DEPARTMENT OF THE TREASURY
Alcohol and Tobacco Tax and Trade Bureau

TTB Ruling
Number: 2016–1 February 11, 2016

The Shelf Plan and Shelf Schematic Exception to the "Tied House" Prohibition, and Activities Outside Such Exception

Under 27 U.S.C. 205(b), the "Tied-house" provisions of the Federal Alcohol Administration Act (FAA Act), and 27 CFR part 6, the provision of services by an industry member to a retailer is in certain circumstances prohibited. Section 6.99(b) provides that the act by an industry member of providing a retailer with a recommended shelf plan or shelf schematic for distilled spirits, wine, or malt beverages, however, is not an inducement within the meaning of the FAA Act's "Tied-house" prohibition. The Alcohol and Tobacco Tax and Trade Bureau (TTB) does not consider § 6.99(b) ambiguous. The plain language of the regulation removes only the act of providing a recommended shelf plan or shelf schematic from the prohibited means to induce enumerated in section 105(b)(3) of the FAA Act. Additional services or items of value do not fall within the § 6.99(b) exception. Therefore, providing such services may constitute a prohibited inducement and, depending on the circumstances, may be deemed to place retailer independence at risk. This Ruling further explains the § 6.99(b) exception and why such additional services or items of value are not entitled to its safe harbor.

I. TTB's Authority Under the Federal Alcohol Administration Act

The FAA Act (27 U.S.C. 201–219a) provides for the Federal regulation of the alcohol beverage industry. The FAA Act's objectives are to protect consumers through establishment of standards for labeling and advertising of distilled spirits, wine, and malt beverages (alcohol beverages); to protect the Federal revenue derived from taxes on alcohol beverages; and to prevent unfair competition and unlawful practices in the distribution of alcohol beverages.

Sections 105(a) through (d) of the FAA Act (27 U.S.C. 205(a)–(d)) prohibit certain marketing practices, irrespective of whether they are offered by an industry member[1] or requested by a retailer, that are deemed to cause unfair competition. These sections, titled "Exclusive outlet," "Tied house," "Commercial bribery," and "Consignment sales," respectively, delineate and proscribe unfair trade practices in the alcohol beverage industry. Section 105(b) of the FAA Act (27 U.S.C. 205(b)) contains the Act's Tied-house provisions. That section provides that it is unlawful for an industry member to induce any retailer engaged in the sale of alcohol beverages to purchase such products

[1] Any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits.

from the industry member to the exclusion, in whole or in part, of alcohol beverage products sold or offered for sale by other persons in interstate or foreign commerce.

Under certain circumstances, section 105(b)(3) of the FAA Act (27 U.S.C. 205(b)(3)) prohibits "furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other thing of value, subject to such exceptions as the Secretary of the Treasury shall by regulation prescribe, 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 [the Tied-house provisions]."

The TTB administers the FAA Act pursuant to section 1111(d) of the Homeland Security Act of 2003, codified at 6 U.S.C. 531(d). The Secretary of the Treasury has delegated various authorities through Treasury Department Order 120–01 (Revised), dated December 10, 2013, to the TTB Administrator to perform the functions and duties related to the administration and enforcement of the FAA Act.

The TTB regulations promulgated under the FAA Act's Tied-house provisions are set forth in 27 CFR part 6. Section 6.21 of these Tied-house regulations (27 CFR 6.21) states that producers, wholesalers, and importers are prohibited from inducing, directly or indirectly, retailers to purchase alcohol beverages to the exclusion of such beverages offered for sale by other persons in interstate or foreign commerce. The Tied-house regulations at § 6.21(a) through (g) list the "means to induce" that can lead to a Tied-house violation. Generally, § 6.21(c) provides that an industry member may not furnish, give, rent, lend, or sell to a retailer any equipment, fixtures, signs, supplies, money, services, or other things of value. Subpart D of part 6 (the subpart D exceptions) sets forth certain exceptions to this rule and specifies that an industry member may furnish a retailer equipment, inside signs, supplies, services, or certain other things of value, under the conditions and within the limitations prescribed in that subpart. For example, promotional support items such as product displays, point of sale advertising materials, consumer advertising specialties, equipment and supplies, and other limited items and services are not considered unlawful inducements if given or sold to a retailer in compliance with the applicable conditions stipulated in the subpart D exceptions.

