



September 30, 2021

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; Supplemental Submission

Dear Director Greenberg,

I write as President and CEO of the Brewers Association (“BA”) to supplement BA’s earlier response 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

BA submitted its initial submission to TTB on the RFI comment deadline of August 18, 2021. That submission focused on issues within Treasury’s jurisdiction, primarily those arising from the trade practice provisions of the Federal Alcohol Administration Act (“FAA Act”)³ and the need to update and clarify many decades-old TTB regulations. Since that time, TTB has announced that it will accept comments through October 1, 2021.⁴ Moreover, comments filed by other interested parties suggest that many view the RFI as an opportunity to expose competition issues going far beyond TTB’s jurisdiction, such as restrictive state alcohol laws and the enforcement policies of the Department of Justice, Antitrust Division (“DOJ”) and the Federal Trade Commission (“FTC”). BA’s August 18 submission did not intend to convey that the only exclusionary issues within the beer market are those governed by TTB. We accordingly write to

¹ 86 Fed. Reg. 40678 (July 28, 2021).

² E.O. 14036, 86 Fed. Reg. 36987 (July 14, 2021).

³ See 27 U.S.C. § 205(a)-(d).

⁴ See <https://www.ttb.gov/news/treasury-still-accepting-comments-for-report-on-competition> (last visited September 12, 2021).

supplement our prior submission with a discussion of broader competition issues within the beer market.

Section 1 of our supplemental submission explains that the beer market, in spite of numerous small new entrants at the supplier tier, is and remains a highly concentrated market. Significantly, at the wholesaler⁵ tier of the industry, consolidation already has produced a duopoly for effective beer distribution⁶ in most geographic territories. Section 2 explains how restrictive state alcohol laws serve to protect and enrich incumbent businesses, particularly existing wholesalers. Section 3 explains how the constrained competitive dynamics of the beer market magnifies the impact of even small acquisitions by large brewers⁷ and beer wholesalers. Section 4 briefly addresses likely objections claiming that the mechanisms restraining competition today are necessary to meet important alcohol policy goals.

1. Today the beer market is concentrated and stacked in favor of incumbent players.

Ironically, defenders of the current competition *status quo* repeatedly point to the existence of BA's membership as proof that competition is alive and well in the beer industry. A closer look, however, demonstrates that in spite of the large number of small brewers, brewing remains a highly consolidated industry. Moreover, massive wholesaler consolidation has created a situation in which most local markets are served by only two effective beer wholesalers – a duopoly that together holds ninety percent or greater of the beer market in a specific geographic territory. This distribution choke point, in turn, helps entrench dominant beer suppliers by forcing smaller brands to compete for “share of mind” in a highly consolidated distribution channel that prioritizes existing major brands.

At the supplier tier, despite the explosion in *the number* small producers in recent years, breweries are the 9th most concentrated manufacturing industry (NAICS 5-digit code level), with 68.6 market share by the largest four manufacturing firms.⁸ And this Economic Census data *undersells* concentration in brewing due to two factors. The first is that the vast majority of that concentration is held by just *two* firms – Anheuser-Busch/InBev (“AB”) and Molson Coors. The second is the presence of a dominant imported beer supplier, Constellation Brands (Corona, Modelo, Pacifico), that does not

⁵ The terms “wholesaler” and “distributor” are often used interchangeably, and different state alcohol laws use both terms. This submission uses the term “wholesaler” for consistency and because “wholesaler” is the term employed by federal law in the Federal Alcohol Administration Act.

⁶ By effective beer distribution, we mean a business capable of serving all or nearly all the retail accounts in a given territory. While a few retailers in most markets may purchase from smaller wholesalers, those wholesalers are capable of serving only a small fraction of the retailers in a given territory. Moreover, and as explained below, the market dynamics created by franchise laws, exclusive territory requirements, and other features of state alcohol law make it nearly impossible for such small wholesalers to achieve the scale needed to engage in effective beer distribution.

