Before the Federal Trade Commission

Comments on the Impact of Supply Chain Disruptions on Competition in Consumer Goods and Retail; Docket No. FTC-2021-0068

Submitted via the Federal e-Rulemaking Portal

I write as President and CEO of the Brewers Association (“BA”) to respond to the Solicitation for Public Comments on the Impact of Supply Chain Disruptions on Competition in Consumer Goods and Retail (“Solicitation”) published on Monday, November 29, 2021.¹ The Solicitation seeks comments on the impact of ongoing supply chain disruptions on competition in the market for consumer goods.

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.

Beer is the quintessential consumer good, enjoyed responsibly by millions of Americans. In the past twenty years consumers have come to embrace the variety and choice offered by thousands of small, independent brewers, who these comments will refer to as “craft brewers.” As small, independent companies without substantial financial or other resources, craft brewers are particularly vulnerable to sudden changes in the availability and price of ingredients and other inputs into their beers. The impact of the COVID-19 pandemic already had a disproportionate impact on craft brewers, many of which rely on sales at bars and restaurants and consequently bear the brunt of health-related closures and the public’s understandable reluctance to return to crowded public places. Supply chain disruptions have heightened those challenges, as critical packaging and production supplies have become scarce or completely un-obtainable.

Section 1 of these comments briefly catalogue the major supply chain disruptions faced by craft brewers, including shortages of aluminum cans, carbon dioxide, transportation services, and other supplies. Section 2 will briefly provide the Brewers Association’s view towards the outlook of these supplies. Section 3 explains how craft brewers generally allocate products in short supply, and how they manage out of stocks. Finally, Section 4 will address the impact of slotting fees and category captains on craft brewers.

1. What supply chain disruptions have craft brewers experienced?

The four sections that follow document pressing supply chain disruptions, focusing on aluminum cans, carbon dioxide, transportation, and a section detailing some of the most prominent other disruptions faced by our members. Rather than attempting to break our

¹ FTC Docket No. FTC-2021-0068.
response to match sub-questions “a” through “f” in the Solicitation, we present each of the four categories in a single narrative format.

a. Aluminum can supply.

Today aluminum cans constitute the most popular way for craft brewers to package their product. Can supply shortages first emerged in early 2020, and the supply constraint has only become worse, reaching crises proportions in late 2021. Indeed, the inability to source aluminum cans poses such an existential threat to many craft brewers that the issue has caught the attention of Congress after the largest producer of cans in North America abruptly cut off supply to hundreds of craft brewers in the fall of 2021.²

Aluminum can production is highly concentrated. Ball Corporation (“Ball”) is the largest can manufacturer in both North America and the world. Ball’s dominant position in North American was enhanced by the purchase of competitor Rexam in 2016. Ball has only two other major competitors with facilities in the U.S., Crown and Ardagh Group.

During the past decade, consumers, retailers, and distributors all have grown to prefer cans over bottles. This preference has manifested itself with all beverage types, not just beer, for a variety of reasons including reduced weight, reduced storage space, and a strong growth in consumer preference for cans. The increased demand for off-premise consumption during the COVID-19 pandemic contributed to the growth in demand, but that increase only accelerated a trend already underway prior to the pandemic. Indeed, the Brewers Association predicted that cans would replace glass as the primary package for craft beer in 2020 before the onset of the pandemic.

The growth in demand for cans has outgrown the current manufacturing capacity for this package in North America, and competition in the can manufacturing industry will remain scarce in the near term. Can manufacturing is a capital-intensive business with large start-up costs. In addition, current supply chain disruptions affecting other industries make accessing raw materials challenging for start-ups.³ Brewers can import cans, but even if a source of supply can be secured, shipping is expensive and quality issue abound with imported cans.⁴

As a result of dwindling supply and high minimum order quantities, in order to access available cans from existing sources craft brewers have limited options for purchasing cans. Today a vast majority of craft brewers must purchase through third party


³ A small number of start-up companies have recently begun operations in the U.S. (American Canning, Vobev), but it will take time for them to increase production to significant levels. Moreover, these start-ups may not provide relief for craft producers. Vobev, for example, primarily produces slim cans for energy drinks and seltzers. Some existing international companies plan on opening new facilities in the U.S. (Canpack of Poland and Envases of Mexico), but their U.S. production will be reserved for their existing contracted large producers rather than small craft producers.

