

**DEPARTMENT OF THE TREASURY
ALCOHOL AND TOBACCO TAX AND TRADE BUREAU**

Consideration of Updates to Trade
Practice Regulations

Docket No. TTB-2022-0011

COMMENT OF
THE ANTITRUST DIVISION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

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The Antitrust Division of the United States Department of Justice (“Antitrust Division”) respectfully submits this comment in response to the Department of the Treasury’s Alcohol and Tobacco Tax and Trade Bureau (“TTB”) request for public comment on its advance notice of proposed rulemaking on updates to trade practice regulations, as described in its Federal Register Notice published on November 9, 2022.¹

I. INTEREST OF THE ANTITRUST DIVISION

The Antitrust Division enforces the federal antitrust laws, which aim to protect economic freedom and opportunity by promoting free and fair competition in the marketplace. The Antitrust Division supports the TTB’s effort to update its trade practice regulations to protect competition for beer, wine, and spirits.

The Antitrust Division has a strong interest in any rulemaking that impacts the production, distribution, importation, and retailing of beer in the United States. Over the last two decades, the global beer industry has undergone significant consolidation.² The two largest brewers in the United States, Anheuser-Busch InBev SA/NV (“ABI”) and Molson Coors Beverage Company (“Molson Coors”), together account for an estimated 65 percent of beer sales nationwide, as measured by revenue, making the U.S. beer market highly concentrated under the standards used by the federal antitrust agencies to assess market concentration.³

Based on its significant experience and expertise with respect to competitive dynamics in the brewer industry, the Antitrust Division remains concerned about the impact of further consolidation, anticompetitive practices, and unnecessary trade regulations on competition in the industry. Accordingly, the Antitrust Division encourages and supports the TTB’s efforts to center robust competition policy in

¹ Consideration of Updates to Trade Practice Regulations, 87 Fed. Reg. 67,612 (Nov. 9, 2022).

² For example, in 2008, SABMiller plc and Molson Coors Brewing Company, the second and third largest brewers in the United States respectively, formed a joint venture. Research finds that beer prices increased following the joint venture. DEP’T OF TREASURY, [COMPETITION IN THE MARKETS FOR BEER, WINE, AND SPIRITS](#) 28 & n.102 (citing Nathan H. Miller, et al., *Oligopolistic Price Leadership and Mergers: the United States Beer Industry*, AM. ECON. REV., 111 (10): 3123-59 (2021) (“We show an abrupt increase in the prices of ABI and MillerCoors shortly after the 2008 consummation of the Miller/Coors merger, both in absolute terms and relative to the prices of Modelo and Heineken, the other large brewers.”); Nathan H. Miller & Matthew C. Weinberg, *Understanding the Price Effects of the MillerCoors Joint Venture*, 85 ECONOMETRICA 1763 (Dec. 2017)).

³ DEP’T OF TREASURY, [COMPETITION IN THE MARKETS FOR BEER, WINE, AND SPIRITS](#) 20 (Feb. 2022) (“ABI is estimated to have 42.4 percent market share, by revenue, in 2021, and Molson Coors is estimated to have 22.4 percent market share, by revenue, in 2021, though their shares have declined modestly in recent years.”) (citing Christopher Lombardo, *Breweries in the US, On Tap: The Decreasing Value of the US dollar is Expected to Boost Industry Revenue Growth*, IBISWorld, at 12 (Feb. 2021)).

updating its trade practice regulations.

II. THE REGULATORY FRAMEWORK FOR PRODUCTION, DISTRIBUTION, AND SALE OF BEER, WINE, AND SPIRITS IN THE UNITED STATES

Most regulation of alcohol sales occurs at the state level.⁴ Many states require beverage alcohol to be sold through a “three-tier” supply chain in which beverages pass from a producer/supplier, to a distributor/wholesaler, and then to a retailer. In the three-tier system, a business operating in one tier is not permitted to hold a significant ownership interest in another tier.⁵ Under its authority to regulate interstate and foreign commerce, however, Congress passed the Federal Alcohol Administration Act (“FAA Act”), which prohibits industry members from requiring or inducing retailers to exclude their competitors.⁶

