Via the Federal e-Rulemaking Portal

Alcohol and Tobacco Tax and Trade Bureau
Attn: Amy Greenberg
Director, Regulations and Rulings Division
1310 G Street NW, Box 12
Washington, DC 20005

Re: **Request for Information; Docket No. TTB-2021-0007; Notice No. 204**
Promoting Competition in the Beer Market

Dear Director Greenberg,

I write as President and CEO of the Brewers Association ("BA") to respond to the Request for Information ("RFI") published in the Federal Register on Wednesday, July 28, 2021.[1] The RFI seeks comments on President Biden's Executive Order on Promoting Competition in the American Economy ("the EO").[2] Sections 5(j) and 5(k) of the EO specifically address the beer, wine, and distilled spirits industries. We will confine our comments to issues specific to the beer industry, although we believe many of our points also apply to the wine and distilled spirits industries as well.

As you know, the Brewers Association is a 501(c)(6) not-for-profit trade association of brewers, for brewers and by brewers. We have more than 5,300 U.S. brewery members and nearly 40,000 members of the American Homebrewers Association, along with members of the allied trade, beer wholesalers, retailers, individuals, and other associate members. Our purpose is to promote and protect American craft brewers, their beers, and the community of brewing enthusiasts.

Given the very limited time provided to respond to the RFI, the information and comments below are necessarily general. With more time to consult our membership and other stakeholders we could provide additional detail related to the subjects raised in the EO. Moreover, as these comments will be public, we refrain from providing information on specific unlawful trade practices or specific consolidations. Finally, our comments below focus on issues within Treasury's jurisdiction, primarily arising from the Federal Alcohol Administration Act ("FAA Act") and will not address issues such as consolidation by mergers primarily

[1] 86 Fed. Reg. 40678 (July 28, 2021).
[2] E.O. 14036, 86 Fed. Reg. 36987 (July 14, 2021).

within the jurisdiction of the Department of Justice, Antitrust Division ("DOJ") for beer and the Federal Trade Commission ("FTC") for wine and spirits. Section 1 of our submission addresses unlawful and exclusionary trade practices in the industry. BA proposes three solutions to better halt such activities: (a) substantially greater penalties and settlement demands in line with an industry member's market power to secure future compliance; (b) a focus of investigative resources on competitively-relevant actors and practices, such as category management practices, electronic coupon demands, and major sports and entertainment venues; and (c) working with the FTC to use the FTC Act as a way to create an effective remedy against retailers engaged in exclusionary trade practices. Section 2 addresses the need to modernize and clarify TTB regulations, particularly as unclear and confusing legal requirements most burden small companies that cannot afford sophisticated legal assistance to understand applicable compliance obligations.

1. Unlawful Trade Practices

For the past six years, TTB has used the additional $5M per year appropriated by Congress for trade practice enforcement to increase its efforts in this area. BA applauds TTB's efforts but believes much more is required to address exclusionary and illegal practices that disadvantage small brewers in the market. While not by any means an exhaustive list, these practices include:

- The abuse of category management practices that put an industry member "category captain" in charge of designing retailer shelf sets, recommending new product listings, and deciding on what products to discontinue. These captains often abuse their favored position. Moreover, even where a retailer allocates a section of its shelves to "local brands," too often the wholesaler serving the retailer will stock such areas with the products of its dominant supplier, such as former craft beer brands purchased by one of the major beer suppliers.

- Retailer demands that a supplier spend money on coupon programs as a *de facto* condition for placement in or promotion of the supplier's products. While coupon programs provide consumer savings and are legal under federal law and the laws of many states, they become illegal slotting allowance payments when retail placement or promotion is conditioned on a supplier (or wholesaler) expending sums on such programs. Yet retailer demands for such *quid pro quo* have become commonplace.

- So-called "sponsorship" arrangements in which large suppliers and wholesalers pay substantial sums to venue operators, ostensibly to purchase advertising within such venues. In practice, these payments almost invariably secure exclusive or near-exclusive pouring rights at the venue. While TTB did settle in 2020 a case against Anheuser-Busch InBev for practices designed to secure preferential treatment at several Colorado venues, a visit to almost any major sports or entertainment venue today will demonstrate that such illegal practices remain standard operating procedure.

In order to realize the FAA Act's goal of preserving a competitive market by ensuring independence between retailers and industry members (be they brewers, importers, or wholesalers), BA urges TTB to do the following:

a. TTB needs to calibrate penalties and settlements by company size and market share, as current settlement amounts have been inadequate to deter continued illegal conduct.