Section 6.41 of TTB's Tied–house regulations (27 CFR 6.41) provides that, subject to the subpart D exceptions, 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 FAA Act. Further, § 6.42 of the Tied-house regulations (27 CFR 6.42) provides that 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, constitutes indirectly furnishing a thing of value within the meaning of the FAA Act. Indirectly furnishing 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.

Included as one of the subpart D exceptions is § 6.99 (27 CFR 6.99), which provides:

> **§ 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.

II. Background

A. Regulation § 6.99 - Stocking, Rotation, and Pricing Service, Prior to 1995

Prior to 1995, the subject of providing shelving schematics to retailers was not addressed in § 6.99. In 1982, TTB's predecessor agency, the Bureau of Alcohol, Tobacco, and Firearms (ATF), charged Stein Distributing Company, a beer and wine wholesaler, with FAA Act violations for providing shelving services to retailers beyond those that were allowed at the time by the exception appearing in § 6.99.

In Stein, a wholesaler furnished to a retailer schematic diagrams that suggested how the retailer should arrange its beer and wine sections. Along with the schematic, the wholesaler also provided the labor necessary to clean and reset the retailer's shelves to conform to the approved diagram, and to routinely maintain shelves, coolers, and cold boxes in that alignment on a district-wide basis. In return, the retailer relinquished a degree of day-to-day control of the beer and wine sections to the wholesaler, who then, ATF alleged, used its influence to assign favorable shelf space and position to itself and deny the same advantage to its competitors.

Because ATF had not yet directly addressed in its regulations the issue of providing shelf schematics as one of the exceptions regarding inducements, the industry member's actions of furnishing shelf schematics and labor, which ATF believed induced the retailer to exclude other products, were cited as violations of the FAA Act. The case was heard by an Administrative Law Judge who determined that ATF had proven its allegations with respect to three retail chains. The action culminated in a Ninth Circuit Court of Appeals decision that affirmed ATF's findings of FAA Act violations and upheld ATF's order to show cause charging violations against Stein. (See Stein Distributing Company v. Dept. of Treasury, Bureau of Alcohol, Tobacco and Firearms, 779 F.2d 1407 (9th Cir. 1986).)

After Stein, ATF still remained concerned about industry members providing shelf schematics and shelf plans to retailers and the effects it could have on fair trade for

retailers and the regulated industry. For that reason, ATF seriously weighed industry concerns regarding schematics from 1986 through 1995. When amended regulations were being considered, as discussed below, industry members assured ATF that schematics themselves were in essence only suggestions used as a sales tool and had no intrinsic value to the retailer, other than to show how the retailer's shelves might be modified for increased profitability. Such a diagram's only value, they argued, would be in assisting the retailer's decision-making process, much the same as any other sales presentation, but with the advantage of being dramatically visual. ATF accepted that explanation of schematics in the early 1990s, and began, through letterhead rulings, to allow industry members to provide schematics to retailers with the caveat that it was not done in conjunction with other, impermissible, services.

B. ATF Adopts 27 CFR 6.99(b), Shelf Plan and Shelf Schematics

In 1994, partly as a result of an inter-industry petition to amend the trade practice regulations, ATF revisited the issue of shelf schematics when it published a notice of proposed rulemaking in the **Federal Register** (ATF Notice No. 794, April 26, 1994; 59 FR 21698). Notice No. 794 proposed several changes to the trade practice regulations, among which was a proposed amendment of § 6.99 to allow industry members to provide retailers with a recommended shelf plan or shelf schematic.

