DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

Oral Dosage Form New Animal Drugs; Lufenuron Suspension

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by Ciba Animal Health, Ciba-Geigy Corp. The NADA provides for oral administration of lufenuron suspension to cats for the control of flea populations.

EFFECTIVE DATE: April 26, 1995.

FOR FURTHER INFORMATION CONTACT: Marcia K. Larkins, Center for Veterinary Medicine (HFV–112), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–0614.

SUPPLEMENTARY INFORMATION: Ciba Animal Health, Ciba-Geigy Corp., P.O. Box 18300, Greensboro, NC 27419–8300, filed NADA 141–026, which provides for oral administration of Program® (Lufenuron) Suspension to cats 6 weeks of age or older. The drug is provided once a month, mixed in food, for the control of flea populations. The product contains six individual dose packs of 135 or 270 milligrams lufenuron. Lufenuron has no deleterious effect on adult fleas, but it prevents most flea eggs from hatching or maturing into adults. The NADA is approved as of March 28, 1995, and the regulations are amended in part 520 (21 CFR 520) by adding new § 520.1289 to reflect the approval. The basis for approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of part 20 (21 CFR part 20) and § 514.11(e)(2)(ii) (21 CFR 514.11(e)(2)(ii)), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857, between 9 a.m. and 4 p.m., Monday through Friday.

Under section 512(c)(2)(F)(ii) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(c)(2)(F)(ii)), this approval qualifies for 3 years of marketing exclusivity beginning March 28, 1995, because it contains reports of new clinical or field investigations, other than bioequivalence or residue studies, essential to the approval and conducted or sponsored by the applicant.

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 520

Animal drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 520 is amended as follows:

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

1. The authority citation for 21 CFR part 520 continues to read as follows:

Authority: Sec. 512 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b).

2. New § 520.1289 is added to read as follows:

§ 520.1289 Lufenuron suspension.

(a) *Specifications.* Each individual dose pack contains either 135 or 270 milligrams of lufenuron.

(b) *Sponsor.* See No. 058198 in § 510.600(c) of this chapter.

(c) *Conditions of use in cats*—(1) *Amount.* Minimum of 13.6 milligrams per pound of body weight (30 milligrams per kilogram). Recommended dose of 135 milligrams for up to 10 pounds of body weight or 270 milligrams for 11 to 20 pounds. Cats over 20 pounds are provided the appropriate combination of packs.

(2) *Indications for use.* For control of flea populations.

(3) *Limitations.* For oral use in cats 6 weeks of age or older, once a month, mixed with food. Administer in conjunction with a full meal to ensure adequate absorption. Treat all cats in the household to ensure maximum benefits. Because the drug has no affect on adult fleas, the concurrent use of insecticides that kill adults may be necessary depending on the severity of the infestation. Federal law restricts this drug to use by or on the order of a licensed veterinarian.

Dated: April 19, 1995.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.

[FR Doc. 95–10273 Filed 4–25–95; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Parts 6, 8, 10 and 11

[T.D. ATF–364, Re: Notice No. 794 and Notice No. 796]

RIN 1512–AB10

Unfair Trade Practices Under the Federal Alcohol Administration Act (93F–003P)

AGENCY: Bureau of Alcohol, Tobacco and Firearms (ATF), Treasury.

ACTION: Final rule, Treasury decision.

SUMMARY: The Bureau of Alcohol, Tobacco and Firearms (ATF) is amending trade practice regulations under the Federal Alcohol Administration (FAA) Act on tied-house, exclusive outlets, commercial bribery, and consignment sales by adding standards for enforcing the ''exclusion'' element where appropriate. Under the FAA Act, ''exclusion, in whole or in part, of distilled spirits, wine, or malt beverages, sold or offered for sale by other persons'' is a necessary element of a violation of the tied-house, exclusive outlets or commercial bribery provisions. In this final rule, ATF promulgates a framework for establishing ''exclusion,'' identifies promotional practices which result in control of a retailer or in exclusion under the Act, identifies factors which will apply in evaluating exclusion, and identifies those practices for which there is no likelihood that exclusion will result and for which the Bureau will not take action (safe harbors). Other regulatory amendments are also made as a result of an ATF review of the regulations and an industry petition submitted in 1992.

EFFECTIVE DATE: May 26, 1995.

FOR FURTHER INFORMATION CONTACT: James R. Crandall, Coordinator, Market Compliance Branch, 650 Massachusetts Avenue, NW, Washington, DC 20226; telephone (202) 927–8100.

SUPPLEMENTARY INFORMATION:

Background

The Federal Alcohol Administration Act

The Federal Alcohol Administration Act (hereinafter referred to as FAA Act

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,*

Bureau of Alcohol, Tobacco and Firearms, 860 F.2d 229 (7th Cir., 1988) (*Foremost*). The courts in both *Fedway* and *Foremost* found that ''exclusion'' as used in the FAA Act cannot occur without a relationship or arrangement between the industry member and the retailer which actually or potentially threatens the retailer's independence.

ATF proposed to amend regulatory parts of Title 27 CFR relating to exclusive outlet (Part 8), tied-house (Part 6), and commercial bribery (Part 10), by adding new subparts on exclusion. Even though the exclusive outlet provision was not involved in the *Fedway* or *Foremost* decisions, the provision is impacted by the decisions since the provision requires the showing of exclusion in order for a violation to arise.

ATF proposed a two-step framework to describe exclusion, in whole or in part, of distilled spirits, wine or malt beverages sold or offered for sale by others as occurring (1) when a practice places retailer independence at risk by means of a tie or link between the industry member and retailer or by any other means of industry control over the retailer, *and* (2) such a practice by an industry member, whether direct, indirect, or through an affiliate, results in the retailer purchasing less than it otherwise would have of a competitor's product. The proposed regulations included a set of criteria by which ATF will determine the existence of the first element. These criteria include the duration of the practice or promotion, the degree to which a practice involves an industry member in the day-to-day operations of a retailer, and, in some cases, the non-discrimination feature of the practice where it is available to all retailers. Exclusion under the Act will exist when ATF can establish the presence of both of these elements.

General Comments on Exclusion

While some commenters expressed support for the approach ATF took in the proposed rule, others objected to certain areas of the proposals. For example, NABI stated it was ''disappointed to see BATF reassert the so-called 'hair trigger' or 'one bottle less' test for determining exclusion. Proposed section 6.152(a)(2) was pointedly rejected by the court in *Fedway,* yet BATF drags up this albatross once again.'' Secondly, NABI quoted the *Fedway* decision which said the ''* * * definition of the 'exclusion' criterion must also recognize adequately—as the agency's current definition does not—the value of pro-competitive wholesale promotion.'' The DISCUS comment stated similar concerns and asked that the second element, relating to retailer purchases, be deleted.

ATF disagrees with the DISCUS/NABI comment about the second part of ATF's two-step framework of exclusion (§§ 6.151(a)(2), 8.51(a)(2), and 10.51(a)(2)) where ATF states that a practice must result in a retailer or trade buyer purchasing less than it would have of competitor's product for exclusion to occur. On this subject, the *Fedway* court stated:

> The Bureau explains that the phrase means that the inducement in question must be successful, i.e., it must in fact cause retailers to buy comparatively less from competitors—a minimal requirement, to be sure, but not a meaningless one.

It was the showing of this minimal requirement in conjunction with evidence that a particular practice threatens retailer independence that the court held is exclusion under the Act. Under the two-step framework, exclusion is present only if both parts or elements of the framework are established. If ATF were to drop the second element as requested by NABI and DISCUS, then ATF could prove exclusion under the Act without ever showing that a competing industry member's products were actually excluded in whole or in part. While this would ease ATF's burden in proving a violation it would ignore the statutory requirement of ''exclusion, in whole or in part'' which by its terms requires some impact on a retailer's purchases.

Regarding NABI's second observation, ATF's goal in airing these proposals and soliciting interested persons' response was to develop a public record showing why certain practices are anticompetitive, in that they threaten retailer independence, and why other practices do not threaten retailer independence. (In the context of commercial bribery, the trade buyer's independence is evaluated.) Relying on all of the comments received, ATF has made adjustments to its original proposals and developed a final rule which it believes does, as *Fedway* directed, ''distinguish rationally between those promotions it decides are lawful and those it decides are not.''

The Federal Trade Commission (FTC) staff (rather than the Commission or Commissioners) submitted comments on the general approach to exclusion. While the staff concurs that the threat to retailer independence analysis is consistent with promoting a competitive market, they recommend that ATF adopt more of a market share or ''market power'' approach.

Before responding to the particular FTC staff comments, ATF feels it is necessary to point out that the FAA Act is concerned with the impact of a particular marketing practice on an individual retailer and not on the entire retail market in any particular locality (e.g., ''relevant market''). The latter market focus is the concern of the antitrust laws enforced by the FTC and explains why the vertical restraint framework applied by the FTC is not relevant to an FAA Act analysis. Congress deemed the general antitrust laws insufficient to address the unique unfair trade practice problems in the alcoholic beverage industry. This is why the FAA Act itself does not contain the term ''competitive'' unlike the general antitrust laws: an absence acknowledged by the FTC staff. Instead, the Act focuses on the transactions between an industry member and ''any retailer'' or ''any trade buyer.''

The FTC staff comments implicitly recognize this difference when they state that the FAA Act speaks in terms of supplier power over retailers rather than simply a supplier's market share or power. If the proper focus of the FAA Act were market share or power, then the Act would be identical to the general antitrust laws rather than merely ''analogous'' as Congress intended.

Turning to the particular comments, the staff objects to the second part of the general approach to exclusion that requires ATF to show the retailer purchased less of a competitor's product than it would have, as a result of a supplier's promotional practices. The FTC staff suggests that this is ''ambiguous'' since there may be many legitimate reasons explaining a decrease in a retailer's purchases. The FTC staff also suggests that the FAA Act does not require the fact of reduced purchases as an element of a statutory violation.

In promulgating the regulation on the exclusion approach, ATF is not concluding that a mere reduction in purchases results in a violation. ATF has deliberately taken a narrow approach to ensure that legitimate competition is not hindered. The fact of reduced purchases is only relevant when that fact results from a supplier practice that creates a tie or link (or other method of control) that threatens retailer independence. By requiring this nexus, ATF is ensuring that reduced purchase situations resulting from free economic choice or pro-competitive marketing practices are not pursued as a violation.

ATF believes that the FAA Act mandates a consideration of whether the retailer's purchases have been impacted by a practice because the statute speaks of ''exclusion, in whole or in part'' of a competing supplier's products as a

result of a transaction between the industry member and any retailer. As noted above, the *Fedway* court recognized this impact as ''a minimal requirement, to be sure, but not a meaningless one.'' (The FTC staff also commented on the criteria used to evaluate exclusion, and those comments will be discussed in that section.)

Finally, E. & J. Gallo Winery, in its comment, noted that the *Fedway* court did not ''question ATF's authority to strike at threats to retailer independence in their incipiency, before harm occurred.'' Their comment quoted the *Fedway* court's demand that ATF make a ''factual showing that retailer independence is potentially threatened.'' The Wine Institute also noted the *Fedway* court demanded only ''a factual showing that retailer independence is potentially threatened.'' These comments caused ATF to review its proposed rule and amend the discussion of exclusion, in general, to address this potential threat by adding ''places (*or has the potential to place*) retailer independence at risk'' in each subpart on exclusion. This revision is consistent with the discussion of the exclusion standard in both the *Fedway* and *Foremost* decisions, since those decisions refer to potential threats.

Practices Which Place Retailer or Trade Buyer Independence at Risk and Practices Not Resulting in Exclusion

In each part, ATF proposed to identify certain practices which the rulemaking record and judicial precedent indicate place retailer independence at risk by their very existence. When such practices are undertaken, ATF would determine through the course of an investigation whether the other part of the exclusion element relating to the actual impact on a retailer's purchases is present. In the exclusive outlet and commercial bribery regulations, ATF also proposed sections for discussion of practices not resulting in exclusion. In the tied-house regulations, ATF proposed to revise and expand the Subpart D exceptions to provide safe harbors.

Exclusive Outlet

Section 105(a) of the FAA Act makes it unlawful for an industry member to require, by agreement or otherwise, any retailer engaged in the sale of alcoholic beverages to purchase any such product from such person to the exclusion in whole or in part of alcoholic beverages sold or offered for sale by other persons in interstate or foreign commerce, provided one of the three interstate or foreign commerce jurisdictional clauses is met.

Retailer independence is threatened in an exclusive outlet arrangement when the ability of the retailer to decide which brands of alcoholic beverages to purchase is restricted or impeded. In the *Fedway* context, the question is whether any restriction negates the retailer's free economic choice or has been utilized by the industry member to restrict such choice.

In that regard, ATF proposed adding a new section 8.52 to identify two practices that clearly result in exclusion under section 105(a) of the Act. The first practice involves purchases of distilled spirits, wine, or malt beverages by a retailer as a result, directly or indirectly, of a threat or act of physical or economic harm by the selling industry member. The second practice involves contracts between an industry member and a retailer which require the retailer to purchase distilled spirits, wine or malt beverages from that industry member and expressly restrict the retailer from purchasing, in whole or in part, such products from another industry member. In both situations, exclusion of a competitor's products results directly from the arrangement or the contract without any action by the retailer. Further, ATF has always viewed an exclusive outlet arrangement as including a situation where the retailer offers exclusivity privileges and the industry member accepts that offer. In other words, it does not matter whether the requirement originates with the industry member or the retailer; rather, the requirement is within the exclusive outlet prohibition so long as it is understood as part of the bargain. This position was enunciated in Industry Circulars 75–20 and 76–18, concerning sales to the U.S. military or other trade buyers. By availing itself of the requirement offer, the industry member has, in effect, specifically conditioned the promotional arrangement on this understanding.

ATF also proposed to add a new section 8.53 to describe practices not resulting in exclusion. Only one practice was identified in the proposed rule, a supply contract for one year or less, under which an industry member agrees to sell alcoholic beverage products to a retailer on an ''as needed'' basis provided that the retailer is not required to purchase any minimum quantity of such products. Commenters Hinman & Carmichael expressed concern that retailers' private label wine supply contracts would not be within this safe harbor, since they often last for more than a year. The commenters state there are legitimate business reasons for the longer duration of the contract, such as the time needed for product development and promotion and wine production. After consideration, ATF believes the one year duration is appropriate since the supply contracts which ATF has reviewed have involved that timeframe. ATF is concerned that supply contracts for three years involve a continuing relationship that has a potential, under certain circumstances, for tying that retailer to the industry member. Nevertheless, the fact that longer contracts are outside this safe harbor does not foreclose their use; it only means that ATF will apply the criteria in section 8.54 to these situations. Sections 8.52 and 8.53 are adopted without change in the final rule.

