



Federal Regulation of Crossover Beverages

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Agenda

Federal authority

Definitions

Premarket: formulas and labeling

Post-market: advertising and trade practices

Questions



TTB Mission

COLLECT the taxes on alcohol, tobacco, firearms, and ammunition

PROTECT the consumer by ensuring the integrity of alcohol products

ENSURE only qualified businesses enter the alcohol and tobacco industries

PREVENT unfair and unlawful market activity for alcohol and tobacco products



Internal Revenue Code

The Internal Revenue Code (IRC) implementing regulations cover issues such as:

- Qualification/registration of bonded premises
- Production requirements
- Formulas (for some)
- Recordkeeping/reports
- Taxes
- Basic labeling/marketing

The IRC regulations apply to all alcohol beverage products with $\geq 0.5\%$ alc./vol., regardless of whether the product is sold interstate



Federal Alcohol Administration Act

- The Federal Alcohol Administration (FAA) Act implementing regulations (27 CFR) cover issues such as:
 - Labeling
 - Certificates of Label Approval (COLA)
 - Qualification (Basic Permit)
 - Advertising
 - Trade practices
 - Labeling proceedings

The FAA regulations apply to wines \geq 7% alc./vol.; distilled spirits; and malt beverages-- and only if sold interstate!



What is a “Crossover Product”?



TTB Definitions

TTB regulations do not define any of these (or similar) terms:

- RTD
- Hard
- Spiked
- Canned cocktail
- Crossover product

Under federal law, crossover products could be regulated as beer, malt beverages, wine, or distilled spirits, depending on how they are made





Beer

“Beer” is an IRC definition

Beer, ale, porter, stout, and other similar **fermented beverages** (including saké and similar products)* of any name or description

- containing **one-half of 1% or more of alcohol by volume (alc by vol)**
- brewed or **produced from malt**, wholly or in part, or from any **substitute for malt**
 - Substitutes for malt are rice, grain of any kind, bran, glucose, sugar, and molasses

*Not covered in this presentation

27 CFR 25.11



Malt Beverage

“Malt beverage” is an FAA Act definition

A beverage made by the **alcoholic fermentation**

- of an infusion or decoction, or combination of both,
- in potable brewing water,
- of **malted barley with hops**, or their parts, or their products,
- and with or without other malted cereals,
- and with or without the addition of unmalted or prepared cereals, other carbohydrates or products prepared therefrom,
- and with or without the addition of carbon dioxide, and
- with or without other wholesome products suitable for human food consumption

27 CFR 7.10



Wine

FAA Act Wine as defined in 26 U.S.C. 5381-5392, and other alcoholic beverages not so defined but made in the manner of wine; only if for non-industrial use and containing **not less than 7% alc by vol** and **not more than 24% alc by vol** (27 USC 211(a)(6))

IRC: Products produced on bonded wine premises from grapes, other fruit, or other suitable agricultural products containing **not more than 24% alc by vol** (27 CFR 24.10)



Distilled Spirits

FAA Act: Ethyl alcohol, hydrated oxide of ethyl, spirits of wine, whiskey, rum, brandy, gin, and other distilled spirits, including all dilutions and mixtures thereof, for non-industrial use. (27 U.S.C. 211(a)(5))