In just a few years and with a limited budget ($5M/year), TTB has settled alleged trade practice law violations by the largest players in the beer industry:

- Anheuser-Busch InBev – Paid $5M in 2020 to compromise an investigation into payments to large sports venues in Colorado to exclude competing products. The company also paid $300,000 to TTB in 2016 to compromise an investigation into alleged consignment sale violations.
- Heineken USA – Paid $2.5M in 2019 to compromise an investigation into the alleged nationwide use of credit card swipes and other illegal payments to secure retailer installation of a Heineken-only proprietary draft system.
- Crown Imports (Constellation Brands) – Paid $420,000 in 2019 to compromise an investigation into alleged slotting fee payments to Illinois retailers in order to secure tap handle placements.
- MillerCoors (now Molson Coors) – Paid $450,000 in 2015 to compromise an investigation into alleged consignment sale violations.
- Large Beer Wholesaler Settlements – Including Brewer's Distributing (Illinois – $350,000 paid in 2019), Carisam Samuel-Meisel (Florida – $450,000 paid in 2019), Eagle Brands (Florida – $1.5M paid in 2018), and Stern Beverage (Illinois – $350,000 paid in 2019).

In spite of these investigations and settlements, illegal exclusionary practices such as the payment of slotting fees remain commonplace in the industry. We believe a primary reason is that the compromise amounts paid to settle these matters represent a minor cost to large enterprises like the major brewers, beer importers, and large beer wholesalers. Large companies can essentially view such amounts as the "cost of doing business" and incorporate them as a (minor) cost component of their overall marketing programs.

BA believes that in order to achieve widespread compliance, Treasury must develop and apply penalty guidelines in which monetary fines and "offer-in-compromise" settlement amounts reflect the size and market share of the violator. If a global multi-billion-dollar enterprise can easily absorb a $5M settlement, then larger offer-in-compromise amounts or alternative remedies (*e.g.*, permit suspensions) are needed so violations are not treated as a cost of doing business. While substantially larger amounts would represent a departure from prior TTB practice, they would not be out of the ordinary in the context of other agency penalties. For example, the Securities and Exchange Commission regularly enters into eight- and nine-figure settlements for Federal Corrupt

Practices Act violations, with some settlement amounts in excess of $1 billion.[3] Taking an example from the beer industry, in 2019 the European Commission fined Anheuser-Busch InBev €200,409,000 for breaching EU competition rules in the Belgian beer market.[4] We cite such figures not as concrete guidelines, but as examples of the magnitude of financial exposure needed to incent compliance from large enterprises like the dominant beer suppliers and major beer wholesalers.

b. TTB must focus investigative resources on stopping competitively-relevant conduct.

While the past six years have seen a welcome uptick in TTB trade practice investigations, too often TTB resources target conduct unlikely to have a material impact on the market. BA recognizes, of course, that industry members of all sizes can and sometimes do violate the FAA Act's trade practice provisions. But preserving the goals of market access and halting exclusionary content necessarily requires TTB to focus on competitively-relevant practices and actors. To take an example of an investigation that we respectfully believe mis-allocated TTB resources, the agency recently expended considerable resources investigating and imposing penalties on a small wine wholesaler and number of very small California wineries that entered into an alleged consignment sale arrangement when the wholesaler agreed to pay the wineries only after selling the wineries' wine. We respectfully submit that the practice in question posed little if any threat to competition or market access. Indeed, by focusing resources on insignificant industry members, TTB may have incrementally helped giant incumbent wine wholesalers and suppliers, which to date appear to have faced little TTB trade practice scrutiny.

Going forward, rather than investigating competitively-irrelevant activities, TTB should focus its finite resources on illegal practices that impact significant channels and segments of the market. As outlined earlier in this submission, we believe areas of future focus must include:

i. **Category management practices.** Too often, under the guise of "category management," a retailer surrenders control of its shelf spacing and product selection decisions to a large supplier or wholesaler "category captain." These arrangements undermine the retailer's independent judgement on what products to carry and put one or two (some systems involve a second-fiddle industry member known as a "validator") industry members in substantial control of the retailer's shelf space. TTB has promulgated a policy warning that common category management activities appear to violate the FAA Act,[5] but to date has not announced any enforcement activity flowing from that policy.

ii. **Electronic couponing programs.** Large retailers increasingly demand that suppliers issue coupons before they will feature the

