

Subpart C is divided into topics (with titles) which parallel sections 105(b)(1) through (7) of the FAA Act. The proposed merger of the corresponding sections will mean that the regulations applicable to an interest in retail property under section 105(b)(2) will be contained in a group of the regulations categorized under an interest in a retail license under section 105(b)(1). ATF believes that it may be confusing for a person or industry representative relying on the Part 6 regulations to look under the regulations on a retail license for a regulation relating to an interest in retail property. ATF proposed no change with respect to this request, received no additional requests for such a merger, and makes no such change in the final rule.

Further, the petitioners recommended clarifying changes to existing regulations to ensure that there is no misunderstanding that a violation of the FAA Act does not occur merely upon a finding of the existence of the means to induce. The petitioners believe that the wording of several existing regulations describing various means to induce results in industry confusion since such sections are written in terms describing "prohibited means to induce."

The petitioners believe that the term "prohibited" should be deleted from such sections in order to avoid any contention or confusion that this provision, read separately from section 6.21, allows for finding a violation of the FAA Act without also establishing that the means to induce results in exclusion. While the petitioners recognize that these sections are subject to the general application provisions of section 6.21, which states that these means to induce are unlawful only if they result in exclusion, they believe such a change will help reduce the possibility of industry confusion on this issue. The same request was made concerning §§ 6.31, 6.41, 6.51, 6.61, 6.65 and 6.71, which all contain similar language.

ATF proposed to amend §§ 6.25, 6.27, 6.31, 6.33, 6.41, 6.51, 6.61, 6.65 and 6.71 by replacing the word "prohibited," with the phrase, "a means to induce," in order to correspond with the wording of the FAA Act. No objections to this change were received, and it is adopted in the final rule.

#### *Section 6.42, Third Party Arrangements*

ATF's review of its regulations disclosed that some confusion exists over the breadth of the proscription on indirect means to induce. Some industry members incorrectly view the two examples in § 6.42 as exclusive of the situations covered by the regulation.

Additionally, ATF believes some industry members interpret the examples as meaning the third party receiving the means to induce must be an agent of an individual retailer.

By enacting the phrase "directly or indirectly or through an affiliate," Congress intended the broadest possible application of the proscriptions of the FAA Act. The term "indirectly" encompasses more than simply trade practice activities with agents of retailers. It covers such activities with any representative of a retailer or industry member, whether or not such representative is technically an agent of the retailer or industry member. Thus, an industry member providing the means to induce to any third party who will pass the means on to the retailer, or use them in a manner to benefit the retailer, is indirectly providing the means to induce to the retailer.

Accordingly, ATF proposed adding a sentence to § 6.42 to clarify that the examples are simply illustrative and not exclusive of the situations resulting in indirect inducements. ATF also proposed to revise the final sentence for clarity.

Several commenters expressed concern that ATF appeared to hold industry members responsible for any inducement provided to a retailer by a third party, whether or not the industry member knew or intended that it would be provided. In response to these comments, ATF revised the section to clarify that an inducement will not arise where the thing of value was furnished to a retailer by a third party without the knowledge or intent of the industry member, or the industry member did not reasonably foresee that the thing of value would be furnished to a retailer. In evaluating the second point of this exception, ATF will determine if the item given was of such a nature or character that the industry member could reasonably foresee that it would be furnished to a retailer.

#### *Section 6.43, Sale of Equipment*

The petitioners recommended deleting the last sentence of § 6.43, which states that negotiation by an industry member of a special price to a retailer for equipment from an equipment company is a thing of value. They argued that this negotiation should not be considered a thing of value unless the industry member subsidizes the special price. ATF disagreed since the thing of value is not the special price, but the service provided by the industry member in negotiating with the equipment company, or using its influence on behalf of the retailer. In the past, ATF has experienced cases in

which a retailer, believing that it received special price consideration, altered its buying patterns resulting in exclusion of a competitor's products. ATF did not propose deleting this language, but did propose a conforming change to the cross-reference.

In its comment, DISCUS reiterated the petitioners' request for deletion of the last sentence, but did not present any new information. ATF maintains its position that the last sentence of § 6.43 describes a service which is a thing of value (that is, a means to induce a retailers' purchases) and should not be deleted. No comments were received objecting to the change in cross reference, so that change is adopted in the final rule.

#### *Section 6.46, Outside Signs*

ATF proposed to repeal this section and add a new § 6.102 to allow industry members to furnish outside signs to retailers as an exception in subpart D. As discussed under § 6.102, ATF received mixed comments on this proposal and has made some changes to § 6.102 as it appears in the final rule. Accordingly, § 6.46 is deleted by the final rule.

#### *Section 6.47, Items Intended for Consumers*

The petitioners recommended deleting this section because they believe that it is redundant and unnecessary in light of § 6.93 and their proposed revisions to § 6.87.

ATF proposed to remove this section since the general prohibition in § 6.41 covers things of value not specifically excepted in Subpart D. ATF proposed to allow certain items listed in § 6.47 by listing them in the proposed revision of § 6.84, Point of sale advertising and consumer advertising specialties. No negative comments were received on this proposal, and the section is removed in the final rule.

#### *Section 6.51, General*

ATF proposed revising this section to replace the word "prohibited" with the phrase "means to induce." No adverse public comments on this proposal were received, but a commenter within ATF pointed out that the regulation should be further clarified. A review of the history of the section shows that it is intended to cover two situations, reimbursements to a retailer for advertising or display services directly provided by the retailer, and reimbursements for such services if purchased by the retailer from a third party. The final rule is revised accordingly.