



July 5, 2023

VIA ELECTRONIC SUBMISSION

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

Re: Consideration of Updates to Trade Practice Regulations, 87 Fed. Reg. 67612

Dear Director Greenberg:

On November 9, 2022, the Alcohol and Tobacco Tax and Trade Bureau (TTB) published an advance notice of proposed rulemaking (ANPRM) titled “Consideration of Updates to Trade Practice Regulations.”¹ In the ANPRM, TTB solicits input on possible improvements to the agency’s trade practice regulations related to the Federal Alcohol Administration Act’s (FAA) exclusive outlet, tied house, commercial bribery, and consignment sales prohibitions.² This letter constitutes the Office of Advocacy’s (Advocacy) public comments on the ANPRM.

Advocacy appreciates the opportunity to provide input on TTB’s alcohol trade practice regulations on behalf of small business stakeholders. In preparing these comments, Advocacy spoke with many small producers of beer, wine, cider, and distilled spirits. In addition, our office consulted with trade groups representing the interests of small alcoholic beverage producers. Although these small businesses represent diverse industry segments, they expressed similar concerns related to market competitiveness and barriers to entry.

Small business stakeholders raised specific concerns and potential regulatory solutions, as outlined below. Advocacy notes, however, that small producers also expressed a general frustration with the lack of enforcement of the existing regulations against large players in the

¹ Consideration of Updates to Trade Practice Regulations, 87 Fed. Reg. 67612 (Nov. 9, 2022).

² Federal Alcohol Administration Act, 27 U.S.C. §205(a)-(d).

industry. Therefore, Advocacy recommends that TTB consider consistent enforcement of existing regulations to create a level playing field as an alternative to additional regulation.³

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),⁴ as amended by the Small Business Regulatory Enforcement Fairness Act,⁵ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁶ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.⁷

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁸

B. The Advance Notice of Proposed Rulemaking

On July 9, 2021, President Joe Biden issued Executive Order 14036, *Promoting Competition in the American Economy* (E.O. 14036).⁹ E.O. 14036 required the Secretary of the Treasury, in consultation with the Attorney General and the Chair of the Federal Trade Commission, to submit a report assessing the current market structure and conditions of competition in the alcohol industry. The analysis needed to include an assessment of any threats to competition and

³ In a 2022 report on competition in the alcohol industry, the Department of the Treasury recommended that TTB "should, as a matter of enforcement policy, focus its efforts against large entities presumed to have market power, such as the larger brewers, distributors, and similar actors. In bringing such cases, which may be complex, it should collaborate with states, as is current practice, but also with the [Department of Justice] and the [Federal Trade Commission] to the extent they have similar concerns." DEPARTMENT OF THE TREASURY, COMPETITION IN THE MARKETS FOR BEER, WINE, AND SPIRITS, 62-63 (2022).

⁴ 5 U.S.C. § 601 et seq.

⁵ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁶ Small Business Jobs Act of 2010, Pub. L. 111-240, §1601.

⁷ *Id.*

⁸ *Id.*

⁹ Promoting Competition in the American Economy, 86 Fed. Reg. 36987 (July 9, 2021).

barriers to new entrants.¹⁰ On July 28, 2021, the Department of the Treasury (Treasury) issued a Request for Information (RFI) regarding the current market structure and conditions of competition in the American alcoholic beverage markets.¹¹

On February 9, 2022, Treasury released a report detailing the results of its RFI, titled “Competition in the Markets for Beer, Wine, and Spirits.”¹² The report noted that two seemingly opposing trends have drastically changed the alcoholic beverage industry in recent decades: the growth of “craft” producers and industry consolidation.¹³ Among the recommendations in the report, Treasury encouraged TTB to “consider rulemaking to update certain of its trade practice regulations under the FAA Act” with a focus on clarity and modernization.¹⁴ Treasury also recommended that TTB “should evaluate its trade practice enforcement policies” to address complaints of underenforcement against larger industry players and temper enforcement against entities lacking market power.¹⁵

In response, on November 9, 2022, TTB published an ANPRM seeking public comment on some of the agency’s trade practice regulations under the FAA Act.¹⁶ The ANPRM notes that TTB has not revised the trade practice regulations in over 20 years and specifically invites comment on the exclusive outlet, tied house, commercial bribery, and consignment sales prohibitions.¹⁷ The ANPRM generally requests comment on how the agency can modernize its trade practice regulations to foster competition without threatening retailer independence or encouraging exclusionary practices.¹⁸ The ANPRM also requests comment on how to update the trade practice regulations to account for current marketplace realities, including the digital market.¹⁹ To assist the agency in its rulemaking process, the ANPRM requests comment on sixteen specific topics of interest, including but not limited to: category management, shelf plans, slotting fee arrangements, interest in a retail license or property, and sponsorships.²⁰