Part 6—''Tied-House''

Section 105(b) of the FAA Act makes it unlawful for an industry member to induce through any of the following means, any retailer engaged in the sale of alcoholic beverages to purchase any such products from such person to the exclusion in whole or in part of alcoholic beverages sold or offered for sale by other persons in interstate or foreign commerce, provided one of the three jurisdictional clauses is met:

(1) By acquiring or holding any interest in any license with respect to the premises of the retailer; or

(2) By acquiring any interest in real or personal property owned, occupied, or used by the retailer in the conduct of the business; or

(3) By furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, or other things of value, subject to the exceptions prescribed by regulations, having due regard to public health, the quantity and value of articles involved, established trade customs not contrary to the public interest and the purposes of the subsection; or

(4) By paying or crediting the retailer for any advertising, display, or distribution service; or

(5) By guaranteeing any loan or repayment of any financial obligation of the retailer; or

(6) By extending to the retailer credit for a period in excess of the credit period usual and customary to the industry for the particular class of transactions as ascertained by the Secretary and prescribed by regulation; or

(7) By requiring the retailer to take and dispose of a certain quota of any of such products.

Retailer independence can be threatened in a tied-house arrangement between an industry member and a

retailer when the arrangement involves a continuing business relationship which restricts the retailer's ability to make free economic choices on which brands of products to purchase. In effect, competition is restricted because the retailer who is dependent on or tied to an industry member cannot make free and rational business choices on whether to make a current purchase from another industry member based on current business considerations such as consumer demand or lower prices offered by the competition.

The proposed regulations identified threats to a retailer's independence which include: a wholesaler's partial ownership of a retailer, sales where the wholesaler conditions the purchase of one distilled spirits product on the retailer purchasing another distilled spirits product at the same time, and wholesaler control over the retailer through controlling the resetting of the products on a retailer's premises.

Commenters on the other practices listed in § 6.152 requested several amendments to these practices. The law firm of Schreiber, Simmons, MacKnight & Tweedy, commenting on behalf of an Asian brewer, expressed concern that because of the way paragraph (c) is worded, it appears that partial ownership of a retailer by an industry member is automatically deemed to put retailer independence at risk. E. & J. Gallo Winery also commented on this section, recommending that ATF allow industry members to own small amounts of stock in publicly traded retailers. ATF revised the wording of this section to show use of the ownership of a less than 100 percent interest in a retailer to influence the retailer's purchases is the act deemed to put retailer independence at risk, not partial ownership alone.

With respect to all the practices listed in proposed § 6.152, ATF will also be required to determine whether the practice results in the retailer purchasing less than it otherwise would have of a competitor's product.

ATF also proposed to revise and consolidate several of the provisions contained in Subpart D of Part 6 of the current regulations which find that certain practices will not result in exclusion under the tied-house provisions (that is, safe harbors).

The classification of these practices in Subpart D of Part 6 is intended to provide guidance to the regulated industry so that legitimate product marketing programs can be developed without the uncertainty of a potential Federal enforcement action. Legitimate product marketing encourages competition, by large and small businesses alike, on the basis of price, product quality and service. (Proposed revisions to these regulatory exceptions and related comments are examined in detail in the discussion of changes to individual sections, below.)

Commercial Bribery

Section 105(c) of the FAA Act makes it unlawful for an industry member to induce through any of the following means, any trade buyer engaged in the sale of alcoholic beverages, to purchase any such products from such person to the exclusion in whole or in part of alcoholic beverages sold or offered for sale by other persons in interstate or foreign commerce, provided one of the three jurisdictional clauses is met:

(1) By commercial bribery; or

(2) By offering or giving any bonus, premium, or compensation to any officer, or employee, or representative of the trade buyer.

Commercial bribery situations involve the receipt of money or a premium by an officer, employee, or representative of the trade buyer. Payments made directly to business entities (*i.e.*, the corporation, partnership, or individual owning the business) for the use of the business do not constitute a commercial bribe. The independence of the trade buyer is threatened in a commercial bribery situation because the officer, employee, or representative of the trade buyer is making a purchasing decision as a result of the money or premium received personally and not based on business or marketing factors which further the interests of the trade buyer itself.

Proposed section 10.52 identifies promotional conduct by an industry member that involves the payment of money or another premium to an employee or representative of a trade buyer without the knowledge of the trade buyer as practices under the Act that place trade buyer independence at risk. The *Fedway* court noted that previous case law upheld as actionable these types of payments. These payments were viewed as anti-competitive because one competitor gained a competitive advantage over another competitor by reason of a ''secret and corrupt dealing with employees or agents of prospective purchasers.'' *See, American Distilling Co. v. Wisconsin Liquor Co.,* 104 F.2d 582 (7th Cir. 1939). Even where such practices exist, ATF would still be required to demonstrate that they affect the trade buyer's purchases in order to establish exclusion. With respect to those practices not mentioned herein, ATF would be required to demonstrate the existence of both of the elements of exclusion set forth above.

ATF also proposed adding a new section 10.53 to discuss practices which do not place trade buyer independence at risk, but proposed no specific examples.

These two sections were adopted in the final rule without any changes.

Criteria for Determining Retailer or Trade Buyer Independence

ATF proposed adding §§ 6.153, 8.54 and 10.54 to list criteria by which ATF would evaluate whether or not a particular practice places retailer or trade buyer independence at risk. Elements which have repeatedly been mentioned in court cases are degree of control exercised over trade buyers' purchasing decisions, duration of the practice, indiscriminateness and contractual or other enforceable requirements. The goal of regulating trade practices in the alcoholic beverage industry has been identified as healthy competition in order to insure the best possible price, quality and selection for the consumer and to prevent formation of a corrupt black market.

The proposed criteria are indications that a particular practice, other than those in sections 6.152 and 8.52, places retailer independence at risk. A practice need not meet all of the criteria specified in order to place retailer independence at risk. The proposed criteria are:

(a) The practice restricts or hampers the free economic choice of a retailer to decide which products to purchase and the quantity in which to purchase them for sale to consumers.

(b) The industry member obligates the retailer to participate in the promotion to obtain the industry member's product.

(c) The retailer has a continuing obligation to purchase or otherwise promote the industry member's product.

(d) The retailer has a commitment not to terminate its relationship with the industry member with respect to purchase of the industry member's products.

(e) The practice involves the industry member in the day-to-day operations of the retailer. For example, the industry member controls the retailer's decisions on which brand of products to purchase, the pricing of products, or the manner in which the products will be displayed on the retailer's premises.

(f) The practice is discriminatory in that it is not offered to all retailers in the local market on the same terms without business reasons present to justify the difference in treatment.

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

and the Circle K corporation both argued that slotting fees are simply reimbursement for the expenses incurred by a retailer when it stocks a new product or moves a product already in stock to a more prominent location, including rearranging warehouses, changing accounting and inventory control systems, and planning new displays and shelf arrangements. No specific examples or data were submitted. NACS cited the high number of new products introduced each year and argued that slotting fees enable the products to be available to consumers at the retail premises. However, no marketing data or studies were submitted in support of this purported effect. MLBA and the Chapter House both noted that consumers, by their purchases, ultimately control the retailer's purchasing decisions, whether or not slotting fees are paid.

Evaluation of Comments on Slotting Fees

In examining slotting allowances or fees, also called ''display fees,'' ''introductory allowances,'' ''pay-to-stay fees,'' ''stocking allowances,'' ''annual renewal fees,'' ''up front fees,'' ''maintenance fees,'' ''push money,'' and ''failure fees,'' ATF has relied heavily upon the aforementioned statements by Bloom, Kaplan, Goodale and Gundlach, since so little objective data was submitted with the other comments. Where material from these statements is cited, ATF will include a reference to the author and page number.

In his statement, Bloom (page 15) notes that slotting fees ''have become entrenched, with both grocery manufacturers and retailers expecting these fees to be a part of every transaction involving a new product.'' Since these fees have become so commonplace in other industries and are not being treated as illegal in those industries, it is appropriate to review ATF's reasons for believing they should continue to be prohibited in the alcoholic beverage industry.

Fedway directed ATF to consider the benefits of legitimate competitive practices in evaluating whether a practice is exclusionary. Several of the statements addressed this aspect of slotting fees. One expected benefit of fair competition is that it will result in better quality, selection or prices for consumers. Goodale (page 8) says slotting allowances ''do not benefit consumers. Retailers do not pass on the proceeds from slotting allowances in the form of lower prices for the favored products. Moreover, competition by slotting allowances may actually tend to displace competition in other forms more likely to be passed on to consumers, such as lower prices to retailers, special promotions, or coupons. To the extent that they reduce the availability or visibility of competing products, slotting allowances also reduce consumer choice.''

Many commenters expressed concern that allocation of shelf space to products under slotting fee agreements is not based on perceived consumer demand, but on money factors. These concerns appear to be borne out by the expert statements and the published material attached to them. Several made the distinction between ''pull'' marketing, in which the supplier uses advertising, coupons, and other means to create consumer demand, and ''push'' marketing, in which the supplier essentially pays the retailer to ''push'' the product by guaranteeing its availability and prominence at retail outlets. Slotting fees, sometimes called ''push money'' fall into this latter category. In *Fedway,* the court acknowledged the ''general belief that cheap and plentiful alcohol is not an unmitigated social good (as opposed, say, to cheap and plentiful home heating oil or shoes) suggest[s] that the alcohol industry requires special oversight and regulation.'' There is at least a perceived danger in allowing slotting fees in the alcoholic beverage industry that heavily promoted products would be overrepresented or ''pushed'' at the retail level.

Bloom (pages 4 through 6 and page 23) points out that ''the channels of distribution through which an industry member may market its beverages are far more limited than those faced by a manufacturer of other beverages or of other unregulated consumer products.'' Availability of retail outlets for alcoholic beverages is ''restricted in number and location, by state licensing requirements'' and ''manufacturers in this industry may not sell their goods through mail order in many states.'' Bloom states the argument that there are alternative retail outlets (that is, that a supplier barred from selling to one customer may sell to others) does not apply in the alcoholic beverage industry because of these factors.

One of ATF's proposed criteria for determining retailer independence, that is, whether the practice has a discriminatory aspect, also has a bearing on the evaluation of the impact of this rulemaking on small businesses under the Regulatory Flexibility Act. Bloom (page 11) states that ''some argue that slotting fees may be beneficial to small business, by offering the opportunity for an untested product to 'buy' its way into a retailer. I consider this view somewhat naive, since, even if such an opportunity exists in theory, it is not a realistic or practical one for most small or start-up businesses. These are precisely the companies that cannot win the bidding war for retail space because they do not have the funding to pay hundreds of thousands of dollars in up-front fees. It is highly relevant that small food manufacturers have been among the most vocal opponents of slotting fees.'' Bloom further notes ''since slotting fees usually bear little relation to the costs of a retailer or wholesaler, often causing manufacturers to pay different amounts to different resellers to stock the same item, such fees can adversely affect small *retailers* as well.'' (page 25—emphasis in original.) Goodale (page 6) makes a similar observation: ''Individual stores and smaller chains have considerably less or no leverage and consequently receive disproportionately less in 'slotting allowances,' if any at all.''

Kaplan (pages 18 and 19) discusses competition and performance in the beer and wine industries. ''By any standard, both industries have exhibited healthy competition and excellent performance under a regulatory regime in which slotting allowances were clearly prohibited. The healthy level of industry performance strongly suggests that material alterations to the regulatory treatment of slotting allowances and other long-prohibited trade practices should be approached cautiously.'' Bloom (pages 5 and 6) also notes, despite ''the vigor of competition in the industry, however, the * * * regulatory structure, by directing competition and creating entry barriers, can sometimes make it more difficult to market products in the alcoholic beverage industry than in others. Accordingly, marketing practices which may be benign in other industries may have severe adverse consequences in this one.''

Kaplan (pages 4 and 5) performs a comparison between ATF's criteria to determine whether a practice places retailer independence at risk and the characteristics of slotting allowances. Kaplan states, ''[i]n my opinion, the payment of a slotting allowance by a supplier restricts or hampers the retailer's choice of which products to purchase (during the time period in which the shelf space has been purchased or rented), represents a continuing obligation on behalf of the retailer to purchase and stock the supplier's product, represents a commitment by the retailer not to terminate its relationship with the supplier with respect to purchase of the supplier's products, reduces the amount

of shelf space available for competing products, and generally results in a reduction in the sales of the displaced products.'' Goodale (pages 6 and 7) performs a similar analysis, with similar findings. He adds that ''[s]lotting allowances involve manufacturers in the day-to-day decisions of the retailer regarding what products the retailer will purchase and how products will be displayed in the store. Payment of slotting allowances is almost always discriminatory among retailers in any given area.''

With particular reference to the continuing character of the obligation, and the danger of a tie or link between the industry member and the retailer, Bloom (page 7) states that ''manufacturers often make continuing payments to retailers and wholesalers either to keep a product on the shelves or in the warehouse when the product does not sell in the volume expected by the retailers, or to obtain preferential display space. In other words, manufacturers may be required to make ongoing payments even after they have paid the entry fee and even if the product sells well. These are referred to as 'pay-to-stay' fees.

''Goodale (page 6) noted ''Manufacturers pay slotting allowances only with the agreement of retailers to provide their products some benefit or favorable treatment. A slotting allowance is part of a mutually binding contract between manufacturer and retailer. Thus, a retailer that accepts a slotting allowance is obligated to fulfill the terms of its agreement with the paying manufacturer. Moreover, retailers do not treat this obligation lightly. A retailer that did not fulfill its part of a slotting allowance agreement would quickly acquire a reputation as a 'welcher' that would damage its ability to collect slotting allowances in the future. Thus, retailers have a strong incentive to honor their commitment to favor the paying manufacturer's product.'' Bearing out this notion of an incentive to favor a supplier who pays slotting fees, Bloom attached an article from *Journal of Public Policy and Marketing* by Joseph P. Cannon and Paul N. Bloom, called ''Are Slotting Allowances Legal Under the Antitrust Laws?'' The article noted:

> Whether slotting allowances have served as anticompetitive weapons or insurance fees, grocery chains have benefited from their existence. Historically, profits rarely exceeded 1 percent of sales, but the last several years have seen profits in the 2 percent range [Sullivan 1989].

Although the article noted there were other contributing factors in this striking increase in profitability, a retailer would be reluctant to give up any practice which contributes to such an increase. Goodale (page 6), stated that, for large retailers, ''slotting allowances are a major source of revenue, accounting for perhaps more than 10% of after-tax profits.'' This underscores the potential for a retailer to become dependent on a slotting fee arrangement, thus creating the tie or link which is an element of exclusion.

Nature and Effect of Slotting Fees

The proposed description of slotting fees in § 6.152(b), read, in part, ''purchasing or renting specific shelf space * * * where such purchase reduces the availability of other shelf space for the distilled spirits, wine or malt beverages of another industry member.''

As noted earlier in the discussion of the comments on slotting, a number of commenters requested that this definition be expanded because slotting fees cover more than just the purchase of specific shelf space.