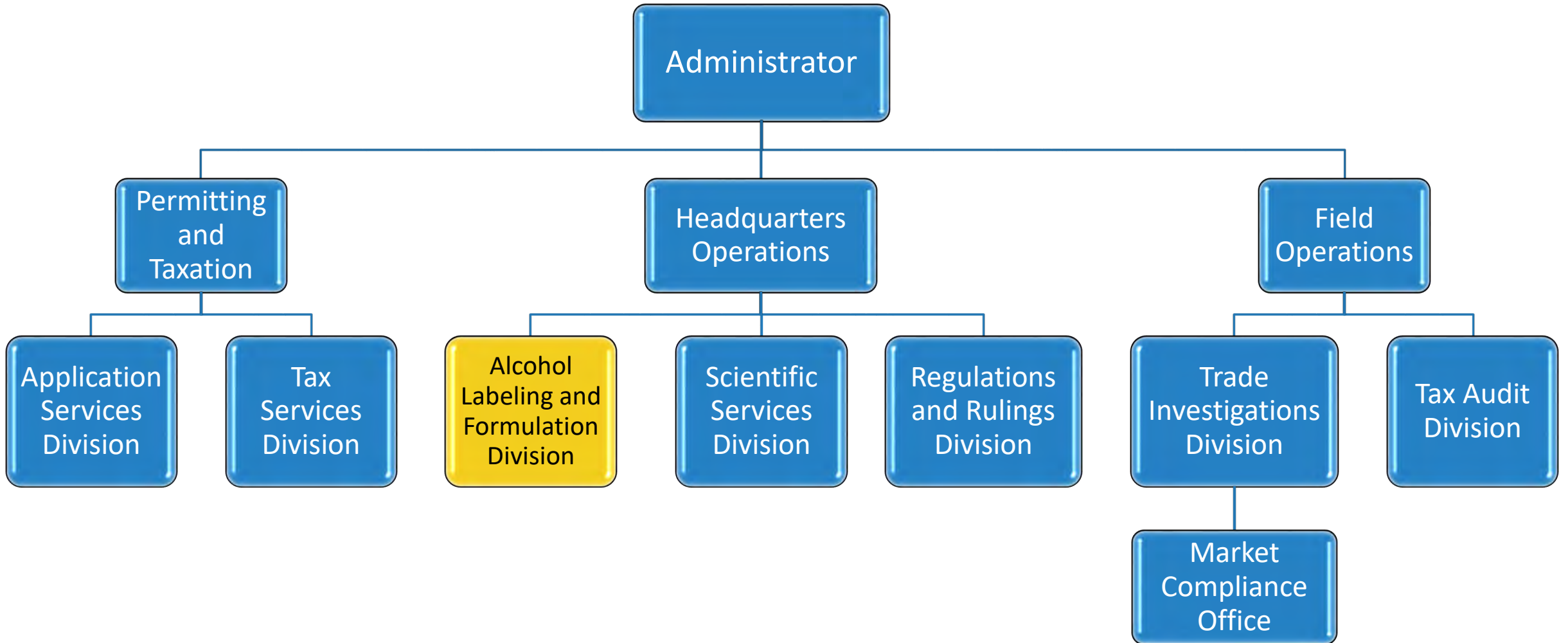
IRC: Ethyl alcohol, ethanol, or spirits of wine in any form (including all dilutions and mixtures thereof from whatever source or by whatever process produced). (26 U.S.C. 5002(a)(8))



Premarket Approval: Formulas & Labels



TTB Organizational Chart





Headquarters Operations: ALFD

Alcohol Labeling and Formulation Division:

- Processes applications for formulas
- Processes applications for label approval

- Located in Washington, DC
- Toll-Free: 866-927-2533
- Web Form: [Submit Online Inquiry](#)



Formulas— Any Alcohol Beverages



- Generally required when adding coloring or flavoring materials
 - Adding carbonation to any distilled spirit requires formula approval
- Obtained before product is produced or imported and prior to label approval (if COLA is required)



Labeling – FAA Act Products

- TTB regulations outline:
 - What must be on the label
 - What may be on the label if certain rules are followed
 - What may not be on the label
- Products that don't fit into the standards of identity must be labeled with a truthful and adequate statement of composition



Labeling – FAA Act Products

- Generally, if the product will travel in interstate commerce, the bottler must get a Certificate of Label Approval (COLA) before bottling/canning product
- TTB conducts review of the label in its **totality**, e.g.:
 - Does it have all mandatory information, including the health warning statement?
 - Does it contain any prohibited information?
 - Is it misleading as to its contents or origin?
 - Is it clearly labeled as an alcohol beverage product?







6.0% ALC/VOL

**DUNKIN'™
SPIKED**

original
**ICED
COFFEE**

21+
CONTAINS
ALCOHOL
12 FL OZ
(355 mL)

6.0% ALC/VOL

**DUNKIN'™
SPIKED**

original
**ICED
COFFEE**

6.0% ALC/VOL

**DUNKIN'™
SPIKED**

original
**ICED
COFFEE**

SHAKE WELL

PREMIUM MALT BEVERAGE WITH REAL COFFEE, NATURAL FLAVOR AND ARTIFICIAL COLOR


GOVERNMENT WARNING: (1) ACCORDING TO THE SURGEON GENERAL, WOMEN SHOULD NOT DRINK ALCOHOLIC BEVERAGES DURING PREGNANCY BECAUSE OF THE RISK OF BIRTH DEFECTS. (2) CONSUMPTION OF ALCOHOLIC BEVERAGES IMPAIRS YOUR ABILITY TO DRIVE A CAR OR OPERATE MACHINERY, AND MAY CAUSE HEALTH PROBLEMS.