⁴ See https://www.brewersassociation.org/brewing-industry-updates/know-before-you-buy-beer-can-specifications/.
distributors and face both increased costs from distributor mark ups and limited decorating options due to the inability to order pre-printed cans from a can manufacturer. Brewers will continue to face challenges in both availability and increasing costs. Recent increases in minimum order quantities for printed cans will push more craft brewers to purchase from distributors. Unit packaging cost increases of as much as 30% have been reported. A common alternative to printed cans are “brite” (unprinted) cans labeled using plastic shrink wraps. This decoration method is considerably more expensive and creates issues in the recycling, sorting, and smelting processes.

Craft brewers have and will continue to find it harder to compete with larger brewers not facing similar shortages and price increases in aluminum cans. A recent communication from a craft brewer member to the Brewers Association illustrates these competitive challenges:

*Our main supply chain disruption is with regards to cans, particularly printed cans, as you know. We were consistent customers of Ball for four years when they cancelled all of our orders in late 2020. This sent us scrambling to use cans from a variety of sources - sleeved cans, printed cans from other countries like China and Mexico, etc. The prices of these cans were all more expensive and as a result we lost money on some products and raised prices on others.*

*We wound up buying a labeler in spring of 2021 so we could label brite cans but this makes it difficult to be price competitive as a labeled can is more expensive (about 60-100% more) than a printed can. This means that large breweries have an unfair advantage as they’ve been able to secure the contracts for these printed cans while we have not been provided the opportunity to do so.*

*In Q3 of 2021 we wound up being allocated some printed cans from Ball and things started to come back to normal, but in Nov 2021 we were told about the min 5 FTL [full truck load] order and later came to find out that our prices were increasing by over 30%. This led us to increase prices on all of our products as we could not afford to take on this price hit, as you know canned beer margins for craft breweries are slim.*

*It seems like the consumer will wind up paying more for this price increase, which could again provide an unfair advantage to larger breweries and drive customers away from smaller craft breweries.*

b. Carbon dioxide.

Carbon Dioxide (CO2) is a basic building block in the economy, used by numerous industries including meat processing, other food and beverage production, and water purification. The brewing industry also relies on CO2 to carbonate its products, and most beer styles would be unrecognizable without carbonation.
The main source of commercial CO2 for industrial use is capture of the CO2 as a by-product from ethanol production, oil and gas refining, and fertilizer production with smaller amounts “mined” from natural sources. Ethanol production alone contributes roughly 40% of the commercial CO2.

In March of 2020 during the initial lockdowns created by the pandemic, demand for ethanol plummeted. Around that time 69 ethanol plants were fully idled while another 64 plants reduced output. Not every plant had CO2 capture capabilities, but the effect on the supply of CO2 was dramatic. Liquified CO2 is expensive to transport, creating acute shortages in areas of the country that depended on ethanol production for their supply of CO2. Industrial users, including brewers, saw the invocation of *force majeure* clauses in their CO2 supply contracts, creating both diminished supply and price increases. As CO2 is essential in the production of beer, many breweries were forced to curtail production schedules or at times shut down completely because of a lack of CO2.

Not all ethanol plants came back on-line during the economic recovery. Ethanol production normalized around 10% lower than pre-pandemic levels, with a corresponding decrease in CO2 supply. This created an ongoing situation where any disruption in supply creates ripples of shortages and price increases of CO2 through the brewing industry. Examples of these disruptions include the 2021 winter storms in Texas, which affected the supply of CO2 coming from the petroleum industry, and shutdowns of fertilizer manufacturers associated with decreased demand, high natural gas prices, and shortages of natural gas in some areas. Plant shutdowns of CO2 producers, whether for routine maintenance or unplanned equipment failures and repairs, remain an on-going issue.

Challenges created by the current difficulties in obtaining transportation (addressed below) exacerbate ongoing CO2 supply tightness. Suppliers of CO2 often cannot secure the means to balance the supply of CO2 between areas affected by a regional disruption. Brewers continue to face issues in supply reliability and price increases, creating lower margins and decreased production.

