U.S. Chamber of Commerce

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Regulations and Rulings Division
Alcohol and Tobacco Tax and Trade Bureau (TTB)
U.S. Department of Treasury
1310 G Street NW, Box 12
Washington, DC 20005

Re: Proposed Rule, Alcohol and Tobacco Tax and Trade Bureau; Consideration of Updates to Trade Practice Regulations (88 Fed. Reg. 1,171, January 9, 2023)

The U.S. Chamber of Commerce submits these comments in response to TTB's Advance Notice of Proposed Rulemaking (ANPRM) regarding competition in the beer, wine, and spirits industry. Although we always appreciate the opportunity to share our views, and though we agree with portions of the ANPRM, we encourage TTB largely to abandon this effort. *First*, and most importantly, TTB lacks legal authority to proceed on most of the topics set forth in the ANPRM. *Second*, there is no need for new regulations because competition is already thriving in these markets. *Third*, as the ANPRM recognizes has happened in the past, new regulations carry a significant risk of discouraging competition. Instead of promulgating new regulations, therefore, TTB should focus its resources on reducing existing regulatory barriers to promote competition.

I. TTB Lacks the Legal Authority to Promulgate Regulations on Most of the Topics Covered in the ANPRM

TTB administers and enforces the Federal Alcohol Administration Act ("FAA Act"), including its prohibition of "unfair competition and unlawful practices." *See* 27 U.S.C. Sec. 205(a)-(d). Under the statutory text, TTB has only limited rulemaking authority, as set forth in subsection (b)(3), defining "exceptions" to the statute's ban on providing things of value, and subsection (b)(6), relating to "tied houses."

Beyond the limited grants of regulatory authority in the statute, both the case law and the statute's legislative history confirm the limits on TTB's rulemaking authority. As a panel of the D.C. Circuit explained,

> The [FAA] Act does not confer upon the Bureau authority to promulgate 'legislative' rules to enforce its provisions, other than the authority to create exceptions to portions of the tied house provision in the interest of public health and certain other listed considerations.

Nat'l Distrib. Co. v. U.S. Treas. Dep't, Bureau of Alcohol Tobacco and Firearms, 626 F.2d 997, 1018-19 (D.C. Cir. 1980). *See also Foremost Sales Promotions, Inc. v. Bureau of Alcohol, Tobacco and Firearms*, 860 F.2d 229, 240 (7th Cir. 1988). Today, courts are taking even more care to ensure that agencies exercise rulemaking authority only pursuant to express grants of authority from Congress. *E.g,. West Virginia v. Envt'l Protec. Agency*, 142 S. Ct. 2587 (2022).

The FAA Act's legislative history confirms that Congress purposefully withheld general rulemaking authority from TTB. In the 1930s, for example, Congress grew upset when the Treasury Department tried to prohibit sale of liquor in barrels without any authority. In response, Congress sought to "take this assumed authority away from the Department to make their own laws." *See* 79 Cong. Rec. 11714 (July 23, 1935).

Unfortunately, the ANPRM inquires into topics ranging far beyond those for which TTB has regulatory authority. For instance, the ANPRM asks about category management (Q1), third party relationships (Q5), sponsorships at sporting venues (Q12), and many other issues that have no meaningful nexus to tied houses or exceptions to the ban on providing things of value, and for which TTB has no claim to regulatory authority in the statutory language. Accordingly, other than the discrete topics set out in subsections (b)(3) and (b)(6) of the FAA Act, TTB simply lacks the legal authority to promulgate regulations.

II. There is No Need for Additional Regulations Because Competition is Thriving

Setting aside TTB's lack of legal authority to promulgate new regulations, there is simply no need for new regulations because competition in alcohol markets is already thriving. In its report on "Competition in the Markets for Beer, Wine, and Spirits,"[1] the Treasury Department acknowledged the "significant growth in the number of small and 'craft' producers of beer, wine, and spirits." As Treasury's report points out,

> There are now over 6,400 operating breweries in the United States, up from a low of 89 in the late 1970s, and more than 6,600 operating wineries. There also more than 1,900 operating distilleries. These businesses are dispersed throughout the country, and they have helped build a strong global reputation for quality and craftsmanship. In addition, over the last several decades the United States has become an innovator in bringing new types of beers, wine, and spirits to the world.

Indeed, competition continues to increase by any metric of innovation, new market entrants, or consumer choice. As compared to a decade ago, the beer industry has five times the number of microbreweries and brewpubs/taprooms. During the same time, there has been an increase of more than 50% in the number of wineries and a surge in the number of craft distillers.[2] In short, the alcohol industry features dynamic competition among established brands as well as craft brewers, vintners, and distillers.