[3] *See* https://www.sec.gov/enforce/sec-enforcement-actions-fcpa-cases.
[4] *See* https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2488.
[5] *See TTB Ruling* 2016-1 (Feb. 12, 2016).

suppliers' product for promotional activity or even listing, effectively marginalizing smaller suppliers that cannot afford such "pay to play" arrangements. By conditioning payments – even if otherwise legal – as a requirement for shelf or promotional placement within a retailer, such demands amount to illegal slotting allowance payments under the FAA Act.[6]

iii. **Sports, entertainment, and other large venues.** While TTB obtained a $5M settlement from Anheuser-Busch InBev for alleged illegal exclusionary practices at certain venues in Colorado, a visit to almost any large sporting or concert venue will reveal that one supplier – the "sponsor" paying big dollars for advertisements in the venue – also completely dominates sales at the venue. More needs to be done to break these modern tied-houses.

c. TTB should work with the FTC to hold retail entities accountable for illegal practices like those described above.

The FAA Act was enacted in 1935, a time when alcohol retailing remained a "mom-and-pop" business. But by that time, large multistate alcohol beverage suppliers were not unheard of, and some of today's largest suppliers, such as Anheuser-Busch, were already giant national businesses prior to Prohibition. Given this history, the Act understandably left the regulation of retailers to state and local authorities, giving TTB little enforcement authority over them.[7]

As a result of retailer consolidation and retailers' lower exposure to consequences of exclusionary and illegal trade practice violations, today retailers frequently initiate trade practice violations. Many a modern large retailer views its shelf space, tap lines, and displays as real estate for sale to the highest bidder. While this pay-to-play attitude runs directly contrary to the spirit and letter of FAA Act trade practice provisions, it does not take a great deal of investigation to find retail companies brazenly demanding monetary payments, free goods, special services, or other things of value in exchange for a place on their shelves, menus, or taps. Indeed, retailers often play suppliers and/or wholesalers against one another, telling prospective "partners" that a failure to engage in questionable schemes will result in lost placements and sales. Industry members often perceive that they have no choice but to succumb to such demands, particularly in an environment with little enforcement of the law.

A critical component to eliminating exclusionary practices that harm competition and consumers will be to hold *both* sides of an illegal arrangement responsible. TTB's most effective remedy against industry members – the threat of permit suspension and revocation – does not exist with respect to retailers. Indeed, even TTB's authority to obtain documents from persons (like retailers) without permits is open to question.[8] This lack of an effective federal remedy gives those

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[6] *See TTB Industry Circular* 2012-1 (Jan. 11, 2012).

[7] Theoretically the FAA Act does make violations by any "persons" – a term that would encompass retailers – a misdemeanor criminal offense. *See* 27 U.S.C. § 207. But as TTB no doubt recognizes, a host of practical and prosecutorial considerations make this remedy impractical.

[8] *See Hiram Walker v. Serr*, 270 F. Supp. 544 (E.D.Pa. 1967), *aff'd* 390 F.2d 619 (3rd Cir. 1968).

retailers that instigate exclusionary schemes in the alcohol beverage industry little incentive to stop.

Retailer consolidation has accentuated this problem. Every state issues licenses to retail sellers of beer, theoretically giving state alcohol regulators a more robust enforcement mechanism than TTB possesses. But the multistate nature of modern chain retailing makes it much harder for state regulators to detect and deter interstate conduct. Today, the headquarters of large players in all three tiers of the industry often are located outside the borders of a state whose retail market is impacted by exclusionary schemes. This presents state regulators with an enormous enforcement challenge: How can a California regulator investigate headquarters-level payments from a wholesaler headquartered in Florida to a retail chain headquartered in Washington? Moreover, industry members and chain retailers may seek to disguise programs that exclude competing products on a national basis by purportedly allocating illegal payments to the few markets (*e.g.*, Nevada) that permit substantial industry member payments to retailers.

While providing TTB with robust jurisdiction over retailers would require statutory changes to the FAA Act, cooperation between federal agencies provides an alternative. In particular, pursuit of illegal exclusionary agreements fits squarely within the ambit of the FTC Act. An illegal unfair act or practice is one that: (1) causes or is likely to cause substantial consumer injury not avoidable by the consumers themselves; and (2) is not outweighed by countervailing benefits to consumers or competition. The FTC may consider established public policies as evidence of an unfair practice, as long as these are not the primary basis for a determination of unfairness.[9]

Under the forgoing standard, consider an arrangement in which a sports venue operator enters into a "sponsorship" arrangement with an industry member that effectively excludes all other industry members' products from that venue. The practice substantially harms consumers by vastly limiting product selection in the venue, and consumers have no alternative because alcohol service within the venue is on an exclusive basis and venue rules do not permit consumers to bring in products from outside retailers. The practice certainly does not appear to have countervailing benefits to consumers – beer prices at large sports venues are notoriously high. Nor is competition assisted; quite the contrary, as the venue becomes a modern tied-house as a result of the sponsorship payment, shielding the "sponsoring" industry member from inter-brand competition within the venue.