II. Advocacy’s Recommendations Regarding the Trade Practice Regulations

A. Trade Practice Regulations

Advocacy is concerned that the existing trade practice regulations do not reflect the current power imbalance in the alcohol market. Small businesses have told Advocacy that while industry consolidation is an issue in all three tiers of the marketplace (producers, distributors, and retailers), it is especially prevalent at the distribution tier. Access to retailers is controlled by an

¹⁰ *Id.*

¹¹ Promoting Competition in the Beer, Wine, and Spirits Markets, 86 Fed. Reg. 40678 (July 28, 2021).

¹² DEPARTMENT OF THE TREASURY, *supra*.

¹³ *Id.* at 2.

¹⁴ *Id.* at 3.

¹⁵ *Id.* at 3-4.

¹⁶ 87 Fed. Reg. 67612.

¹⁷ *Id.* at 67613.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 67613-67615.

increasingly limited number of wholesale distributors, resulting in decreased competition and higher prices for consumers. Small producers report that access to distributors is, in turn, effectively controlled by a few large alcohol producers. Given this market reality, Advocacy has identified the following areas of the trade practice regulations that could be improved to increase the competitiveness of small producers.

1. Category Management and Shelf Plans

Small producers expressed particular concern with category management activities. As noted in the Treasury report, “[c]ategory management refers broadly to the purchasing, stocking, and display decisions that a retailer makes for a class of products.”²¹ Category management includes the provision of shelf plans, or “planograms,” which are visual aids that optimize the layout and placement of products on store shelves.

Small businesses informed Advocacy that it has become increasingly difficult to gain space on retailer shelves due to the exclusionary category management activities of large producers and wholesale distributors. It is a common industry practice for retailers to select a large industry player as a “category captain.” Category captains are supposed to provide recommended shelf plans to retailers, as allowed by 27 C.F.R. § 6.99(b). In practice, however, these interested parties are often responsible for determining the final design of shelf schematics and even selecting which products a retailer will stock.

Small businesses told Advocacy that category management, particularly shelf planning, is a major issue impeding competition in the alcohol market. Those businesses reported that substantially all major supermarkets and other chain retail establishments engage category captains. Small suppliers are routinely denied meetings with chain retailers and are informed of their placement status via written notice. One small northeastern producer reported that it was selected for a “local set” at a major retailer in its region. After its product was left off a shelf plan by the retailer’s category captain, however, the retailer chose not to correct the plan and did not stock the product. The small producer was not able to get onto the store’s shelves again for five years, markedly impacting growth. Other small businesses described similar issues with shelf planning, including an inability to gain access to store shelves and preferential placement without the greater resources available to major producers and distributors.

The provision of shelf plans and other category management services is inherently valuable, and conflicts with section 105(b) of the FAA. To maintain retailer independence, Advocacy recommends that TTB remove the exception which allows industry members to provide retailers with shelf plans and schematics.

2. Slotting Fees and “Pay-to-Play”

Small alcohol producers identified slotting fee and other pay-to-play arrangements as high-visibility issues affecting industry competition. Slotting fees are payments made to retailers in exchange for stocking and displaying products.²² As noted in the ANPRM, “TTB regulations

²¹ DEPARTMENT OF THE TREASURY, *supra* at 39.

²² *Id.* at 38.

provide that paying or crediting a retailer for any advertising, display, or distribution service is an inducement.”²³ Small businesses reported that retailer requests for free or subsidized equipment, menu printings, tastings, and other slotting fees are commonplace in alcohol markets. In addition to these traditional slotting fee arrangements, small business representatives identified two modern slotting fee practices that should be expressly prohibited. First, small businesses report that retailers are increasingly demanding that suppliers spend money on coupon programs as a condition for placement or promotion of the supplier’s product. Second, third-party distribution websites routinely require the payment of fees for access to banner ads and other virtual display space.

Advocacy recommends that TTB clearly define slotting fees in its regulations, including both physical and virtual elements in the definition. The list of physical slotting fees should include any free or subsidized equipment that can only be used to display a specific brand’s products, as well as menu printings and tastings. The definition should also include coupon programs where retail placement or promotion is conditioned on a supplier or the wholesaler making payments for participation. The definition should further include fees paid for virtual display space.

