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