AMERICAN SPIKED BEVERAGES—BOSTON, MA

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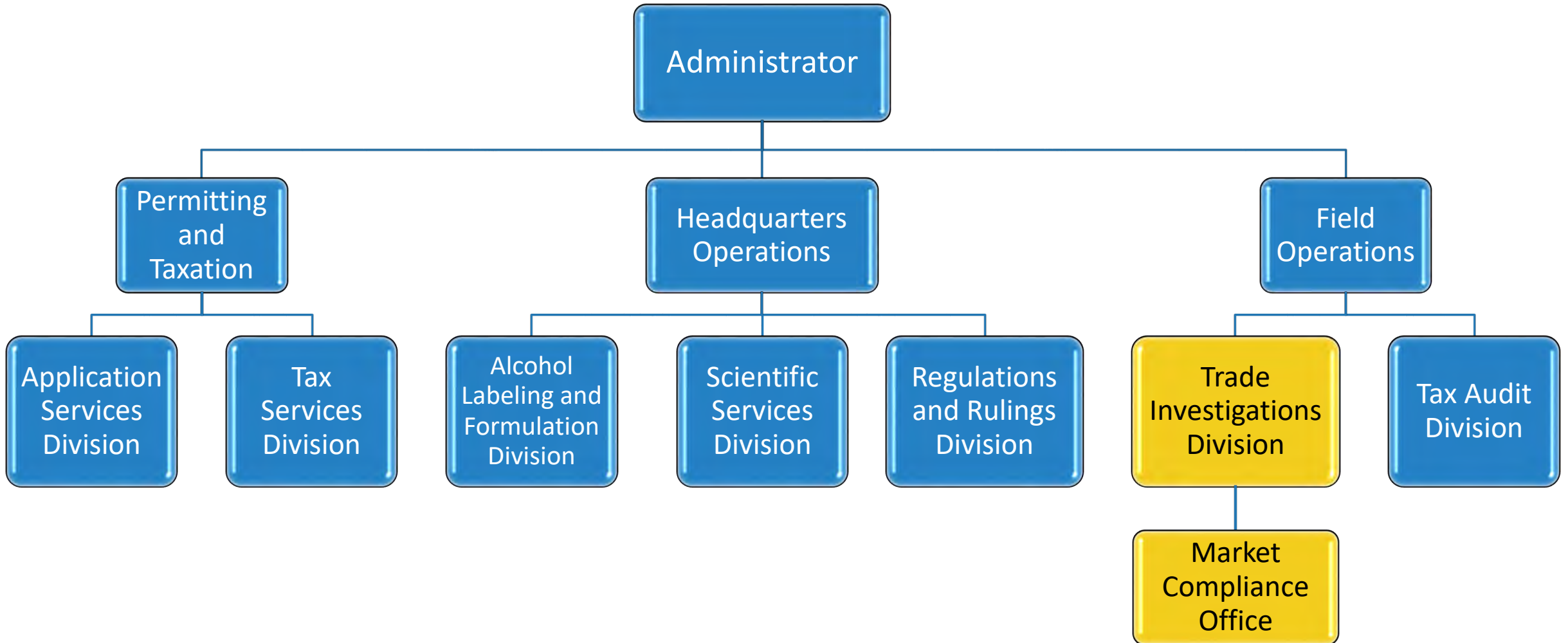


Post-market: Advertising & Trade Practices





TTB Organizational Chart





Field Operations: Trade Investigations Division

Ensures and promotes industry compliance with the laws and regulations TTB administers through education and investigations in 6 Districts. Activities include:

- Ensuring only qualified applicants are granted permits to engage in production and distribution of alcohol and tobacco
- Investigating allegations of trade practice violations in marketplace
- Examining Certificates of Label Approvals (COLAs) to deter unauthorized usage

