



Federal Trade Practices

What every Industry Member should know

APRIL 10, 2018 – MIAMI, FL

MAY 9, 2018 – SAN FRANCISCO, CA

JUNE 13, 2018 – CHICAGO, IL

JULY 18, 2018 – BOSTON, MA



TTB Disclaimer

Notice:

This information is being presented to help the public to understand and comply with the laws and regulations that the Alcohol and Tobacco Tax and Trade Bureau (TTB) administers.

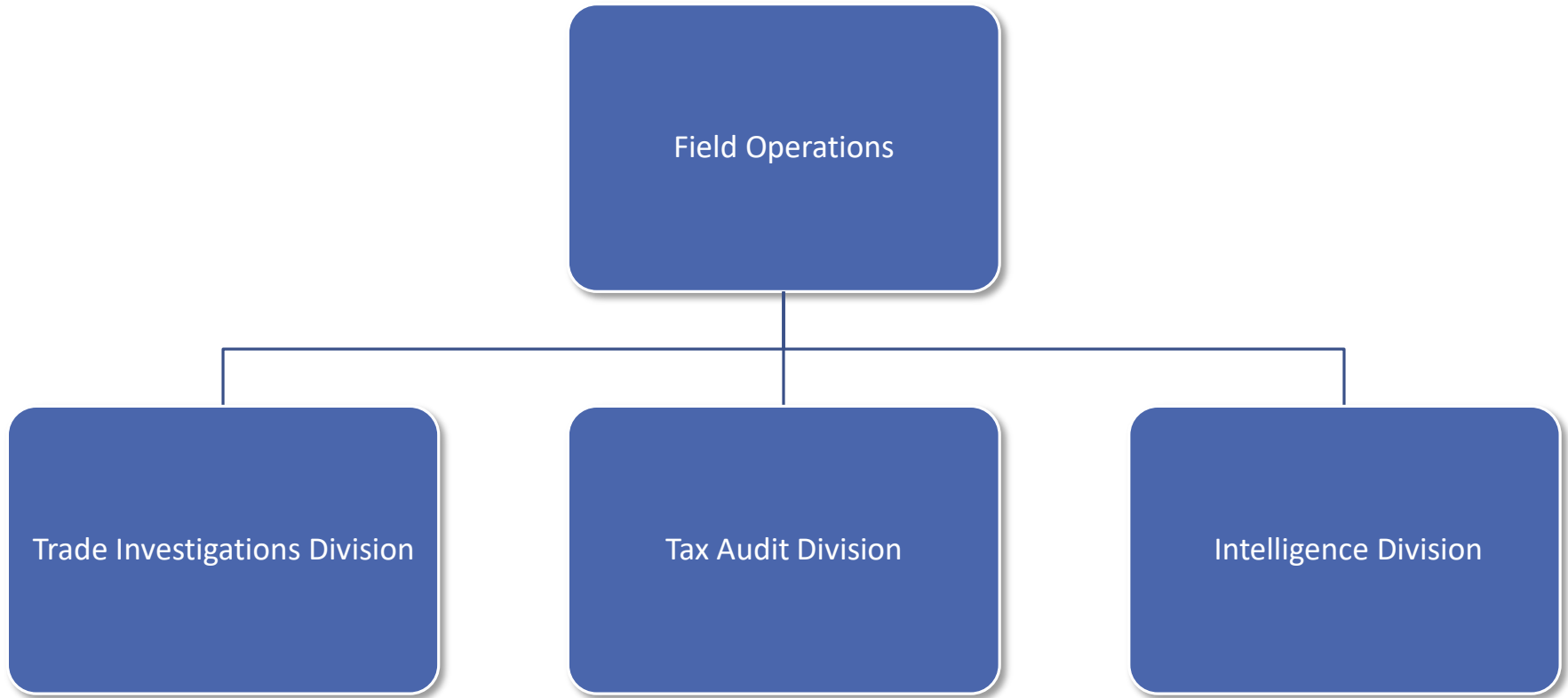
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In addition, this presentation may be made obsolete by changes in laws and regulations.

Please consult the applicable laws and regulations for the most current requirements.

