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