



805 15<sup>TH</sup> STREET, NW, SUITE 1120  
WASHINGTON, DC 20005

OFFICE: (202) 371 9792  
FAX: (202) 789 2405

WWW.WSWA.ORG

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United States Department of Justice  
Antitrust Division  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530  
[CompReg1@atr.usdoj.gov](mailto:CompReg1@atr.usdoj.gov)

Re: Department of Justice March 14, 2018 Roundtable Discussion Series on Regulation and Antitrust Law

Dear Sir or Madam:

On behalf of the Wine & Spirits Wholesalers of America (WSWA), we are pleased to provide comments in advance of the March 14 Department of Justice (DOJ) Antitrust Division Roundtable on Competition and Regulation.

WSWA is a national trade association representing the wholesale tier of the wine and spirits industry. Its members distribute more than 80 percent of all wine and spirits sold at wholesale in the U.S. WSWA-member companies are family-owned, U.S. businesses that provide marketing and logistical services in the distribution of wine and spirits. WSWA advocates for state-based regulations that ensure an effectively-regulated, competitive, and responsible marketplace for the distribution and sale of beverage alcohol.

As an initial matter, WSWA generally supports the long-standing presumption that competition yields the best allocation of economic resources, the lowest prices, the highest quality, and the most innovation. We, however, caution the DOJ that some products, such as alcohol, are unique and the goal of unrestrained interaction of competitive forces to achieve the lowest prices should be balanced with competing federal and state public safety concerns. We believe that the product innovation and ever-evolving marketplace we have in beverage alcohol today for example, demonstrate that the current state-based regulatory systems in place successfully balance regulation with competition, promoting a dynamic and diverse purchasing environment while protecting citizens of the potentially harmful effects of alcohol. As such, the current legal systems in place sufficiently protect competition with respect to the markets for beverage alcohol products and do not warrant change.

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## Impact of Express Statutory Exemptions and Implied Immunities from the Antitrust Laws and Their Effects on Antitrust Enforcement

We note that beverage alcohol is a unique product that falls within a completely different legal rubric (as explained in further detail below). The laws and regulations governing the production, distribution, and sale of beverage alcohol do not benefit from any express statutory exemption, nor do they enjoy implied immunities from the antitrust laws. Quite oppositely, market participants are free to challenge state laws regulating alcohol as antitrust violations and have achieved success in some cases.

State regulation of beverage alcohol has been the subject of numerous cases in the U.S. Supreme Court, as well as other courts both federal and state. The Supreme Court has acknowledged, consistent with the principles of federalism, important state interests that permit the regulation of this unique product. Indeed, the seminal decision of the Supreme Court, *Rice v. Norman Williams Company*,<sup>1</sup> identifies with great clarity, the extremely limited circumstances in which one may assert that a state law is preempted under the Supremacy Clause by reason of an irreconcilable conflict with the federal antitrust laws.<sup>2</sup>

This fundamental tenet of the primacy of state regulation is strengthened in the context of state beverage alcohol regulations. This is so because alcohol stands apart from other commodities in that it is the subject of its own constitutional amendment, the 21<sup>st</sup> Amendment,<sup>3</sup> which grants the states “virtually complete control” over the distribution and sale of beverage alcohol within their respective borders.<sup>4</sup> The adoption of the 21<sup>st</sup> Amendment settled vigorous political debate and reflected recognition by both Congress and the states that the difficult problem of regulating alcohol, a socially-controversial product that could be misused, potentially causing costly problems for individuals and communities, required that the states be granted sweeping authority to develop comprehensive, manageable solutions to protect their citizens. States wrestled with the formidable task of designing alcohol distribution systems that would prevent the abuses and problems that had prompted Prohibition in the first place, which arose from inadequately regulated and overstimulated retail sales. As a result, many beverage alcohol-related state laws and regulations promote, for example, a level playing field, prohibiting below cost pricing,

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<sup>1</sup> 458 U.S. 654 (1982).

<sup>2</sup> *Id.* at 659-61. (“A party may successfully enjoin enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy. . . . Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation.”).

<sup>3</sup> Section 2 of the 21<sup>st</sup> Amendment states, “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.” To the extent that states seek to extend their authority beyond their borders, such conduct has been deemed to implicate the dormant Commerce Clause. *See, e.g., Granholm v. Heald*, 544 U.S. 460, 486-87 (2005) (citing cases).