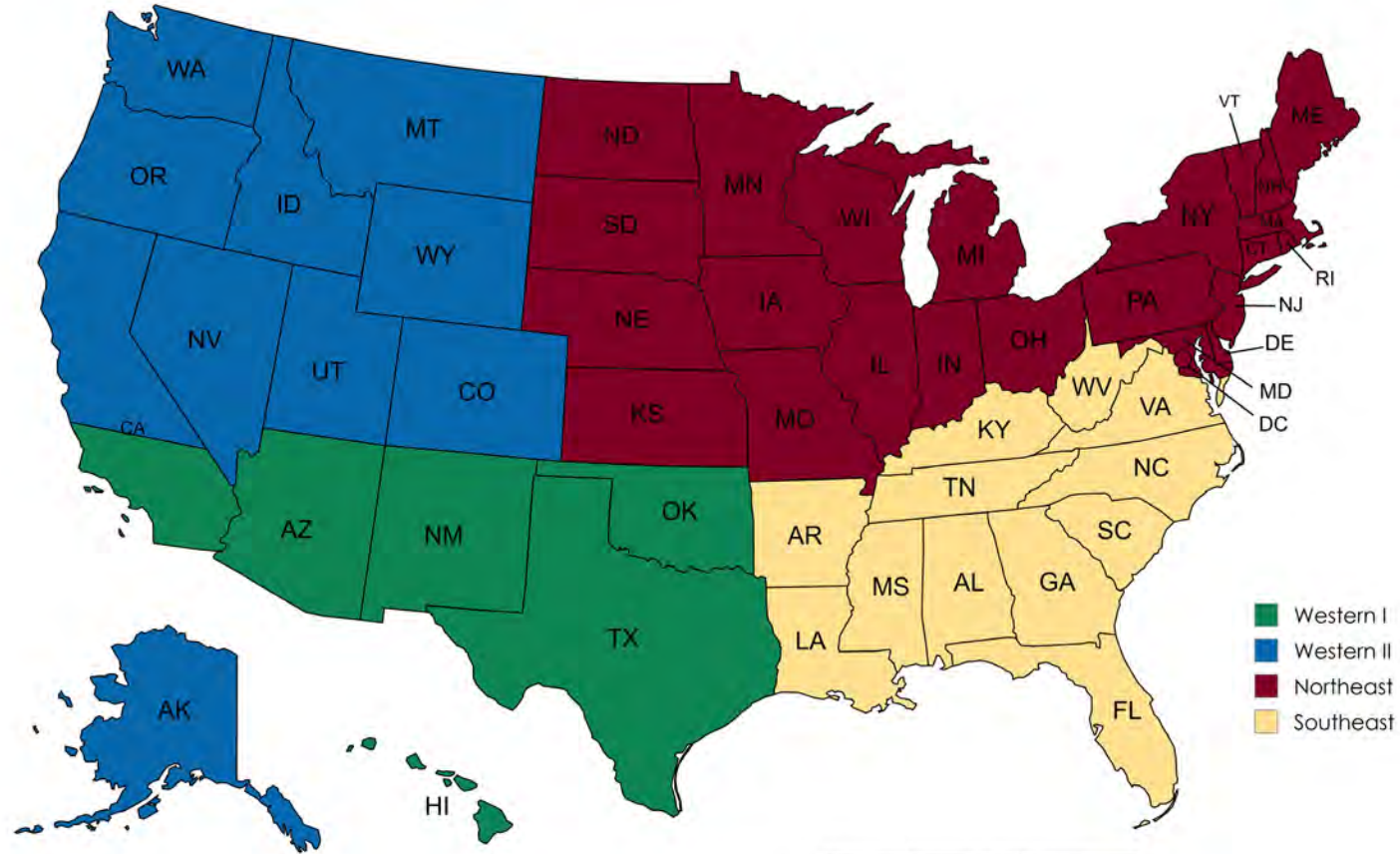


Trade Investigations Division

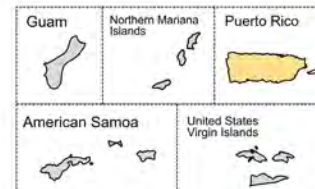
- Preventing misleading labeling and advertising of alcohol beverages
- Ensuring public safety by responding to credible information suggesting health-related contamination or adulteration of alcohol product
- Conducting investigations of suspected alcohol or tobacco tax evasion



Trade Investigations Division Districts



- Western I
- Western II
- Northeast
- Southeast



Created with mapchart.net



Types of TTB Investigations

- Application Investigation
- Post Application Investigation
- Product Integrity Investigation
- Revenue Investigation
- Operating without a Permit Investigation
- Trade Practice Investigation



Field Operations: MCO

Market Compliance Office (MCO): Ensures industry compliance in the marketplace through programs addressing consumer complaints, trade practices, product recalls, and advertising reviews.