3. Sponsorship and Marketing Agreements

Small breweries and distilleries reported sports stadiums and other entertainment venues acting as “tied houses” through sponsorship agreements. Under sponsorship agreements, marketing rights are implicitly or explicitly tied to exclusive or near-exclusive pouring rights at the venue. Small businesses reported similar marketing agreements at chain restaurants and even some single-unit operations. Small business stakeholders reported that retailers will often set up separate marketing companies to make sponsorship agreements appear legal. Such agreements are detrimental to competition and to consumers.

Advocacy recommends that TTB clarify its regulations to prohibit direct and indirect exclusionary sponsorship and marketing arrangements. TTB should consider whether it is appropriate to include a rebuttable presumption that sponsors with outsized market share at a venue have effectively paid for exclusive sales rights at that venue.

4. Digital Marketplace

Small businesses had a mix of concerns about TTB’s regulation of digital markets. As noted above, producers reported that slotting fee arrangements are ubiquitous on wholesaler-controlled and other third-party delivery websites. Such websites break TTB regulations by allowing producers to pay for search prominence, advertising space, or selection as the “feature of the week.” One small western brewer reported that to obtain prime placement in the search patterns of a well-known third-party site, producers are required to participate in a blind bidding process. The bidding process occurs on a per-click basis, and producers are left in the dark about the actual cost to win placement. The small brewer noted that only large national brands are featured consistently on the site. Small businesses identified these site features as the virtual equivalent of paying for advertising space, and in some cases, exclusive pouring rights.

²³ 87 Fed. Reg. 67612 at 67614.

Small businesses were concerned, however, that TTB might create prescriptive digital regulations that may become unworkable in a rapidly changing market. Small producers were particularly concerned about any digital regulation that would hamper direct-to-consumer sales. In light of these concerns, Advocacy recommends that TTB update its tied house regulations to specifically include third-party alcohol delivery websites. TTB should specify that its tied house regulations do not apply to producer's company websites.

5. Other Concerns

In addition to the above, small businesses expressed the following thoughts on the trade practice regulations:

- *Sales competitions*: Small producers were generally in favor of capping incentives provided to trade buyer sales representatives where the provision of such incentives inhibits competition.
- *Interest in a retail license or property*: Small business representatives believe that modern financing options warrant a de minimis ownership exception to the tied house regulations. Given modern funding options, a minority interest in a retail license/property should not be considered an interest that will result in an inducement.
- *Importers acting as distributors*: Small distillers expressed concerns regarding importers of foreign distilled spirits acting simultaneously as distributors of imported products. This concern was particularly tied to products produced in countries where governments subsidize the base ingredients and foreign marketing of alcoholic beverages. In combination, these factors lower the price point of imported products and make it difficult for domestic producers to compete.

B. Enforcement

Advocacy notes that small businesses described many of the above issues as an enforcement problem. This was particularly true of slotting fees, sponsorships, and other pay-to-play arrangements that are already prohibited by the trade practice regulations. Small producers have consistently been denied market access due to their inability to provide retailers with trips, sports tickets, and other inducements. Multiple small businesses complained that retailers commonly require “credit card swipes” to gain access to taps or shelf space. Credit card swipes were described as arrangements where producers and distributors, either directly or through third parties, agreed to pay thousands of dollars to retailers in exchange for stocking a product, premium shelf space, or the installation of proprietary equipment.

Due to the commonality of these industry practices, Advocacy recommends TTB consider consistent enforcement as an alternative to additional regulation. Effective enforcement efforts should focus on category management, tied house, and pay-to-play arrangements. TTB should exercise its enforcement discretion to focus on major industry players that hold most of the market power. To ensure compliance by the largest industry players, Advocacy recommends that TTB consider developing consistent, transparent penalty guidelines in which fines and settlement amounts reflect the revenue and market share of the offending party. In addition, Advocacy

recommends that TTB continue coordinated efforts with state and federal agencies to combat unfair business practices in all three tiers of the market.

III. Conclusion

Advocacy appreciates the opportunity to provide input on TTB's trade practice regulations on behalf of small business stakeholders. Advocacy submits the above comments to assist the agency as it prepares its proposed rulemaking and any small entity analysis. Based upon small business input, Advocacy recommends clarification and modernization of the existing alcohol trade practice regulations to support competition. Advocacy further recommends that the agency consider consistent and effective enforcement efforts as an alternative to additional regulation.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Meagan Singer at (202) 921-4843 or by email at meagan.singer@sba.gov.

Sincerely,

/s/

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Office of Advocacy
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/s/

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Copy to: Richard L. Revesz, Administrator
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