



Federal Alcohol Administration Act Trade Practices Law and Regulations

Presented by
Robert Angelo, Steve Taylor, and Michael Desrochers,
Trade Investigations Division, and
Thomas Niekamp, TTB Counsel



5/2008



Overview

- Background
 - History
 - Federal Alcohol Administration (FAA) Act
- Basic Permit Requirements
- Trade Practice Provisions
- FAA Act Permit Proceedings

Alcohol and Tobacco Tax and Trade Bureau

Background



History

- Pre-Prohibition problems and excesses
- Prohibition (18th Amendment)
- Repeal (21st Amendment)
- Congress did not want a return to excesses of pre-prohibition problems in alcohol industry
 - Solution

Alcohol and Tobacco Tax and Trade Bureau



Federal Alcohol Administration Act

- 27 U.S.C. 201 et seq. – Goals:
 - Keep criminal element out of alcohol industry using permit system (§§ 203 and 204)
 - Regulate formulation, labeling, and advertising of alcohol beverages (§ 205(e) and (f))
 - Regulate promotional and marketing trade practices that might lead to corruption or excessive consumption (§ 205)
 - Protect the consumer

Alcohol and Tobacco Tax and Trade Bureau



FAA Act — Constitutional Authority

- Commerce Clause:
 - The Congress shall have the power to “regulate commerce with foreign nations and among the several states ...”
 - Interstate commerce nexus for FAA Act — broad nexus that generally includes interstate commerce activities between two or more States

Alcohol and Tobacco Tax and Trade Bureau

Basic Permit Requirements



Basic Permit Requirements

- Basic permits are required for all:
 - Importers and wholesalers of all beverage alcohol products, as well as producers of wine and distilled spirits (§ 203)

Alcohol and Tobacco Tax and Trade Bureau



Basic Permit Requirements (Cont'd)

- Application will be denied pursuant to § 204 if the administrator finds that the applicant:
 1. Has been convicted of a felony under Federal or State law within last 5 years or convicted within 3 years of a misdemeanor under Federal law relating to liquor, including the taxation thereof;

Alcohol and Tobacco Tax and Trade Bureau



Basic Permit Requirements (Cont'd)

2. Proposed operations violate State law in the State where they are to occur;
3. "Such person, by reason of his business experience, financial standing, or trade connections is not likely to commence operations...within a reasonable period or to maintain operations in conformity with Federal law."

Alcohol and Tobacco Tax and Trade Bureau

Trade Practice Provisions



Trade Practice Provisions

- Purposes:
 - Prevent wholesaler and producer control over retailer (and accompanying corruption and over-consumption)
 - To help keep the playing field level among industry members

Alcohol and Tobacco Tax and Trade Bureau



Prohibited Trade Practices

- There are four trade practices that are prohibited for producers, wholesalers, and importers:
 - Exclusive Outlet
 - Tied House
 - Commercial Bribery
 - Consignment Sales

27 U.S.C. 205

Alcohol and Tobacco Tax and Trade Bureau

Exclusive Outlet



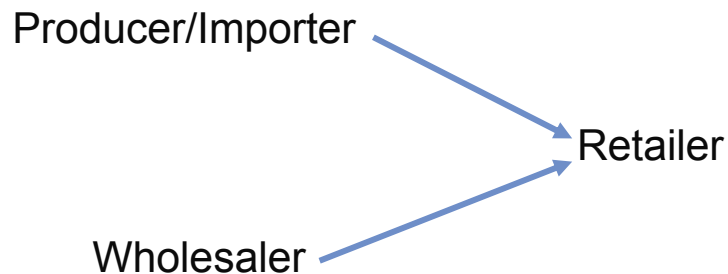
Exclusive Outlet

- 27 U.S.C. 205(a); 27 CFR Part 8
 - Defined: Unlawful for industry member to require, “by agreement or otherwise” that a retailer purchase alcohol from such person to exclusion of alcohol sold or offered for sale in interstate commerce by others.

Alcohol and Tobacco Tax and Trade Bureau



Exclusive Outlet (Cont'd)



Alcohol and Tobacco Tax and Trade Bureau



Exclusive Outlet — Examples

- Contracts
- Coercion through acts or threats of violence

Alcohol and Tobacco Tax and Trade Bureau



Exclusive Outlet – Contract Example

- ABC-Wholesaler enters into a sales contract with The Pub, a liquor retailer, in which The Pub agrees to purchase all its alcohol beverages exclusively from ABC to the exclusion of alcohol beverages offered for sale by others in interstate commerce. In exchange, ABC will sell its products to The Pub at a very favorable cost.