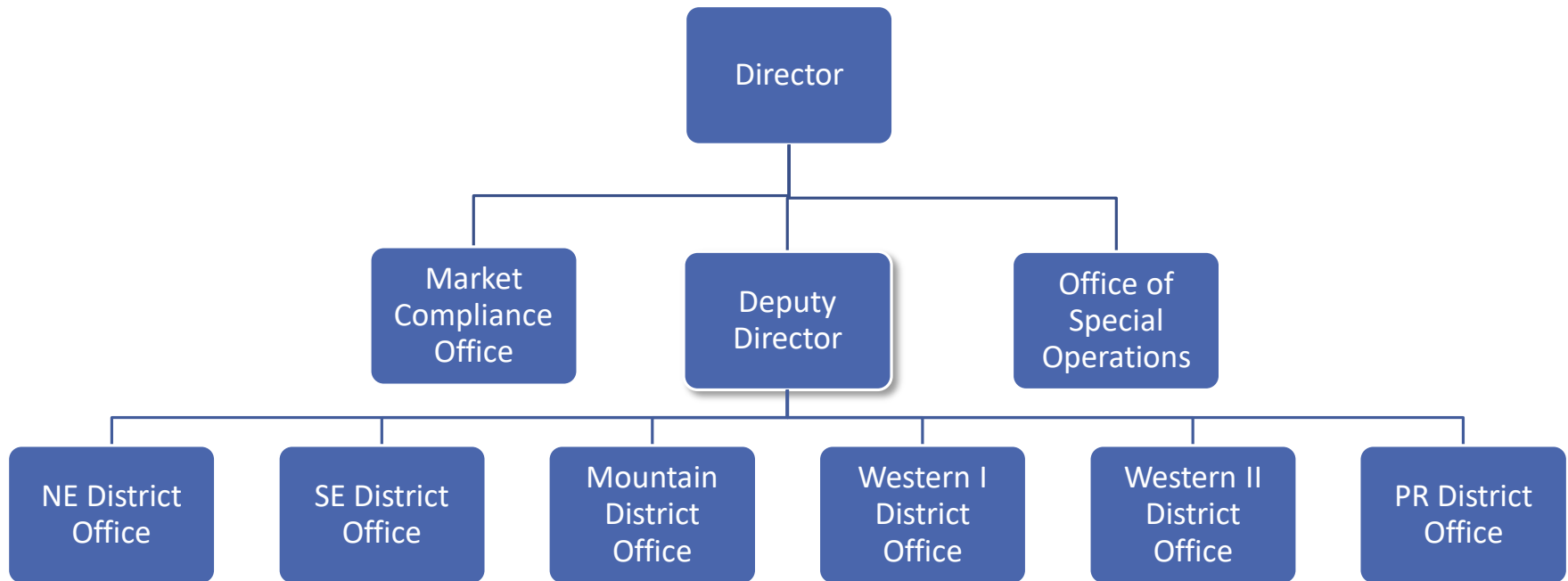


Field Operations Organizational Chart





TID Organizational Chart





Market Compliance Realignment

- Market Compliance Office was realigned under TID.
- Marketplace monitoring and enforcement functions now under one Division.
- Among other things, MCO now oversees TTB's trade practice program.
- Program Manager available to answer your trade practice questions at TradePractices@ttb.gov.



New TID Office

- TTB received a \$5 million appropriation for FY 2017 and FY 2018 to increase enforcement efforts for industry trade practice violations.
- New Office of Special Operations under TID initiates and oversees trade practice investigations.
 - Office consists of 9 Special Operations Investigators (SOI) and a supervisor.
 - Other TID investigators will be assigned to assist.



Overview

- History
- Trade Practice Rules
- TTB Guidance
- Enforcement
- Practical Exercises



HISTORY



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 the alcohol industry
- Solution



Federal Alcohol Administration (FAA) Act

Signed into law by President Roosevelt in 1935.

27 U.S.C. 201 et seq. – Goals:

- Keep criminal element out of alcohol industry and maintain compliance by using permit system (sections 203 and 204)
- Regulate formulation, labeling, and advertising of alcohol beverages (section 205(e) and (f))
- **Regulate promotional and marketing trade practices that might lead to corruption or excessive consumption (section 205)**
- Protect the consumer



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 commerce activities between two or more States



FAA Act (cont'd)

Under the FAA Act, producers, importers and wholesalers of alcohol beverages must register and receive a basic permit to start operations.

- **Importers** and **wholesalers** of malt beverages must register and obtain a basic permit.
- **Producers** of malt beverages must file a Brewer's Notice.

Permits can be revoked, suspended, or annulled.



TRADE PRACTICE TERMS



Trade Practice Terms

Industry Member – an entity regulated by TTB who is engaged in business as a:

- Distiller, brewer, rectifier, blender or other producer; or
- Importer or wholesaler of distilled spirits, wine or malt beverages; or
- Bottler, or warehousemen and bottler of distilled spirits.

Does NOT include agency of a State or political subdivision, or an officer or employee of such agency.



Trade Practice Terms (cont'd)

Trade Buyer – any person who is a wholesaler or retailer of distilled spirits, wine or malt beverages.



Trade Practice Terms (cont'd)

Inducement – a thing that persuades or influences someone to do something

- May include goods, property, financial obligation, etc.
- Interest in a license with respect to premises of a retailer
- Paying for advertising or display space



Trade Practice Terms (cont'd)

Exclusion — Element of proof in exclusive outlet, tied house and commercial bribery cases:

- i.e., requirement or inducement to purchase one person's alcohol must be "to the exclusion, in whole or in part" of alcohol sold by others



Trade Practice Terms (cont'd)

Exclusion (continued)

Historic interpretation:

- Practice considered a violation of FAA Act if the induced or required purchases result in retailers purchasing less of competitors' alcohol beverages than they otherwise would have



Trade Practice Terms (cont'd)

Exclusion (continued)

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)



Trade Practice Terms (cont'd)

Exclusion (continued)

Two elements to 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.



Trade Practice Terms (cont'd)

Interstate Commerce requirements:

- Primary — Competitor's products must be sold or offered for sale in interstate commerce, and
- One of the other three interstate commerce requirements of 27 U.S.C. 205(a)-(c) must be met.
- Consignment sales have slightly different IC requirements



Trade Practice Terms (cont'd)

Interstate Commerce requirements (cont'd):

- (1) If such requirement is made in the course of interstate or foreign commerce, or
- (2) If such person engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or



Trade Practice Terms (cont'd)

Interstate Commerce requirements (cont'd):

- (3) If the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce.