As part of his Executive Order on Promoting Competition in the American Economy (the “Executive Order”), President Biden directed the Secretary of Treasury, in consultation with the Attorney General of the United States and Chair of the Federal Trade Commission, to submit a report to the Chair of the White House Competition Council assessing the market structure and conditions of competition for beer, wine, and spirits.⁷ The report, the Executive Order directed, should address “any unlawful trade practices . . . such as certain exclusionary, discriminatory, or anticompetitive distribution practices that hinder smaller and independent businesses or new entrants from distributing their productions;” “patterns of consolidation in production, distribution, or retail;” and “any unnecessary trade practice regulations of matters such as bottle sizes, permitting, or labeling that may unnecessarily inhibit competition by increasing costs without serving any public health, informational, or tax purpose.”⁸

The Division worked with the Department of Treasury on the report, which was completed and published in February 2022.⁹ The report observed that some state laws may increase costs, weaken price competition, and raise barriers to entry (e.g., franchise laws, post-and-hold laws, restrictions on direct-to-consumer shipping).¹⁰ The report

⁴ U.S. CONST. amend. XXI § 2. (“The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”).

⁵ DEP’T OF TREASURY, [COMPETITION IN THE MARKETS FOR BEER, WINE, AND SPIRITS](#) 10 (Feb. 2022).

⁶ 27 U.S.C. § 205.

⁷ Executive Order No. 14,036 § 5(j), 86 Fed. Reg. 36987, 36944 (July 14, 2021).

⁸ *Id.*

⁹ DEP’T OF TREASURY, [COMPETITION IN THE MARKETS FOR BEER, WINE, AND SPIRITS](#) 4.

¹⁰ *Id.* at 12–17, 61.

encouraged the states to “explore changes in these areas to eliminate anticompetitive effects and to bolster competition.”¹¹ The report also recommended the TTB consider revisions to its trade practice regulations to prevent unlawful trade practices in the beer, wine, and spirits industries, “to sharpen and modernize the categories of conduct that are considered intrinsically harmful,” and to better understand “less-well understood forms of exclusionary conduct.”¹²

III. UPDATES TO THE TRADE PRACTICE REGULATIONS SHOULD PROMOTE COMPETITION

The Executive Order also directed the TTB to consider “initiating a rulemaking to update the Alcohol and Tobacco Tax and Trade Bureau’s trade practice regulations;” “rescinding or revising any regulations of the beer, wine, and spirits industries that may unnecessarily inhibit competition;” and “reducing any barriers that impede market access for smaller and independent brewers, winemakers, and distilleries.”¹³ On November 9, 2022, the TTB published an advance notice of proposed rulemaking on updates to its trade practice regulations seeking comment on many areas that could impact competition for beer, wine, and spirits.

The Antitrust Division commends the TTB for taking this initial step to update its trade practice regulations and encourages the TTB to use its authority to identify and prohibit practices that firms may use to stifle competition for beer, wine, and spirits. The Antitrust Division recognizes that the FAA Act and the TTB’s rulemaking under the Act can establish “‘rules of the game’ intended to ensure that networks, both wholesale and retail, should remain open and available to all competitors.”¹⁴ Indeed, these authorities can help open up competition at all levels of the supply chain from production to purchase by consumers.

For example, with respect to beer, the Antitrust Division supports the TTB’s efforts to consider revising its trade practice regulations to address exclusionary conduct that can stifle competition among upstream brewers and downstream wholesalers and retailers. In particular, the TTB should consider updates to prevent unlawful exclusionary conduct in the beer industry that deters new or smaller firms from competing. A large brewer, or large brewers acting in parallel, may be able to erect barriers to entry and expansion through the brewer’s unilateral influence on beer distributors, which may also impact retailers. The TTB trade practice regulations should limit exclusionary anticompetitive behavior to ensure a robust U.S. market for beer.

The Antitrust Division also encourages the TTB to remain vigilant about whether industry members are using digital tools that may tend to exclude rivals and nascent

¹¹ *Id.* at 61.

¹² *Id.*

¹³ Executive Order No. 14,036 § 5(k).

¹⁴ DEP’T OF TREASURY, [COMPETITION IN THE MARKETS FOR BEER, WINE, AND SPIRITS](#) 63.

competitors, establish or heighten barriers, or create opportunities for firms to gain access to competitively sensitive information. The TTB should consider updates to its trade practice regulations to address the use of anticompetitive digital tools if the TTB believes that enforcement against firms that use these tools to harm rivals is not currently authorized by existing laws and regulations.

IV. CONCLUSION

The Antitrust Division supports the TTB's efforts to promote competition as it updates its trade practice regulations for beer, wine, and spirits. Given its relevant experience and expertise investigating beer mergers, the Antitrust Division encourages the TTB to strengthen or propose new regulations that prohibit anticompetitive conduct in these industries.

Respectfully Submitted,

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