Goodale (pages 8 and 9) states ''in my view, the slotting allowance provision in § 6.152(b) of the NPR is too narrow. The reference to 'purchasing or renting specific shelf space' would not include many of the slotting allowance arrangements discussed above that have the same adverse effect on retailer independence. The draft regulation should be modified to make clear that all forms of slotting allowance arrangements will be treated as putting retailer independence at risk, as in fact they most certainly do.'' The slotting practices listed by Goodale (pages 2 through 4) were:

> Payments made by manufacturers to retailers and wholesalers to set up a new item in their store or warehouse.
>
> Payments made by manufacturers to retailers in return for an obligation to, for some agreed-upon period of time:
>
> Allocate a specified quantity of shelf or refrigerator space to the manufacturer's product;
>
> Allocate a favorable shelf or display position to the manufacturer's product (aisle end or eye level, for instance);
>
> Feature the manufacturer's products in advertising and displays during times of peak demand, such as holidays;
>
> Set aside warehouse or backroom space on the retail premises for storage of the manufacturer's product, to reduce the number of deliveries and facilitate restocking of the store shelves;
>
> In some product categories (greeting cards and light bulbs, for example) the retailer may carry one manufacturer's product exclusively.

Based upon the evidence noted, ATF believes that slotting fees put retailer independence at risk, and proposed § 6.152(b) is adopted in this final rule, with two changes. In the final rule, ATF has expanded the description of slotting fees to more accurately reflect the variety of practices which come under this category. ATF also dropped the condition that the purchase of shelf space reduce the availability of space for competitors' products from § 6.152(b), since that factor must always be shown within the framework discussed in § 6.151(a)(2).

Slotting Fees as Consignment Sales

In Notice No. 794, ATF proposed to classify payment of slotting allowances as ''not a bona fide sale'' in the consignment sale regulations in Part 11. This classification grows out of the description of consignment sales in 27 U.S.C. 205(d), ''to sell * * * on consignment or under conditional sale or with the privilege of return or on any basis otherwise than a bona fide sale.'' ATF argued the practical effect of ''slotting allowances'' is to refund, in whole or in part, the purchase price of a product that has not been sold, in proportion to the period of time that it remains unsold.

At a minimum, payment of ''slotting allowances'' may reimburse the trade buyer for the cost of shelf space occupied by the industry member's products. In addition, it may also compensate the trade buyer for the lost opportunity cost of having capital tied up in inventory acquired from the industry member. Ultimately, the amount refunded by this mechanism can, over any specified period of time, be the economic equivalent of simply buying back a product at the end of that period of time.

ATF believes that its regulations should address all arrangements that clearly embody the substance of the ''consignment sale'' practice proscribed by Congress, and not merely particular forms of that practice. Therefore, ATF proposed to amend its regulations to specify payment of ''slotting allowances'' from an industry member to a trade buyer is a form of consignment sale.

NACS, in its comment, stated that slotting allowances cannot be equated with consignment sales. They argue that it is unlikely that, even over time, the slotting allowances would be the equivalent of the wholesale price, and that ATF cannot presume ''that slotting allowances would have this effect in all circumstances.''

Other commenters offered contrasting views on this subject. E. & J. Gallo Winery cited remarks by FTC Commissioner Deborah K. Owen on the subject of slotting fees. She called them

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

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 administrating 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

official and relied on by that official is still a criminal offense under 18 U.S.C. 1001.

In the proposed rule, ATF delegated authority for requiring this report to the regional director (compliance). Several commenters expressed concern that these reports could be required at any time, without any justification, and that the policy for requiring such reports might vary from region to region. ATF addressed these concerns by revising the final rule to authorize the Deputy Associate Director (Regulatory Enforcement Programs) to require these reports, and by adding language to the section specifying that the reports would only be required as part of an investigation. Further, the final rule also provides that the report shall cover a period of no more than three years.

Several commenters expressed the opinion that ATF had understated the time needed to comply with this requirement, but since no alternative time burden estimate was offered, ATF is retaining the one hour estimated burden in the final rule. Comments on this estimate may be submitted to the address shown in the Paperwork Reduction Act section of the supporting data.

Meaning of Terms Revisions in Parts 6, 8, 10 and 11

ATF proposed to add the terms ''ATF officer'' and ''Director'' to the definitions in 27 CFR 6.11, 8.11, 10.11, and 11.11 to correspond to the terms in the proposed administrative provisions in §§ 6.5, 8.5, 10.5, and 11.5, discussed above. ATF also proposed adding the term ''Regional director (compliance)'' to the definitions in 27 CFR 6.11, 8.11 and 10.11 to correspond to the term in the proposed administrative provisions. In view of the change in this delegation in the final rule, a definition for ''Deputy Associate Director (Regulatory Enforcement Programs)'' has been substituted.

ATF proposed to define the term ''brand'' in 27 CFR 6.11, since a number of dollar limitations on things of value which may lawfully be given to retailers is on a ''per brand'' basis. The definition proposed was drawn from ATF Ruling 81–1, Q.B. 1981–2, page 27, excluding changes in the color or design of the label. Commenters on this issue were divided.

While most commenters supported narrowing the definition of the word ''brand'' as proposed, Hinman & Carmichael, attorneys, noted in their comment that label color is sometimes used to distinguish ''different quality designations of similar products produced by the same manufacturer,'' and suggested adding ''different quality standard or grade'' to the list of examples of different brands. ATF believes the items listed in the proposed definition, such as age and alcohol content, should address most such differences.

NBWA and the President's Forum of the Beverage Alcohol Industry both commented that the proposed increase in the dollar limits in Part 6, Subpart D, combined with such a broad definition of the term ''brand,'' would have an anticompetitive effect by allowing industry members with diverse brand portfolios to give a large number of valuable items to retailers. As discussed later in the supplementary information, a number of commenters expressed concern about the large proposed increase in the dollar limitations, but did not comment on the proposed definition of brand. Since ATF has decided to address these concerns by raising the dollar limitations less than originally proposed, it will not be necessary to further narrow the proposed definition of ''brand.''

NBWA expressed concern that beverage varieties ''have proliferated at an unprecedented rate'' and that ''even the most subtle variation in the product line would be construed to create another 'brand' '' under our proposed definition. NBWA further stated in their comment that the ''whole matter of what constitutes a brand is at the center of controversy and litigation across the country.'' They suggested airing this issue in a separate rulemaking and, if a definition is adopted at all, specifying that the definition is only intended to apply to Part 6. In view of this comment, ATF has decided to adopt the definition of brand as proposed, with the addition of a note in the definition that it only applies to the administration of the exceptions in Part 6.

Although the petitioners suggested revising the definition of ''retailer'' in 27 CFR Parts 6 and 8, ATF proposed no changes in this definition. The petitioners suggested removing the language which specifies that a wholesaler who makes incidental retail sales *representing less than 5 percent of its sales during the preceding two months* shall not be considered a retailer. The petitioners state that a supplier cannot know whether the wholesaler's retail sales are within the 5 percent limitation and suggest eliminating that standard. The petitioners also believe that the definition of ''retailer'' should be clarified in order to ensure that this definition is consistent with § 6.2 which defines the territorial extent of Part 6 of the regulations.

ATF believes that removal of the 5 percent limitation would make the definition too broad. For example, without the percent limitations, a wholesaler who makes a single sale to a consumer is deemed to be a retailer. Also, the petitioners' proposed definition would exclude, as a retailer, someone within the United States who makes sales for consumption *outside* of the United States; i.e., a duty free shop. The FAA Act itself does not allow this type of exception to the territorial coverage of the law. Therefore, ATF did not agree with this proposal, and proposed no change to the definition of ''retailer.'' DISCUS, in their comment on the proposed rules, reiterated the request for these revisions, but presented no new arguments. No other comments addressed the definition of the word ''retailer.'' For the same reasons, ATF did not propose conforming amendments to the definition of ''retailer establishment.'' ATF holds to its comments as expressed in Notice No. 794, and made no changes to these definitions in the final rule.

ATF proposed to change the term ''retailer establishment'' in 27 CFR 6.11 to ''retail establishment'', since that is the term used in 27 CFR Part 6 regulations. The term ''retail establishment'' in 27 CFR 8.11 will be removed because the term is not used in 27 CFR Part 8 regulations. No commenters objected to these proposals, and they were adopted in the final rule. Since the term ''retailer'' is being added to Part 11, ATF has added a definition for that term in section 11.11 which conforms to the definition in 6.11.

Discussion of Changes to Individual Sections

Sections 6.25 through 6.33, Interest in Retail Licensee

The petitioners stated that these sections of the regulations provide identical treatment concerning an interest of an industry member in a license with respect to a retailer's premises (Sections 6.25–6.27) and in real or personal property owned, occupied, or used by the retailer in the conduct of the business (Sections 6.31–6.33). The petitioners proposed combining the provisions which they believe parallel each other (Sections 6.25 and 6.31; 6.26 and 6.32; and 6.27 and 6.33).

ATF does not believe that the provisions of §§ 6.25 through 6.33 should be combined in the various ways proposed by the petitioners. From a structural point of view, merging §§ 6.25 through 6.33 fundamentally alters the organization of Subpart C of Part 6.

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.

Section 6.52, Cooperative Advertising

ATF proposed deleting the phrase ''placed by the retailer'' from this section and cross-referencing § 6.52 to § 6.98, Advertising Service. DISCUS, in its comment, requested that the section be retained in its present form.

Upon review, ATF concurs. The phrase ''placed by the retailer'' should be retained in § 6.52, since the section is based on 27 U.S.C. 205(b)(4), and advertisements placed by the industry member would be evaluated as ''things of value'' under 27 U.S.C. 205(b)(3). Further, it is not appropriate to cross-reference § 6.52 to § 6.98, which is an exception under 205(b)(3). ATF withdraws its proposal; no change is made to this section in the final rule.

Section 6.67, Sales to a Retailer Whose Account is in Arrears

ATF's current position is contained in Revenue Ruling 54–162, 1954–1 C.B. 340. On August 1, 1979, ATF proposed a regulation (Notice No. 327, 44 FR 45298) on credit arrears which would have provided that a supplier could continue to sell to a retailer, with unpaid purchases existing in excess of 30 days, without violating the extension of credit provision if the retailer either made payments in accordance with Revenue Ruling 54–162 or the amount of arrears did not exceed an average purchase by the retailer from the supplier over the preceding 4 month period.

Commenters at the time objected to the proposal stating that it would require extensive bookkeeping checks or it might force repayment of large outstanding debts in order to keep dealing with a wholesaler. Several commenters recommended that ATF simply adhere to the credit requirements imposed by State law. ATF withdrew the proposal (T.D. ATF–74, 45 FR 63242, September 23, 1980) from further consideration. In Notice No. 794, ATF again proposed to adopt in the regulations the position stated in Revenue Ruling 54–162. However, comments on other possible approaches were solicited.

Several commenters endorsed the proposed change as set forth in Notice No. 794 and some opposed allowing industry members to extend credit to retailers at all. Other commenters again suggested that State law be the guideline on extension of credit. E. & J. Gallo Winery, in its comment, suggested that ATF allow industry members to accept cash on delivery instead of cash with the order, to be more consistent with most State credit laws. After reviewing the comments, ATF believes it is appropriate to incorporate its longstanding policy as stated in Revenue Ruling 54–162 into the regulations.

ATF has adopted the proposed rule, but modified it to show that a sale to a retailer who is in arrears is not a means to induce ''so long as the retailer pays in advance or on delivery'' for that current order and to show that it applies only to products as defined in § 6.11. Where State rules are more restrictive than the Federal rules, retailers and industry members must still comply with State law.

Section 6.71, Quota Sales and Section 6.72, Tie-In Sales

In addition to the language change to § 6.71 discussed under § 6.41, the petitioners proposed to eliminate the tie-in prohibition in § 6.72 and consolidate the remaining provisions into § 6.71. The petitioners recommended deleting the first two sentences of § 6.72 because they believed that there is no statutory basis for this regulation under the FAA Act. The petitioners stated that the classic ''tying relationship'' prohibited by the antitrust laws is not addressed by section 105 of the FAA Act notwithstanding that subsection 105(b) of the FAA Act bears the heading ''Tied-House.'' The petitioners further stated that prohibitions against tie-in agreements are covered adequately by the Federal antitrust laws.

The tie-in sale described in the regulations is a form of quota sale covered by the Act. Moreover, ATF feels that § 6.71 and § 6.72 are distinct from one another and should be kept separate to insure clarity and foster understanding of the regulations. The fact that another Federal law may also apply to such a practice is not relevant to whether such a practice is covered by the FAA Act. In enacting the FAA Act, Congress expressly decided that reliance on the more general antitrust laws was inadequate in this field. Finally, ATF proposed revising § 6.72 to cover expressly a particular type of transaction as a tie-in sale.

DISCUS reiterated the requests from the petition in its comment. ATF sees no reason to change its position on these sections. DISCUS, E. & J. Gallo Winery, and Hinman and Carmichael all asked that ATF clarify § 6.72 to show that it does not cover combination packaging allowed in § 6.93. The combination packaging addressed in § 6.93 involves combinations of alcoholic beverages with nonalcoholic products, whereas § 6.72 addresses combinations of alcoholic beverages only since this section deals only with ''products'' as defined in section 6.11. A cross reference to § 6.93 was added for clarification.

Subpart D—Exceptions

Many changes discussed in the first section of the Supplementary Information on Exclusion affect this subpart. The discussion which follows is limited to specific requests by the industry or findings of ATF's own internal review which were not discussed in that earlier section.

Section 6.81, General

The petitioners proposed amending § 6.81(a) by deleting the second sentence which prohibits an industry member from conditioning the providing of items or services allowed under Subpart D on the purchase of distilled spirits, wine, or malt beverages. ATF agreed this prohibition is not necessary for most items, and proposed to remove the prohibition from the general section and place it in the specific sections where such conditioning has been a concern, for instance, § 6.83 on product displays. No one commented specifically on this proposal. While ATF agrees to delete the general prohibition, industry members should be aware that abusive conditioning will be evaluated as a quota sale under 27 U.S.C. 205(b)(7).

Section 6.81(b), Recordkeeping requirements, requires industry members to maintain certain records which can be used to substantiate claims that items provided to retailers are within the Subpart D exceptions to the tied-house prohibitions. The petitioners proposed deleting § 6.81(b) in its entirety, thereby eliminating all recordkeeping requirements. The petitioners stated that ''(t)his change should be adopted because the FAA Act neither provides nor suggests that any such requirements can be imposed.''

The petitioners further stated that if it is decided not to delete § 6.81(b) in its entirety, they recommend the addition of language to this paragraph to make it clear that no separate violation of the FAA Act shall arise from the failure of an industry member to maintain records in accordance with the requirements of § 6.81(b). The petitioners believe that the FAA Act neither creates nor supports the existence of any such violation of the FAA Act.