MCO Customer Service Line: 202-453-2251

Email:

- Market.Compliance@ttb.gov
- TradePractices@ttb.gov



Advertising – FAA Act Products

- Review of advertising material on website and social media accounts.
- Review any point of sale (POS) materials for violations, such as:
 - Sales pamphlets
 - Posters
 - Promotional displays, or
 - Written, printed, or graphic materials in stock



Advertising – FAA Act Products

Common issues for crossover products:

- False or misleading health claims
- Advertising not consistent with approved COLA
- Use of prohibited statements



Advertising– FAA Act Products

TTB monitors the advertising of FAA Act alcohol beverages through a combination of:

- 1) referrals and complaints about specific alcohol beverage advertisements,
- 2) industry member requests for advertising pre-clearance, and
- 3) internal selections of advertisements for review



Trade Practices– FAA Act Products

Purposes:

- Prevent wholesaler, importer and producer control over retailer (and accompanying corruption and over-consumption)
- To help keep the playing field level among industry members



Trade Practices Overview

There are four trade practices that are prohibited for producers, wholesalers, and importers:

1. Exclusive Outlet
2. Tied House
3. Commercial Bribery
4. Consignment Sales

27 U.S.C. 205 (a-d)



Jurisdiction: Interstate and Foreign Commerce

Primary Clause (Excludes Consignment Sales):

The excluded competitors' products must be **sold or offered for sale in interstate or foreign commerce** and **ONE** of the following:

1. If the inducement requirement or offer is made in the course of interstate or foreign commerce, this clause is satisfied if the prohibited conduct crosses state lines (i.e. product or money crosses state lines).
2. Applies if such a person engages in the practices to such an extent as to substantially restrain or prevent transactions in interstate or foreign commerce (If during the period of the violation, the **excluded product moves in interstate or foreign commerce** and the prohibited act causes the retailer not to purchase it).
3. Applies if the **direct effect** of such requirement is to prevent, detour, hinder or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce. This clause requires some sort of direct interference with interstate or foreign commerce.



Jurisdiction: Similar State Law (Penultimate Clause)

In the case of **Malt Beverages**:

The trade practice provisions apply to transactions between a retailer or a trade buyer in any state and an industry member outside such state **only** if the retailer's or trade buyer's state law imposes similar requirements for in-state transactions.

NOTE: Similar doesn't mean exact, and it doesn't even have to be related to alcohol, as long as the state law is similar in nature.



Trade Practice Terms

- **Industry Member:** Anyone who produces, distributes or imports alcohol beverage products. This also includes a bottler and warehousemen. Must have a permit.
- **Wholesaler:** Any person who sells alcoholic beverages at wholesale to retailers. Must have a permit.
- **Importer:** Any person who imports distilled spirits, wines, or beer into the United States. Must have a permit.
- **Retailer:** Anyone who sells alcohol beverage products to consumers.
- **Trade Buyer:** Retailer or Wholesaler of alcohol beverage products.



Exclusion

Exclusion is an element of proof in **Exclusive Outlet, Tied House** and **Commercial Bribery** cases.

To prove a violation, TTB must show that the prohibited practice resulted in the exclusion of competing products.

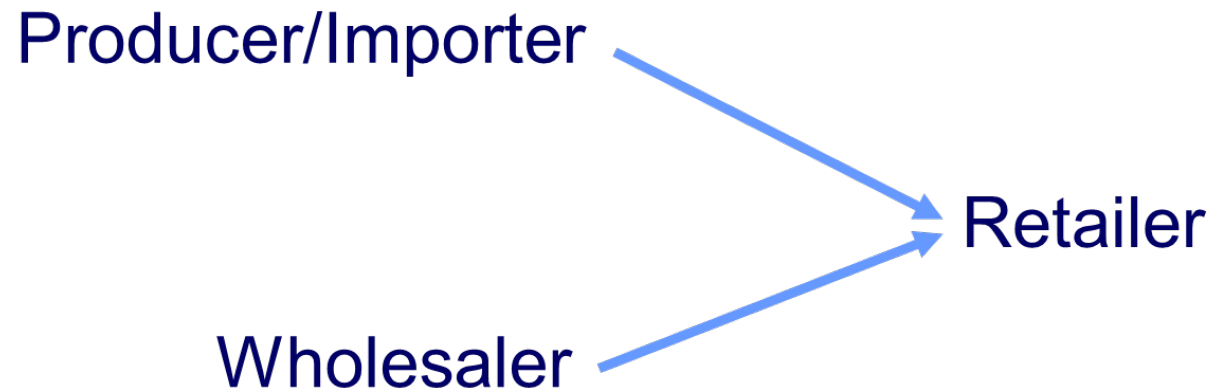
Elements to exclusion:

1. The practice places or has the potential to place a retailer's independence at risk by means of a "tie or link" between the industry member and the retailer OR by any other means of industry member control.
2. The practice results in the retailer purchasing less of a competitor's product that it otherwise would have.