While each case will require a specific analysis, viewing exclusionary industry member arrangements with retailers as an unfair method of trade under the FTC Act will provide federal authorities with an enforcement mechanism that can hold retailers accountable for such activities. To facilitate investigations and enforcement actions, FTC and TTB should develop and enter into a memorandum of understanding that articulates how the agencies can coordinate investigations of exclusionary trade practices. The memorandum of understanding should ensure that each agency plays a complementary role in halting such practices.

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[9] *See* 15 U.S.C. § 45(n); FTC Policy Statement on Unfairness (Dec. 17, 1980), *available at* https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.

2. Regulations that Unnecessarily Inhibit Competition

BA believes that all regulations should strive for clarity and transparency. While recognizing that TTB agrees with these goals, it can do more. Small companies like most BA members have a greater need for clarity and transparency than large ones, as the vast majority of BA members lack the resources to hire or retain sophisticated legal counsel. Small brewers would benefit from clarified regulatory language, codification of policies announced in informal documents like *Industry Circulars*, updates to regulations in order to reflect statutory changes, and the elimination of regulations that no longer substantially advance TTB's revenue and consumer protection missions.

BA has provided TTB with a number of written submissions in the past four years focused on updating and streamlining TTB regulations. They include:

- Brewers Association comments on Executive Order 13771, TREAS-DO-2017-0012: Review of Regulations – Request for Information (Oct. 30, 2017);
- Brewers Association comments on TTB Notice No. 176, Docket No. TTB-2018-0007; Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages (June 26, 2019); and
- Brewers Association Petition to Modernize the Regulations Governing the Labeling and Advertising of Non-Alcoholic and Alcohol-Free Malt Beverages (Jan. 28, 2020).

While TTB has made a few changes to its regulations in response to BA's comments to Notice Number 176,[10] a great deal remains to be done. We urge TTB to redouble its efforts at clarifying and modernizing its regulations for the benefit of all industry members, but particularly those that must rely most on a plain reading of the regulations to achieve compliance.

With respect to TTB's trade practice regulations contained in Parts 6, 8, 10, and 11 of Title 27, the limited time provided to comment on the RFI has not allowed BA to provide detailed comments. As noted above, BA favors robust enforcement of the FAA Act's trade practice provisions in order to protect competition and eliminate exclusionary practices. The regulations in some places, however, may contain ambiguities or gaps that require clarification. But providing a section-by-section analysis of current regulations would require BA to survey its members, engage in a detailed review of existing regulations and market practices, and confer with other stakeholders. The limited time given to respond to the RFI does not permit such a thorough process.

As Section 5(k) of the EO requires TTB to consider rulemaking on these subjects, BA suggests the following process:

[10] *See* 85 Fed. Reg. 18704 (Apr. 2, 2020).

a. For regulatory modernization and clarification proposals already in the proposed rule stage, such as substantial aspects of Notice 176, proceed to promulgating final rules as expeditiously as possible.

b. For specific regulatory proposals still in the pre-rule stage, proceed to the notice of proposed rulemaking stage as expeditiously as possible. For example, BA believes its January 2020 petition on the labeling and advertising of non-alcoholic and alcohol-free malt beverages is ready for a proposed rule.

c. For modernization and clarification of TTB's trade practice regulations in Parts 6, 8, 10 and 11, TTB should publish an advanced notice of proposed rulemaking as expeditiously as possible. The advance notice should give interested industry members and members of the public at least ninety (90) days in which to prepare and submit comments.

BA looks forward to submitting comments to TTB on such future rulemaking projects.

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BA and its thousands of members greatly appreciate the opportunity to present our views in response to the RFI. The need to foster a competitive beer market free from undue influence and exclusionary practices has never been greater. We stand ready to supplement our submission at the request of TTB or other involved federal agencies, and we look ahead to a time when beer selection is dictated solely by consumer choice and not other factors.

Sincerely,

Robert D. Pease
President & CEO
Brewers Association