In Notice No. 794, ATF did not propose to eliminate the requirement to keep records which substantiate industry members' claims that items provided retailers are within the exceptions of Subpart D. Such a change would negate ATF's capability to verify

compliance with the dollar limitations and any other requirements of Subpart D. The limitations in each exception section of the regulations would be unenforceable if ATF had no way to verify compliance with the requirements of such exceptions. ATF did propose to add a sentence to § 6.81(b) to state that, where an industry member fails to keep the required records, such industry member is not eligible for the regulatory exception in that particular transaction. No separate recordkeeping violation would be charged.

In its comment, DISCUS continued to request elimination of § 6.81(b) in its entirety, but said if § 6.81(b) is retained, ATF should amend it to allow industry members to use unspecified other means to show compliance. ATF disagrees, since the recordkeeping requirement as written gives considerable flexibility to the industry member. No specific form or record has been prescribed, as long as the industry member can provide information an ATF officer would need to verify that a promotion is within the scope of Subpart D. ATF is adopting § 6.81 as proposed, except for some minor editing changes suggested by the **Federal Register**.

Section 6.82, Cost Adjustment Factor

While the petitioners did not request a specific change to this section, they requested that ATF explore alternate methods which would be cost effective for ATF to convey this information in a manner that continues to ensure that all permittees are apprised of the annual dollar adjustments. Instead, ATF proposed to delete this section, increase the dollar limitations and periodically review the amounts if necessary.

Although a few commenters supported the proposal, most objected to the size of the proposed increase in the dollar limitations. For instance, on product displays, ATF had proposed to increase the limitation from $160 (1994 adjusted rate) to $500. Many commenters who characterized themselves as small or medium size businesses said they simply could not afford to compete with large industry members if their competitors were providing displays worth $500 per brand.

After a thorough review of the comments, ATF concurs that such a large increase could create the sort of tie or link identified by *Fedway.* ATF has determined that making a smaller increase in the dollar amounts is appropriate. The final rule deletes this section as proposed in Notice No. 794.

Section 6.83, Product Displays

The petitioners recommended amending the definition of product display to substitute ''* * * and similar items the primary function of which is to hold, display or shelve consumer products'' for ''* * * and the like,'' which appears in the current regulation. ATF proposed this change, but used the phrase ''hold and display'' for clarity.

The petitioners also requested that ATF amend the dollar limitation in the regulation to reflect the current adjusted rate of $160. Instead, ATF proposed changing the dollar limit to $500 per brand at any one time per retail establishment, from the current $100 (as adjusted) per brand at any one time per retail establishment.

Although the general prohibition against an industry member imposing conditions on receipt of items allowed in Subpart D has been removed from § 6.81, ATF proposed adding a statement to § 6.83 that giving or selling product displays may be conditioned upon the purchase of the distilled spirits, wine or malt beverage product advertised thereon in a quantity only necessary for the initial completion of the product display. From the mid-1960s to the 1980 recodification of the trade practice regulations, conditioning was allowed for window or other interior displays. Industry members have long argued that they should be allowed to condition receipt of product displays on the purchase of a limited quantity of the product advertised. ATF also proposed to delete the language which allows lending or renting of product displays in the current regulation. Such a continuing tie would not be consistent with the intent of the Act. In making these proposals, ATF believed the dollar limit of $500 per brand, coupled with the requirements for permanently inscribed advertising and transfer of ownership of product displays to the retailer minimizes the inducement value to the retailer. The combination of these factors would allow product displays to be excepted from the regulations of Part 6, and would be the basis for allowing the industry member to condition receipt of such materials as described above.

Commenters requested a number of amendments to this proposed section. First, E. & J. Gallo Winery noted that in the preamble, ATF had said § 6.83 would allow conditioning product displays upon the purchase of the product advertised thereon in a quantity only necessary for the initial completion of the product display, and yet the regulatory text omitted the word ''initial.'' This omission is corrected in the final rule.

In the proposed amendment to § 6.83, ATF eliminated the words ''furnish, loan or rent.'' DISCUS requested reinstatement of these options, but ATF maintains its position that allowing lending or renting of product displays creates a tie or link which is inconsistent with the goals of the FAA Act. As a result of the *Fedway* decision, any element of a promotion which indicates a continuing character is subject to greater scrutiny.

Several other commenters, among them the American Brandy Association, expressed concern that the higher dollar limit would allow a large industry member to ''install a new $500 display every week in a specific store.'' For the reasons discussed here and under § 6.82, the dollar limit has been set at $300. That dollar limit and the aforementioned amendment to allow only outright giving or selling of displays should also prevent the sort of monopolization of retail premises feared by these commenters.

Finally, several commenters requested substitution of the word ''securely'' for the word ''permanently'' in describing how the advertising material would be inscribed or affixed to the product display. They argued that, when they give or sell a product display, they cannot control the actions of a retailer, who may choose to remove such advertising material. ATF will use the phrase ''permanently inscribed or securely affixed'' in this section and in § 6.84. However, ATF will revisit this subject in later rulemaking if abuses are found.

Section 6.84, Point of Sale Advertising and Consumer Advertising Specialties

Promotions and practices currently allowed under the regulatory exceptions to the tied-house provisions are safe harbors. Notice No. 794 proposed a revision to those exceptions which would combine several of the current exceptions into one general regulatory section. The approach of having a single general section addressing all of the similar activities gives greater flexibility to the industry.

The proposed regulations combine the exceptions listed in §§ 6.84, 6.85, 6.86 and 6.87 (inside signs, retailer advertising specialties, wine lists and consumer advertising specialties), into a revised § 6.84, Point of sale advertising and consumer advertising specialties. Items intended for consumers currently identified in section 6.47 are also included in the proposed listing of exceptions. The petitioners requested that ATF amend the dollar limitation to

reflect the adjusted rates, but instead, under ATF's proposed revision there will be no limit to the dollar value of the specified point of sale (POS) materials furnished by an industry member to a retail establishment.

The petitioners also requested that the term ''wine lists'' be expanded to include all alcoholic beverages. Instead, the proposed 6.84 permits all lists or menus, subject to the conditions in paragraph (c) of the section.

Several commenters on these proposals requested that ATF limit lists or menus to alcoholic beverage lists or menus. On review, ATF concurs that there is more of a continuing character and more potential for industry member involvement in day to day operations at a retailer if full menus are allowed, and has revised this portion of the final rule accordingly.

DISCUS requested that ''mechanical devices,'' which had been permitted under ''inside signs'' in the current regulations but had been omitted from the proposed rule, be reinstated, and that the rule be further expanded to include ''electronic devices.'' After considering this and related comments, ATF has revised the definition of ''point of sale advertising materials'' to eliminate the distinctions (inside signs and retailer advertising specialties) within that definition and simply list examples. In that context, ATF has added ''inside signs (electric, mechanical or otherwise)'' to the listing of point of sale advertising materials in the final rule. The restriction of electronic devices to signs is consistent with the current regulatory approach and prevents abuses which could occur if all electronic devices were allowed (since the point of sale section contains no dollar limitations).

In their comment, E. & J. Gallo Winery suggested that the condition in § 6.84(c)(2) need not be limited to retailer and consumer advertising specialties, and ATF concurs. In the final rule, the condition applies to all point of sale materials and consumer advertising specialties.

The Forum and the American Brandy Association suggested an annual dollar limit per retail location. In the past, some of the items listed in this section had a limitation and others did not. ATF does not believe, given the nature of the items described and the requirement for substantial advertising material, that furnishing such items would create a tie or link between the industry member and the retailer. In the final rule, ATF imposes no dollar limit, but will revisit this subject if abuses are found.

Section 6.85, Temporary Retailers

ATF proposed adding a new section which will allow furnishing things of value to a temporary retailer. The proposed regulations recognize that certain retail activities of a temporary nature, such as weekend events and community festivals, are so minor in the retail marketplace so as not to justify Federal intervention; rather, State agencies can regulate these situations to prevent abuses. There were numerous comments concerning this section.

DISCUS suggested extending the provisions to cover things of value given to a retailer for a ''temporary event.'' ATF disagrees; the reason for excepting *temporary* retailers was that their short-term existence as a retailer did not justify Federal intervention. However, since a permanent retailer can operate at a ''temporary event,'' it is proper to apply the trade practice provisions to the industry member's dealings with those retailers. A number of commenters opposed allowing any special privileges to temporary retail dealers. ATF believes that the impact of giving things of value to temporary retailers, within the limitations of the proposed rule, would not be disruptive to the retail marketplace. However, the issue will be revisited if substantial abuses are found. NABCA suggested there may be conflicts between ATF's definition of a temporary retailer and any definition in State rules. After considering the comments, ATF has amended the section to show that the definition of temporary retailers applies only for purposes of administration of the tied-house rules.

Section 6.88, Glassware—Section 6.89, Tapping Accessories—Section 6.90, Supplies—Section 6.97, Coil Cleaning Service

The petitioners recommended that these four sections be combined in a new § 6.88, under the title ''Equipment and supplies,'' because they deal with similar types of merchandise and impose similar conditions. As with other Subpart D exceptions which combine similar types of merchandise, (viz., §§ 6.83, 6.87 and 6.89), the petitioners felt that combining these items in one section will enhance the simplicity and clarity of the rules.

The petitioners also recommended several other revisions to this consolidated section:

Extend coil cleaning service from ''a retailer of wine or malt beverages'' to ''a retailer'' to provide equal treatment for wine, malt beverages and distilled spirits;

Substitute the term ''dispensing accessories'' in § 6.88 for ''tapping accessories'' because the former term more accurately describes the modern type of accessories falling within this category and reflects present marketplace practices where, for example, wine also is served by dispensing equipment;

Add cold plates to the list of examples of ''dispensing accessories'' and,

Allow carbon dioxide gas or ice to be sold at a price not less than the cost to the industry member who initially purchased it.

While the petitioners' proposal to combine various sections into one all inclusive section covering equipment and supplies is structurally logical and the terminology change from tapping equipment to dispensing equipment has merit, some of the items listed in the petition have not in the past been recognized as exceptions by ATF.

ATF proposed consolidating these sections with the following additional changes. ATF proposed to revise the definition of glassware to include similar containers made of materials other than glass. The proposed regulation also specifies that the industry member must pass on the cost of initial installation of equipment to the retailer.

The proposed regulation expanded the original coil cleaning service exception currently in § 6.97 to cover distilled spirits, as well as wine and malt beverages. Keeping the coils clean and free of contamination is clearly in the interest of public health. Therefore, it is in the public interest to allow such services without a dollar limit.

The current regulation allows industry members to sell carbon dioxide gas to retailers. The regulation does not provide for the sale of other gases, such as nitrogen, which are used in various existing alcoholic beverage dispensing systems. ATF proposed modifying this regulatory section to allow industry members to sell any gas to a retailer provided it is used in a beverage dispensing system. This proposal should not be viewed as sanctioning treatment which would change still wine to sparkling wine.

Comments on these proposals were generally favorable, and the regulation is adopted as proposed. Forum members, in their comment, stated the extension of coil cleaning service to distilled spirits is unnecessary, since spirits have a longer shelf life and a higher alcohol content. The provision was retained, to be used at the option of the industry member. DISCUS asked that ATF amend the definition of equipment and supplies by changing the word ''means'' to the phrase ''includes, but is not limited to.'' The use of the proposed phrase would add an element of uncertainty and indefiniteness to the scope of the exception. Therefore, ATF

retained the more limited wording of the proposed rule, to emphasize that the exception is limited to these items.

Section 6.91, Samples

The current section allows an industry member to furnish or give samples of distilled spirits, wine or malt beverages to a retailer. The petitioners recommended amending this section to provide that industry members may furnish a maximum of 750 milliliters (mls.) of distilled spirits samples to qualifying retailers, rather than the obsolete 500 milliliter (ml.) container cited in the regulation. They further requested that the third sentence of this section, which limits the size of a sample of spirits given to a State or a subdivision of a State to 2 liters, should be eliminated in its entirety.

ATF agreed with the petitioners that the reference to the obsolete 500 ml size be replaced, but proposed a maximum of 3 liters for distilled spirits. ATF also proposed amending the current regulation by limiting the number of commonly owned retail establishments (not to exceed four per retailer) which can be given samples. This amendment would allow for a control State or chain retailer to receive sufficient samples to determine whether to purchase a product.

Comments on these proposed changes were mixed. The American Brandy Association opposed any revision to this section. DISCUS supported the change to a spirits sample size of 3 liters and WSWA favored a sample size of 750 ml, since that is the most common commercial package size. ATF has decided to retain its proposal to allow a sample size of 3 liters for spirits.

The proposal to limit the number of samples which may be given to a ''chain'' of retail outlets met with a number of adverse comments. NABCA, Hinman & Carmichael, DISCUS and Wine Institute all noted that first, individual outlets within a chain may have the ability to request that certain items be purchased, even though the order is placed centrally; and second, that samples are also provided to retailers so their personnel can be sufficiently familiar with a brand to recommend or use it. Limiting samples to four outlets per chain would restrict an industry member's ability to promote its products. In light of these comments, ATF is removing the proposed limitation in the number of samples which may be given to a chain from the final rule.

Several commenters also addressed an area which had not been changed in the proposed amendment. E. & J. Gallo Winery and Hinman & Carmichael both noted that, in an industry as dynamic as the alcoholic beverage industry, it is not practical to limit samples to retailers who have not previously purchased a brand from an industry member. They suggested a time limit of six months or a year. The final rule has been changed to allow samples to be given to a retailer who has not purchased the brand from the industry member within the last 12 months.

Section 6.92, Newspaper Cuts

In Notice No. 794, ATF proposed to change the word ''loaned'' to the word ''lent'' in this section. However, in view of the change to § 6.84, which eliminates the options of renting or lending product displays, ATF has determined that for consistency, this section should permit only permanent transfers. Therefore, the words ''furnished,'' ''loaned'' and ''rented'' have been removed from this section.

Section 6.93, Combination Packages

In general, section 6.93 addresses combination packages where an industry member packages a non-alcoholic item with distilled spirits, wine, or malt beverages and, in particular, paragraph (c) requires that the cost of the combination package be passed on to the retailer. The petitioners recommend deleting paragraph (c) of section 6.93 because they feel the condition imposed by the paragraph is really a pricing decision outside of ATF's regulation under the FAA Act.

ATF proposed removing all the conditions currently imposed on combination packages. Some commenters supported this proposal, but NABCA expressed concern that, as written, the exception could be used as a subterfuge to deliver non-alcohol items to the retailer with no intention that they be passed along to consumers. Accordingly, ATF has amended this section in the final rule to clarify that the combination packages must be intended for sale to consumers.

Section 6.94, Educational Seminars

ATF proposed to clarify the final sentence, ''This does not authorize an industry member to pay a retailer's expenses in conjunction with an educational seminar.'' by adding the explanatory phrase ''(such as travel, lodging, and meals).''