Alcohol and Tobacco Tax and Trade Bureau

- Interstate Commerce requirements:
 - Primary — Competitor's products must be sold or offered for sale in interstate commerce, and
 - One of the other three jurisdictional requirements of § 205(a) must be met.
- Similar State law (malt beverage)

- **Similar State Law** — If the excluded product is a malt beverage (beer), there must be a similar state law to enable application of the FAA Act.



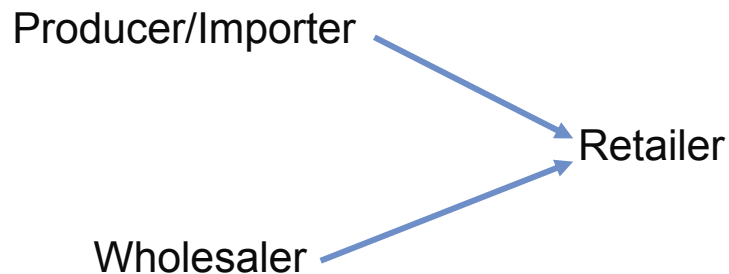
Trade Practices — Terms (Cont'd)

- **Exclusion** — Requirement for exclusive outlet, tied house, and commercial bribery cases
 - i.e., requirement, inducement, or agreement to purchase one person's alcohol must be “to the exclusion, in whole or in part” of alcohol sold by others

Alcohol and Tobacco Tax and Trade Bureau

Tied House

- 27 U.S.C. 205(b); 27 CFR Part 6
 - Defined: Unlawful to induce a retailer to purchase alcohol from such person to exclusion of alcoholic beverages offered for sale by other persons. Inducement must come through one of seven specifically enumerated means.





Tied House — “Means to Induce”

1. Acquiring or holding...any interest in any license with respect to premises of retailer
 - Note: TTB does NOT license retail dealers
2. Acquiring any interest in real or personal property owned, occupied, or used in the retailer’s business
 - Note: 100% ownership is not prohibited (§§ 6.27 and 6.33)

Alcohol and Tobacco Tax and Trade Bureau



Tied House — “Means to Induce” (Cont’d)

3. “Giving, renting, lending, or selling to retailer, equipment, fixtures, signs, supplies, money, services, or other thing of value”
 - Important exceptions in CFR
4. Paying or crediting retailer for advertising, display, or distribution services
 - i.e., “Slotting fees”
5. Guaranteeing a loan or repaying retailer’s financial obligation

Alcohol and Tobacco Tax and Trade Bureau



Tied House — “Means to Induce” (Cont’d)

6. Extending credit to a retailer for “a period of time in excess of 30 days from the date of delivery”
7. Requiring the retailer to take and dispose of a certain quota of alcohol beverages

Alcohol and Tobacco Tax and Trade Bureau



Tied House — Example

- ABC-Wholesaler purchases or rents display, shelf, storage, or warehouse space from a retailer (i.e., slotting allowance)
- See 27 CFR 6.152(b)

Alcohol and Tobacco Tax and Trade Bureau

Tied House — Exceptions

Important exceptions on things of value that may be given to retailers by suppliers/wholesalers:	Regulations
Product Displays – provided displays do not exceed \$300 per brand at any one time in any one establishment	27 CFR 6.83
POS & Consumer advertising - Posters, inside signs, clocks, calendars, menus, products list, etc; retailer must not be paid or credited by industry member in order to use these materials	27 CFR 6.84
Temporary Retailers – Not engaged in business for more than 4 consecutive days per event and not more than 5 events per year	27 CFR 6.85
Equipment & Supplies – (glassware, dispensing accessories, ice, etc.) sold to retailer for not less than cost and price is collected within 30 days	27 CFR 6.88
Samples – 3 gallons of malt beverages, 3 liters of wine or distilled spirits (provided not purchased w/in previous 12 months)	27 CFR 6.91
Newspaper Cuts	27 CFR 6.92
Combination Packaging – Combining distribution and packaging of alcohol and non-alcoholic beverages	27 CFR 6.93

Tied House — Exceptions (Cont'd)