Industry commenters on the proposal did not unanimously support it as written. Some industry members raised concerns that allowing an industry member to provide a recommended shelf plan to a retailer could result in abuse of the regulation's intent. For example, an industry member may provide a biased analysis of retailer needs or furnish additional services that would transcend providing a recommended shelf plan.

Comments from industry assured ATF that the shelf plan and shelf schematics were merely sales tools in which the supplier suggests how the retailer might arrange products on its shelves and had no intrinsic value. It was further anticipated that a retailer would likely be receiving schematics from several competing distributors, and would be able to pick and choose among these suggested layouts—or ignore all of them. Accordingly, on May 26, 1995, ATF adopted § 6.99(b) as proposed. However, the preamble to the final rule stated that ATF would "revisit the subject if it appears that the new exception is being abused or creating a situation in which a retailer becomes dependent on a single industry member's purchasing advice." (See T.D. ATF–364, April 26, 1995; 60 FR 20424.) Since publication of the final rule, neither ATF nor TTB has promulgated any further rulemaking to amend § 6.99(b).

C. Current Practices Relating to Providing Shelf Plans and Shelf Schematics

Industry members have requested that TTB clarify its position with respect to what is and what is not permissible under the § 6.99(b) exception regarding recommended shelf plans and shelf schematics. This regulatory exception is limited, and merely allows industry members to furnish retailers with shelf plans and shelf schematics recommending product placement on the retailer's shelves. The limited nature of this exception is also clear in light of Congress's purpose in authorizing such exceptions.

When Congress delegated authority to the Secretary of the Treasury to specify certain practices as regulatory exceptions to the general prohibition against inducements in section 105(b), it did so with the limitation that such exceptions, among other things, must account for the quantity and value of articles involved and be consistent with the purposes of the Tied-house provision.

After examining the legislative history of the FAA Act, the District of Columbia Circuit Court of Appeals in National Distributing Co. v. United States Treasury Dep't, Bureau of Alcohol, Tobacco and Firearms, 626 F.2d 997, 1008 (D.C. Cir. 1980) noted that "the Tied-house provision was designed to prevent control by alcoholic beverage producers and wholesalers over retailer outlets." Control over retailers, the Court of Appeals later explained in Fedway Associates, Inc. v. U.S. Treasury Dept., BATF, 976 F.2d 1416, 1420–1424 (D.C. Cir. 1992), "involve[s] a link or tie between the wholesaler or producer and the retailer", resulting in a relationship that threatens the retailer's independence. To illustrate this, Judge Ginsburg, in the Fedway decision, quoted with approval the following portion of the ATF's Director's decision in the Stein case:

> [T]he concern under the FAA Act is not that displaying products in a particular manner affects sales or that poor selling wines were eliminated from retailer stores. The concern is that these . . . buying decisions were being made by the wholesaler, or by a retailer so strongly influenced by the wholesaler that no independent decision is being made. That this was the situation (here) . . . is exemplified by the testimony of other wholesalers that they were directed by managers of retailer chains . . . to contact a Stein employee to get one of their products on the shelf at the store. (See Id. at 1422.)

In enacting the FAA Act, Congress recognized that monopolistic control exercised by suppliers and wholesalers in the alcohol beverage industry was a real threat and viewed the abuses prohibited by the Tied-house provision as the principal means of creating and maintaining such monopolies. Accordingly, the report of the House Ways and Means Committee with respect to the Tied-house provision provided that:

> The forgoing practices [note, those prohibited by this subsection] have in this industry constituted the principal abuses whereby interstate and foreign commerce have been restrained and monopolistic control has been accomplished or attempted. The most effective means of preventing monopolies and restraints of trade in this industry is by prohibiting such practices, thereby striking at the causes for restraints of trade and monopolistic conditions and dealing with such conditions in their incipiency. (See Hearings on H.R. 8539 before the Committee on Ways and Means, House of Representatives, 74th Cong., 1st Sess. 58 (1935).)