Many commenters objected to excluding meals and, upon consideration of the comments, ATF has decided to adopt a revised final rule which will permit an industry member to provide nominal hospitality in conjunction with an educational seminar.

Section 6.96, Consumer Promotions

ATF proposed revising the text of section 6.96(a), Coupons, to make the language consistent with the other sections and to simplify the conditions. Hinman & Carmichael noted that the restriction in paragraph (a)(1) of the proposed rule, that redemption of the coupons may not be limited to a particular retailer or group of retailers, could be read as preventing promotions by small producers who have a limited area of distribution, or regional promotions by larger producers. This restriction, which is also in the current § 6.96(a), was intended to prevent the benefit of a promotion from going to specific, named retailers. ATF modified the provision in the final rule to require that all retailers within the market where the offer is made may redeem such coupons.

Section 6.98, Advertising Service

The petitioners recommended adding the clause ''except where the exclusive retailer in the state is a state agency'' to paragraph (a) to read as follows:

''(a) The advertisement does not also contain the retail price of the product, except where the exclusive retailer in the state is a state agency, and * * *''

The petitioners argue that the objectives of section 105(b) of the FAA Act are not served by prohibiting industry members from advertising control States' prices. The petitioners' proposed revision would permit an industry member to advertise a control State's state-wide retail prices as determined by that State for product sold within the State. The petitioners feel that in such circumstances, there is no possibility of any ''inducement'' or ''exclusion'' that would contravene the intent or purpose of the FAA Act.

ATF proposed amending the current regulation in accordance with the industry request, modified to reflect situations in which the sole retailer in a jurisdiction is a State or local agency. ATF also proposed to delete the condition that an advertisement placed by an industry member may not mention events or promotions at a retail establishment.

In response to several comments, ATF is modifying the final rule to specify ''State or political subdivision of a State,'' for consistency with the language in other sections of the regulations. DISCUS suggested using the term ''unaffiliated'' rather than ''two or more'' retailers, to make it clear that an advertisement can not list outlets of a single chain, and that change was adopted. NABCA additionally requested that the final rule show that prices may

be listed for ''a private retailer acting as an agent'' for a State or local agency. ATF is not adopting this suggestion at this time. The trend toward privatization of State agency sales is an evolving area. States which are privatizing are doing so in various ways. Therefore, it is not possible to set a single rule which will cover these changes.

Section 6.99, Stocking, Rotation, and Pricing Service

The petitioners recommended revising this section to allow industry members to ''recommend shelf plans.'' The petitioners stated that this revision would permit an industry member to provide services to a retailer consistent with present day marketplace realities. ATF proposed to amend this section in line with the petitioners' proposal.

Most commenters approved of this proposal, and it is adopted as proposed. However, serious concerns were raised by Kendall-Jackson Winery and American Vintners' Association about the potential for abuse of shelf plans or schematics, through biased analysis of retailer needs or by an industry member supplying additional services which are not hereby authorized. ATF will revisit this subject if it appears the new exception is being abused or creating a situation in which a retailer becomes dependent on a single industry member's purchasing advice.

Section 6.100, Participation in Retailer Association Activities

Section 6.100 permits industry members to participate in retailer association activities under certain circumstances. Paragraphs (b) and (d) permit rental of display booth space and purchase of tickets or payment of registration fees, respectively. Each of these paragraphs contains the phrase ''if * * * not excessive and * * * the same as paid by all exhibitors.'' ATF proposed amending the section to delete ''not excessive'' and specifying the fees must be the same as the fees paid by all exhibitors ''at that event.'' ATF also proposed raising the limitation for payments for advertisements in programs or brochures authorized by paragraph (e) from $100 (as adjusted) to $500.

Several commenters objected to the large increase in the dollar limitation, as discussed earlier. ATF is revising the dollar limit to $300 in the final rule. NABCA pointed out that at some retailer activities, there are no exhibitors, so the term ''exhibitors'' may not always be appropriate in paragraph (d). ATF concurs, and has substituted the phrase, ''attendees, participants or exhibitors'' in the final rule.

Section 6.101, Merchandise

Paragraph (a) currently provides that an industry member who also is engaged in business as a bona fide vendor of other merchandise may sell such merchandise to a retailer if three conditions are met, the first of which is that the merchandise is ''sold at its fair market value.'' The petitioners recommended changing this condition to state that the merchandise is ''furnished, distributed, or sold according to the custom and practice of that business.'' The petitioners also recommended eliminating paragraph (b) regarding things of value covered in other sections of Part 6 since they believe it is redundant and unnecessary in light of other sections of Subpart D.

ATF did not propose either of these changes. Section 6.101 excepts sales transactions by industry members who are engaged in the business as bona fide vendors of other merchandise in addition to alcoholic beverages. This section sanctions sales of other merchandise to retailers in addition to alcoholic beverages if the merchandise is sold at its fair market value, not in combination with distilled spirits, wines, or malt beverages, and the merchandise is itemized separately on the industry member's invoices and other records. The records are necessary so that ATF can determine the real cost of the merchandise to the industry member and whether the industry member is reselling the merchandise to retailers at its fair market value. Likewise, ATF needs these records to determine whether the industry member is a bona fide vendor of the merchandise or whether it is using the merchandise as a means to induce.

Accordingly, ATF proposed to revise the records requirement of the regulation to state that, first, acquisition costs must appear on the industry member's purchase invoices (available upon request to ATF) and, second, the merchandise and the distilled spirits, wines, or malt beverages sold to the retailer in a single sales transaction must be itemized separately on the same invoice.

DISCUS, in its comment reiterated the petitioners' original requests for changes, and noted ATF's proposal to require alcoholic beverages and other merchandise to be shown on the same invoice was not practical. WSWA commented further:

> * * * [W]e support the objective of assuring an audit trail when other items are offered for sale in conjunction with alcoholic beverages. We view as impractical and unnecessarily burdensome the proposal to require that ''merchandise and distilled spirits, wines or malt beverages sold in a single transaction'' be ''itemized separately on the same invoice covering the sales transaction.''
>
> Inventory systems commonly print invoices that sequence items sold by their warehouse location. Alcohol beverages are routinely stored separately from other items. It is not unusual for delivery of non-alcoholic items to be made on separate days or by a separate, but affiliated company having its own invoicing system. Furthermore, some states forbid using the same invoice for alcohol beverages and other items.
>
> It should be sufficient to require that invoices for sales of other items with alcohol beverages to a retailer be maintained in a manner similar to invoices for alcohol beverages.

In response to these comments, ATF is removing the requirement for showing alcoholic beverages and other merchandise on the same invoice. Instead, the final rule will require that the sale price of each commodity be on the records covering the transaction. ATF still believes the change requested by DISCUS, from ''sold at its fair market value'' to ''furnished, distributed or sold according to the custom and practice of that business'' is not appropriate. The requested language appears to sanction giving things of value (other merchandise) to retailers, in direct conflict with the statute. Additionally, the phrase ''custom and practice'' is vague and does not provide clarity to the industry member relying on the regulations. Paragraph (b), which DISCUS advocates removing, is also retained in the final rule.

Hinman & Carmichael expressed a different concern in their comment on the proposed revision to § 6.101:

> Section 6.72 allows certain combination sales of alcoholic brands or products, but § 6.101 seems to take this away if the producer is also a producer (as opposed to a vendor) of nonalcoholic beverage products. A fairly common marketing situation in California is the packaging of gift packs of wine and olive oil, or wine and another commodity produced by the winery. In this situation, there is no acquisition cost to report.

ATF has modified the wording of the section to make it clear that the exception applies to industry members who are bona fide producers or vendors of other merchandise, if the conditions are met. As stated earlier, § 6.72 only applies to ''products'' that are distilled spirits, wine or malt beverages. In addition, in response to this comment and a request by DISCUS, a cross reference to the exception for combination packaging under § 6.93 has been added.

Section 6.102, Outside Signs

ATF proposed a new section allowing outside signs in certain circumstances and with a $500 limit. A few commenters opposed any change in ATF's treatment of outside signs, while others, while not opposing the proposal, expressed concern that the proposed rule did not contain adequate safeguards against abuse. These commenters recommended including various conditions and limitations in proposed § 6.102, among them:

Requiring that the product or the industry member's name appear on the sign for consistency with other exceptions under Subpart D;

Lowering the dollar limitation, though no specific amount was proposed;

Clarifying whether the word ''furnished'' includes leasing;

Specifying frequency with which signs may be provided;

Stating whether industry members may pool this allowance to provide a sign worth more than the dollar limitation and limiting the number of brands which may appear on a sign;

Limiting the location of the sign to the wall or roof of a building adjacent to or occupied by a retailer, or stating whether retail premises include roofs and parking lots; and

Specifying whether the industry member may pay for installation, repair and maintenance of the sign.

After a careful review of the comments, ATF has decided to adopt a modified version of § 6.102 which permits signs to be given or sold on the following conditions:

(a) The sign must bear conspicuous and substantial advertising matter about the product or the industry member which is permanently inscribed or securely affixed,

(b) The retailer is not compensated, directly or indirectly such as through a sign company, for displaying the signs, and

(c) The cost of the signs may not exceed $400.

These changes were made to take into account the concerns expressed by the commenters and to make this section more consistent with the rest of Subpart D. Interested parties may petition ATF in the future to reconsider the conditions under which outside signs may be provided to retailers.

27 CFR Part 8, Exclusive Outlet

New administrative provisions and definition changes were discussed previously.

Section 8.23, Third Party Arrangements

The current regulation can be interpreted to mean that a violation of the section could occur if a third party requires the retailer to use an industry member's product without the knowledge of the industry member. ATF proposed clarifying that the industry member's requirement, by agreement or otherwise, with a third party is necessary to violate this section. However, the requirement need not originate with the industry member. If the industry member knows or is aware that the third party controlling the retailer extends such a requirement with respect to the products of the industry member making payments under the arrangement, and the industry member avails itself of such requirement, then the requirement within the proscription of the FAA Act is present.

As discussed in relation to the comments on § 6.42, ATF concurs that the industry member must know or be able to expect that the retailer will be controlled by the third party, in other words, that the industry member will have ''the benefit of the deal.'' This is not a new position; ATF published Industry Circular 75–16 to discuss this interpretation of the exclusive outlet rules. The proposed language is adopted in the final rule.

27 CFR Part 10, Commercial Bribery

New administrative provisions and definition changes were discussed previously.

Section 10.4, Jurisdictional Limits

ATF proposed amending this section to correct the wording of paragraph (a)(1), which appeared in error in ATF TD–74 on September 3, 1980 (45 FR 63242). There were no objections, and this proposal is adopted in the final rule.

Section 10.23, Gifts or Payments to Wholesalers

While no specific change was proposed to this section, ATF asked for comments as to whether the purpose of the section should be clarified. ATF gave an example of a sales representative incentive program which it views as an instance of commercial bribery since it involves the furnishing of a premium or bonus to an employee of a trade buyer: An industry member and a trade buyer meet to discuss, among other things, upcoming programs to promote a particular product or products. They agree that specific promotions will be run over a period of time. Some of these agreed upon promotions include sales incentive programs in which sales representatives can win money and/or prizes. At the conclusion of the meeting, the parties agree or understand, or it is implied, that all or part of the funding for these sales representative incentive programs will come from monies that have been or will be provided by the industry member, usually under the guise of unrestricted funds.

Several commenters addressed this issue, and cited ATF Ruling 77–17 as allowing the sort of promotion described in the example above. ATF disagrees with this interpretation of ATF Ruling 77–17, and notes that ATF Ruling 77–17 became obsolete when the regulations in 27 CFR Part 10 were originally issued in 1980 (T.D. ATF–74 45 *FR* 63251). In situations where the industry member and the trade buyer have agreed upon the promotions benefiting employees and other representatives and such promotions are funded by the industry member, it cannot be said that the money is being furnished to the entity in any context other than as a conduit for the employee or representative. No change was made to the language of § 10.23 in the final rule.

27 CFR Part 11, Consignment Sales

New administrative provisions and definition changes were discussed previously.

Section 11.24, Other than Bona Fide Sale

Section 105(d) of the Act addresses ''consignment sales.'' Section 105(d) describes consignment sales to include conditional sales (i.e., where an industry member is not paid for products until they are sold by a trade buyer); sales with a privilege of return (i.e., where an industry member agrees to repurchase products that remain unsold by the trade buyer at the end of a specified period of time); and other sales on any basis otherwise than a bona fide sale.

Consignment sales are essentially arrangements pursuant to which the risk, or cost, of non-sale of a product is retained by an industry member, or transferred from a trade buyer back to an industry member at the expiration of a specified time period. ATF proposed adding a new § 11.24 to the consignment sale regulations to specify certain other arrangements, in addition to conditional sales and sales with a privilege of return, in which the risk of non-sale is transferred from the trade buyer back to the industry member and which therefore do not constitute bona fide sales. The only example proposed was the payment of ''slotting allowances,'' which were discussed at length earlier in this supplemental information.

After a review of the comments, ATF has decided the proposed language should be modified to include purchase

or rental of display, storage, floor or warehouse space at premises owned or controlled by a retailer. ATF substituted the term ''retailer'' for ''trade buyer'' in this provision to clarify its application.

Section 11.32, Defective Products

The current regulation specifically allows products which are unmarketable for specific reasons to be exchanged for an equal quantity of identical products, but is silent as to whether such products may be returned for cash or credit. Industry Circular 81–11 states that a return of such products for cash or credit is not precluded by § 11.32. ATF proposed changing this regulation to incorporate the provisions of Industry Circular 81–11 into the section. The proposed revision also deleted references to mutilated and missing strip stamps since they are no longer a requirement. No objection to these changes was received, however, DISCUS pointed out that allowing returns for mutilated or missing tamper evident closures would ''clearly serve the public interest.'' ATF concurs and has incorporated that language in the final rule.

Section 11.34, Products Which May No Longer Be Lawfully Sold

ATF proposed revising the current regulation to allow the return of a product if, due to a change in law or regulation over which the trade buyer has no control, a particular size or brand is no longer permitted to be sold. The addition of the phrase ''over which the trade buyer has no control'' was intended to address situations in which the trade buyer is a State agency with the authority to delist a particular product.

The Forum comment said this section, as proposed, and the preamble discussion were confusing. ATF intended to make it clear that by administratively delisting a particular product, a State or a political subdivision of a State acting as a trade buyer could not gain a right of return that would not be available to a commercial trade buyer. On review, ATF notes that a State legislature may have other, legitimate, reasons for prohibiting sale of a particular product, so the wording of the section has been changed from ''law or regulation'' to ''regulation or administrative procedure.''

Section 11.35, Termination of Business

ATF is revising this section to cite § 11.39 instead of the incorrect § 11.40 citation.