Important exceptions on things of value that may be given to retailers by suppliers/wholesalers:	Regulations
Educational Seminars – Sponsored by industry member	27 CFR 6.94
Consumer Tasting at Retailer Establishment	27 CFR 6.95
Consumer Promotions (Coupons and Direct Offerings)	27 CFR 6.96
Advertising Service – Where two or more unaffiliated retailers selling industry member products are listed in an advertisement	27 CFR 6.98
Stocking Rotation & Pricing – Provided other industry members products are not altered or disturbed	27 CFR 6.99
Participation in Retailer Association Activities	27 CFR 6.100
Merchandise – Groceries, pharmaceuticals, etc., sold at fair market value; not combined with sale of alcohol beverages	27 CFR 6.101
Outside Signs – Provided it bears conspicuous advertising matter about product/industry member and cost does not exceed \$400, and the retailer is not compensated	27 CFR 6.102



Tied House — Recordkeeping Requirements

- Industry members must keep and maintain records on premises for certain items furnished to retailers:
 - Product displays
 - Equipment and supplies
 - Samples
 - Coupons
 - Participation in retailers association activities
 - Merchandise

27 CFR 6.81(b)

Alcohol and Tobacco Tax and Trade Bureau



Tied House — Recordkeeping Requirements (Cont'd)

- Required records for certain items furnished to retailers must be kept on premises and include:
 - Name and address of retailer
 - Date furnished
 - Item furnished
 - Industry member's cost of item
 - Charges to retailer (if any)

27 CFR 6.81(b)

Alcohol and Tobacco Tax and Trade Bureau



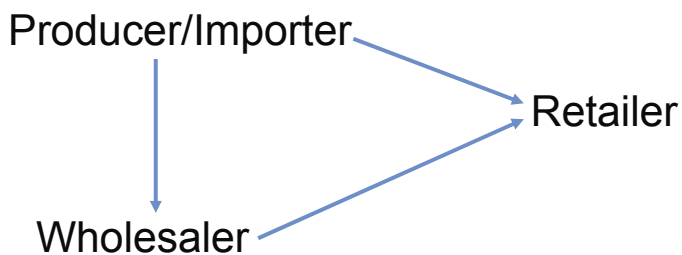
Tied House (Cont'd)

- Interstate Commerce requirement:
 - Primary — Excluded competitor's products must be sold or offered for sale in interstate commerce, and
 - One of the other three IC requirements of Section 205(b) must be met
- Similar State law req. for malt beverages

Alcohol and Tobacco Tax and Trade Bureau

Commercial Bribery

- 27 U.S.C. 205(c); 27 CFR Part 10:
 - Defined: Unlawful to induce any “trade buyer” (wholesaler/retailer) to purchase alcohol from such person to the exclusion of those sold by others by:
 - Offering or giving any bonus, premium or compensation to employees, officers, or representatives of trade buyer
- Note: Industry member may give things of value to wholesale entity unless wholesaler is mere conduit to the employees (27 CFR 10.23)





Commercial Bribery— Example

- Sales Contests: Offering gift or bonus to trade buyer's employees to promote sales of industry member's products, which indirectly induces trade buyer to purchase more of those products

Alcohol and Tobacco Tax and Trade Bureau



Commercial Bribery— Example

- An industry member contacts a purchasing agent for a chain of restaurants to buy and sell its alcoholic beverages in exchange for a weekly cash incentive of \$200. The purchasing agent agrees, and secretly receives the payment by check through the mail and also stops buying a competitor's product. The purchasing agent's employer doesn't know anything about it.

Alcohol and Tobacco Tax and Trade Bureau



Commercial Bribery (Cont'd)

- Interstate Commerce requirement:
 - Primary — Excluded competitor's products must be sold or offered for sale in interstate commerce, and
 - One of the other three Interstate Commerce requirements of § 205(c) must be met
- Similar State law req. for malt beverages

Alcohol and Tobacco Tax and Trade Bureau

Consignment Sales



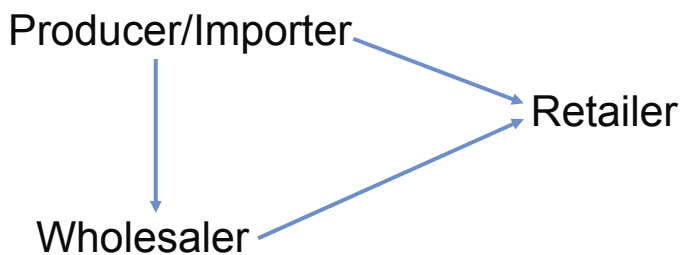
Consignment Sales

- 27 U.S.C. 205(d); 27 CFR Part 11
 - Defined: Unlawful to sell or offer to sell alcohol beverages to trade buyer on consignment, or under conditional sale, or with the privilege of return or on any basis other than a bona fide sale
 - Exception: Returns for bona fide commercial reasons

