Submitted via the Federal e-Rulemaking Portal

Docket Clerk, Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Ave. NW
Washington, DC 20530

Re: *Request for Information on State Laws Having Significant Adverse Effects on the National Economy or Significant Adverse Effects on Interstate Commerce*, DOJ Docket No. OLP182

Dear Sir or Madame,

I write on behalf of the Brewers Association (BA) to provide information in request to the Department's *Request for Information on State Laws Having Significant Adverse Effects on the National Economy or Significant Adverse Effects on Interstate Commerce*.[1] We appreciate the opportunity to comment and thank you in advance for your time and attention.

The Brewers Association is a 501(c)(6) not-for-profit trade association of brewers, for brewers, and by brewers. We have approximately 5,000 U.S. professional brewery members and over 1,200 supplier members from throughout the beer supply chain. Our mission is to promote and protect American craft brewers and their beers, and our members are American manufacturing businesses. Our members are exactly the type of businesses the President seeks to promote through strengthening domestic supply chains and rebuilding our industrial prowess.

Today a series of state laws raise costs and harm markets in the beer industry. Often justified as methods to control over consumption and prevent underage drinking, today many state alcohol control laws are thinly-veiled mechanisms for favoring large, entrenched economic actors at the expense of consumers and healthy competition. Among the most egregious:

1. Beer "Franchise" Laws

[1] 90 Fed. Reg. 39,427 (Aug. 15, 2025).

So-called beer "franchise"[2] laws 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, as recognized by the Department in 2020 letter examining a franchise law bill then pending in California.[3]

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 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.

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[2] 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.

[3] *See* https://www.ftc.gov/news-events/news/press-releases/2020/03/joint-ftc-doj-letter-raises-concerns-about-california-assembly-bill-1541-which-would-impose-new.

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.

2. 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.[4] Such mandates foreclose or severely limit the ability 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, 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 Anheuser-Busch InBev a.k.a. ABI) or the "blue/silver network wholesaler" (affiliated with Molson Coors although today increasingly dependent on the sale of

[4] 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.

Constellation Brand 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 Brewers Association members.

Today, only one of the major suppliers, ABI, has vertically-integrated wholesale operations in a number of states, notably including California. 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 is restrictions on brewers' ability to access consumers directly via deliveries and shipments. Online 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. 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, 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.

3. 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.

4. Preemption

With the limited exception of laws imposing warnings on alcohol beverage labels, few state laws are subject to an express federal preemption provision.

Nevertheless, many actions under federal law potentially preempt state activities even the absence of an express congressional preemption provision. Notably on the subject of competition, the Supreme Court has held that state alcohol beverage laws remain subject to federal antitrust statutes.[5] We accordingly see a role for federal law in restoring competitive balance to the current distribution system.

5. Federal Legislative or Regulatory Means to Address

There is no question that state alcohol beverage laws remain subject to the Supremacy Clause and therefore may be subject to preemption.[6] As state alcohol laws remain subject to federal supremacy and preemption, it follows that state alcohol laws also are subject to federal regulations and other lawful activities.

Taking one example, federal competition authorities can and do scrutinize mergers and acquisitions in the alcohol beverage industry. The Department, during the merger review process, can and should look at how anti-competitive state laws would impact competition following the completion of a transaction. Where appropriate, remedies may blunt the impact of such state laws by, for example, permitting the termination of distribution relationships following the transaction and without regard to any contrary state laws.[7]

6. Federal Agency with Subject Matter Jurisdiction

The federal agency with the most expertise in regulating the beer and alcohol beverage industry is the Alcohol and Tobacco Tax and Trade Bureau (TTB), within the Department of the Treasury. TTB possesses substantial experience in regulating the industry and possesses deep institutional knowledge about many aspects of the trade.

TTB, however, does not focus on competition. Moreover, it is a small federal agency with roughly 500 employees. As such, we believe the Department should continue to play a primary role in addressing competition in the alcohol beverage industry. That role would include addressing state laws that have an adverse effect on the national economy and on interstate commerce.

We thank you for your careful consideration of these comments and stand ready to work with the Administration on these important topics.

Sincerely,

Marc E Sorini

Marc E. Sorini
Vice President of Government Relations, Brewers Association

Cc: Bart Watson, President & CEO, Brewers Association

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[5] *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).
[6] *See, e.g., Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984); *Midcal Aluminum*, 445 U.S. 97.
[7] *See United States v. Anheuser-Busch InBev*, Civil Action No. 13-127 (RWR), Final Judgement (2013), Section V.C.; *available at* https://www.justice.gov/atr/case-document/file/486311/dl.