While CO2 shortages affect all industrial users, certain technologies capture CO2 from beer fermentation and allow it to be cycled back into beer production. This technology is only practical today for the largest brewers, partially insulating them from the vagaries in CO2 supply. Once again, then, recent supply chain disruptions further tilt the competitive landscape towards the biggest brewers and against craft brewers.

c. Transportation.

Like virtually all manufacturers in the modern economy, craft brewers rely on transportation networks both to obtain needed inputs and to get their products to

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Craft brewers, like other businesses, have faced supply chain issues associated with transportation during the past two years. Both incoming supplies and outgoing products have faced delays and increased costs, and both domestic and international shipping have presented challenges.

Domestically, brewers have faced the same issues as other businesses created by the well-documented shortage of truck drivers. In addition, brewer-specific issues have had unique effects on our industry. For example, most CO2 is sourced locally or regionally. When a local or regional supply is disrupted for reasons described in the previous section on CO2 shortages, craft brewers sometimes find it impossible to secure transportation to balance supply between regions. CO2 might be available one or two states away, but there is no transportation to deliver this essential ingredient to a brewing location. Breweries have had to discontinue or curtail production because of a lack of transportation.

As detailed below, the shortage of barley malt in North America has created an increased demand for imported barley malt. In addition, some brewers depend on imported malt to achieve specific flavor profiles in particular beers. With the well-documented shortage of shipping containers, container shipments from the EU, where imported malts often originate, have doubled or tripled in price, with delivery times of four to five months.

The shipping challenges from the EU pale in comparison to shipping challenges in bringing in goods from Asian markets. Because of the aluminum can shortage in North America (described above), many craft brewers were forced to source aluminum cans from Asia. Brewers also source brewing equipment from Asia, primarily China, because of less expensive stainless-steel prices. In the past eighteen months shipping costs from Asia soared in price, with the cost of shipping often exceeding the cost of the goods being delivered.

Some reports from brewers:

- **We recently had two 60 bbl tanks shipped from China. The price for shipping a contain[er] was increased by 10x and what was a 3 month turnaround was extended to a 6 months. Cost of tanks were 20% higher from the previous year.**

- **Tanks being shipped out of China and were quoted at 6K a piece (40 ft containers, 2 Total). Cost to ship for first container was 19K. For the second container, we were able to secure an FTL spot on a ship for 16K. The container arrived at the Port of Tacoma and due to the lack of chassis, sat inaccessible for two weeks. The freight forwarding company said the Port was nonresponsive to phone calls or emails. They finally contacted our freight forwarder and charged another 5K for storage fees. Total cost to ship went from 12K to 40K. Biggest impact, stress on cash flow and 4-month delay in producing in our expansion area. We were told that there was not control over the shipping industry (extortion was happening).**
• Equipment order from China has steep container pricing (33% surcharge on total project cost).

d. Other supply chain issues.

While aluminum can, CO2, and transportation shortages represent the most widespread and significant impacts of the current supply chain crises, craft brewers have had to deal with numerous secondary issues. We highlight a few of them below.

Glass Packaging – Although not as acute as the shortages in aluminum can supply, brewers are experiencing delays in shipments, price increases, and partially filled orders when procuring glass bottles. According to one major glass manufacturer, as a result of the shift to aluminum cans as the preferred package for craft producers, demand dropped for glass beer bottles. With this diminishing demand for glass beer bottles, manufacturers converted equipment and production lines to other types of glass packaging, primarily for food products. As a result, available capacity to produce glass beer bottles has dropped. Another complicating factor is disruptions in the supply of recycled glass, forcing glass manufacturers to use more expensive virgin material, increasing price.

Barley Malt – Extreme weather conditions, primarily heat and drought in the major barley growing areas of North America, led to dramatically low yields in the 2021 crop in both the U.S. and Canada. The U.S. harvest was 118 million bushels, one of the lowest levels since 1900. The Canadian harvest was down 31% from previous years. This reduction, combined with low carry over from the 2020 harvest, made for the lowest level of available barley malt supply on record. Low to average production from most other producing areas across the globe created few opportunities to import malt. These barley malt supply difficulties were exacerbated by low availability and high costs for shipping.