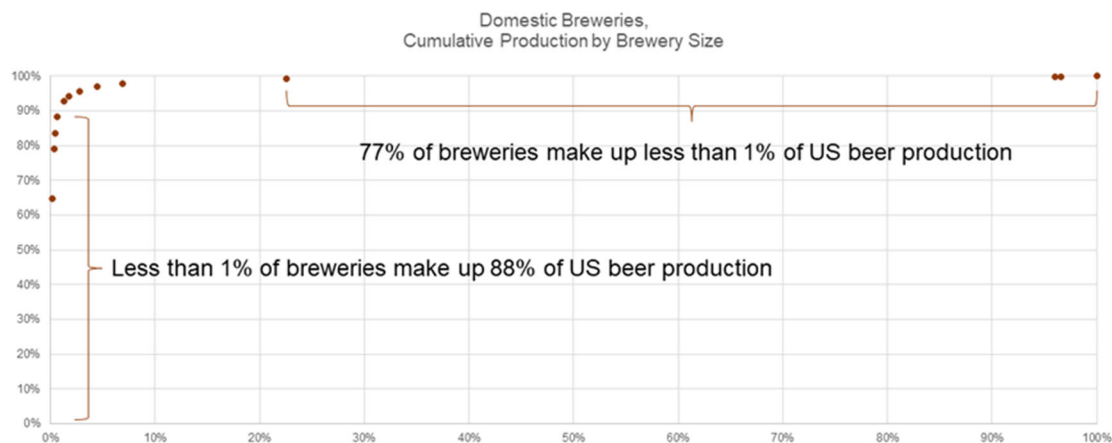
⁷ For simplicity these comments will generally use the term “brewers” to refer to suppliers of beer, which in some cases may also include beer importers.

⁸ U.S. Census Bureau, 2017 Economic Census

appear in the brewery sector in Census data because the company is not a U.S. beer manufacturer.⁹

In 2020, including imports, the top two firms (ABI and Molson Coors) held 59.9 share of the US beer market, and the top four firms (including Constellation and Mark Anthony Brands) held 75.5 share.¹⁰ In contrast, the smallest 77% of facilities account for less than 1% of total domestic production.¹¹ Moreover, growth by small, independent breweries in the past decade has depended heavily on the ability to bypass conventional channels of distribution.¹² In effect, the barriers to access primary routes to market have channeled consumer demand towards the very small businesses able to survive outside conventional distribution channels by selling at their own premises. The following graph starkly illustrates the continued consolidation of the brewing sector despite the proliferation of many very small craft brewers:

Lots of Breweries, Lots of Concentration



Source: TTB (2021); Brewers Association Analysis



The situation on a local market-by-market basis is even grimmer within the wholesaler “tier” of the industry. In 2017, the top 50 beer and ale merchant wholesalers (NAICS 42481) had 46.8 market share.¹³ But a focus on national data obscures the much higher concentration at the local or regional level. Today most geographic territories are

⁹ Constellation accounted for 7.2 share of the U.S. beer market in 2020. Beer Marketers Insights, *Beer Industry Update, 2021*, Table 3.1

¹⁰ Beer Marketers Insights, *Beer Industry Update, 2021*, Table 3.1

¹¹ See https://www.ttb.gov/images/pdfs/statistics/production_size/2020_brew_prod_size_ttb_gov.pdf (last visited September 12, 2021).

¹² For example, tax-determined sales for consumption or sale in a tavern or on brewery premises grew by nearly three million barrels from 2014 to 2019, equating to roughly half of craft growth during that five year period. See https://www.ttb.gov/images/pdfs/statistics/aggregated/aggr-data-beer_2008-2020.pdf (last visited September 16, 2021).

¹³ U.S. Census Bureau, 2017 Economic Census

served by only two effective (*i.e.*, capable of reaching most retail accounts in the market) beer wholesalers. As a result, both brewers and retailers effectively must deal with a duopoly in beer distribution on a market-by-market basis.

“Horizontal” consolidation at the wholesaler tier now threatens to create regional duopolies, and unless halted beer wholesaler consolidation will result in a situation similar to the distribution of wine and spirits, where two giant national companies distribute most major brands. For example, most industry estimates currently have a single group of companies (all owned by Reyes Holdings) at around 160 million cases in California (~11.6 million barrels).¹⁴ That equates to roughly half of the California beer market, which has fallen to a bit under 300 million cases (21.6 million barrels) in recent years. The volume of this single wholesaler group is roughly three and a half times the total production of all 958 craft breweries in California.

We have no doubt that defenders of the *status quo* will point to the number of TTB wholesaler “basic permits”¹⁵ as evidence that there are thousands of beer wholesalers, ostensibly proving that the market is competitive. But TTB requires a wholesaler basic permit whenever a business purchase and resells at wholesale any alcohol beverage. Thus, TTB’s basic permit total includes, for example, hundreds of wholesaler permits held by large off-premise retail establishments in states where off-premise retailers are a source of supply for any other type of retailer, such as caterers. Similarly, many supplier-tier entities hold multiple wholesaler permits, such as when brewers must obtain a wholesaler permit if they pass title to products from one affiliate to another as part of their domestic or global route-to-market. The TTB permit number says nothing to undermine the fact that most geographic territories today are served by a duopoly of just two effective beer wholesalers.

The use of *non-sequitur* information like the number of TTB wholesaler permits does underscore the need for more precise data on beer wholesaler market shares. Most large beer suppliers are publicly-traded and must report information on shipments and depletions. In addition, a number of states compile and publish data on shipments by beer suppliers. Finally, several non-governmental sources, including BA’s own Beer Industry Production Survey, compiles data on brewery production. Similar sources do not exist for beer wholesalers, most of which are closely-held companies with few reporting requirements. BA would welcome greater transparency into the market share of wholesalers on a market-by-market basis.

2. Restrictive state laws foreclose effective market responses to consolidation and market concentration.

Competition in the beer industry cannot be understood without understanding how restrictive state laws serve to protect the market power of existing businesses,

¹⁴ *Beer Business Daily*, September 9, 2021 & *Beer Marketers Insights*, September 9, 2021. One source uses “about 160 million case equivs of beer” and one uses “over 160 mil cases.”

¹⁵ See 27 U.S.C. § 203(c); 27 C.F.R. § 1.22.

particularly existing wholesalers. Indeed, these structures explain why almost no new beer wholesaler businesses have established themselves as effective competitors to existing wholesaler businesses in the past fifty years. Instead, beer wholesaling is a closed industry, with existing businesses protected from many competitive forces. As a result, the only way for an outsider to participate in beer distribution in a meaningful way is to purchase an existing business if and when its owner decides to sell.

a. Beer “franchise” laws

The most anti-competitive state laws are the so-called beer “franchise” laws¹⁶ that make it all-but-impossible for a brewery to terminate a wholesaler. Enacted in the 1970s through 1990s, beer franchise laws responded to a market in which large, national brewers appeared to have overwhelming bargaining power advantages over their wholesalers. At the time, most beer wholesalers were small operations distributing in limited territories and most depended primarily on one or a handful of brands for their entire business. Those days are long gone.

In the large majority of states today, a beer wholesaler cannot be terminated except for a showing of “cause,” with “cause” requiring an affirmative showing by the brewer. Moreover, non-renewals are treated the same as any other termination, and the parties cannot alter the requirement for showing “cause” (or any other aspect of the beer franchise law) by agreement, written or otherwise. In this way the beer franchise laws mandate presumptively perpetual distribution relationships between brewers and wholesalers. “Cause,” of course, is not capable of a precise legal definition except for a few extreme circumstances (e.g., a felony conviction of a wholesaler owner) that rarely occur. In virtually all cases, then, showing cause requires a fact-specific inquiry and, thus, a dispute will require the parties to engage in the expensive and time-consuming discovery process and other aspects of modern litigation. Very few small brewers can afford the six- and even seven-figures in legal fees required for such an ordeal. Moreover, in many cases the parties remain bound to continue doing business during the pendency of the dispute, leaving the brewer solely dependent for distribution in the territory on a hostile company. In contrast, the wholesaler is free to shift its efforts to the other brands in its portfolio during the pendency of the dispute.

Beer franchise laws also empower consolidation by making any brewer’s disapproval of the sale of a wholesaler’s business or a wholesaler’s assignment of the brewer’s brand distribution rights a decision subject to a litigation challenge. Under most state laws, even in the face of contrary contractual language, a wholesaler is free to sell or assign the brand rights of a brewer’s brands, which a brewery cannot unreasonably withhold

¹⁶ The use of the term “franchise” in many of these laws, and by the industry generally, is quite misleading. While the term franchise traditionally applies to a relationship in which the franchisee business is completely or at least substantially dependent on its relationship with the franchisor, very few beer franchise laws confine themselves to the relationship between a dominant supplier and its dependent wholesaler. Instead, most beer franchise laws restrict the brewer and provide legal advantages to the wholesaler even where the brewer represents a tiny fraction of the wholesaler’s business.

consent to. Here, too, the issue of “reasonableness” or “unreasonableness” does not lend itself of a quick judicial resolution as a matter of law. Thus, the financial burden of litigating the issue to a final judgment is beyond the means of most small brewers. And a loss would mean that the brewer’s brand would be handed to a hostile wholesaler that usually has many other brands to focus its efforts on.

The impact of franchise laws on the competitive landscape for small brewers cannot be overstated. Once a brewer appoints a wholesaler in a given territory, it effectively cannot move away from that wholesaler regardless of the performance or focus of the wholesaler on its brands. While beer wholesalers correctly point out that brands do move from wholesaler to wholesaler, virtually all of that movement occurs when one wholesaler *agrees* – based on its own self-interested business reasons – to sell the brewer’s distribution rights or “swap” brand rights with another wholesaler. In short, the wholesaler holds all the cards and can treat a brewer’s brand or brands as its own property that it can sell or trade virtually at will.

Franchise laws also ensure that a small start-up wholesaler can rarely succeed in achieving real scale in order to effectively compete with existing incumbent wholesaler businesses. Existing brands are effectively “locked up” by such laws, such that a startup, or a neighboring wholesaler seeking to enter into a new territory (without buying out the incumbent) has no path towards obtaining scale brands from the incumbent. Moreover, the protection such laws provide to an appointed wholesaler likely makes brewers less willing to risk appointing a new or smaller wholesaler, as doing so would risk trapping the brewer’s brands in a sub-optimal wholesaler if the smaller wholesaler cannot deliver on any promised sale or service improvements. While ordinarily effective contracting could mitigate this risk (e.g., by appointing the new wholesaler for a limited period of time in order to assess its performance), the non-waiver provisions in almost all beer franchise laws makes this impossible.

b. Three-tier mandates

In many states, beer wholesalers enjoy a mandatory place in the beer distribution chain. While immediate post-Prohibition state laws generally contemplated a mandatory separation of producers and wholesalers from retail outlets (often excepting those attached to the brewer’s premises), in the post-World War II era many states adopted laws mandating that beer pass through a wholesaler before reaching a retailer. Today, where brewer-to-retailer sales are permitted, state law often imposes severe constraints on this privilege. These may include a cap on the total volume a brewer can sell to retailers, a restriction on brewers distributing the beers of other brewers and therefore placing a severe limit on the scale of such operations, or a limitation on self-distribution rights to only in-state breweries.¹⁷ Such mandates foreclose or severely limit the ability

¹⁷ Restrictions imposed only on out-of-state businesses would likely be found unconstitutional by the courts, but few small brewers have the resources to pursue constitutional litigation.

of small brewers to respond to a constricted and consolidating wholesaler tier by finding their own route to market.

We caution, however, that the evolution of the market and its structure would make vertical integration by the largest beer suppliers competitively problematic. While there is nothing inherently wrong with a brewer selling to a retailer, as already explained, the current beer distribution market is characterized by a duopoly of effective wholesalers in a given geographic territory, each associated with a major supplier. These wholesalers are typically referred to as either the “red network wholesaler” (affiliated with ABI) or the “blue/silver network wholesaler” (affiliated with Molson Coors although today increasingly dependent on the sale of Constellation Brands products). While taking even a large craft brewer out of one of these networks would hardly threaten the viability of any wholesaler, vertical integration by ABI or another of the largest beer suppliers would further constrain distribution options for small beer suppliers like BA members.

Today, only one of the major suppliers, ABI, has vertically-integrated wholesale operations in a number of states, notably including California.¹⁸ Those “wholly owned distributors” (“WODs”) typically carry ABI products exclusively, or carry ABI products plus a smattering of very small local brands. In markets served by a WOD, then, virtually every small supplier has no choice but to seek distribution through the blue/silver network wholesaler in that market. In short, ABI vertical integration in a territory leaves small brewers with a single effective distribution option – a monopoly – in that territory.

Another aspect of three-tier mandates are restrictions on brewers’ ability to access consumers directly via deliveries and shipments. On-line shopping had been growing for years, and the COVID-19 pandemic greatly accelerated that trend. And although many states responded by relaxing restrictions on in-state businesses engaging in home delivery, out-of-state breweries can only ship beer to consumers in eleven states plus the District of Columbia.¹⁹ Leaving aside the Commerce Clause implications of limiting direct-to-consumer shipping to in-state companies, such restrictions inherently favor widely-distributed products at the expense of small and independent businesses. It should come as no surprise, then, that although the largest beer suppliers and wholesaler groups have embraced at-home delivery,²⁰ they categorically oppose efforts to relax restrictions on interstate shipment and sales. While at-home delivery by any business requires careful controls to minimize underage access, the successful history of direct-to-consumer interstate shipping by wineries illustrates that states can successfully open their markets while protecting the public.

¹⁸ Molson Coors still operates a single wholesale operation in and around Golden, Colorado, the historic birthplace of Coors Brewing Company.

¹⁹ See <https://www.brewersassociation.org/government-affairs/state-laws/> (last visited September 16, 2021). Indeed, interstate beer shipment took a step back this month when Nevada enacted a wholesaler-supported law repealing the right of brewers and distillers to ship directly to Nevada consumers.

²⁰ Indeed, an investment group organized by the Wine & Spirits Wholesalers Association directly invested in the largest facilitator of in-state alcohol delivery, Drizly.

c. Mandated exclusivity

Many states also explicitly prohibit intrabrand competition by requiring brewers to grant their wholesalers exclusive distribution rights in a given geographic territory. Under such laws, often just one aspect of the many wholesaler-friendly provisions in the typical beer franchise law, wholesalers receive absolute protection against competition from any other business selling a brand carried by that wholesaler. As a result, retailers seeking a popular brand have no choice but to deal with the wholesaler granted the exclusive right to that brand in the retailer's territory.

States often add further protections against intrabrand competition in the form of "primary American source" laws. Such laws typically mandate that a wholesaler can only purchase alcohol beverages from the primary American source for such products. This generally means the brewer or, in the case of imported beer, the beer's U.S. importer as designated by the foreign brand owner or producer. In this way, states help enforce a strict non-compete regime between wholesalers, ensuring that no retailer can pit one wholesaler against another when seeking to obtain better pricing or services with respect to a given brand.

d. Retailer tier constraints

The regulation of retailers further forecloses or restrains competitive responses to wholesaler consolidation, at least in most states. Very few states permit retailers to distribute beer among their stores – a common practice of large chain retailers when handling other consumer products. Similarly, most states give retailers little or no ability to sell alcohol beverages to other retailers.²¹ Thus, while "big box" superstores often serve as the wholesale distributor for smaller "mom and pop" retail operations, in most places they cannot serve this role with respect to beer.

These regulatory structures foreclose a natural response to consolidation. Increasingly, small retailers find that wholesalers unilaterally cut their service levels, delivering beer less frequently and requiring minimum "drops" for the wholesaler to service the account. With most commodities such wholesaler policies, which may be economically justifiable from a wholesaler perspective, would simply force the retailer to find an alternative (if perhaps more expensive) source for needed product. The retailer might, for example, resort to purchasing from a big box superstore down the road. But the laws of most states foreclose this option – the retailer must continue doing business with the wholesaler even if it does not receive a service level appropriate for the account.

²¹ As noted above, a few states allow retailers to sell to select categories of other retailers, most often caterers. These represent an exception to the general rule and, as noted above, inflate the total number of wholesaler basic permits issued by TTB.

3. State law constraints and the wholesaler-tier bottleneck exacerbate the impact of industry mergers and acquisitions.

The constrained competitive dynamic present in the current beer industry magnifies the impact of consolidation occurring in the supplier and wholesaler tiers. The obstacles posed by franchise laws, prohibitions on self-distribution, and other state law restrictions give expanding regional and national wholesalers irresistible leverage over their suppliers. Similarly, the distribution bottleneck created by state laws and market consolidation means that large suppliers can use the bottleneck to their advantage by squeezing out competition in emerging categories, such as craft beer.

When an expanding wholesaler purchases a wholesaler or its brand distribution rights in another territory, it already possesses substantial leverage over the suppliers it carries in its existing territories. By holding franchise law-protected rights to existing brands, the wholesaler can exert pressure – explicitly or implicitly – on a supplier to approve the acquisition of the same supplier’s distribution rights in another territory. As most wholesalers hold the rights to many brands in a given territory and know they are one of just two effective beer distribution options in that territory, any act (such as non-appointment in a new territory) risks lower wholesaler efforts in existing territories. Few brewers can afford to take that risk.

As wholesaler consolidation results in ever-larger territories, suppliers increasingly find themselves captive to wholesalers that are too important to alienate. The system of state regulatory constraints then ensures that normal competitive responses to these developments cannot occur: Termination or non-renewal of the distribution relationship is impossible for most small brewers, and the cost of exit is exorbitantly high (in the form of legal fees, disruption in the disputed territory, etc.) even for those brewers big enough to attempt a termination for cause. Territorial exclusivity and primary American source requirements foreclose both the supplier and other wholesalers from acting as an alternative source of products to retailers in the territory. And the ability to serve substantial retail accounts is usually foreclosed by a combination of self-distribution restrictions and the prohibition on retailers distributing within their own stores.

Given these dynamics, it is hardly surprising that wholesaler margins in the beer industry are substantially higher than those in other consumer non-durable goods. Moreover, in the past 25 years, while margins in other wholesale distribution businesses have been falling, beverage alcohol wholesaler margins have *increased*. These increases have occurred in spite of the absence of any significant increase in cost inputs to the wholesaler business.²² The following chart illustrates these developments:

²² Operating expenses for “beer, wine, and distilled alcoholic beverages” wholesalers actually declined slightly from 18.4% in 2006 (earliest available data) to 18.0% in 2019 (latest available). Source: U.S. Census Bureau Annual Wholesale Trade Survey (AWTS).

Gross Margins as a Percent of Sales 1993-2019



Source: United States Census Bureau, Annual Wholesale Trade Survey (AWTS)



Consolidation within the wholesaler tier also magnifies the impact of large beer supplier acquisitions of emerging competitors. Today, the existence of territorial duopolies for effective distribution in a given territory facilitates the ability of dominant suppliers to blunt competitive threats by acquisition.

As already explained, because of exclusive wholesaler territories, retail customers and ultimately consumers have little choice but to deal with two (or occasionally three) full-service beer wholesalers in a territory. One or two brewers usually supply the vast majority of the beer sold by a given wholesaler, naturally giving those suppliers substantial influence over even “independent” wholesalers. These suppliers leverage their position as the key partners to their wholesaler distribution networks to ensure that their brands in every category – established or emerging – receive outsized wholesaler sales and distribution efforts. As a result, the current distribution bottleneck at the wholesaler tier helps dominant suppliers protect their market shares. When a new competitive category emerges, large suppliers can and often do acquire a position in that category and then leverage their influence to ensure that their new entrant distracts its wholesalers from competing brands within their respective portfolios.

Retail consolidation also exacerbates the impact of supplier acquisitions. As outlined in BA’s August 18, 2021 submission in response to the RFI, large retailers often engage in conduct that violates the spirit, and often the letter, of the tied house laws designed to ensure that meaningful retail channels remain open to all suppliers and wholesalers. Many large chain retailers, for example, rely on category management practices that magnify the influence of the largest suppliers and wholesalers. Under these arrangements, a single large supplier or wholesaler acts as the “category captain” for the retailer’s beer aisle. While styled as a system for “recommendations” to retailers, in

practice the category captain has an enormous amount of say over product listings, de-listings, and shelf placements within the retailer's stores. In this way, a large supplier can use its position as the category captain to favor its newly-acquired product(s) in an emerging category to displace or marginalize similar products of small competitors. While the Federal Alcohol Administration Act's trade practice provisions aimed to prohibit such activity, category captaincy is a common practice today.

4. The competitive constraints prevalent today do not advance legitimate public health or safety objectives.

Alcohol is a socially sensitive product, and of course requires particularized regulation to minimize its abuse. These include minimum purchase age laws, laws against intoxicated drivers, restrictions on retailers selling alcohol to minors or intoxicated persons, and a host of other sensible measures. Contrary to the refrain of *status quo* defenders, criticism of anti-competitive and unfair measures like beer franchise laws does not mean that critics favor an unregulated market that treats beer no differently than, say, milk.²³

Enactments like franchise laws and three-tier mandates, however, do not bear any relationship to alcohol abuse. A brief look at the facts reveals no correlation, much less causation, between the particulars of the U.S. alcohol market and rates of alcohol abuse around the world. Looking at global figures for (a) heavy episodic drinking, (b) heavy episodic drinking by teens, and (c) alcohol-attributable death rates around the world, the United States' unique regulatory structure has not delivered best-in-world results. Instead, the World Health Organization ("WHO") report entitled *Global status report on alcohol and health 2018* shows the following:²⁴

²³ The reliance of entrenched industry members on such arguments has resulted in the creation of whole alcohol policy organizations primarily funded by, and no doubt serving the interests of, the wholesaler tier of the alcohol beverage industry. The Center for Alcohol Policy, for example, is substantially funded by U.S. beer wholesalers. It's programs naturally seek to justify current state laws using alcohol-control rhetoric. The Center also hosts a conference featuring alcohol regulators and even issues awards to specific regulators, presumably those that advance Center-favored policies. And by giving a platform to and funding for other groups traditionally critical of the alcohol beverage industry, it presumably seek to influence those groups to adopt pro-wholesaler policies. See *generally* <https://www.centerforalcoholpolicy.org/> (last visited September 12, 2021).

²⁴ See <https://www.who.int/publications/i/item/9789241565639> (last visited September 15, 2021).

Figure 3.8 Prevalence (in %) of heavy episodic drinking (HED) among current drinkers (15+ years), 2016

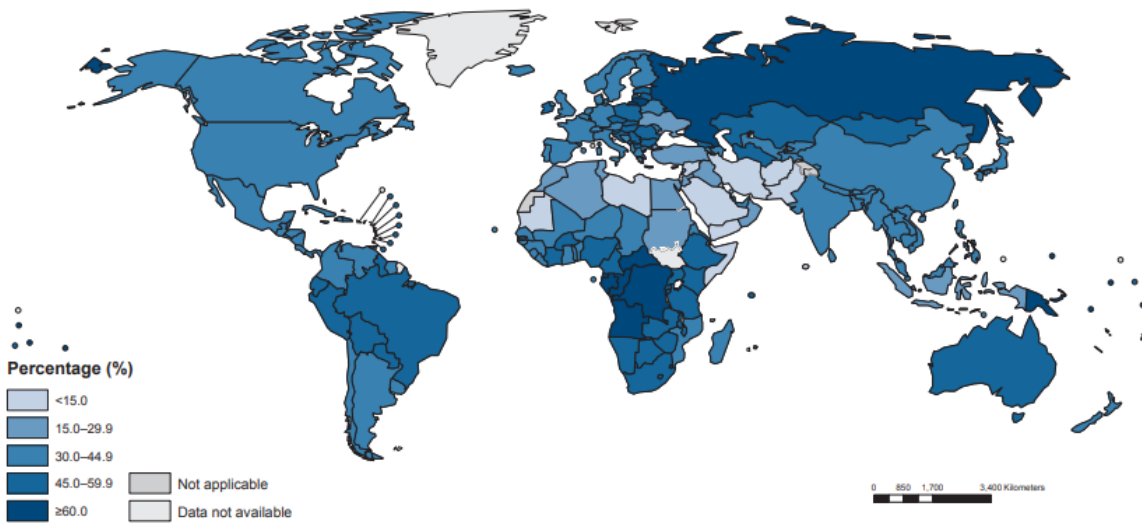


Figure 3.11 Prevalence (in %) of heavy episodic drinking (HED) among 15–19-year-olds, 2016

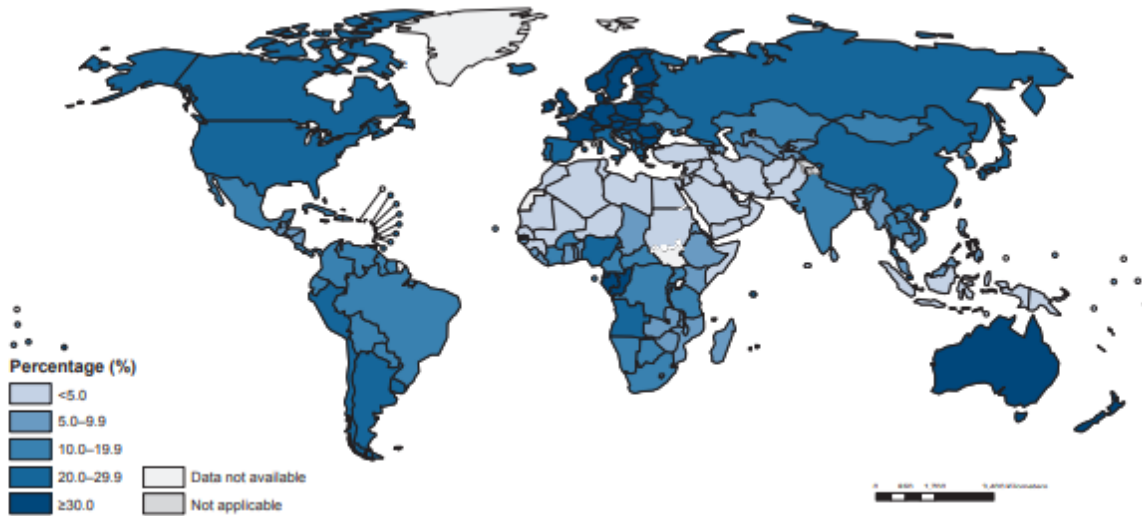
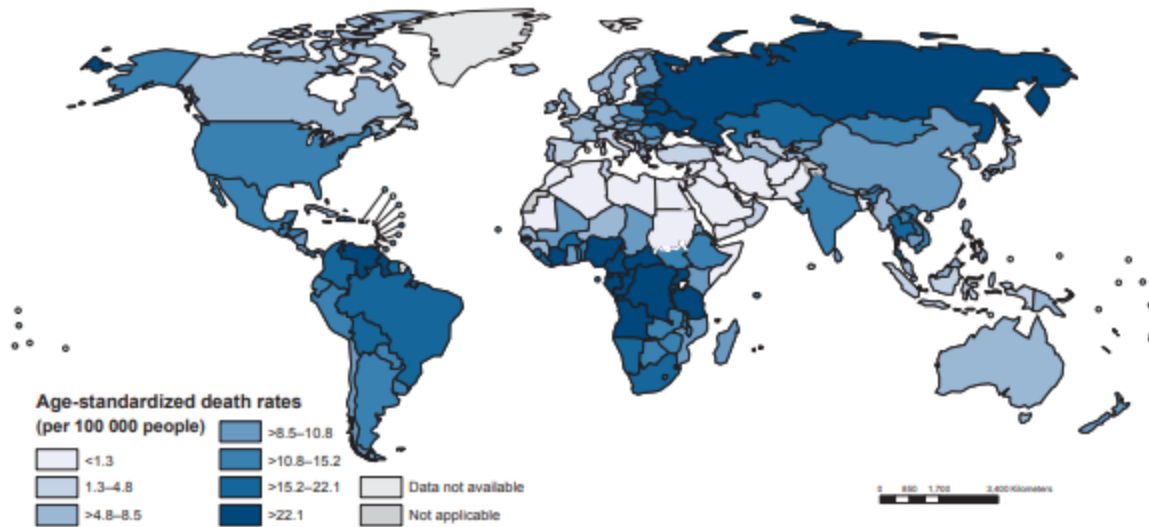