Obsolete Rulings and Circulars

The following revenue ruling, ATF rulings and industry circulars are incorporated into the regulations or superseded by amended regulations; they will become obsolete on the effective date of these regulations: Revenue Ruling 54–162, 1954–1 C.B. 340; ATF Ruling 81–1, 1981–2 ATF Q.B. 27 and ATF Ruling 81–6, 1981–4 ATF Q.B. 23; Industry Circulars 81–7, 81–11 and 86–16. ATF Ruling 77–17 was made obsolete by T.D. ATF–74 (45 FR 63242), effective November 24, 1980, but a number of commenters cited it in this rulemaking.

Executive Order 12866

It has been determined that this final rule is not a significant regulatory action as defined by Executive Order 12866. Therefore, a Regulatory Assessment is not required.

Regulatory Flexibility Act

It is hereby certified under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. In Notice No. 794, we specifically asked for comments as to whether small businesses would be significantly affected by our proposals. Wine Institute, the one commenter who addressed this issue, stated that the rules, as proposed, would not have a significant impact on a substantial number of small entities. A majority of the commenters who wrote in support of our proposals concerning slotting fees said that any change in our policy would have a significant adverse impact on their small businesses. The final rule adopts the proposals in this area, so there should be no adverse impact.

A final area of concern to commenters was ATF's proposal to raise dollar limits on things of value which may be given to retailers under Subpart D of Part 6. ATF proposed raising the limit on certain promotional items from $160 to $500, and a number of commenters noted this large an increase would place small and medium size businesses at a competitive disadvantage. In view of these comments, ATF is adopting a limit of $300, a more moderate increase over the existing dollar limit.

Paperwork Reduction Act

The collection of information contained in this final rule has been approved by the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)). Comments on the collection of information should be directed to the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to: Reports Management Officer, Information Programs Branch, Room 3450, Bureau of Alcohol, Tobacco and Firearms, 650 Massachusetts Avenue, NW, Washington, DC 20226.

The collection of information in this regulation is in 27 CFR Parts 6, 8, and 10. This information is required by ATF to protect the public interest and ensure fair trade competition in the alcoholic beverage industry. The information will be used to analyze promotional activities as part of an investigation. The likely respondents are industry members.

The authority to require reports which is stated in this final rule is to be used on a case-by-case basis only, and does not apply to industry members in general. The estimated number of respondents in any given year is 20, with one report being required from each respondent. The estimated average annual burden associated with this collection of information is 1 hour per respondent.

Drafting Information

The principal author of this document is Marjorie Ruhf, Wine, Beer, Spirits and Regulations Branch, Bureau of Alcohol, Tobacco and Firearms. However, other personnel of ATF and the Treasury Department participated in developing the document.

List of Subjects

27 CFR Part 6

Advertising, Alcohol and alcoholic beverages, Antitrust, Credit and trade practices.

27 CFR Part 8

Alcohol and alcoholic beverages, Antitrust, and Trade practices.

27 CFR Part 10

Alcohol and alcoholic beverages, Antitrust, and Trade practices.

27 CFR Part 11

Alcohol and alcoholic beverages, Antitrust, and Trade practices.

Issuance

Title 27, Chapter I, is amended as follows:

PART 6—''TIED-HOUSE''

Paragraph 1. The authority citation for part 6 is revised to read as follows:

Authority: 15 U.S.C. 49–50; 27 U.S.C. 202 and 205; 44 U.S.C. 3504(h).

Par. 2. Section 6.1 is revised to read as follows:

§ 6.1 General.

The regulations in this part, issued pursuant to section 105 of the Federal Alcohol Administration Act (27 U.S.C. 205), specify practices that are means to induce under section 105(b) of the Act, criteria for determining whether a practice is a violation of section 105(b) of the Act, and exceptions to section 105(b) of the Act. This part does not attempt to enumerate all of the practices that may result in a violation of section 105(b) of the Act. Nothing in this part shall operate to exempt any person from the requirements of any State law or regulation.

§ 6.4 [Amended]

Par. 3. Section 6.4 is amended by removing the reference to ''section 5(b) of the Federal Alcohol Administration Act'' where it appears in paragraph (b) and replacing it with a reference to ''section 105(b) of the Federal Alcohol Administration Act''.

Par. 4. Section 6.5 is added to subpart A to read as follows:

§ 6.5 Administrative provisions.

(a) *General.* The Act makes applicable the provisions including penalties of sections 49 and 50 of Title 15, United States Code, to the jurisdiction, powers and duties of the Director under this Act, and to any person (whether or not a corporation) subject to the provisions of law administered by the Director under this Act. The Act also provides that the Director is authorized to require, in such manner and such form as he or she shall prescribe, such reports as are necessary to carry out the powers and duties under this chapter.

(b) *Examination and Subpoena.* The Director or any authorized ATF officers shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against. The Director shall also have the power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation, upon a satisfactory showing that the requested evidence may reasonably be expected to yield information relevant to any matter being investigated under the Act.

(c) *Reports required by the Deputy Associate Director (Regulatory Enforcement Programs).*

(1) *General.* The Deputy Associate Director (Regulatory Enforcement Programs) may, as part of a trade practice investigation of an industry member, require such industry member to submit a written report containing information on sponsorships, advertisements, promotions, and other activities pertaining to its business subject to the Act conducted by, or on behalf of, or benefiting the industry member.

(2) *Preparation.* The report will be prepared by the industry member in letter form, executed under the penalties of perjury, and will contain the information specified by the Deputy Associate Director (Regulatory Enforcement Programs). The period covered by the report will not exceed three years.

(3) *Filing.* The report will be filed in accordance with the instructions of the Deputy Associate Director (Regulatory Enforcement Programs).

(Approved by the Office of Management and Budget under control number 1512–0392)

Par. 5. Section 6.11 is amended by adding the definitions for ''ATF officer,'' ''brand,'' ''Deputy Associate Director (Regulatory Enforcement Programs)'' and ''Director'' and by removing the term ''retailer establishment'' and adding in its place ''retail establishment'' and placing it in appropriate alphabetical order.

§ 6.11 Meaning of terms.

* * * * *

ATF officer. An officer or employee of the Bureau of Alcohol, Tobacco and Firearms (ATF) authorized to perform any function relating to the administration or enforcement of this part *Brand.* For purposes of administering this part, the term ''brand'' refers to differences in the brand name of a product or in the nature of a product. Examples of different brands are products having a different brand name or class, type, or kind designation; appellation of origin (wine); vintage date (wine); age (distilled spirits); or percentage of alcohol. Differences in packaging such as difference in label design or color, or a different style, type or size of container are not considered different brands.

Deputy Associate Director (Regulatory Enforcement Programs). The principal ATF headquarters official responsible for administering regulations in this part. *Director.* The Director, Bureau of Alcohol, Tobacco and Firearms, the Department of the Treasury, Washington, DC.

* * * * *

Par. 6. Section 6.25 is revised to read as follows:

§ 6.25 General.

The act by an industry member of acquiring or holding any interest in any license (State, county or municipal) with respect to the premises of a retailer constitutes a means to induce within the meaning of the Act.

Par. 7. Section 6.27 is amended by revising paragraph (a) to read as follows:

§ 6.27 Proprietary interest.

(a) Complete ownership. Outright ownership of a retail business by an industry member is not an interest which may result in a violation of section 105(b)(1) of the Act.

* * * * *

Par. 8. Section 6.31 is revised to read as follows:

§ 6.31 General.

The act by an industry member of acquiring an interest in real or personal property owned, occupied, or used by the retailer in the conduct of business constitutes a means to induce within the meaning of the Act.

Par. 9. Section 6.33 is amended by revising paragraph (a) to read as follows:

§ 6.33 Proprietary interest.

(a) Complete ownership. Outright ownership of a retail business by an industry member is not an interest that may result in a violation of section 105(b)(2) of the Act.

* * * * *

Par. 10. Section 6.41 is revised to read as follows:

§ 6.41 General.

Subject to the exceptions listed in Subpart D, the act by an industry member of furnishing, giving, renting, lending, or selling any equipment, fixtures, signs, supplies, money, services, or other things of value to a retailer constitutes a means to induce within the meaning of the Act.

Par. 11. Section 6.42 is revised to read as follows:

§ 6.42 Indirect inducement through third party arrangements.

(a) *General.* The furnishing, giving, renting, lending, or selling of equipment, fixtures, signs, supplies, money, services, or other thing of value by an industry member to a third party, where the benefits resulting from such things of value flow to individual retailers, is the indirect furnishing of a thing of value within the meaning of the Act. Indirect furnishing of a thing of value includes, but is not limited to, making payments for advertising to a retailer association or a display

company where the resulting benefits flow to individual retailers.

(b) *Exceptions.* An indirect inducement will not arise where the thing of value was furnished to a retailer by the 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 have been furnished to a retailer. Things which may lawfully be furnished, given, rented, lent, or sold by industry members to retailers under subpart D may also be furnished directly by a third party to a retailer.

§ 6.43 [Amended]

Par. 12. Section 6.43 is amended by removing the reference ''§§ 6.88 and 6.89,'' where it appears in the first sentence and replacing it with ''§ 6.88,''.

§§ 6.46 and 6.47 [Removed and reserved]

Par. 13. Sections 6.46 and 6.47 are removed and reserved.

Par. 14. Section 6.51 is revised to read as follows:

§ 6.51 General.

The act by an industry member of paying or crediting a retailer for any advertising, display, or distribution service constitutes a means to induce within the meaning of the Act, whether or not the advertising, display, or distribution service received by the industry member in these instances is commensurate with the amount paid therefor. This includes payments or credits to retailers that are merely reimbursements, in full or in part, for such services purchased by a retailer from a third party.

Par. 15. Section 6.61 is revised to read as follows:

§ 6.61 Guaranteeing loans.

The act by an industry member of guaranteeing any loan or the repayment of any financial obligation of a retailer constitutes a means to induce within the meaning of the Act.

Par. 16. Section 6.65 is revised to read as follows:

§ 6.65 General.

Extension of credit by an industry member to a retailer for a period of time in excess of 30 days from the date of delivery constitutes a means to induce within the meaning of the Act.

Par. 17. The text of § 6.67 is added to read as follows:

§ 6.67 Sales to retailer whose account is in arrears.

An extension of credit (for product purchases) by an industry member to a retailer whose account is in arrears does not constitute a means to induce within the meaning of the Act so long as such retailer pays in advance or on delivery an amount equal to or greater than the value of each order, regardless of the manner in which the industry member applies the payment in its records.

Par. 18. Section 6.71 is revised to read as follows:

§ 6.71 Quota sales.

The act by an industry member of requiring a retailer to take and dispose of any quota of distilled spirits, wine, or malt beverages constitutes a means to induce within the meaning of the Act.

Par. 19. Section 6.72 is revised to read as follows:

§ 6.72 ''Tie-in'' sales.

The act by an industry member of requiring that a retailer purchase one product (as defined in § 6.11) in order to obtain another constitutes a means to induce within the meaning of the Act. This includes the requirement to take a minimum quantity of a product in standard packaging in order to obtain the same product in some type of premium package, i.e., a distinctive decanter, or wooden or tin box. This also includes combination sales if one or more products may be purchased only in combination with other products and not individually. However, an industry member is not precluded from selling two or more kinds or brands of products to a retailer at a special combination price, provided the retailer has the option of purchasing either product at the usual price, and the retailer is not required to purchase any product it does not want. See § 6.93 for combination packaging of products plus non-alcoholic items.

Par. 20. Section 6.81 is revised to read as follows:

§ 6.81 General.

(a) *Application.* Section 105(b)(3) of the Act enumerates means to induce that may be unlawful under the subsection, subject to such exceptions as are prescribed in regulations, having due regard for public health, the quantity and value of articles involved, established trade customs not contrary to the public interest, and the purposes of that section. This subpart implements section 105(b)(3) of the Act and identifies the practices that are exceptions to section 105(b)(3) of the Act. An industry member may furnish a retailer equipment, inside signs, supplies, services, or other things of value, under the conditions and within the limitations prescribed in this subpart.

(b) *Recordkeeping Requirements.*

(1) Industry members shall keep and maintain records on the permit or brewery premises, for a three year period, of all items furnished to retailers under §§ 6.83, 6.88, 6.91, 6.96(a), and 6.100 and the commercial records required under § 6.101. Commercial records or invoices may be used to satisfy this recordkeeping requirement if all required information is shown. These records shall show:

(i) The name and address of the retailer receiving the item;

(ii) The date furnished;

(iii) The item furnished;

(iv) The industry member's cost of the item furnished (determined by the manufacturer's invoice price); and

(v) Charges to the retailer for any item.

(2) Although no separate recordkeeping violation results, an industry member who fails to keep such records is not eligible for the exception claimed.

(Approved by the Office of Management and Budget under control number 1512–0392)

§ 6.82 [Removed and Reserved]

Par. 21. Section 6.82 is removed and reserved.

Par. 22. Section 6.83 is revised to read as follows:

§ 6.83 Product displays.

(a) *General.* The act by an industry member of giving or selling product displays to a retailer does not constitute a means to induce within the meaning of section 105(b)(3) of the Act provided that the conditions prescribed in paragraph (c) of this section are met.

(b) *Definition.* ''Product display'' means any wine racks, bins, barrels, casks, shelving, or similar items the primary function of which is to hold and display consumer products.

(c) *Conditions and limitations.*

(1) The total value of all product displays given or sold by an industry member under paragraph (a) of this section may not exceed $300 per brand at any one time in any one retail establishment. Industry members may not pool or combine dollar limitations in order to provide a retailer a product display valued in excess of $300 per brand. The value of a product display is the actual cost to the industry member who initially purchased it. Transportation and installation costs are excluded.

(2) All product displays must bear conspicuous and substantial advertising matter on the product or the industry member which is permanently inscribed or securely affixed. The name and address of the retailer may appear on the product displays.

(3) The giving or selling of such product displays may be conditioned upon the purchase of the distilled

spirits, wine, or malt beverages advertised on those displays in a quantity necessary for the initial completion of such display. No other condition can be imposed by the industry member on the retailer in order for the retailer to receive or obtain the product display.

Par. 23. Section 6.84 is revised to read as follows:

§ 6.84 Point of sale advertising materials and consumer advertising specialties.

(a) *General.* The act by an industry member of giving or selling point of sale advertising materials and consumer advertising specialties to a retailer does not constitute a means to induce within the meaning of section 105(b)(3) of the Act provided that the conditions prescribed in paragraph (c) of this section are met.

(b) *Definitions.*

(1) *Point of sale advertising materials* are items designed to be used within a retail establishment to attract consumer attention to the products of the industry member. Such materials include, but are not limited to: posters, placards, designs, inside signs (electric, mechanical or otherwise), window decorations, trays, coasters, mats, menu cards, meal checks, paper napkins, foam scrapers, back bar mats, thermometers, clocks, calendars, and alcoholic beverage lists or menus.