Extreme weather conditions also created quality issues with the 2021 barley crop. High temperatures and drought created high protein content, which increases process time and expense for maltsters and brewers. Excessive moisture during harvest also created “pre-harvest sprouting,” a condition that impacts yield and quality. Future contracts for barley reportedly feature price increases as high as 40%. In addition to higher prices, smaller craft brewers unable to secure long-term contracts face issues of obtaining this essential ingredient in beer. Several recent communications from brewers to the Brewers Association report that they have been unable to buy barley malt on the spot market from their regular suppliers.

Paperboard – For brewers that sell their product for off-premise production, paperboard is a critical material for “secondary packaging” items like six-pack carriers, case trays, and case cartons. Member brewers have reported significant increases in price over

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7 One glass supplier representative informed the Brewers Association that out of her top twenty customers, only two had not decreased orders for glass over the last two years.
the course of the pandemic, in some cases those price increases for paperboard are larger than the price increases they have experienced when sourcing aluminum cans. We believe that government data confirms the existence of these price increases.

Other Materials – Brewers are reporting price increases, delayed shipments and, in some cases, unavailability of many supplies necessary to support production, from pallets to ship product to helium gas necessary for certain quality testing equipment. What follows provides some color from a brewer and also contains some data illustrating the magnitude of some price increases that craft brewers face:

Thank you for requesting input from your smaller craft breweries for the FTC. We are a 3,000 barrel brewery in San Jose, California. We distribute throughout the state of California and have two taprooms. Besides being in one of the most locked down areas of the country over the past two years, we've seen absolutely obscene price increases from key suppliers over the past year or so. I know we're one of thousands of breweries experiencing this, but I felt the need to put my thoughts in writing on these topics, since you asked.

The biggest frustration is that our suppliers take their increases with zero notice. It's just “on your next delivery, here's the new price.” Breweries are not able to turn on a dime like this. We are in many major chain stores, and they require 60-90 days for any price change. Let alone what our distributor needs to change everything in their sales booklets, online and with their sales staff. It's been horrendous. And we just have to “eat it.”

Here are my top 2 examples:

Silo Fill:
January 2021: $8,542
December 2021: $13,109
*.338/lb up to .497/lb = 47% Increase

Aluminum Cans (6 pallets):
January 2021: $6,729
December 2021: $9,612
*.14/can body up to .22 = 55% Increase

We gave in and signed a contract to lock this silo fill price for the year, but no aluminum can supplier will set a contract price from what we understand. We were lucky last year that we had a blanket PO so we were never in dire need of brite cans.

Beyond just these two huge, key items, we've seen huge increases in cardboard (13% increase), our PakTech tops (30% increase), freight (15%), chemicals, carbon dioxide and other gases, and other key ingredients that there are simply very few suppliers for. Our great, local yeast supplier went entirely out of
business last year. And so even there we’ve had to take a 40% increase and go to a new out-of-state company.

These are just the hard costs that I can quantify. Utilities have skyrocketed as well here in California. [We] got no rent break even though our taprooms were essentially shut down for over a year. I’m aware that’s not exactly what you were asking about, but it all feels quite related at this point.

We did implement an 8% price increase across all of our products that was effective January 1st, which in turn made our distributor take a 12% increase. So, customers are already seeing new price tags, but there’s no way we can come close to these 47-55% increases that our suppliers have thrown at us. It would be nice to understand where their justification stems from exactly.

2. What is the current outlook for future supply disruptions over the next quarter and year?

Aluminum Cans – Aluminum can availability will likely remain tight for two or more years. The three major North American suppliers as well as several new market entrants are investing in increased can production capacity. Nevertheless, demand for cans continues to grow, and we do not expect the market to reach equilibrium until 2024 at the earliest.

Another compounding factor arises from the relatively inexperienced workers new facilities will have when they first come on-line. Can requirements for craft brewers typically involve smaller quantities, necessitating more frequent artwork changes and other processes. As a result, new capacity will likely focus on the production of "long run" products (e.g., cans for massive brands like Bud Light and Coca-Cola) until they gain experience.