FAA Act

Penultimate clause – 27 U.S.C. 205 (f)

In the case of malt beverages, the provision of the FAA Act with respect to Trade Practices shall apply to transactions between a retailer or trade buyer in any State and a brewer, importer, or wholesaler of malt beverages outside such State **only** to the extent that the law of such State imposes similar requirements with respect to similar transactions between a retailer or trade buyer in such State and a brewer, importer, or wholesaler of malt beverages in such State, as the case may be.



Trade Practice Terms (cont'd)

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:

- Similar means similar, not same
- Broad interpretation of similarity

NOTE: Similar State Law not required for distilled spirits or wine.



TRADE PRACTICES OVERVIEW



Trade Practices Overview

Purposes:

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



Trade Practices Overview (cont'd)

There are four trade practices that are prohibited for producers, wholesalers, and importers:

1. Tied House
2. Exclusive Outlet
3. Commercial Bribery
4. Consignment Sales

27 U.S.C. 205



TIED HOUSE



Tied House

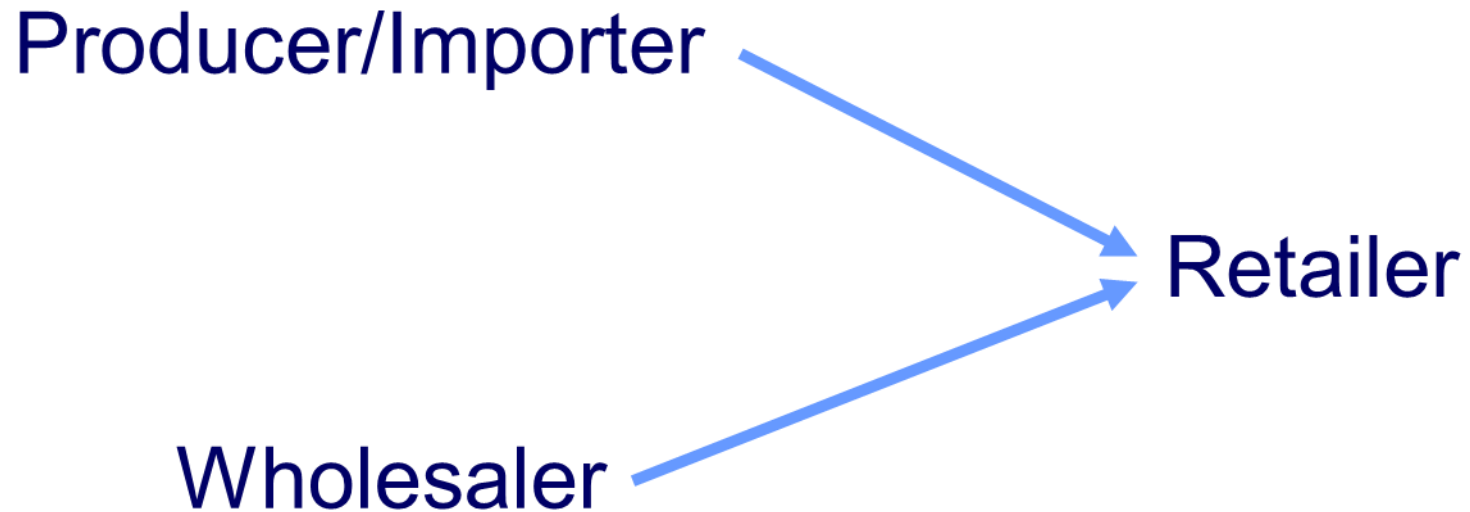
It is unlawful for an industry member to induce, directly or indirectly, a retailer to purchase alcohol beverages from the industry member to the exclusion of alcoholic beverages offered for sale by other persons.

27 U.S.C. 205(b)

27 CFR part 6



Tied House (Cont'd)





Tied House — “Means to Induce”

27 U.S.C. 205(b)(1) through (b)(7)

- (b)(1) Acquiring or holding...any interest in any license (State, county or municipal) with respect to premises of retailer; or

- (b)(2) Acquiring any interest in real or personal property owned, occupied, or used in the retailer’s business.
 - Note: 100% ownership is not prohibited. (27 CFR 6.27 and 6.33)

27 CFR part 6



Tied House — “Means to Induce”

27 U.S.C. 205(b)(1) through (b)(7) cont’d

- (b)(3) Giving, renting, lending, or selling to retailer, equipment, fixtures, signs, supplies, money, services, or other thing of value. – (Except for 27 CFR part 6 Subpart D exceptions).
- (b)(4) Paying or crediting a retailer for any advertising, display or distribution service.

27 CFR part 6



Tied House — “Means to Induce”

27 U.S.C. 205(b)(1) through (b)(7) cont’d

- (b)(5) Guaranteeing any loan or repaying retailer’s financial obligation.
- (b)(6) Extending credit to a retailer for a “period of time in excess of 30 days from the date of delivery.”
- (b)(7) Requiring the retailer to take and dispose of a certain quota of alcohol beverages.



Tied House — Examples

- Industry member provides free labor to reset stock on a retailer's premises (other than stock offered for sale by the industry member).
- Industry member purchases or rents display, shelf, storage, or warehouse space from a retailer (i.e. slotting allowance).