Exclusive Outlet

It is unlawful for an **industry member** to directly or indirectly **require** a retailer, “by agreement or otherwise” to purchase alcohol from that industry member **to the exclusion** of alcohol sold or offered for sale in interstate or foreign commerce by others.



27 U.S.C. 205(a) / 27 CFR Part 8



Exclusive Outlet

Deals with “Requirements to Purchase”:

- Voluntary industry member-retailer purchase agreements (Contracts)
- Coercion through acts or threats of physical or economic harm



Exclusive Outlet: Practices with Exclusion

Examples of practices that result in exclusion **and** meet the requirements for exclusion:

- Purchases of alcoholic beverages by a retailer as a result, directly or indirectly, of a threat or act of physical or economic harm by the industry member.
- Contracts between an industry member and a retailer which require the retailer to purchase alcoholic beverages from that industry member and expressly restrict the retailer from purchasing, in whole or in part, such products from another industry member.

NOTE: 27 CFR 8.52 is different in that the practices above result in exclusion. No requirement to establish the loss of sales by the competitor.

27 CFR § 8.52



Exclusive Outlet: Criteria for Determining Retailer Independence

- Practices under **27 CFR § 8.54** have the **potential** to be exclusive outlet violations but a sales analysis is needed to show if exclusion exists.
- The criteria are indications that a particular practice, other than those in 27 CFR § 8.52 and 8.53, places retailer independence at risk.
- A practice need not meet all the criteria to place retailer independence at risk.

27 CFR § 8.54



Exclusive Outlet: Criteria for Determining Retailer Independence

- a) The practice restricts or hampers the free economic choice of a retailer to decide which products to purchase or 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.



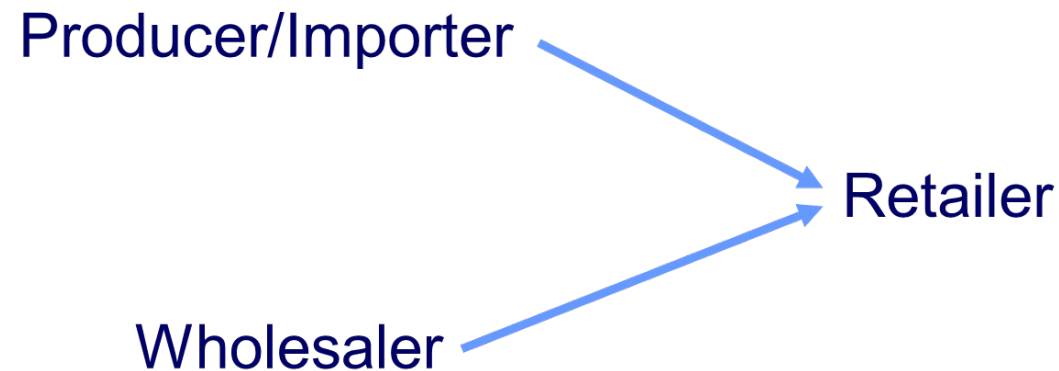
Exclusive Outlet: Criteria for Determining Retailer Independence

- 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 way 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.



Tied House

It is unlawful for an **industry member** to **induce**, directly or indirectly, a retailer to purchase alcohol beverages from the industry member to the exclusion of alcoholic beverages offered for sale by other persons.



27 U.S.C. 205(b) / 27 CFR Part 6



Tied House: 7 Means to Induce

1. By acquiring or holding any interest (100% is ok) in any license with respect to the premises of the retailer;
2. By acquiring any interest (100% is ok) in the real or personal property owned, occupied, or used by the retailer in the conduct of his business;
3. By furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services or other thing of value, subject to the exceptions contained in subpart D;
4. By paying or crediting the retailer for any advertising, display, or distribution service (i.e. Slotting Allowance);
5. By guaranteeing any loan or the repayment of any financial obligation of the retailer;
6. By extending to the retailer credit for a period more than the credit period usual and customary (30 days) to the industry for the class of transactions or
7. By requiring the retailer to take and dispose of a certain quota of any such products (i.e., Tie In Sale).



Tied House: Practices which put Retailer Independence at Risk

- The act by an industry member of resetting stock on a retailer's premises (other than stock offered for sale by the industry member).
- The act by an industry member of purchasing or renting display, shelf, storage or warehouse space (i.e., slotting allowance).
- Ownership by an industry member of less than a 100 percent interest in a retailer, where such ownership is used to influence the purchases of the retailer.
- The act by an industry member of requiring a retailer to purchase one alcoholic beverage product to be allowed to purchase another alcoholic beverage product at the same time.