Carbon Dioxide – The CO2 supply remains tight, with little likelihood of complete recovery soon. The ethanol industry has not yet fully recovered from pandemic declines, and numerous ethanol facilities remain closed, constraining supply. As a result, any disruption in supply such as equipment failures or required maintenance and downtime, sends ripples through the industry, particularly in regional markets.

Transportation – The brewing industry faces the same uncertain outlook on transportation as many other sectors of the economy. The current shortage of qualified commercial drivers, for example, will likely take a year or more to resolve.

Glass Bottles – While less acute than the shortage of aluminum cans, the supply of beer bottles remains tight. The combination of increased demand (partially as brewers shift back from cans to bottles) and labor issues suggests that ongoing disruptions may continue throughout 2022.

Barley – The current outlook for malting barley supply suggests that the market will remain in shortage through 2023. Currently the North American market is operating at a
supply deficit and will need a particularly successful harvest later in the year to replenish stocks. Europe’s most recent harvest was slightly below average and cannot provide substantial relief. While several southern hemisphere growing areas (Argentina and Australia) had good harvests, the high cost of shipping and increased demand from other countries (for example, Mexico has taken a bulk of Australia’s surplus) make these sources of little help to U.S. craft brewers.

3. **How do craft brewers allocate product among customers when there is a shortage of a product or it is out of stock?**

Allocation of beers in short supply or out of stock will depend heavily on the distribution model of the particular craft brewer. Many craft brewers sell all or substantially all of their beer on the premise of their own business – generally at a “brewpub” restaurant or at a brewery “taproom.” For such businesses, being out of stock means that the brewer cannot sell its beer to the public, or not sell a particular beer. For short supply beers sold for off-premise consumption (i.e., taken away from the brewery), a few craft brewers limit the number of cans, bottles, or cases that any one consumer can purchase.

Product shortages are particularly hard on brewpub- or taproom-focused brewers because the laws in many states restrict the products that such brewers can sell at retail to products produced by the selling brewer. In such circumstances, running out of beer due to supply disruptions eliminates the brewer’s source of revenue from beer sales.

Most craft brewers that distribute their products outside of their own premises rely on beer wholesalers to re-sell and distribute beer to retail accounts. The terms and conditions of most brewer agreements with wholesalers, and in some cases state law, requires that brewers allocate product equitably between customers in the event of product shortages. Moreover, such allocation is the norm even in the absence of a legal requirement to do so. For those brewers that sell directly to retailers (where permitted by state law), equitable allocation is also the usual practice, although it generally is not governed by any written agreement.\(^8\)

Where product becomes unavailable, the impact can last long after supply becomes available again. Both on- and off-premise retailers have limited space. A restaurant, for example, may only have the ability to serve eight beers on draught. For many retailers, then, an out-of-stock prompts a change in the beer selection available. A retailer may then stick with the new selection to avoid “churn” in their beer menu and reward the brewer able to keep the retailer supplied. In the off-premise environment, many retailers (particularly large retailers) operate from shelf schematics that precisely allocate space between different brands. These schematics are changed infrequently –

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\(^8\) By law brewers and beer wholesalers cannot require retailers to take a certain allocation of beer, making supply agreements with retailers extremely rare and legally risky.
typically twice per year. If a schematic eliminates an out-of-stock beer, that beer may never get another opportunity to be included in the retailer’s shelf sets.

4. What impact, if any, do slotting fees or roles as category captains have on supply disruptions and the allocation of supplies of products that craft brewers purchase or sell?

   a. Slotting fees.

On paper, the payment of slotting fees by a brewer or beer wholesaler to a retailer constitutes an unlawful trade practice under federal law and the laws of most states. Nevertheless, the Alcohol and Tobacco Tax and Trade Bureau ("TTB"), which enforces the federal law against slotting fee payments in the alcohol industry, consistently believes it has found violations of the law, which it resolves through “offer-in-compromise” settlements between the Agency and brewers or beer wholesalers. As the Brewers Association recently explained in comments filed with the Department of the Treasury, current enforcement practices fall short of the efforts needed to substantially reduce the prevalence of illegal slotting fee and similar payments in the beer industry.