(2) *Consumer advertising specialties* are items that are designed to be carried away by the consumer, such as trading stamps, nonalcoholic mixers, pouring racks, ash trays, bottle or can openers, cork screws, shopping bags, matches, printed recipes, pamphlets, cards, leaflets, blotters, post cards, pencils, shirts, caps, and visors.

(c) *Conditions and limitations.*

(1) All point of sale advertising materials and consumer advertising specialties must bear conspicuous and substantial advertising matter about the product or the industry member which is permanently inscribed or securely affixed. The name and address of the retailer may appear on the point of sale advertising materials.

(2) The industry member may not directly or indirectly pay or credit the retailer for using or distributing these materials or for any expense incidental to their use.

Par. 24. Section 6.85 is revised to read as follows:

§ 6.85 Temporary retailers.

(a) *General.* The furnishing of things of value to a temporary retailer does not constitute a means to induce within the meaning of section 105(b)(3) of the Act.

(b) *Definition.* For purposes of administering this part, a temporary retailer is a dealer who is not engaged in business as a retailer for more than four consecutive days per event, and for not more than five events in a calendar year.

§§ 6.86 and 6.87 [Removed and reserved]

Par. 25. Sections 6.86 and 6.87 are removed and reserved.

Par. 26. Section 6.88 is revised to read as follows:

§ 6.88 Equipment and supplies.

(a) *General.* The act by an industry member of selling equipment or supplies to a retailer does not constitute a means to induce within the meaning of section 105(b)(3) of the Act if the equipment or supplies are sold at a price not less than the cost to the industry member who initially purchased them, and if the price is collected within 30 days of the date of the sale. The act by an industry member of installing dispensing accessories at the retailer's establishment does not constitute a means to induce within the meaning of the Act as long as the retailer bears the cost of initial installation. The act by an industry member of furnishing, giving, or selling coil cleaning service to a retailer of distilled spirits, wine, or malt beverages does not constitute a means to induce within the meaning of section 105(b)(3) of the Act.

(b) *Definition.* ''Equipment and supplies'' means glassware (or similar containers made of other material), dispensing accessories, carbon dioxide (and other gasses used in dispensing equipment) or ice. ''Dispensing accessories'' include items such as standards, faucets, cold plates, rods, vents, taps, tap standards, hoses, washers, couplings, gas gauges, vent tongues, shanks, and check valves.

§§ 6.89 and 6.90 [Removed and reserved]

Par. 27. Sections 6.89 and 6.90 are removed and reserved.

Par. 28. Section 6.91 is revised to read as follows:

§ 6.91 Samples.

The act by an industry member of furnishing or giving a sample of distilled spirits, wine, or malt beverages to a retailer who has not purchased the brand from that industry member within the last 12 months does not constitute a means to induce within the meaning of section 105(b)(3) of the Act. For each retail establishment the industry member may give not more than 3 gallons of any brand of malt beverage, not more than 3 liters of any brand of wine, and not more than 3 liters of distilled spirits. If a particular product is not available in a size within the quantity limitations of this section, an industry member may furnish to a retailer the next larger size.

Par. 29. Section 6.92 is revised to read as follows:

§ 6.92 Newspaper cuts.

Newspaper cuts, mats, or engraved blocks for use in retailers' advertisements may be given or sold by an industry member to a retailer selling the industry member's products.

Par. 30. Section 6.93 is revised to read as follows:

§ 6.93 Combination packaging.

The act by an industry member of packaging and distributing distilled spirits, wine, or malt beverages in combination with other (non-alcoholic) items for sale to consumers does not constitute a means to induce within the meaning of section 105(b)(3) of the Act.

Par. 31. Section 6.94 is amended by adding the phrase ''(such as travel and lodging)'' before the period in the final sentence of the section, and by adding a new sentence at the end of the section to read as follows:

§ 6.94 Educational seminars.

* * * This does not preclude providing nominal hospitality during the event.

* * * * *

Par. 32. Section 6.96 is amended by revising paragraph (a) to read as follows:

§ 6.96 Consumer promotions.

(a) *Coupons.* The act by an industry member of furnishing to consumers coupons which are redeemable at a retail establishment does not constitute a means to induce within the meaning of section 105(b)(3) of the Act, provided the following conditions are met:

(1) All retailers within the market where the coupon offer is made may redeem such coupons; and

(2) An industry member may not reimburse a retailer for more than the face value of all coupons redeemed, plus a usual and customary handling fee for the redemption of coupons.

* * * * *

§ 6.97 [Removed and reserved]

Par. 33. Section 6.97 is removed and reserved.

Par. 34. Section 6.98 is revised to read as follows:

§ 6.98 Advertising service.

The listing of the names and addresses of two or more unaffiliated retailers selling the products of an industry member in an advertisement of that industry member does not

constitute a means to induce within the meaning of section 105(b)(3) of the Act, provided:

(a) The advertisement does not also contain the retail price of the product (except where the exclusive retailer in the jurisdiction is a State or a political subdivision of a State), and

(b) The listing is the only reference to the retailers in the advertisement and is relatively inconspicuous in relation to the advertisement as a whole, and

(c) The advertisement does not refer only to one retailer or only to retail establishments controlled directly or indirectly by the same retailer, except where the retailer is an agency of a State or a political subdivision of a State.

Par. 35. Section 6.99 is revised to read as follows:

§ 6.99 Stocking, rotation, and pricing service.

(a) *General.* Industry members may, at a retail establishment, stock, rotate and affix the price to distilled spirits, wine, or malt beverages which they sell, provided products of other industry members are not altered or disturbed. The rearranging or resetting of all or part of a store or liquor department is not hereby authorized.

(b) *Shelf plan and shelf schematics.* The act by an industry member of providing a recommended shelf plan or shelf schematic for distilled spirits, wine, or malt beverages does not constitute a means to induce within the meaning of section 105(b)(3) of the Act.

Par. 36. Section 6.100 is revised to read as follows:

§ 6.100 Participation in retailer association activities.

The following acts by an industry member participating in retailer association activities do not constitute a means to induce within the meaning of section 105(b)(3) of the Act:

(a) Displaying its products at a convention or trade show;

(b) Renting display booth space if the rental fee is the same as paid by all exhibitors at the event;

(c) Providing its own hospitality which is independent from association sponsored activities;

(d) Purchasing tickets to functions and paying registration fees if the payments or fees are the same as paid by all attendees, participants or exhibitors at the event; and

(e) Making payments for advertisements in programs or brochures issued by retailer associations at a convention or trade show if the total payments made by an industry member for all such advertisements do not exceed $300 per year for any retailer association.

Par. 37. Section 6.101 is revised to read as follows:

§ 6.101 Merchandise.

(a) *General.* The act by an industry member, who is also in business as a bona fide producer or vendor of other merchandise (for example, groceries or pharmaceuticals), of selling that merchandise to a retailer does not constitute a means to induce within the meaning of section 105(b)(3) of the Act, provided:

(1) The merchandise is sold at its fair market value;

(2) The merchandise is not sold in combination with distilled spirits, wines, or malt beverages (except as provided in § 6.93);

(3) The industry member's acquisition or production costs of the merchandise appears on the industry member's purchase invoices or other records; and

(4) The individual selling prices of merchandise and distilled spirits, wines, or malt beverages sold in a single transaction can be determined from commercial documents covering the sales transaction.

(b) *Things of value covered in other sections of this part.* The act by an industry member of providing equipment, fixtures, signs, glassware, supplies, services, and advertising specialties to retailers does not constitute a means to induce within the meaning of section 105(b)(3) of the Act only as provided in other sections within this part.

Par. 37a. Section 6.102 is added to read as follows:

§ 6.102 Outside signs.

The act by an industry member of giving or selling outside signs to a retailer does not constitute a means to induce within the meaning of section 105(b)(3) of the Act provided that:

(a) The sign must bear conspicuous and substantial advertising matter about the product or the industry member which is permanently inscribed or securely affixed;

(b) The retailer is not compensated, directly or indirectly such as through a sign company, for displaying the signs; and

(c) The cost of the signs may not exceed $400.

Par. 38. Part 6 is amended by adding a new subpart E to read as follows:

Subpart E—Exclusion

Sec.

6.151 Exclusion, in general.
6.152 Practices which put retailer independence at risk.
6.153 Criteria for determining retailer independence.

Subpart E—Exclusion

§ 6.151 Exclusion, in general.

(a) Exclusion, in whole or in part occurs:

(1) When a practice by an industry member, whether direct, indirect, or through an affiliate, places (or has the potential to place) retailer independence at risk by means of a tie or link between the industry member and retailer or by any other means of industry member control over the retailer; and

(2) Such practice results in the retailer purchasing less than it would have of a competitor's product.

(b) Section 6.152 lists practices that create a tie or link that places retailer independence at risk. Section 6.153 lists the criteria used for determining whether other practices can put retailer independence at risk.

§ 6.152 Practices which put retailer independence at risk.

The practices specified in this section put retailer independence at risk. The practices specified here are examples and do not constitute a complete list of those practices that put retailer independence at risk.

(a) The act by an industry member of resetting stock on a retailer's premises (other than stock offered for sale by the industry member).

(b) The act by an industry member of purchasing or renting display, shelf, storage or warehouse space (*i.e.* slotting allowance).

(c) Ownership by an industry member of less than a 100 percent interest in a retailer, where such ownership is used to influence the purchases of the retailer.

(d) The act by an industry member of requiring a retailer to purchase one alcoholic beverage product in order to be allowed to purchase another alcoholic beverage product at the same time.

§ 6.153 Criteria for determining retailer independence.

The criteria specified in this section are indications that a particular practice, other than those in § 6.152, places retailer independence at risk. A practice need not meet all of the criteria specified in this section in order to place retailer independence at risk.

(a) The practice restricts or hampers the free economic choice of a retailer to decide which products to purchase or the quantity in which to purchase them for sale to consumers.

(b) The industry member obligates the retailer to participate in the promotion to obtain the industry member's product.

(c) The retailer has a continuing obligation to purchase or otherwise promote the industry member's product.

(d) The retailer has a commitment not to terminate its relationship with the industry member with respect to purchase of the industry member's products.

(e) The practice involves the industry member in the day-to-day operations of the retailer. For example, the industry member controls the retailer's decisions on which brand of products to purchase, the pricing of products, or the manner in which the products will be displayed on the retailer's premises.

(f) The practice is discriminatory in that it is not offered to all retailers in the local market on the same terms without business reasons present to justify the difference in treatment.

PART 8—EXCLUSIVE OUTLETS

Par. 39. The authority citation for part 8 is revised to read as follows:

Authority: 15 U.S.C. 49–50; 27 U.S.C. 202 and 205; 44 U.S.C. 3504(h).

Par. 40. Section 8.1 is revised to read as follows:

§ 8.1 General.

The regulations in this part, issued pursuant to section 105 of the Federal Alcohol Administration Act (27 U.S.C. 205), specify arrangements which are exclusive outlets under section 105(a) of the Act and criteria for determining whether a practice is a violation of section 105(a) of the Act. This part does not attempt to enumerate all of the practices prohibited by section 105(a) of the Act. Nothing in this part shall operate to exempt any person from the requirements of any State law or regulation.

Par. 41. Section 8.5 is added to subpart A to read as follows:

§ 8.5 Administrative provisions.

(a) *General.* The Act makes applicable the provisions including penalties of sections 49 and 50 of Title 15, United States Code, to the jurisdiction, powers and duties of the Director under this Act, and to any person (whether or not a corporation) subject to the provisions of law administered by the Director under this Act. The Act also provides that the Director is authorized to require, in such manner and such form as he or she shall prescribe, such reports as are necessary to carry out the powers and duties under this chapter.

(b) *Examination and Subpoena.* The Director or any authorized ATF officers shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against. The Director shall also have the power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation, upon a satisfactory showing that the requested evidence may reasonably be expected to yield information relevant to any matter being investigated under the Act.

(c) *Reports required by the Deputy Associate Director (Regulatory Enforcement Programs).*

(1) *General.* The Deputy Associate Director (Regulatory Enforcement Programs) may, as part of a trade practice investigation of an industry member, require such industry member to submit a written report containing information on sponsorships, advertisements, promotions, and other activities pertaining to its business subject to the Act conducted by, or on behalf of, or benefiting the industry member.

(2) *Preparation.* The report will be prepared by the industry member in letter form, executed under the penalties of perjury, and will contain the information specified by the Deputy Associate Director (Regulatory Enforcement Programs). The period covered by the report will not exceed three years.

(3) *Filing.* The report will be filed in accordance with the instructions of the Deputy Associate Director (Regulatory Enforcement Programs).

(Approved by the Office of Management and Budget under control number 1512–0392)

Par. 42. Section 8.11 is amended by removing the definition for the term ''retail establishment'' and by adding definitions for ''ATF officer,'' ''Deputy Associate Director (Regulatory Enforcement Programs)'' and ''Director'' as follows:

§ 8.11 Meaning of terms.

* * * * *

ATF officer. An officer or employee of the Bureau of Alcohol, Tobacco and Firearms (ATF) authorized to perform any function relating to the administration or enforcement of this part.

Deputy Associate Director (Regulatory Enforcement Programs). The principal ATF headquarters official responsible for administering regulations in this part.

Director. The Director, Bureau of Alcohol, Tobacco and Firearms, the Department of the Treasury, Washington, DC.

* * * * *

Par. 43. Section 8.23 is revised to read as follows:

§ 8.23 Third party arrangements.

Industry member requirements, by agreement or otherwise, with non-retailers which result in a retailer being required to purchase the industry member's products are within the exclusive outlet provisions. These industry member requirements are covered whether the agreement or other arrangement originates with the industry member or the third party. For example, a supplier enters into a contractual agreement or other arrangement with a third party. This agreement or arrangement contains an industry member requirement as described above. The third party, a ballclub, or municipal or private corporation, not acting as a retailer, leases the concession rights and is able to control the purchasing decisions of the retailer. The third party, as a result of the requirement, by agreement or otherwise, with the industry member, requires the retailer to purchase the industry member's products to the exclusion, in whole or in part, of products sold or offered for sale by other persons in interstate or foreign commerce. The business arrangements entered into by the industry member and the third party may consist of such things as sponsoring radio or television broadcasting, paying for advertising, or providing other services or things of value.

Par. 44. Part 8 is amended by adding a new subpart D to read as follows:

Subpart D—Exclusion

Sec.

8.51 Exclusion, in general.
8.52 Practices which result in exclusion.
8.53 Practice not resulting in exclusion.
8.54 Criteria for determining retailer independence.

Subpart D—Exclusion

§ 8.51 Exclusion, in general.

(a) Exclusion, in whole or in part occurs:

(1) When a practice by an industry member, whether direct, indirect, or through an affiliate, places (or has the potential to place) retailer independence at risk by means of a tie or link between the industry member and retailer or by any other means of industry member control over the retailer, and

(2) Such practice results in the retailer purchasing less than it would have of a competitor's product.