[1] See https://home.treasury.gov/system/files/136/Competition-Report.pdf.
[2] See https://www.regulations.gov/comment/TTB-2021-0007-0272

Notably, even workers in the industry share this view. According to the Teamsters, "Despite being one of the most highly regulated industries in the United States, the last decade has seen significant growth of new beer manufacturers thereby providing consumers with more choice than ever before…The beer industry is extremely competitive."[3]

Ignoring this evidence, the ANPRM rests on outdated data and flawed assumptions about concentration levels in alcohol markets, particularly a supposed "trend" of "consolidation." Contrary to the ANPRM, the most recent economic census data shows that industrial concentration has decreased significantly in alcohol markets during the past two decades. In an exhaustive analysis of all available census data from the past two decades, a study found that, since 2007, the economy actually became less concentrated in both the manufacturing sector and the broader economy. Within alcoholic beverage manufacturing, concentration levels in breweries and distilleries declined significantly, and among wineries, which were already unconcentrated, concentration levels fell even further.[4]

More generally, the ANPRM mistakenly assumes that higher concentration correlates with, or causes, a decrease in competition. Not so. According to the study, the "evidence does not support the claim that rising industrial concentration is generally associated with poor economic outcomes." Instead, increases in industrial concentration often are associated with "output growth, job creation, and higher employee compensation." Indeed, case studies reveal that "rising industrial concentration can be a direct response to increasing market competition."

Finally, setting aside any concerns about concentration or a snapshot of the market today, even more competition is on the way. As Treasury's report noted, the "direct-to-consumer model, common in wine, has been spreading to beer and spirits and offers distribution opportunities for small producers." In short, the evidence overwhelmingly shows that beer, wine, and spirits markets are very competitive, innovative, and productive, and are becoming even more so, all to the benefit of consumers.

III. New Regulations Could Discourage Competition

Not only is there no need for new regulations, but any such regulations could also depress competition by raising compliance costs and entrenching incumbent competitors. Such a phenomenon has happened in the past. Treasury's report recognizes that many existing laws and regulations, both state and federal, "may impose a disproportionate burden on small and medium-sized producers without corresponding justifications based in public health or the prevention of anticompetitive behavior." The report notes that, though well-intentioned, "some state and federal laws may actually inhibit the growth and competitiveness of small producers." For instance, one study estimated that "post and hold" laws restricting price competition could lead beer consumers to "spend $147-478 million more than they did previously."

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[3] See https://www.uschamber.com/finance/antitrust/the-white-house-wants-to-fix-the-exploding-beer-market.

[4] See https://www.uschamber.com/finance/antitrust/industrial-concentration-in-the-united-states-2002-2017.

Similarly, now, many ideas for new regulations likely would suppress competition. For instance, some floated proposals would have the effect of reducing the flow of information to consumers (which raises costs to new entrants), raising the costs of reaching consumers (which helps incumbents), or generally raising the cost of doing business (which raises prices for consumers). Accordingly, TTB should take a lesson from history and avoid costly new regulations.

Instead, TTB should promote competition by working to reduce legal and regulatory barriers. Treasury's report highlighted several actual barriers to competition, including overly expensive labeling requirements and state regulations, such as post-and-hold laws, that harm consumers. Likewise, in a recent analysis, the Washington Post urged federal regulators to advocate for pro-competitive changes at the state level: "Treasury might not be able to effect dramatic change, because most of the problems inhibiting competition were at the state level."[5]

Of course, to the extent that industry participants are violating existing laws and regulations, the Chamber supports vigorous law enforcement. Where antitrust concerns arise, they should be handled without politicization, by the federal antitrust agencies on a case-by-case basis, governed by the consumer welfare standard, and evaluated under the rule of reason. As a regulator, TTB's chief concern should be consumer protection and revenue compliance. Regulation should play a limited role in managing competition.

Conclusion

As Treasury's report points out, "[t]he innovation in American wine, beer, and spirits in the last few decades has resulted in a flourishing of small and craft producers in local markets." This competitive marketplace, along with TTB's limited statutory authority and the risks of new regulations, weigh strongly against new regulations.

Sincerely,

Sean Heather
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U.S. Chamber of Commerce

[5] See https://www.washingtonpost.com/food/2022/02/24/treasury-report-wine-competition-barriers/.