September 18, 2023

*Via Regulations.gov portal*

Federal Trade Commission
Department of Justice, Antitrust Division

Re:  [Docket ID FTC-2023-0043](#)

I write on behalf of the Brewers Association to provide comments on the draft *Merger Guidelines* published on July 19, 2023. The Brewers Association applauds the draft *Guidelines*’ identification of potential threats to competition that reach more broadly than prior versions of the *Merger Guidelines*. We believe the policies of the revised *Guidelines* along with more rigorous enforcement of the antitrust laws, both pre-merger and post-merger, will make the U.S. market more hospitable to small and independent businesses like Brewers Association members.

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 mission is to promote and protect American small and independent brewers, their beers, and the community of brewing enthusiasts. As such, defending small, independent business interests in a market dominated by much larger enterprises is central to the Brewers Association’s mission.

The beer market is highly concentrated. At the supplier level (generally called “tiers” in the alcohol beverage industry), in 2022 just three companies held a 71.4 share of the market, and that share was up one percent from 2021.¹ We estimate the beer market Herfindahl-Hirschman Index (“HHI”) at approximately 2,100 – well above the 1,800 HHI threshold used in the *Guidelines* to identify a highly concentrated market.

At the wholesaler/distributor tier, most markets are served by two wholesalers that together generally hold eighty-five percent or greater of the beer market. While the closely held nature of most wholesale businesses makes precise data difficult to obtain, in some states (e.g., California) we estimate statewide HHI above 2,500 after a spate of recent acquisitions. Moreover, in most states these

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¹ Source: *Beer Marketer’s Insights.*

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wholesale businesses are insulated from inter-brand competition, have near-
perpetual rights to the brands they carry, and their use is often mandated by law.

At the retail tier, roughly 98% of all beer sales go through retailers, with roughly half that volume sold through the more concentrated supermarket, grocery, and convenience channels. The least concentrated segments of retailing, such as bars, restaurants, and liquor stores, generally have a lower volume share relative to the more concentrated channels.

Finally, critical packaging inputs that brewers need come from a handful of potential sellers. As the Commission is well-aware, for example, just three firms supply virtually all the aluminum cans sold to U.S. brewers. Similar market concentration affects the glass bottle market.

The picture of concentration becomes even more alarming when looking at trends towards greater consolidation in the wholesale and retail tiers of the industry. Just a few decades ago, most geographic territories were served by multiple full-service beer wholesalers capable of making regular deliveries to most of the retailers in their respective territories. Today in most markets that has shrunk down to just two. Moreover, rapid consolidation is now occurring horizontally across geographic territories, creating massive wholesale businesses holding dominant share position in entire states, and increasingly in multiple states.

At the retail tier, a study by the United States Department of Agriculture’s Economic Research Service found that between 1990 and 2019, food retailing has steadily consolidated at the national, state, and local level. During that period, food sales from the top twenty firms increased from approximately 35% to more than 60%, and sales for the top four firms increased from less than fifteen percent to around 35%. Indeed, and as you know, a proposed pending merger would combine the number one and number two supermarket chains into one mega retailer, creating a retail behemoth spanning the country and reaching consumers in 48 states plus the District of Columbia. Reports indicate that this merger will involve the number one and two grocery brands in nine, mostly western, states. Large chain grocery stores, already a difficult environment for small, independent producers for a myriad of reasons, would become even more concentrated and inhospitable should the merger proceed.

In light of these challenges and trends, the Brewers Association applauds the draft Guidelines’ general direction of identifying more ways that a merger could diminish or harm competition. We will not comment on each of the proposed thirteen Guidelines, but wish to highlight several points that may have particular relevance to the beer industry.

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**Guideline 1:** The Brewers Association agrees that in a highly concentrated market like the beer industry, a merger that eliminates even a relatively small competitor may substantially lessen competition. The eliminated firm may allow a dominant player to leapfrog into an emerging category or sub-market, then use its dominant position (e.g., advantages in distribution or marketing) to quickly dominate the new category or sub-market. Similarly, where two or three companies have a chokehold on the market, the emergence of a new competitor, even if small at first, may represent a significant entry that pressures the dominant firms in terms of price, service, or selection.

**Guideline 4:** The Brewers Association applauds the draft Guidelines’ recognition that a merger eliminating a potential entrant can negatively impact competition, even if the merger does not immediately lessen competition in a relevant line of products or services. Small and independent brewers often rely on highly concentrated markets for the supply of necessary inputs into the brewing process, for example packaging material. Ensuring that firms in “adjacent” industries can inject competition into such markets will have short-term (by mitigating dominant firm behavior through the threat of market entry) and long-term competitive benefits (as some companies will, in fact, enter into competition with the dominant firms).