Alcohol and Tobacco Tax and Trade Bureau



Consignment Sales (Cont'd)



Alcohol and Tobacco Tax and Trade Bureau



Consignment Sales— Example

- An industry member (wholesaler, importer) sells a retailer 300 cases of alcohol beverages with the understanding that if it is not sold, it may be returned

Alcohol and Tobacco Tax and Trade Bureau



Consignment Sales (Cont'd)

- Merchandise returns for ordinary and usual commercial reasons (do not constitute consignment sales):
 - Error in delivery
 - Defective product
 - Product unlawful to sell
 - Termination of retail business or wholesale franchise
 - Change in product
 - Discontinued product
 - Seasonal dealer

Alcohol and Tobacco Tax and Trade Bureau



Consignment Sales (Cont'd)

- Merchandise returns for reasons not considered as ordinary and/or usual (considered as consignment sales):
 - Overstocked or slow moving products
 - Seasonal products
- Note: Similar State law requirements for malt beverages

Alcohol and Tobacco Tax and Trade Bureau



Consignment Sales (Cont'd)

- Interstate Commerce jurisdictional requirement:
 - No primary clause: Applies if the sale, purchase, offer, or contract is made in the course of interstate commerce, or
 - One of the other two Interstate Commerce requirements of § 205(d) is met.
 - **Note the difference from the other three trade practice prohibitions:** No Exclusion Requirement if the sale, purchase, offer, or contract is made in the course of interstate or foreign commerce.

Alcohol and Tobacco Tax and Trade Bureau

Exclusion



Exclusion

- Requirement in trade practice cases:
 - Requirement, inducement, or agreement etc., must be “to the **exclusion**, in whole or in part” of alcohol sold by others

Alcohol and Tobacco Tax and Trade Bureau



Exclusion (Cont'd)

- Historic interpretation:
 - Violation of FAA Act if the induced or required purchases result in retailers purchasing less of competitors' alcohol beverages than they otherwise would have

Alcohol and Tobacco Tax and Trade Bureau



Exclusion (Cont'd)

- Current interpretation:
 - Requires “something more” than the retailer purchasing less of a competitor's products to show exclusion
- Two key cases are:
 - *Foremost Sales v. ATF*, 860 F.2d 229 (7th Cir. 1988)
 - *Fedway Associates v. U.S. Treasury*, 976 F.2d 1416 (D.C. Cir. 1992)

Alcohol and Tobacco Tax and Trade Bureau



Current Interpretation of Exclusion

- The proscribed practice must place retailer independence at risk by means of a “tie or link” between industry member and the retailer or by any other means of industry member control, and
- Such practice results in retailer purchasing fewer of competitors’ products than it otherwise would have (27 CFR 6.151)

Alcohol and Tobacco Tax and Trade Bureau



New “Exclusion” Approach — Green, Red, and Yellow Lights

- TTB’s regulations currently enumerate specific practices that:
 - **Green Light** — Are permissible; i.e., do not place retailer independence at risk (27 CFR 8.53)
 - **Red Light** — Are not permissible; i.e., do place retailer independence at risk (27 CFR 8.52)
 - **Yellow Light** — Regulations also set forth criteria to determine whether a practice other than those specifically addressed place retailer independence at risk (27 CFR 8.54)

Alcohol and Tobacco Tax and Trade Bureau

FAA Act Permit Proceedings



FAA Act Permit Proceedings

- Permit may be annulled if Secretary finds it was obtained through fraud, misrepresentation, or concealment of material fact.
- Permit may be revoked if permittee has not engaged in business for more than 2 years.

Alcohol and Tobacco Tax and Trade Bureau



FAA Act Permit Proceedings (Cont'd)

- Permit may be revoked or suspended if permittee willfully violates any conditions of its basic permit:
 - However, can only be suspended for first time violation

Alcohol and Tobacco Tax and Trade Bureau



FAA Act Permit Proceedings (Cont'd)

- As an alternative to suspension or revocation, TTB can accept offers in compromise (27 U.S.C. 207).
- Maximum compromise amount is \$500 per offense.

Alcohol and Tobacco Tax and Trade Bureau

- Trade Practice Prohibitions:
 - Exclusive Outlet
 - Tied House
 - Commercial Bribery
 - Consignment Sales
- Exclusion element
- Current interpretation of exclusion
- Potential administrative actions

Michael Desrochers
Program Manager, Trade
Investigations Division
(978) 649-6943
Michael.Desrochers@ttb.gov