Figure 4.15 Global age-standardized alcohol-attributable injury death rates, 2016



While a deeper study is beyond the scope of these comments, BA would welcome a comprehensive federal study of the relation (or lack thereof) between the restrictive alcohol laws identified in Section 2 of this submission and key indicators of alcohol policy, such as underage consumption rates, intoxicated driving measures, and rates of liver disease due to over consumption. We are confident that studies will reveal that laws, policies, and practices directly addressing such issues, such as laws establishing a minimum legal drinking age, intoxicated driving enforcement and penalties, and important cultural norms will provide the key policy determinants of such measures. Indeed, such studies may provide valuable information for federal courts evaluating whether “concrete evidence” supports state assertions that public health and safety can justify a particular alcohol law.²⁵ But regulating the relationship between brewers and wholesalers has no bearing on important alcohol policy goals and, indeed, post-Prohibition regulation of alcohol in the U.S. proved successful for many years prior to the arrival of the first franchise laws in the 1970s.

At best, enactments like franchise laws and exclusivity mandates help pad corporate bottom-lines at the expense of consumers. Some might argue that inflating the price of alcohol for policy reasons represents a strategy to reduce over consumption, although BA generally believes that such measures fail to differentiate between abuse and non-problematic enjoyment. But even if a goal of increased price is embraced, any price increase can and should be accomplished through the levy of taxes or fees, not by padding the profits of private businesses.

* * *

²⁵ See *Tennessee Wine & Spirits Retailers Association v. Thomas*, 139 S. Ct. 2449, 2474 (2019).

BA and its thousands of members greatly appreciate the opportunity to supplement our response to the RFI. While much of this submission has addressed issues that existing federal law has limited tools to directly impact, we believe DOJ, FTC, and TTB can play an important role in restoring competitive balance to the beer market. In particular:

- A. Starting with the report called for in Section 5(j) of the EO, the federal government can use its competition expertise and resources to better study and document the barriers to competition in the industry. The Section 5(j) report, as well as other studies,²⁶ can help state policymakers' efforts to reform the laws towards more competitive, equitable structures.
- B. DOJ can and should rethink its approach towards the review of beer wholesaler acquisitions. As catalogued above, the current state of the market has created a situation where brewers and retailers must deal with entrenched duopolies in most geographic territories. Moreover, the increasing pace of horizontal acquisitions will give a shrinking number of giant beer wholesalers almost unlimited leverage over both small suppliers and their retail customers. DOJ needs to block mergers that clearly would exacerbate current restrictive conditions, and condition others to give brewers and retailers relief from the most anti-competitive aspects of current market structures.
- C. DOJ can and should also rethink its approach towards large beer supplier acquisitions of smaller competitors. As catalogued above, the current market chokepoint at the wholesaler tier gives dominant beer suppliers the ability to substantially impede the route to market of smaller companies dependent on the same distribution channels as the dominant supplier. DOJ needs to focus not only on the increase in market share gained by the acquisition, but how the acquisition may allow a dominant supplier to restrict access at the wholesaler and retailer tiers of the industry.

BA stands ready to further supplement its comments and to play a constructive role in restoring competition to the beer market. We thank you for your time and attention.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. D. Pease', with a stylized, cursive script.

Robert D. Pease
President & CEO, Brewers Association

²⁶ For example, the FTC's 2003 report on direct-to-consumer shipping and sale of wine provided invaluable analytical weight to efforts to open state markets to such sales. See *Possible Anticompetitive Barriers to e-Commerce: Wine*, https://www.ftc.gov/sites/default/files/documents/reports/possible-anticompetitive-barriers-e-commerce-wine/winereport2_0.pdf (last visited September 16, 2021).