

TREASURY REPORT TAKES ON ALCOHOL INDUSTRY COMPETITIVENESS



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The U.S. Treasury Department recently released its 63-page report on competition in the alcohol beverage industry, citing concerns about consolidation in the \$250 billion annual U.S. alcohol market. The report, "*Competition in the Markets for Beer, Wine and Spirits*" prescribes:

- (i) greater regulatory scrutiny of mergers and acquisitions that would impact competition,
- (ii) different and more progressive tax rates, and
- (iii) lifting regulatory burdens to new entrants in the wine, beer, and spirits

as market reforms that Treasury believes could make the market fairer for new entrants and existing smaller industry members, enhance competition within the industry, and save consumers hundreds of millions of dollars each year.

ORIGINS AND PROCESS

The just-released Treasury report originated as part of the Biden Administration's July 9, 2021 [Executive Order on Promoting Competition in the American Economy](#). Historically, several federal agencies, including the Department of Justice and the Federal Trade Commission, as well as the Treasury Department, have exercised regulatory responsibilities in promoting competition across industries.

The Biden Administration's Competition Order directed Treasury and certain executive agencies both to intensify those efforts and to implement policy priorities in furtherance of promoting industry competitiveness via rulemaking or other agency efforts. While the published Treasury report focuses on the beer industry in particular, it is expected to provide context for the Biden administration's efforts to fight excess consolidation in other industries such as telecommunications, meat processing, and transnational shipping.

As part of the preparation process, the report's authors took into account over 800 public comments submitted by industry members and trade associations, as well as submissions voicing consumer perspectives. Significant components of the public input received by Treasury included complaints about concentration in the malt beverage manufacturing and distributing tiers of the malt beverage industry, and anti-competitive market behaviors exhibited by the largest, most dominant players in all three tiers of the entire alcohol industry.

WHAT TREASURY CONCLUDED

Based on studies, public comments, and its own internal analyses, the Treasury Department concluded that two sister occupants of the Executive Branch, the Department of Justice and Federal Trade Commission, should exercise more stringent scrutiny over the alcohol industry, especially with regard to antitrust concerns. According to the Treasury report, improved efficiencies and reduced consumer prices – benefits that regulators relied upon to approve past M&A transactions within the malt beverage segment – actually failed to materialize.

Within its own jurisdiction, the report asserted the need for the U.S. Alcohol and Tobacco Tax and Trade Bureau (TTB) to ramp up tougher enforcement of existing trade practice rules and restrictions under the Federal Alcohol and Administration Act. The report also called for TTB to promulgate new regulations that would impose stricter scrutiny of horizontal consolidation between alcohol industry manufacturers, as well as between wholesale distributors.

For proponents of traditional alcohol regulation, the Treasury report's most troubling language is found in discussions focused on the continuing efficacy of the alcohol industry's three-tier system, the existing regulatory framework's negative affect on market efficiencies, and the degree to which current market conditions have spawned material barriers to new entrants. State laws governing distribution relationships (so-called alcohol beverage "franchise laws"), as well as post-and-hold requirements, were held up for special criticism by the report as hobbling market efficiency and constraining the ability of new entrants to expand and find new markets. Even the venerable three-tier system, while acknowledged by the report to be "consistent with the current thinking on preventing monopolistic control," nevertheless was questioned as to whether it and other vestiges of post-Prohibition regulation had outlived their usefulness:

[S]tate legislatures might consider if the benefits of the three-tier system outweigh its costs to competition and study markets without a three-tier system. Similarly, states might explore amending their franchise laws and consider revisiting post-and-hold regulations, which have been struck down in some states as preempted by the Sherman Act. State officials should evaluate the direct-to-consumer distribution model, both in terms of the distribution opportunities it presents for small producers and the

comparative risks it may present of making alcohol more readily available to underage drinkers. (Footnote omitted).

For its most damning example, the Treasury report focused on state post-and-hold laws. These post-Prohibition laws are intended to level the playing field among competitive alcohol industry members, and provide state regulators needed levels of transparency into the operations of the regulated licensees. However, the Treasury report concludes that they actually restrict price competition, to the point that beer consumers alone paid \$487 million more last year than they should have. The report also concludes that post-and-hold laws can drive up the cost of a bottle of wine by as much as 18% and a bottle of spirits by over 30%, according to cited studies.

Expressing a different type of damnation, the Treasury report also called for TTB to limit the impact of lobbying. As of 2017, alcohol companies reported 303 lobbyists in Washington D.C.

TO WHAT END?

The impact of the Treasury's report on competition in the alcohol beverage industry is hard to discern. Already, key players in the malt beverage segment have pushed back on several of the report's conclusions. The Beer Institute issued a public statement on the same day of the report's release contending that the beer business today was more competitive than ever before, "unprecedented levels of competition," to quote that trade association.

Over in the wholesaler tier, the National Beer Wholesalers Association noted "[t]he American beer industry is intensely competitive and successful, as demonstrated by TTB data showing the growth in the number of permitted breweries from around 2,000 to 13,380 over the last 11 years."

Seventeen years ago, the U.S. Supreme Court (SCOTUS) declared the three-tier system of traditional alcohol regulation to be "unquestionably legitimate." That was a 5-4 decision with a balanced court. Today, some would call the Court "unbalanced." However, regardless of political perspective, it is indisputable that the SCOTUS of today has far less regard for the principle of *stare decisis* (respect for past precedents) than its previous composition.

Will a desire to promote efficiency and "modernization" override what is left of what some regulators and industry members reverently refer to as "the traditional three-tier system" of alcohol regulation? At this point, it's the Undertaker's Test: *Remains to be seen!*