Small and independent brewers also rely on highly concentrated markets as their customers, with just a few (often two) viable beer wholesalers for a given geography. Competition policy should view adjacent distribution businesses (wine and spirits wholesalers, food distributors, etc.) as important potential competitors that may be able to mitigate existing concentration through future market entry.

**Guideline 5:** The Brewers Association strongly endorses the concept that a rival’s control of products or services needed in an industry can create adverse competitive effects. As just two or three wholesalers sell most of the beer sold in most geographic markets today, dominant beer suppliers should not be permitted to vertically integrate by acquiring distribution operations. Fortunately, a number of state laws and at least one Department of Justice Consent Decree limit the opportunities for such vertical integration.

A broad principle as articulated in the draft Guidelines will help protect against competitive threats posed by the acquisition of emerging new services and/or products necessary to compete in the brewing industry. For example, software platforms and services have become increasingly important in the beer business. Federal competition policy should prevent such critical services from being acquired or otherwise captured by dominant supplier- or wholesaler-tier companies, which could use their control to raise rivals’ cost of market access.

**Guideline 6:** As noted above, vertical integration by dominant players could severely alter the competitive landscape of the beer business. Fortunately, existing legal structures, such as tied-house restrictions limiting supplier or

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wholesaler ownership of retail outlets, make the threat of vertical integration much lower in the alcohol beverage industry than in other lines of consumer product goods.

We also appreciate the Guidelines’ recognition that vertical integration becomes problematic only when it would “foreclose competition.” As recent experience has shown, allowing small and independent brewers to retail at their place of production and a few “satellite” locations does not threaten competition in a retail market inhabited by tens of thousands of retail outlets. Similarly, while vertical integration by a dominant brewer would allow a rival to control one of only two or three viable distribution channels in a given territory, allowing small and independent brewers to self-distribute does not eliminate existing distribution channels and offers retailers more competition. In short, the focus on whether vertical integration would foreclose competition is a key to properly evaluating policies to restrict vertical integration.

Guideline 7: The Brewers Association supports the draft Guidelines’ recognition that a merger that is neither strictly vertical nor strictly horizontal can threaten competition if it entrenches a dominant position. We have witnessed dominant firms in the beer industry increase switching costs, interfere with the use of competing alternatives, deprive rivals of scale economies or network effects, and eliminate nascent competitive threats. Greater willingness on the part of federal competition authorities to challenge such activities even when they arise in situations without a substantial HHI increase would be welcome.

Guideline 8: The Brewers Association welcomes greater scrutiny of mergers that further a trend towards greater concentration. The past decade has witnessed a remarkable increase in concentration at the wholesale tier and the emergence of a small set of very large, regional and increasingly national consolidated wholesale operations. This trend points to an obvious end state similar to the situation in the wine and spirits distribution tier, where just two firms operate nationally as a quasi-duopoly in the scale distribution of spirits and, to a lesser extent, wine. Such a hyper-consolidated distribution channel would be profoundly inhospitable to small and independent brewers.

Retail consolidation trends are equally concerning. As with distribution, local retail markets are much more concentrated, with county level average HHI in food sales above 3,500 and continuing to increase.5 Similar studies around retail more broadly also show higher and growing levels of local market concentration across retail sectors.6 Many metropolitan areas also show significant and increasing concentration, with HHI by metropolitan statistical area (MSA) approaching 2,000 by 2019.

Guideline 12: The Brewers Association agrees that a singular focus on the traditional corporate definition of “control” may often obscure the actual ability to coordinate in a way that lessens competition. In the alcohol beverage industry, we often witness minority investments coupled with distribution coordination that

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5 See Zeballos, Dong, and Islamaj, supra.
effectively make the minority-owned business part of the acquiring firm’s brand portfolio. In such cases, the minority ownership and other factors result in an integration of business operations and objectives that effectively eliminate the partially-acquired firm as a competitor to the acquiring firm.

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The Brewers Association appreciates this opportunity to comment on the proposed Merger Guidelines and believes that new Guidelines incorporating the draft’s principles will improve competition in the beer industry. We welcome future opportunities to work with federal competition authorities to preserve the ability of small and independent businesses to compete on a fair and equitable basis.

Sincerely,

Marc E. Sorini

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Cc: Robert Pease, President & CEO, Brewers Association