Tied House — Examples

- Industry member pays for live entertainment for an on-premise retailer in exchange for product promotion and preferential display space within the retailer's premises.
- Industry member informs a retailer that they must purchase a slow-moving alcohol beverage product in order to obtain a product that is in high demand.



Tied House — Subpart D Exceptions

Included among the items listed in the Subpart D exceptions are:

- Product displays;
- Point of sale advertising materials;
- Consumer tasting/sampling at retail locations;
- Limited equipment and supplies;
- Stocking, rotation and pricing service.

There are limitations and conditions for all Subpart D exceptions. Generally, any exceptions to 27 U.S.C. 205(b)(3) must be of little value.



Tied House – Recordkeeping Requirements

For exception to apply, 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 part 6

27 CFR 6.81(b)



Tied House – Recordkeeping Requirements (Cont'd)

Required records must include:

- Name and address of retailer
- Date furnished
- Item furnished
- Industry member's cost of item
- Charges to retailer (if any)

27 CFR part 6

27 CFR 6.81(b)



Tied House

When does a violation occur?

1. Inducement

- Industry Member to Retailer---unless industry member wholly owns retailer.

2. Interstate Commerce

3. Exclusion

4. Similar State Law (Malt Beverages Only)

NOTE: If all elements are not established, there is no violation.

27 CFR part 6



EXCLUSIVE OUTLET



Exclusive Outlet

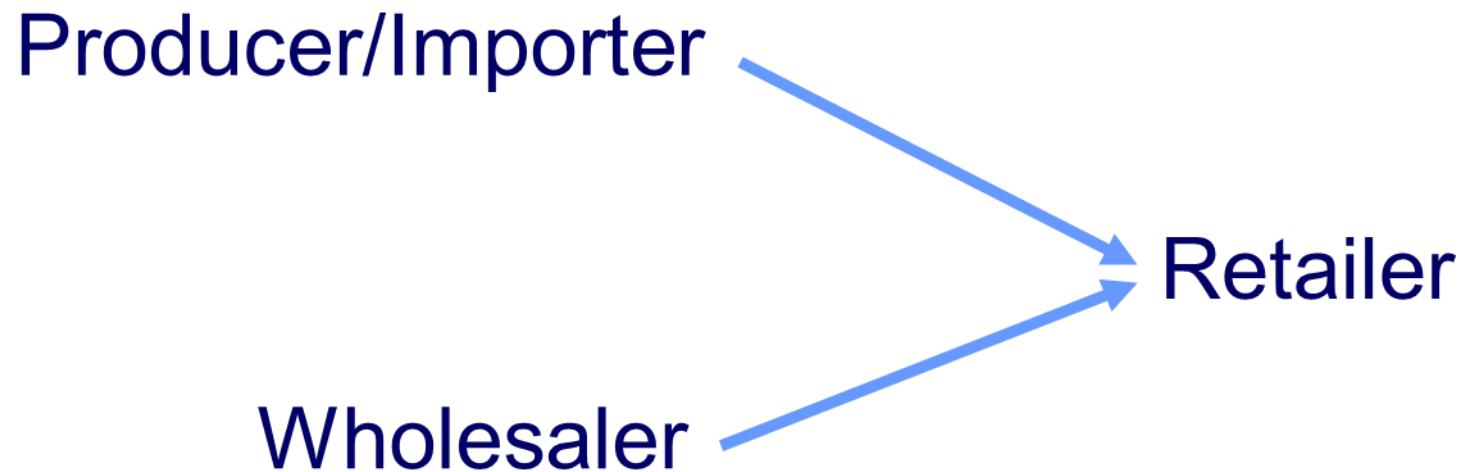
It is unlawful for an industry member to directly or indirectly require a retailer, “by agreement or otherwise” to purchase alcohol from that industry member to the exclusion of alcohol sold or offered for sale in interstate or foreign commerce by others.

27 CFR part 8

27 U.S.C. 205(a)



Exclusive Outlet (Cont'd)





Exclusive Outlet (Cont'd)

- Voluntary industry member-retailer purchase agreements (Contracts)
- Coercion through acts or threats of physical or economic harm



Exclusive Outlet - Contracts

Any contract or agreement, written or unwritten, which has the effect of requiring the retailer to purchase alcohol beverage products from the industry member beyond a single sales transaction is prohibited.

(27 CFR 8.22)



Exclusive Outlet - Contracts (Cont'd)

(a) An advertising contract between an industry member and a retailer with the express or implied requirement to purchase the advertiser's products; or



Exclusive Outlet - Contracts (Cont'd)

(b) A sales contract awarded on a competitive bid basis which has the effect of prohibiting the retailer from purchasing from other industry members by:

(1) Requiring that for the period of the agreement, the retailer purchase a product or line of products exclusively from the industry member; or

(2) Requiring that the retailer purchase a specific or minimum quantity during the period of the agreement.



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 of 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.



Exclusive Outlet

When does a violation occur?

1. **Requirement by agreement or otherwise**
 - Retailer must purchase from industry member
2. **Interstate commerce**
3. **Exclusion** (of other industry member's products)
4. **Similar State Law** (Malt Beverages Only)

NOTE: If all elements are not established, there is no violation.

