Industry Circular

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Department of the Treasury

Bureau of Alcohol, Tobacco and Firearms

Washington, DC 20226

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TRADE PRACTICE ENFORCEMENT

Proprietors of Distilled Spirits Plants, Bonded Wine Cellars, Taxpaid Wine Bottling Houses, Brewers, Importers, Wholesale Malt Beverage Dealers, Wholesale Liquor Dealers, and Others Concerned:

PURPOSE. This circular is to advise members of the regulated industries of the Bureau of Alcohol, Tobacco and Firearms (ATF) position concerning "tied house" arrangements and "commercial bribery" transactions under the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. sections 205(b) and (c). The circular is issued in light of Foremost Sales Promotions, Inc. v. Director, Bureau of Alcohol, Tobacco and Firearms, 860 F.2d 229 (7th Cir. 1988).

BACKGROUND. The Foremost case arose after an enforcement action by ATF against an industry member for making advertising payments to Foremost Sales Promotions, Inc. (Foremost). Foremost is a marketing company and a loosely fabricated franchise which, for a fee, provides advertising for suppliers' products and independent retail franchisees.

Foremost required payments from suppliers for featured advertising of the suppliers' products and for associated promotional services. While the Foremost retailers neither had control over the products to be advertised nor were obligated to either carry or price the products as advertised, ATF determined that the Foremost retailers regularly honored the advertised prices and stocked most or all of the advertised products, to the partial exclusion of nonfeatured products offered for sale by other suppliers. ATF accepted an offer in compromise in 1981 from a supplier who used the services of Foremost. The offer in compromise was to settle the violations by that industry member of 27 U.S.C. sections 205(b)(4) and (c)(2).

Subsequently, Foremost filed an action in Federal District Court seeking both an injunction preventing the Bureau from taking similar actions against other suppliers and a declaratory judgment that the advertising payments by suppliers to Foremost did not violate the cited provisions of the FAA Act. The court did not issue the injunction.

With respect to the declaratory judgment, the district court ruled in favor of Foremost, and ATF appealed. On appeal, the Seventh Circuit addressed the legal standard for violating sections 205(b)(4) and (c)(2), and concluded that based on the history and purpose of the FAA Act, it should not be interpreted literally. Specifically, the court held that transactions between suppliers and retailers do not "induce" the "exclusion in whole or in part" of competing suppliers' products unless "their purpose or potential

effect is to lead to substantial control by the supplier over ostensibly independent purchasers."

DISCUSSION. ATF enforcement policy has been, and will continue to be, based upon the literal statutory language. Section 205 does not, on its face, call for an independent evaluation of either the purpose or the potential effect of any particular trade practice. Further, in accordance with the legislative history of the FAA Act, and in consideration of its purpose, it is our view that Congress, by design, made a judgment and identified in Section 205, those trade practices which would have a detrimental effect on fair competition. Congress, therefore, made such trade practices unlawful where an interstate commerce nexus is present, provided that such practice results in even partial exclusion of any competitor's product(s).

The Court of Appeals decision in Foremost reflects a substantial departure from over 50 years of consistent enforcement of the FAA Act based upon this literal interpretation of both the statute and the elements of an offense. ATF believes the decision is incorrect, and its enforcement policy outside the Seventh Circuit will not change. Within the Seventh Circuit (which consists of the states of Illinois, Wisconsin, and Indiana), ATF will limit consideration of the Foremost decision to cases under sections 205(b) and (c), the tied house and commercial bribery provisions. We do not interpret the decision as establishing any new standard with respect to exclusive outlet or consignment sale cases under sections 205(a) or (d).

It is not possible to describe how Foremost will affect ATF enforcement policies in cases which would be subject to review by the Seventh Circuit. Both the analysis utilized and the standard established by the court will necessitate a case by case approach. On the one hand, the new standard established by the Foremost case would not bar every type of enforcement action which ATF might bring under the traditional interpretation of the FAA Act. For example, the Foremost decision cites, with approval, the Ninth Circuit decision in Stein Distributing Co. v. Department of Treasury, 779 F.2d 1409 (9th Cir. 1986), where ATF suspended the permit of a wholesaler who supplied retailers with both the diagrams and the labor necessary to restock shelves. However, this new threshold requirement obviously makes it less likely that practices which involve only indirect intrusion into a retailer's operations, such as the cooperative advertising arrangement at issue in Foremost, could be found to violate the FAA Act.

INQUIRIES. Inquiries concerning this circular should refer to its number and be addresses to the Associate Director, (Compliance Operations), Bureau of Alcohol, Tobacco and Firearms, 1200 Pennsylvania Avenue, NW., Washington, DC 20226.

Signed by
Stephen Higgins

Director