While the enforcement of the trade practice restrictions contained in the Federal Alcohol Administration Act falls outside of FTC’s jurisdiction, it bears re-capping some significant issues facing craft brewers in today’s market. All too often, retailers demand that a beer supplier spend money on coupon programs as a de facto condition for placement in or promotion of the supplier’s products. By requiring an implicit quid pro quo, coupon programs become illegal slotting fee payments when retail placement or promotion is conditioned on a supplier (or wholesaler) expending sums on such programs. The Brewers Association believes that retailer demands for such programs have become commonplace.

Similarly, many large suppliers and wholesalers today engage in so-called “sponsorship” arrangements in which they 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. Despite TTB collecting multiple settlements from brewers and beer wholesalers for such

9 See generally 27 U.S.C. § 205(b) (tied-house statute), 27 C.F.R. § 6.152(b) (declaring slotting fees a per se threat to retailer independence). Under “the penultimate clause” of the Federal Alcohol Administration Act (“FAA Act”), an illegal trade practice with respect to malt beverages (beer) is only punishable under federal law if the activity in question occurred in a state with a similar law to the federal law. See 27 C.F.R. § 6.4(b). Virtually every state has adopted trade practice restrictions, such as tied house laws, similar to the restrictions contained in the FAA Act.

10 See https://www.ttb.gov/fo/2021-offers-in-compromise-accepted (list of 2021 offers-in-compromise accepted, including several alleging illegal payments beer brewers and beer wholesalers to retailers).

11 See https://www.regulations.gov/comment/TTB-2021-0007-0282.
violations, a visit to almost any major sports or entertainment venue today will demonstrate that such illegal practices remain standard operating procedure.

Federal law, along with the trade practice laws of most states, should help maintain an even playing field allowing craft brewers to compete fairly with their giant competition. But these laws only work if they are rigorously enforced. The Brewers Association believes that slotting fees and other illegal trade practices can only be meaningfully reduced if:

- TTB substantially increases the stakes of trade practice investigations. Entering into six-figure settlements with billion-dollar companies allows violators to treat the settlement of an occasional TTB investigation as a “cost of doing business” and does not significantly alter behavior.
- TTB focuses enforcement resources on competitively relevant conduct. Too often it appears that TTB uses scarce enforcement resources to address conduct that does not pose a systemic threat to fair competition.
- TTB and FTC work together to treat retailer violations of the FAA Act an unfair business practice under the FTC Act. Doing so will provide federal authorities with an enforcement mechanism that can hold retailers accountable for such activities.

b. Category captains.

Over the past decade-plus craft brewers increasingly have had to deal with category management practices and the related rise of “category captains” as the gatekeepers to retailer shelf space. TTB has identified a number of category management practices as prohibited by the FAA Act and its implementing regulations. Nevertheless, TTB has yet to make a case under its announced category management policy, even though the Brewers Association has heard multiple reports from members that category captains abuse their favored position. The Brewers Association recently raised this issue in comments filed with the Department of the Treasury.

As a result of this activity, the Brewers Association believes that large retailers may end up with shelf space skewed in favor of a handful of large suppliers and/or wholesalers. Consumers are not receiving a product selection curated by the retailer itself, but by a self-interested supplier with every incentive to favor its own products and irrespective of market demand. These practices exacerbate craft brewer challenges in accessing consumers and artificially constrain consumer choice to the benefit of a few large firms. The Brewers Association welcomes any enforcement of TTB’s announced policy towards category management practices.

12 See, e.g., TTB Newsletter, January 14, 2022 (TTB Trade Practice Investigations into Sponsorships Result in Two $225,000 Offers in Compromise).
13 See TTB Ruling 2016-1 (Feb. 11, 2016).
14 See https://www.regulations.gov/comment/TTB-2021-0007-0282.
BA and its thousands of members greatly appreciate the opportunity to present our views in response to the Solicitation. The challenges of the past year have left thousands of craft brewers economically vulnerable and have disproportionately affected the smallest brewers. So supply chain challenges, like many other economic headwinds, favor large incumbent brewers to the detriment of small, local business interests.

We stand ready to provide additional information to the FTC on this subject and appreciate the attention being given to this important issue.

Sincerely,

Bob Pease
President & CEO
The Brewers Association