<sup>4</sup> *Calif. Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980); *see also United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 361-62 (2007) (“[W]ere it not for the Twenty-first Amendment, laws creating state-owned liquor monopolies – which many states maintain today – would be deemed discriminatory under the dormant Commerce Clause,” *citing Granholm v. Heald*, 544 U.S. at 489).



predatory pricing, and price discrimination. Importantly, the policy goals of these components of state regulation are consistent, and do not conflict, with the principles embedded in the federal antitrust laws.<sup>5</sup>

### Whether the State Action Doctrine in its Current Form Strikes the Appropriate Balance between State Sovereignty and the Federal Policy Favoring Competition in Interstate Commerce

Under the Supreme Court’s 21<sup>st</sup> Amendment balancing test, even if the state’s regulatory requirements directly conflict with express federal policies, those regulations will nevertheless prevail when the interests implicated by the state regulation are closely related to the interests reserved to the states under the 21<sup>st</sup> Amendment.<sup>6</sup> Similarly, the Supreme Court’s well-established state action immunity doctrine, which also rests on principles of federalism and state sovereignty, functions to insure that state-imposed constraints on competition are the subject of clearly articulated and affirmatively expressed state policies supervised by state officials who are not, themselves, market participants.<sup>7</sup>

Alcohol regulation in this country is intimately related to core principles of federalism. The U.S. Supreme Court has identified with precision the balance between competition and regulation in its interpretation of both the antitrust laws and the dormant Commerce Clause with respect to the distribution and sale of beverage alcohol. These key markers must be neither discounted nor disregarded.

### Whether the Dormant Commerce Clause Could Provide a Meaningful Limit on States’ Ability to Reduce Competition involving Interstate Commerce

As noted above, the U.S. Supreme Court has identified with precision the balance between competition and regulation in its interpretation of the dormant Commerce Clause. There is a well-developed body of case law regarding dormant Commerce Clause claims, and even today, it acts as a strong, effective check on state interests that conflict with federal interstate commerce interests. In the area of beverage alcohol, the dormant Commerce Clause has limited the states’ ability to discriminate between in-state and out-of-state producers,<sup>8</sup> however the Supreme Court has made it clear that “[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.”<sup>9</sup> We note, however, that the dormant Commerce Clause primarily protects interstate commerce and not competition or competitors generally, therefore protecting competition

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<sup>5</sup> Compare the Robinson-Patman Act, 15 U.S.C. § 13(a) and (b), with Conn. Gen. Stat. § 35-45(a) and (b); see also *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978) (rejecting Sherman Act preemption when “basic purposes of the state statute and the Robinson-Patman Act are similar.”).

<sup>6</sup> *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984).

<sup>7</sup> See *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. —, 135 S. Ct. 1101 (2015); accord *Fisher v. City of Berkeley*, 475 U.S. 260, 265 (legislation that would otherwise be preempted under *Rice* may nonetheless survive if it is found to be state action immune from antitrust scrutiny under *Parker v. Brown*, 217 U.S. 341 (1943)).

<sup>8</sup> *Granholm v. Heald*, 544 U.S. 460 (2005).

<sup>9</sup> *Id.* at 25, quoting *Midcal Aluminum Inc.*, 445 U.S. 97 (1980).



between in-state and out-of-state producers. We further note that analysis under the dormant Commerce Clause is quite different from antitrust law competition analysis and is likely inapplicable to, for example, pricing cases.

### Conclusion

Some products, like beverage alcohol, are wholly unique and their related state-based regulatory schemes undergo a well-established legal review. State laws and regulations concerning alcohol generally flow from the 21<sup>st</sup> Amendment and are subject to the 21<sup>st</sup> Amendment's balancing test, which weighs countervailing interests of other federal laws, including the antitrust laws and the dormant Commerce Clause.

We also highlight that the regulatory systems developed in the states to effectively manage beverage alcohol have created the most innovative, dynamic alcohol marketplace in the world today – offering consumers the widest array of brands in more alcohol categories from the widest range of U.S. locations, as well as foreign countries, than is offered to consumers in any other country in world. The playing field for beverage alcohol is one of constant and intense competition. From nearly every perspective, beverage alcohol demonstrates how strong state laws governing production, distribution and retail provide benefit to consumers while satisfying the policy interests of the given state. These laws create opportunity for entrepreneurs to enter this exciting industry by ensuring a fair playing field, thereby allowing all members of the industry to compete on even terms.

As discussions on competition unfold, we encourage the DOJ to recognize that some products, like beverage alcohol, are unique and require a balance of interests between competition and public safety. We also emphasize that well-regulated systems, such as exist in the alcohol-industry in the U.S., actually promote competition, innovation, and quality products.

Please let us know if you have any questions or would like further information on any of the topics discussed in this comment.

Warm regards,

A handwritten signature in black ink that reads 'Craig Wolf'.

Craig Wolf  
President and CEO  
Wine & Spirits Wholesalers of America