27 CFR part 8



COMMERCIAL BRIBERY



Commercial Bribery

It is unlawful for an industry member to induce any “trade buyer” (wholesaler/retailer) to purchase alcohol from the industry member to the exclusion of those sold by others by:

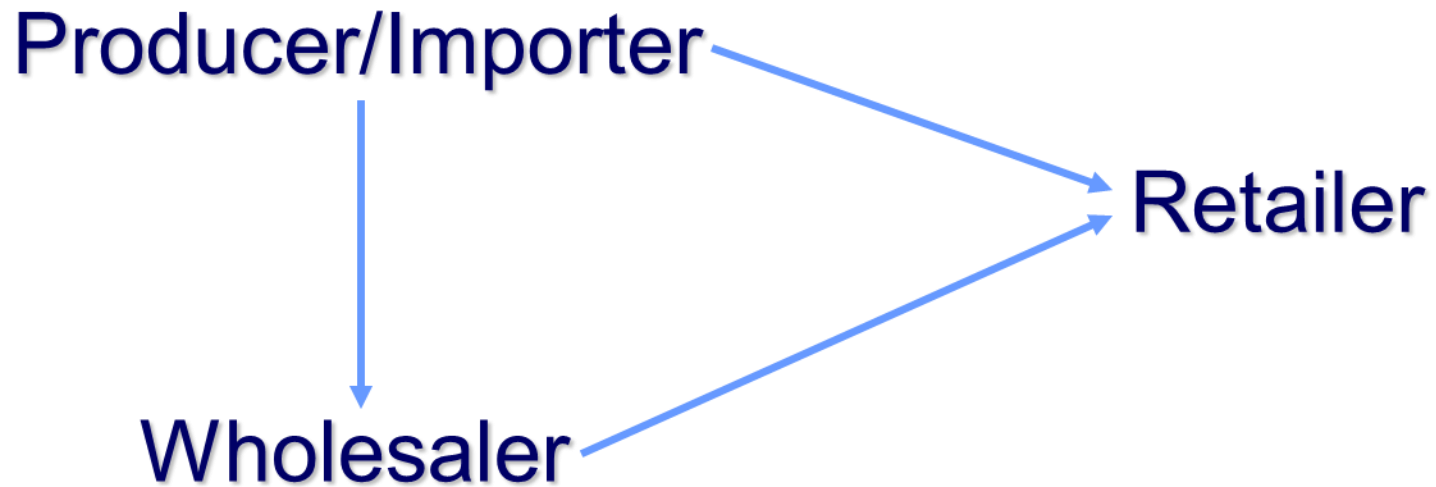
- Commercial bribery; or
- Offering or giving any bonus, premium or compensation to employees, officers, or representatives of trade buyer.

27 CFR part 10

27 U.S.C. 205(c)



Commercial Bribery (cont'd)



27 CFR part 10



Commercial Bribery (cont'd)

“Commercial Bribery” under section 205(c)(1) means:

- The practice of sellers paying money or making gifts to employees or agents to induce them to promote purchases by their own employers from the sellers offering the secret inducements.

27 CFR part 10

27 U.S.C. 205(c)



Commercial Bribery (cont'd)

- Things of value given to officers, employees, or representatives of trade buyers that promote sales of industry member's products can indirectly induce the trade buyers to purchase more of those products (27 U.S.C. 205(c)(2))
- **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

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 to the agent. 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.



Commercial Bribery - Example

(cont'd)

Sales Contests:

- Industry member offers gift or bonus to trade buyer's employees to promote sales of industry member's products. This sales contest indirectly induces the trade buyer to purchase more of those products.



Commercial Bribery (cont'd)

When does a violation occur?

1. **Inducement (to employee or representative)**
 - Industry member to trade buyer (wholesaler or retailer).
2. **Interstate Commerce**
3. **Exclusion**
4. **Similar State Law** (Malt Beverages Only)

NOTE: If all elements are not established, there is no violation.

27 CFR part 10



CONSIGNMENT SALES



Consignment Sales

Unlawful to sell, offer to sell, or contract to sell alcohol beverages to **trade buyer** (or for trade buyer to purchase or offer/contract to purchase):

- On consignment, or
- Under conditional sale, or
- With the privilege of return, or

27 CFR part 11

27 U.S.C. 205(d)



Consignment Sales (cont'd)

Unlawful to sell (continued):

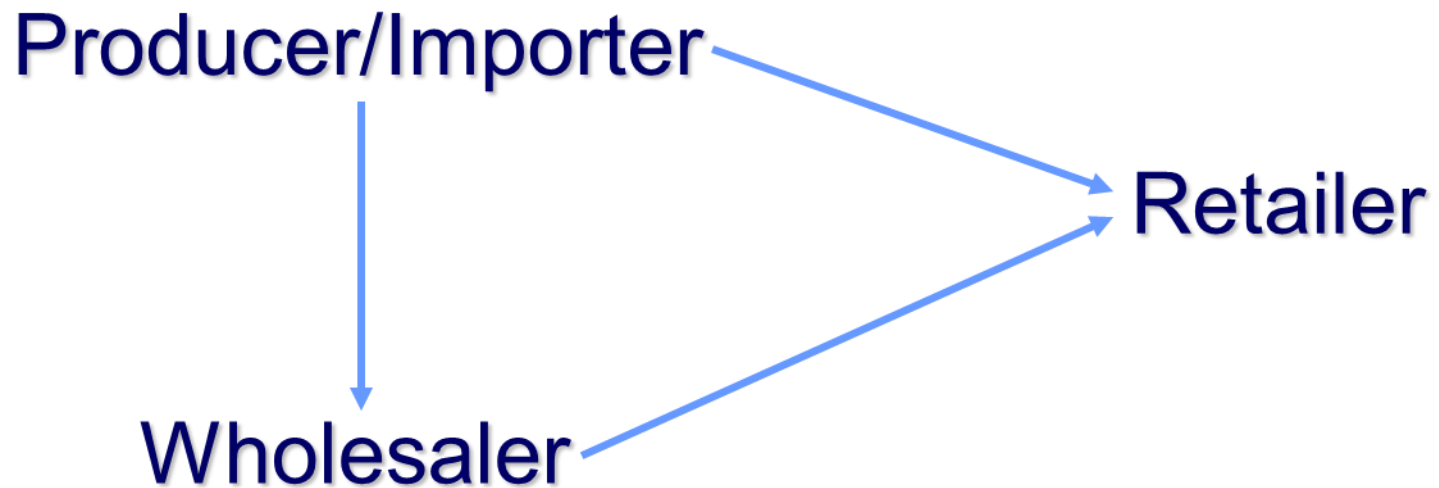
- On any basis other than a bona fide sale, or
- Where any part of the transaction involves the acquisition of other wine, distilled spirits, or malt beverages from the trade buyer

27 CFR part 11

27 U.S.C. 205(d)



Consignment Sales (cont'd)



27 CFR part 11



Consignment Sales Exception

Merchandise returns for ordinary and usual commercial reasons do not constitute consignment sales, such as:

- Error in delivery (27 CFR 11.33)
- Defective product (27 CFR 11.32)
- Product unlawful to sell (27 CFR 11.34)

27 CFR part 11



Consignment Sales Exception

(Cont'd)

Ordinary and usual commercial reasons (continued):

- Termination of retail business (27 CFR 11.35) or wholesale franchise (27 CFR 11.36)
- Change in product (27 CFR 11.37)
- Discontinued product (27 CFR 11.38)
- Seasonal dealer (27 CFR 11.39)

27 CFR part 11



Consignment Sales Exception

(Cont'd)

Merchandise returns for reasons that are NOT considered ordinary and/or usual include:

- Overstocked or slow moving products (27 CFR 11.45)
- Seasonal products (27 CFR 11.46)

27 CFR part 11



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.
- Importer sells to wholesaler under condition that wholesaler is not required to pay for alcohol until sold to retailer.

27 CFR part 11



Consignment Sales

When does a violation occur?

1. Consignment Sale

- To sell, offer for sale, or contract to sell, **OR**, to purchase, offer to purchase, or contract to purchase.

2. Interstate Commerce

3. Similar State Law (Malt Beverages Only)

No Exclusion Requirement - if the sale, purchase, offer, or contract is made in the course of interstate or foreign commerce.

27 CFR part 11



Summary

- Trade Practice Prohibitions:
 - Tied House
 - Exclusive Outlet
 - Commercial Bribery
 - Consignment Sales
- All elements of a violation **must** be present for there to be a violation.
- Exclusion element is required for all but Consignment Sales



TTB GUIDANCE



TTB Guidance

Industry Circular 2012-1

Guidance Regarding Industry Members' Participation in Retail Programs

- Discusses the use of third-party marketing companies.
- Subpart D exceptions are only applicable to the prohibition of providing things of value under 27 U.S.C. 205(b)(3) and **do not** apply to other provisions of the FAA Act.
- Subpart D exceptions cannot be used as a subterfuge to violate another provision of the FAA Act.



TTB Guidance

Industry Circular 2012-2

Tie-In Sales - An Unlawful Trade Practice

- **Tie-in sale** is when a industry member requires a retailer to purchase one product in order to obtain another product.
- Tie-in sales are prohibited inducements under 27 U.S.C. 205(b)(7).



TTB Guidance

Ruling 2016-1 and FAQs

The Shelf Plan and Shelf Schematic Exception to the “Tied House” Prohibition, and Activities Outside Such Exception:

- Allows furnishing a retailer with a recommended shelf plan or schematic.
- Provides general guidance concerning promotional activities commonly associated with category management programs.
- Reminds industry members that if a thing of value is not specifically exempted in Subpart D, it is an inducement.



TTB Guidance

Ruling 2017-2 Revised

Freshness Dating and Allowable Returns of Malt Beverage Products under the FAA:

Malt beverages may be returned under the following conditions:

- The brewer has pre-established policies and procedures in place across various product lines that specify the date the retailer must pull the product;
- Such brewer's freshness return/exchange policies and procedures are readily verifiable and consistently followed by the brewer;



TTB Guidance

Ruling 2017-2 Revised (cont'd)

Conditions (continued):

- The container has identifying markings that correspond with this date; and
- The malt beverage product pulled by the trade buyer may not re-enter the retail marketplace.



Trade Practice Proceedings



Consequences

Violations of the FAA Act Trade Practice prohibitions can result in:

- Criminal charges
- Injunction or consent decree
- Revocation of Basic Permit
- Suspension of Basic Permit
- Offer in Compromise



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.



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
- As an alternative to suspension or revocation, TTB can accept offers in compromise (27 U.S.C. 207)



Other Proceedings

Violations of FAA Act Trade Practice prohibitions can result in criminal charges against any person who violates the Act:

- Misdemeanor
- \$1,000 fine for each offense

In consignment sale context, can include the retailer



Trade Practice Cases

Chicago - Press Release January 2009

- Glazer’s Distributors of Illinois, Inc. - **\$225,000**
- Southern Wine & Spirits of Illinois, Inc. - **\$225,000**
- Wirtz Corporation - **\$130,000**
- Distinctive Wine & Spirits, LLC - **\$110,000**
- Johnson Brothers Liquor Company of Illinois - **\$40,000**
- Vin Divino, Ltd. - **\$30,000**
- Stoller Wholesale Wine & Spirits, Inc. - **\$18,000**
- Fine Vines, LLC - **\$12,000**
- Shaw-Ross International Importers - **\$10,000**
- Wein-Bauer Distributing, Inc. - **\$3,000**



Trade Practice Cases (cont'd)

Las Vegas – Press Release May 2011

- Diageo North America, Inc. - **\$650,000**
- Pernod Ricard USA, LLC - **\$300,000**
- Moet Hennessey USA, Inc. - **\$275,000**
- Bacardi USA - **\$262,500**
- Future Brands, LLC - **\$250,000**
- E. & J. Gallo Winery - **\$225,000**



Recent Trade Practice Cases

- Offer in Compromise of **\$450,000** from **MillerCoors, LLC** (Consignment Sales)
- Offer in Compromise of **\$300,000** from **Anheuser-Busch, LLC** (Consignment Sales)
- Offer in Compromise of **\$750,000** from **Craft Beer Guild, LLC** (Tied-House)

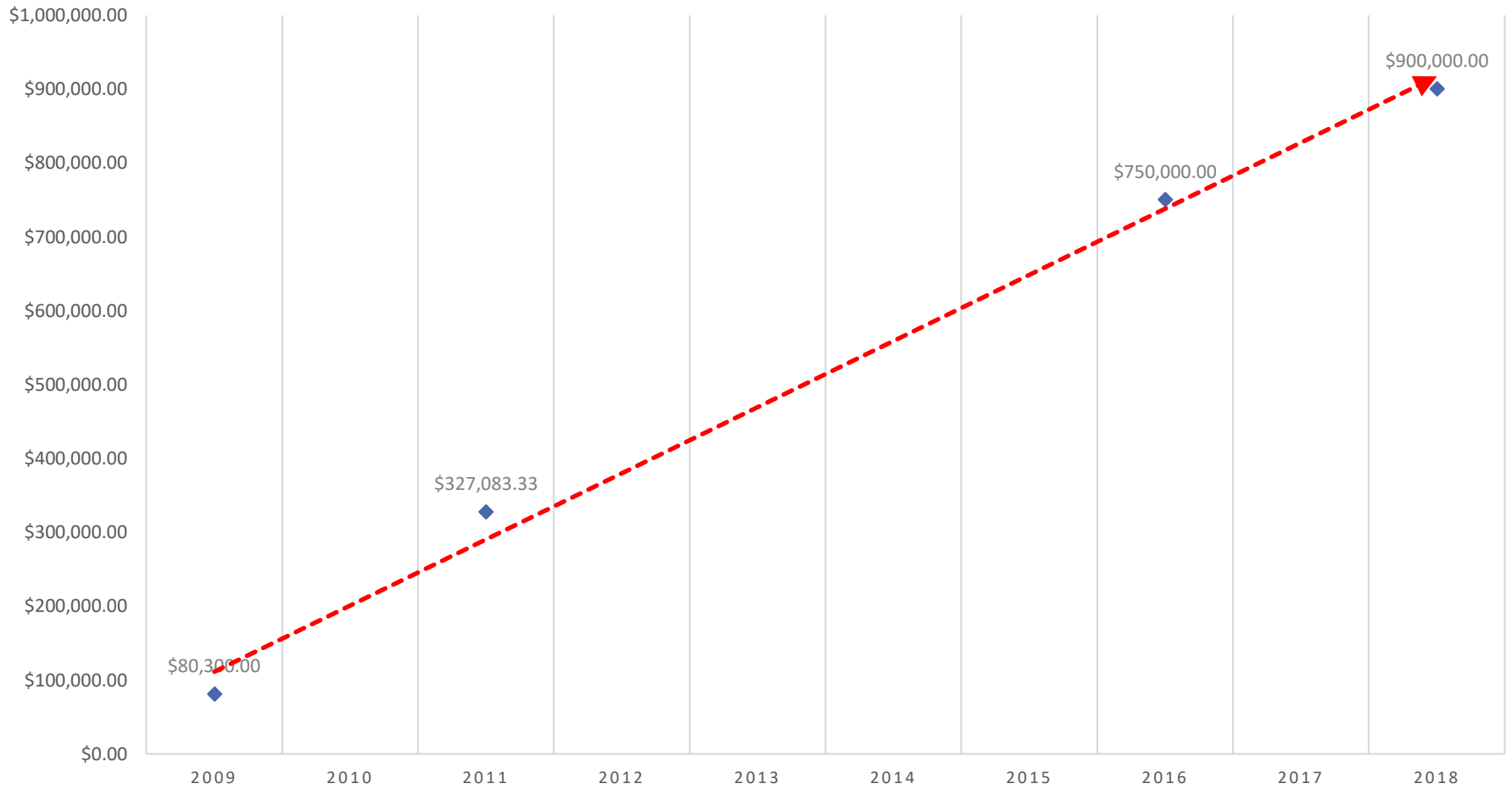


Most Recent

- Offer in Compromise of **\$900,000** from Warsteiner Importers Agency, Inc.