Although the language of § 6.99(b) is clear, twenty years have passed since the regulation was promulgated. When ATF implemented the § 6.99(b) exception in 1995, it was assured that the provision of a shelf plan or shelf schematic would be used as a stand-alone marketing tool and that the schematics had little or no intrinsic value. As

discussed above, the expectation was that a retailer would receive such plans from multiple sources.

During its review of current practices, TTB discovered that, presumably under the auspices of the § 6.99(b) exception, some industry members are providing schematics *as well as* additional services that far exceed the exception in § 6.99(b), which unambiguously exempts only the simple act by an industry member of providing to a retailer a recommended shelf plan or shelf schematic from the provisions of section 105(b)(3) of the FAA Act. These additional services constitute "things of value," therefore serving as a means to induce under § 6.21 of the TTB regulations. A violation of the FAA Act would ensue if such practices result in exclusion of a competitor's product, in whole or in part, with the requisite connection to interstate or foreign commerce. (A similar State law is required only in the case of malt beverages, pursuant to the penultimate paragraph of section 105.) In determining whether exclusion exists, TTB will consider whether the practice places the retailer's independence at risk as defined in 27 CFR § 6.152 and/or § 6.153. Practices involving an industry member in a retailer's day-to-day operations, such as many of those described in this Ruling, are indications that the retailer's independence is at risk. (See 27 CFR 6.153(e).)

III. TTB Finding:

This Ruling illustrates what a shelf plan or shelf schematic is, and is not, relative to the exception in 27 CFR 6.99(b). A shelf plan or shelf schematic provided under this exception is a simple sales tool offering options as to how an industry member thinks a retailer's shelves should appear. As such, TTB does not object to furnishing retailers with such shelf plans or shelf schematics, regardless of their complexity. However, as revealed by TTB's review of industry practices, some industry members do not offer a mere shelving plan alone but also include additional services, sometimes of significant value, that exceed the 27 CFR 6.99(b) exception's plain language.

Held therefore, Furnishing retailers with a shelf plan or shelf schematic, as stated unambiguously at 27 CFR 6.99(b), is not an inducement under section 105(b)(3) of the FAA Act (27 U.S.C. 205(b)(3)).

Held further: Additional services, such as those described in this Ruling, furnished by an industry member to a retailer, with respect to alcohol beverages, are not exempted by 27 CFR 6.99(b). The practice of providing such services will therefore be considered a means to induce within the meaning of section 105(b)(3) of the FAA Act, and as such, will be subject to TTB scrutiny and investigation. If such practice results in exclusion of competitor products, in whole or in part, such that the retailer's independence is at risk, with the requisite connection to interstate or foreign commerce and if (in the case of malt beverages only) there is a similar State law, the practice would violate the FAA Act. Such practices that are not exempted by 27 CFR 6.99(b) and that may result in TTB scrutiny and investigation include, but are not limited to:

(1) Assuming, in whole or in part, a retailer's purchasing or pricing decisions, or shelf stocking decisions involving a competitor's products;

(2) Receiving and analyzing, on behalf of the retailer, confidential and/or proprietary competitor information;

(3) Furnishing to the retailer items of value, including market data from third party vendors;

(4) Providing follow-up services to monitor and revise the schematic where such activity involves an agent or representative of the industry member communicating (on behalf of the retailer) with the retailer's stores, vendors, representatives, wholesalers, and suppliers concerning daily operational matters (such as store resets, add and delete item lists, advertisements and promotions);

(5) Furnishing a retailer with human resources to perform merchandising or other functions, with the exception of stocking, rotation or pricing services of the industry member's own product, as permitted in § 6.99(a) of the TTB regulations.

IV. Questions:

If you have questions about this Ruling, please contact Lisa Gesser of the Regulations and Rulings Division at **(202) 453-2292** or by e-mail: FAARegs@ttb.gov.

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/s/

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