Note: 27 CFR 6.153 are additional practices that MAY be indications that a retailer's independence is at risk.

27 CFR § 6.152



Tied House: Subpart D Exceptions

Only applies to the 205(b)(3) provision and generally not a Means to Induce
(Red font: recordkeeping requirements)

- 1. Product Displays-** May not exceed \$300 per brand at each retail establishment.
- 2. Point of Sale Advertising Materials-** Posters, Coasters, electric signs, clocks etc.
- 3. Temporary Retailers-** Furbishing things of value to temporary retailer does not constitute a means to induce. Cannot be engaged in business as a retailer for more than 4 consecutive days per event and not more than 5 events in a calendar years.
- 4. Equipment and Supplies-** Selling equipment and supplies to a retailer ok if at price paid and money is collected within 30 days. Can't pay to install equipment but can service it.
- 5. Samples-** Furnishing or giving samples of alcoholic products for free is ok as long as they haven't purchased the brand within the last 12 months. Sample amounts are limited.
- 6. Combination Packaging-** Combining alcoholic products with other non-alcoholic products.



Tied House: Subpart D Exceptions

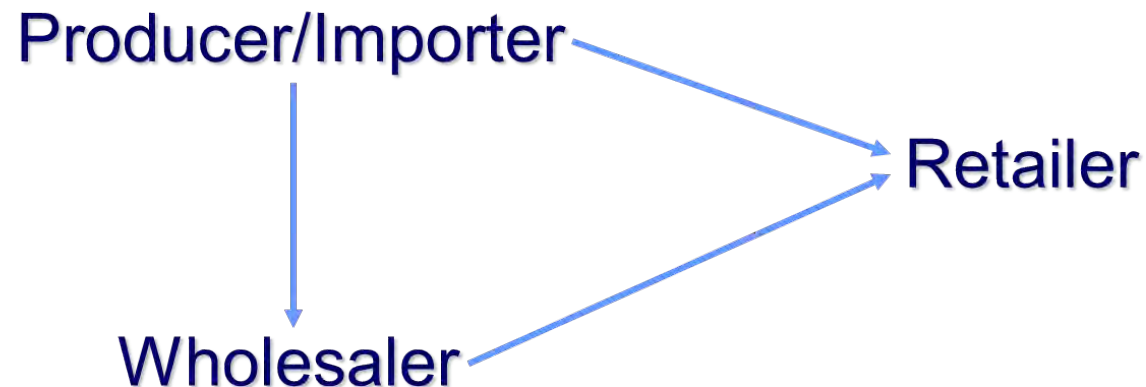
7. **Educational Seminars-** Ok to give or sponsor educational seminars for employees of retailers.
8. **Consumer Tasting-** The industry member can give consumer samples at the retail establishment must be at the ordinary price if purchased from retailer.
9. **Consumer Promotions-** Furnishing **coupons** to consumers ok
10. **Advertising Services-** Listing two or more unaffiliated retailers in advertisement ok
11. **Sticking, rotation and pricing services-** Ok to move your own product but no one else's. You may give them a plan to do it (ie Category Management) but may not do it yourself.
12. **Participation in retailer associated activities-** Displaying your own product is ok, pay the same price as attendees, make payments for advertising not to exceed \$300.
13. **Merchandise-** Ok to sell other merchandise from other business.
14. **Outside Signs-** May not exceed \$400.



Commercial Bribery

It is unlawful for an industry member to induce any **“trade buyer”** (wholesaler/retailer) to purchase alcohol from the industry member to the exclusion of those sold by others by:

- Commercial bribery;
- Offering or giving any bonus, premium or compensation to employees, officers, or representatives of trade buyer.



27 U.S.C. 205(c) / 27 CFR Part 10



Commercial Bribery

“Commercial Bribery” under section 205(c)(1) means:

- The practice of sellers paying money or making gifts to employees or agents to induce them to promote purchases by their own employers from the sellers offering the secret inducements.
- Things of value given to officers, employees, or representatives of trade buyers that promote sales of industry member’s products can indirectly induce the trade buyers to purchase more of those products (27 U.S.C. 205(c)(2))
- Note: Industry member may give things of value to wholesale entity unless wholesaler is mere conduit to the employees (27 CFR 10.23)



Commercial Bribery: Practice which puts Trade Buyer's Independence at Risk

Industry member payments of money to the employee(s) of a trade buyer **without** the **knowledge or consent** of the trade buyer-employer in return for the employee agreeing to order distilled spirits, wine, or malt beverages from the industry member.