Tied House OIC Trend





PRACTICAL EXERCISES



Practical Exercise #1

A Wholesaler enters into a 9-month advertising contract with Bob's Racetrack, a retailer. Under the terms of the contract, Bob's Racetrack will receive \$50,000 and agrees to purchase the Wholesaler's malt beverages throughout the 9-month contract period. The Wholesaler will be able to put up signage throughout the racetrack advertising its malt beverage products.



Practical Exercise #1 (Cont'd)

Is this an exclusive outlet arrangement?

27 CFR 8.22 prohibits:

“Any contract or agreement, written or unwritten, which has the effect of requiring the retailer to purchase distilled spirits wine or malt beverages from the industry member beyond a single sales transaction.”



Practical Exercise #1 (Cont'd)

Does the practice place retailer independence at risk?

- Bob's Racetrack has a continuing obligation to purchase or otherwise promote the Wholesaler's product — 27 CFR 8.54(c)
- Bob's Racetrack has a commitment not to terminate its relationship with the Wholesaler with respect to purchase of the Wholesaler's products — 27 CFR 8.54(d)
- This practice may also hamper the free economic choice of Bob's Racetrack to decide which products to purchase — 27 CFR 8.54(a)



Practical Exercise #2

A Wholesaler enters into a 12-month sales contract with a retailer of fine wines. Under the terms of the contract, the retailer agrees to purchase all of its French burgundy wines exclusively from the wholesaler for the duration of the 12-month period. In return, the wholesaler offers a discounted price.



Practical Exercise #2 (Cont'd)

Is this an exclusive outlet arrangement?

The contract clearly requires purchases beyond a single sales transaction — 27 CFR 8.22



Practical Exercise #2 (Cont'd)

Does this practice lead to exclusion?

This contract requires the purchase of all French burgundy wines exclusively from the wholesaler. This is a practice that *per se* results in exclusion under 27 CFR 8.52(b).



Practical Exercise #3

A Wholesaler enters into a 12-month contract with a local tavern that caters to an affluent clientele. Under the terms of the contract, the wholesaler will provide several wines at a very favorable price throughout the contract period. The products are being supplied on an as-needed basis and there are no minimum quantity purchase requirements.



Practical Exercise #3 (Cont'd)

Is this an exclusive outlet arrangement?

Contract meets the requirements of 27 CFR 8.53 – Practice not resulting in exclusion:

- Supply contract for 1 year or less
- Industry member agrees to sell on “as-needed basis”
- No minimum quantity purchase requirements



Practical Exercise #4

Bob's Imports USA, an importer of alcoholic beverages, sponsored a 10-day all expense paid trip to the Bahamas for the top 3 sales people of a Wholesaler who sold the most Bob's Rum products over the 3-month period of June, July, and August 2017. The value of the trip to each winner was approximately \$2,000.



Practical Exercise #4 (Cont'd)

Is this commercial bribery?

- There are no secret payments
27 U.S.C. 205(c)(1)
- “Sales contests sponsored by an industry member which offer prizes directly or indirectly to trade buyer officers, employees, or representatives are inducements within the meaning of the act.” (27 CFR 10.21 and 10.24)



Practical Exercise #4 (Cont'd)

Does it place the wholesaler's independence at risk?

- Could “hamper the free economic choice” of wholesaler to determine which products to buy (27 CFR 10.54(a)), or
- Could be considered a continuing obligation to purchase or otherwise promote the importer's product (27 CFR 10.54(c))



Practical Exercise #5

Angelo's Imports, a beer importer provides tap systems to a new chain of restaurants in exchange for its products being offered on tap.



Practical Exercise #5 (cont'd)

Is this an inducement (assuming similar state law)?

- The industry member is paying for display space at a retail establishment (27 U.S.C. 205(b)(2) and 4); 27 CFR 6.35 and 6.56)
- The industry member is also furnishing a thing of value to the retailer (27 CFR 6.41)



Practical Exercise #5 (cont'd)

Is this a risk to the retailer's independence?

- This is a slotting allowance under 27 CFR 6.152(b)



Practical Exercise #6

Bob's Distillery, in order to introduce a new whiskey to the market, enters into an agreement with a Wholesaler. As part of the agreement, Bob's Distillery will accept the return of any product that doesn't sell within 90 days.



Practical Exercise #6 (Cont'd)

Is this a consignment sale?

Sale of the whiskey involves the distiller agreeing to buy back slow moving product from the wholesaler/trade buyer (27 U.S.C. 205(d); 27 CFR 11.21(c) and 11.45)

Remember: Proof of exclusion is not required for consignment sale if the sale is made in the course of interstate commerce



Questions?

- We are here to answer your questions.
- Additional questions can be submitted in writing to:

TradePractices@ttb.gov