(b) Section 8.52 lists practices that result in exclusion. Section 8.53 lists practices not resulting in exclusion. Section 8.54 lists the criteria used for

determining whether other practices can put retailer independence at risk.

§ 8.52 Practices which result in exclusion.

The practices specified in this section result in exclusion under section 105(a) of the Act. The practices specified here are examples and do not constitute a complete list of such practices:

(a) Purchases of distilled spirits, wine or malt beverages by a retailer as a result, directly or indirectly, of a threat or act of physical or economic harm by the selling industry member.

(b) Contracts between an industry member and a retailer which require the retailer to purchase distilled spirits, wine, or malt beverages from that industry member and expressly restrict the retailer from purchasing, in whole or in part, such products from another industry member.

§ 8.53 Practice not resulting in exclusion.

The practice specified in this section is deemed not to result in exclusion under section 105(a) of the Act: a supply contract for one year or less between the industry member and retailer under which the industry member agrees to sell distilled spirits, wine, or malt beverages to the retailer on an ''as needed'' basis provided that the retailer is not required to purchase any minimum quantity of such product.

§ 8.54 Criteria for determining retailer independence.

The criteria specified in this section are indications that a particular practice, other than those in §§ 8.52 and 8.53, places retailer independence at risk. A practice need not meet all of the criteria specified in this section in order to place retailer independence at risk.

(a) The practice restricts or hampers the free economic choice of a retailer to decide which products to purchase or the quantity in which to purchase them for sale to consumers.

(b) The industry member obligates the retailer to participate in the promotion to obtain the industry member's product.

(c) The retailer has a continuing obligation to purchase or otherwise promote the industry member's product.

(d) The retailer has a commitment not to terminate its relationship with the industry member with respect to purchase of the industry member's products.

(e) The practice involves the industry member in the day-to-day operations of the retailer. For example, the industry member controls the retailer's decisions on which brand of products to purchase, the pricing of products, or the manner in which the products will be displayed on the retailer's premises.

(f) The practice is discriminatory in that it is not offered to all retailers in the local market on the same terms without business reasons present to justify the difference in treatment.

PART 10—COMMERCIAL BRIBERY

Par. 45. The authority citation for part 10 is revised to read as follows:

Authority: 15 U.S.C. 49–50; 27 U.S.C. 202 and 205; 44 U.S.C. 3504(h).

Par. 46. Section 10.1 is revised to read as follows:

§ 10.1 General.

The regulations in this part, issued pursuant to section 105 of the Federal Alcohol Administration Act (27 U.S.C. 205), specify practices which may result in violations of section 105(c) of the Act and criteria for determining whether a practice is a violation of section 105(c) of the Act. This part does not attempt to enumerate all of the practices prohibited by section 105(c) of the Act. Nothing in this part shall operate to exempt any person from the requirements of any State law or regulation.

Par. 52. Section 10.4 is amended by revising paragraph (a)(1) to read as follows:

§ 10.4 Jurisdictional limits.

(a) *General.* * * *

(1) The industry member induces a trade buyer to purchase distilled spirits, wine, or malt beverages from such industry member to the exclusion, in whole or in part, of products sold or offered for sale by other persons in interstate or foreign commerce; and

Par. 47. Section 10.5 is added to subpart A to read as follows:

§ 10.5 Administrative provisions.

(a) *General.* The Act makes applicable the provisions including penalties of sections 49 and 50 of Title 15, United States Code, to the jurisdiction, powers and duties of the Director under this Act, and to any person (whether or not a corporation) subject to the provisions of law administered by the Director under this Act. The Act also provides that the Director is authorized to require, in such manner and such form as he or she shall prescribe, such reports as are necessary to carry out the powers and duties under this chapter.

(b) *Examination and subpoena.* The Director or any authorized ATF officers shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against. The Director shall also have the power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation, upon a satisfactory showing that the requested evidence may reasonably be expected to yield information relevant to any matter being investigated under the Act.

(c) *Reports required by the Deputy Associate Director (Regulatory Enforcement Programs).*

(1) *General.* The Deputy Associate Director (Regulatory Enforcement Programs) may, as part of a trade practice investigation of an industry member, require such industry member to submit a written report containing information on sponsorships, advertisements, promotions, and other activities pertaining to its business subject to the Act conducted by, or on behalf of, or benefiting the industry member.

(2) *Preparation.* The report will be prepared by the industry member in letter form, executed under the penalties of perjury, and will contain the information specified by the Deputy Associate Director (Regulatory Enforcement Programs). The period covered by the report will not exceed three years.

(3) *Filing.* The report will be filed in accordance with the instructions of the Deputy Associate Director (Regulatory Enforcement Programs).

(Approved by the Office of Management and Budget under control number 1512–0392)

Par. 48. Section 10.11 is amended by adding definitions for ''ATF officer,'' ''Deputy Associate Director (Regulatory Enforcement Programs),'' and ''Director'' as follows:

§ 10.11 Meaning of terms.

* * * * *

ATF officer. An officer or employee of the Bureau of Alcohol, Tobacco and Firearms (ATF) authorized to perform any function relating to the administration or enforcement of this part.

Deputy Associate Director (Regulatory Enforcement Programs). The principal ATF headquarters official responsible for administering regulations in this part.

Director. The Director, Bureau of Alcohol, Tobacco and Firearms, the Department of the Treasury, Washington, DC.

* * * * *

Par. 49. Part 10 is amended by adding a new subpart D to read as follows:

Subpart D—Exclusion

Sec.
10.51 Exclusion, in general.
10.52 Practice which puts trade buyer independence at risk.
10.53 Practices not resulting in exclusion. [Reserved]
10.54 Criteria for determining trade buyer independence.

Subpart D—Exclusion

§ 10.51 Exclusion, in general.

(a) Exclusion, in whole or in part occurs:

(1) When a practice by an industry member, whether direct, indirect, or through an affiliate, places (or has the potential to place) trade buyer independence at risk by means of a tie or link between the industry member and trade buyer or by any other means of industry member control over the trade buyer, and

(2) Such practice results in the trade buyer purchasing less than it would have of a competitor's product.

(b) Section 10.52 lists practices that create a tie or link that places trade buyer independence at risk. Section 10.53 is reserved and will list practices not resulting in exclusion. Section 10.54 lists the criteria used for determining whether other practices can put trade buyer independence at risk.

§ 10.52 Practice which puts trade buyer independence at risk.

The practice specified in this section is deemed to place trade buyer independence at risk within the description of exclusion in § 10.51: Industry member payments of money to the employee(s) of a trade buyer without the knowledge or consent of the trade buyer-employer in return for the employee agreeing to order distilled spirits, wine, or malt beverages from the industry member. The practice enumerated here is an example and does not constitute a complete list of those situations which result in such control.

§ 10.53 Practices not resulting in exclusion. [Reserved]

§ 10.54 Criteria for determining trade buyer independence.

The criteria specified in this section are indications that a particular practice between an industry member and an officer, employee, or representative of a trade buyer, other than those in § 10.52, places trade buyer independence at risk. A practice need not meet all of the criteria specified in this section in order to place trade buyer independence at risk.

(a) The practice restricts or hampers the free economic choice of a trade buyer to decide which products to purchase or the quantity in which to purchase them for sale to retailers and consumers.

(b) The industry member obligates the trade buyer to participate in the promotion to obtain the industry member's product.

(c) The trade buyer has a continuing obligation to purchase or otherwise promote the industry member's product.

(d) The trade buyer has a commitment not to terminate its relationship with the industry member with respect to purchase of the industry member's products.

(e) The practice involves the industry member in the day-to-day operations of the trade buyer. For example, the industry member controls the trade buyer's decisions on which brand of products to purchase, the pricing of products, or the manner in which the products will be displayed on the trade buyer's premises.

(f) The practice is discriminatory in that it is not offered to all trade buyers in the local market on the same terms without business reasons present to justify the difference in treatment.

PART 11—CONSIGNMENT SALES

Par. 50. The authority citation for 27 CFR Part 11 is revised to read as follows:

Authority: 15 U.S.C. 49–50; 27 U.S.C. 202 and 205.

Par. 51. Section 11.1 is revised to read as follows:

§ 11.1 General.

The regulations in this part, issued pursuant to section 105 of the Federal Alcohol Administration Act (27 U.S.C. 205), specify arrangements which are consignment sales under section 105(d) of the Act and contain guidelines concerning return of distilled spirits, wine and malt beverages from a trade buyer. This part does not attempt to enumerate all of the practices prohibited by section 105(d) of the Act. Nothing in this part shall operate to exempt any person from the requirements of any State law or regulation.

Par. 52. Section 11.5 is added to subpart A to read as follows:

§ 11.5 Administrative provisions.

(a) *General.* The Act makes applicable the provisions including penalties of sections 49 and 50 of Title 15, United States Code, to the jurisdiction, powers and duties of the Director under this Act, and to any person (whether or not a corporation) subject to the provisions of law administered by the Director under this Act.

(b) *Examination and subpoena.* The Director or any authorized ATF officers shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Director shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation, upon a satisfactory showing that the requested evidence may reasonably be expected to yield information relevant to any matter being investigated under the Act.

Par. 53. Section 11.11 is amended by adding definitions for ''ATF officer,'' ''Director'' and ''Retailer'' as follows:

§ 11.11 Meaning of terms.

* * * * *

ATF officer. An officer or employee of the Bureau of Alcohol, Tobacco and Firearms (ATF) authorized to perform any function relating to the administration or enforcement of this part.

Director. The Director, Bureau of Alcohol, Tobacco and Firearms, the Department of the Treasury, Washington, DC.

* * * * *

Retailer. Any person engaged in the sale of distilled spirits, wine or malt beverages to consumers. A wholesaler who makes incidental retail sales representing less than five percent of the wholesaler's total sales volume for the preceding two-month period shall not be considered a retailer with respect to such incidental sales.

* * * * *

Par. 54. A new § 11.24 is added to subpart C to read as follows:

§ 11.24 Other than a bona fide sale.

''Other than a bona fide sale'' includes, but is not limited to, sales in connection with which the industry member purchases or rents the display, shelf, storage or warehouse space to be occupied by such products at premises owned or controlled by the retailer.

Par. 55. Section 11.32 is revised to read as follows:

§ 11.32 Defective products.

Products which are unmarketable because of product deterioration, leaking containers, damaged labels or missing or mutilated tamper evident closures may be exchanged for an equal quantity of identical products or may be returned for cash or credit against outstanding indebtedness.

Par. 56. Section 11.34 is revised to read as follows:

§ 11.34 Products which may no longer be lawfully sold.

Products which may no longer be lawfully sold may be returned for cash or credit against outstanding indebtedness. This would include situations where, due to a change in regulation or administrative procedure over which the trade buyer or an affiliate of the trade buyer has no control, a particular size or brand is no longer permitted to be sold.

Par. 57. Section 11.35 is revised to read as follows:

§ 11.35 Termination of business.

Products on hand at the time a trade buyer terminates operations may be returned for cash or credit against outstanding indebtedness. This does not include a temporary seasonal shutdown (see § 11.39).

Signed: January 4, 1995.

Daniel R. Black,

Acting Director.

Approved: March 30, 1995.

John P. Simpson,

Deputy Assistant Secretary, (Tariff and Trade Enforcement).

[FR Doc. 95–10116 Filed 4–24–95; 8:45 am]

BILLING CODE 4810–31–U

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGDO5–94–076]

Drawbridge Operation Regulations; Atlantic Intracoastal Waterway, Scotts Hill, NC

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is changing the regulations governing the operation of the Figure Eight Island swingbridge across the Atlantic Intracoastal Waterway, mile 278.1, located in Scotts Hill, North Carolina, by restricting recreational vessels to bridge openings every half hour. This is intended to reduce the amount of bridge openings to relieve the increased volume of vehicular traffic crossing this bridge, while still providing for the reasonable needs of navigation.

EFFECTIVE DATE: This rule is effective on May 26, 1995.

FOR FURTHER INFORMATION CONTACT: Ann B. Deaton, Bridge Administrator, Fifth Coast Guard District, (804) 398–6222.

SUPPLEMENTARY INFORMATION:

Draft Information

The principal persons involved in drafting this document are Bill H. Brazier, Project Officer, and LCDR C.A. Abel, Project Attorney, Fifth Coast Guard District.

Regulatory History

On November 8, 1994, the Coast Guard published a Notice of Proposed Rulemaking entitled Atlantic Intracoastal Waterway, Scotts Hill, North Carolina, in the **Federal Register** (59 FR 55601). The commend period ended January 9, 1995. The Coast Guard did not receive any comments on the Notice of Proposed Rulemaking. On January 13, 1995, the Coast Guard issued Public Notice 5–845 requesting comments on the Notice of Proposed Rulemaking. The comment period ended February 13, 1995. No comments were received. A public hearing was not requested and one was not held.

Background and Purpose

The Figure Eight Beach Homeowners Association, Inc. has requested that openings of the Figure Eight swingbridge mile 278, Atlantic Intracoastal Waterway, be restricted for recreational vessels to every half hour due to the increase in vehicular traffic across the bridge. Currently, this bridge opens on signal at all times. The Coast Guard has decided to reduce the required bridge openings for recreational vessels from ''on demand'' to openings on the hour and half hour, as needed. The bridge will continue to open on signal at all other times for all other vessels. The Coast Guard believes that recreational vessels will not be unduly restricted in passage through the bridge, since they can plan their vessel transits around the hour and half opening restriction.

Regulatory Evaluation

This proposal is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. It has been exempted from review by the Office of Management and Budget under that order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040; February 26, 1979). The Coast Guard expects the economic impact of this final rule to be so minimal that a full regulatory evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), the Coast Guard must consider whether this final rule, will have a significant economic impact on a substantial number of small entities. ''Small entities'' include independently owned and operated small businesses that are not dominant in their field and that otherwise qualify as ''small business concerns'' under section 3 of the Small Business Act (15 U.S.C. 632). Because it expects the impact of this final rule to be minimal, the Coast Guard certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities.

Collection of Information

This proposal contains no collection of information requirements under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

Federalism

The Coast Guard has analyzed this final rule under the principles and criteria contained in Executive Order 12612, and has determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard considered the environmental impact of this final rule and concluded that under section 2.B.2.e.(32)(e) of Commandant Instruction M16475.1B (as revised by 59 FR 38654; July 29, 1994), this rule is categorically excluded from further environmental documentation. A Categorical Exclusion Determination and checklist has been prepared and placed in the rulemaking docket.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

In consideration of the foregoing, the Coast Guard is amending part 117 of Title 33, Code of Federal Regulations as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05.1(g); section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

2. In § 117.821, paragraphs (b) (4) and (5) are redesignated as (b) (5) and (6) respectively, and new paragraph (b)(4) is added to read as follows: