retailer when the arrangement involves a continuing business relationship which restricts the retailer's ability to make free economic choices on which brands of products to purchase. In effect, competition is restricted because the retailer who is dependent on or tied to an industry member cannot make free and rational business choices on whether to make a current purchase from another industry member based on current business considerations such as consumer demand or lower prices offered by the competition.

The proposed regulations identified threats to a retailer's independence which include: a wholesaler's partial ownership of a retailer, sales where the wholesaler conditions the purchase of one distilled spirits product on the retailer purchasing another distilled spirits product at the same time, and wholesaler control over the retailer through controlling the resetting of the products on a retailer's premises.

Commenters on the other practices listed in § 6.152 requested several amendments to these practices. The law firm of Schreiber, Simmons, MacKnight & Tweedy, commenting on behalf of an Asian brewer, expressed concern that because of the way paragraph (c) is worded, it appears that partial ownership of a retailer by an industry member is automatically deemed to put retailer independence at risk. E. & J. Gallo Winery also commented on this section, recommending that ATF allow industry members to own small amounts of stock in publicly traded retailers. ATF revised the wording of this section to show use of the ownership of a less than 100 percent interest in a retailer to influence the retailer's purchases is the act deemed to put retailer independence at risk, not partial ownership alone.

With respect to all the practices listed in proposed § 6.152, ATF will also be required to determine whether the practice results in the retailer purchasing less than it otherwise would have of a competitor's product.

ATF also proposed to revise and consolidate several of the provisions contained in Subpart D of Part 6 of the current regulations which find that certain practices will not result in exclusion under the tied-house provisions (that is, safe harbors).

The classification of these practices in Subpart D of Part 6 is intended to provide guidance to the regulated industry so that legitimate product marketing programs can be developed without the uncertainty of a potential Federal enforcement action. Legitimate product marketing encourages competition, by large and small

businesses alike, on the basis of price, product quality and service. (Proposed revisions to these regulatory exceptions and related comments are examined in detail in the discussion of changes to individual sections, below.)

Commercial Bribery

Section 105(c) of the FAA Act makes it unlawful for an industry member to induce through any of the following means, any trade buyer 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 commercial bribery; or
- (2) By offering or giving any bonus, premium, or compensation to any officer, or employee, or representative of the trade buyer.

Commercial bribery situations involve the receipt of money or a premium by an officer, employee, or representative of the trade buyer. Payments made directly to business entities (i.e., the corporation, partnership, or individual owning the business) for the use of the business do not constitute a commercial bribe. The independence of the trade buyer is threatened in a commercial bribery situation because the officer, employee, or representative of the trade buyer is making a purchasing decision as a result of the money or premium received personally and not based on business or marketing factors which further the interests of the trade buyer

Proposed section 10.52 identifies promotional conduct by an industry member that involves the payment of money or another premium to an employee or representative of a trade buyer without the knowledge of the trade buyer as practices under the Act that place trade buyer independence at risk. The Fedway court noted that previous case law upheld as actionable these types of payments. These payments were viewed as anticompetitive because one competitor gained a competitive advantage over another competitor by reason of a "secret and corrupt dealing with employees or agents of prospective purchasers." See, American Distilling Co. v. Wisconsin Liquor Co., 104 F.2d 582 (7th Cir. 1939). Even where such practices exist, ATF would still be required to demonstrate that they affect the trade buyer's purchases in order to establish exclusion. With respect to those practices not mentioned herein, ATF would be required to demonstrate

the existence of both of the elements of exclusion set forth above.

ATF also proposed adding a new section 10.53 to discuss practices which do not place trade buyer independence at risk, but proposed no specific examples.

These two sections were adopted in the final rule without any changes.

Criteria for Determining Retailer or Trade Buyer Independence

ATF proposed adding §§ 6.153, 8.54 and 10.54 to list criteria by which ATF would evaluate whether or not a particular practice places retailer or trade buyer independence at risk. Elements which have repeatedly been mentioned in court cases are degree of control exercised over trade buyers' purchasing decisions, duration of the practice, indiscriminateness and contractual or other enforceable requirements. The goal of regulating trade practices in the alcoholic beverage industry has been identified as healthy competition in order to insure the best possible price, quality and selection for the consumer and to prevent formation of a corrupt black market.

The proposed criteria are indications that a particular practice, other than those in sections 6.152 and 8.52, places retailer independence at risk. A practice need not meet all of the criteria specified in order to place retailer independence at risk. The proposed criteria are:

- (a) The practice restricts or hampers the free economic choice of a retailer to decide which products to purchase and the quantity in which to purchase them for sale to consumers.
- (b) The industry member obligates the retailer to participate in the promotion to obtain the industry member's product.
- (c) The retailer has a continuing obligation to purchase or otherwise promote the industry member's product.
- (d) The retailer has a commitment not to terminate its relationship with the industry member with respect to purchase of the industry member's products.
- (e) The practice involves the industry member in the day-to-day operations of the retailer. For example, the industry member controls the retailer's decisions on which brand of products to purchase, the pricing of products, or the manner in which the products will be displayed on the retailer's premises.
- (f) The practice is discriminatory in that it is not offered to all retailers in the local market on the same terms without business reasons present to justify the difference in treatment.