Note: Additional potential criteria for determining trade buyer independence can be found in § 10.54.

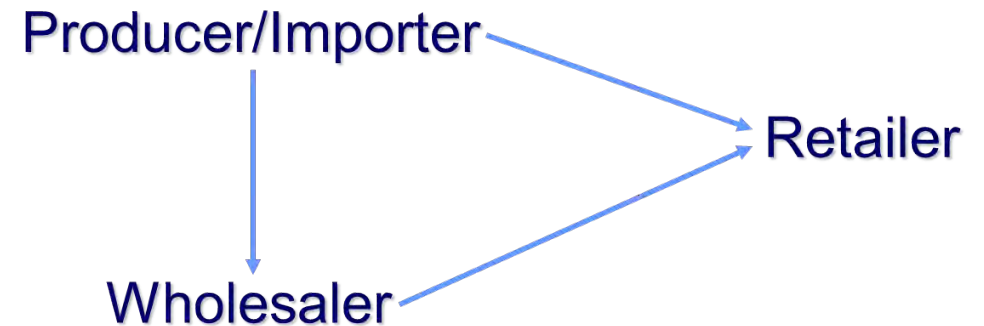
27 CFR § 10.52



Consignment Sales

It is unlawful for an industry member to sell, offer for sale, or contract to sell to a trade buyer, or for the trade buyer to purchase, offer to purchase, or contract to purchase alcoholic beverages:

- On consignment, or
- Under conditional sale, or
- With privilege of return, or
- On any basis other than a bona-fide sale, or
- Conditioned upon acquiring other products



27 U.S.C. 205(d) / 27 CFR Part 11



Consignment Sales

Consignment Sales rules are different from the other Trade Practices in **two ways**:

1. Both parties to the transaction can violate the consignment sales provisions.
2. The consignment sale provisions apply to both industry members and trade buyers.

Jurisdictional limits:

- Occurred in or had effect on interstate/foreign commerce
- Consignment Sales **do not require exclusion** as an element of proof; therefore, the primary clause does not apply.

Note: Exceptions to return and listed in regulations. TTB also lists reasons that are **NOT reasons to return.*

27 U.S.C. 205(d) / 27 CFR Part 11



Trade Practice Violations

Civil Penalties

For violating Trade Practice laws can include suspension, revocation, or denial of the industry member's TTB permit.

Criminal Penalties

For violating Trade Practice laws are a misdemeanor and upon conviction thereof can be fined not more than \$1000 for each offense.



TTB Trade Practices Resources

- www.ttb.gov/trade-practices
- Videos explain the history of the FAA Act and each trade practice offense:


FAA Act History & Background (16:19)



In this video we introduce the trade practice rules and the history leading up to the rules. We also discuss various terms every industry member should know.

[Watch video](#)

Tied House (14:28)



In this video we discuss Tied House practices and the rules and regulations associated with them.

[Watch video](#)


Exclusive Outlet (11:30)



In this video we discuss arrangements which are considered Exclusive Outlets and the rules and regulations that cover these activities.

[Watch video](#)

Commercial Bribery (9:52)



In this video we explain activities considered Commercial Bribery and the rules and regulations that cover these activities.

[Watch video](#)

Consignment Sales (12:07)



We explain prohibited arrangements under the Consignment Sales rules and regulations.

- On Consignment
- Under Conditional Sale
- With Return Privilege
- Non-Bona Fide Sale
- Conditioned on Acquiring Other Products

[Watch video](#)

- Additional questions can be submitted in writing to TradePractices@ttb.gov



Recap of Federal Legal Authority*

	≥ 0.5% Alc/Vol Beer (w/o malted barley and/or hops)	Malt Beverage	Distilled Spirit	< 7% Alc/Vol Wine	≥ 7% - 24% Alc/Vol Wine
Primary Labeling Authority	FDA**	TTB	TTB	FDA	TTB
Trade Practice Prohibitions	No	Yes, if similar state law	Yes	No	Yes
Advertising Authority	FDA/FTC	TTB	TTB	FDA/FTC	TTB

* TTB authority noted above assumes products are sold in interstate commerce.

**These products would have to satisfy TTB's IRC labeling requirements.



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TTB Newsletter

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