA Act. Therefore, the failure of Congress to enact this provision indicates nothing about Congress' intent on whether the administering agency could conduct an investigation to determine whether the industry member violated the statute. It is fair to conclude that Congress intended that the administering agency have routine investigatory authority as an inherent part of the given "duties and powers" to administer and enforce the unfair trade practice provisions when there is reason to believe that an industry member violated the FAA Act.

Finally, the court's conclusion that suspension or revocation of basic permits is sufficient for effective enforcement of the Act fails to recognize that the FAA Act contains other enforcement mechanisms such as injunctions, consent decrees, and offers in compromise which are used outside of an administrative proceeding against a basic permit, as well as ignores the fact that brewers do not hold basic permits. Such reasoning also fails to recognize that an investigation is a pre-requisite to developing adequate facts to support issuing an order to show cause that alleges a specific violation. For all of these reasons, it is illogical to conclude that Congress, on the one hand, gave the administering agency these other traditional enforcement mechanisms and authorized the use of other Government agencies and the

submission of reports under 27 U.S.C. 202(b) and (d) and, on the other hand, denied the same agency the inherent authority to conduct traditional investigations into whether an industry member has violated a specific trade practice provision. Accordingly, ATF has retained the proposed examination and subpoena provisions in Parts 6, 8, 10 and 11 of the final rule.

One change was made in these provisions in the final rule because ATF noted some industry concern that these powers will be used for "fishing," rather than as part of a specific investigation. ATF has added language to require a showing that the requested evidence may reasonably be expected to yield information relevant to a violation of the statute by a particular industry member being investigated under the Act.

Report of Promotional Activities

In addition, pursuant to section 102(d) of the FAA Act, new regulations were proposed in §§ 6.5, 8.5, and 10.5, authorizing the regional director (compliance) to require a letter report from industry members regarding information on sponsorships, advertisements, promotions, and other activities conducted by, or on behalf of, or benefiting the industry member. The reporting requirement would be used on a case-by-case basis, rather than as a recurrent and periodic reporting requirement such as a monthly report of activities applying to all industry members. ATF did not propose adding a reporting requirement in Part 11, Consignment Sales.

Most of the 66 comments on this section described the subject reports as "advertising reports" and noted that ATF already had "abundant" authority to regulate advertising. The remainder of the comments on this report addressed three main areas: The perjury statement requirement, the delegation to the regional director (compliance) and the absence of limits or safeguards.

The proposed rule required that the letter report be "executed under the penalties of perjury." Commenters were critical of this requirement because, they pointed out, perjury carries a criminal penalty, whereas most practices which are under investigation, if found to be violations, would be handled administratively. ATF is retaining this requirement in the final rule for consistency with requirements for other documents filed under the FAA Act regulations, such as applications for basic permits and certificates of label approval. Further, even if the perjury statement were not required, giving a false statement in a document presented to a government