



Administrator Mary G. Ryan
Office of the Administrator
Alcohol and Tobacco Tax and Trade Bureau
1310 G Street NW, Box 12
Washington, D.C. 20005

Dear Administrator Ryan,

The following comments are respectfully submitted in response to the Alcohol and Tobacco Tax and Trade Bureau's (TTB) Advance Notice of Proposed Rulemaking regarding updates to trade practice regulations [Docket No. TTB-2022-0011; Notice No. 216].

The road leading to this point started with the current administration's July 9, 2021 Executive Order on Promoting Competition in the American Economy [EO 14036]. Among many other things, this order called for an assessment of "the conditions of competition" for beer, wine and spirits, including "any threats to competition and barriers to new entrants."¹ The order specified that this could include analysis of "unlawful trade practices, patterns of consolidation in production, distribution, or retail markets, and regulations pertaining to such things as "bottle sizes, permitting, or labeling that may unnecessarily inhibit competition."²

The TTB responded first with a Request for Information (RFI) in the summer of 2021, with comments eventually due by October of that year.³ Next, the Treasury Department (of which the TTB is a part of) issued a February 2022 report on competition in the beer, wine and spirits market.⁴ Then, in November 2022, the TTB issued its current Advance Notice of Proposed Rulemaking, once again seeking public input.⁵

¹ "Executive Order on Promoting Competition in the American Economy," The White House, July 9, 2021, Sec. 5(j)-(k). <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy>.

² Ibid.

³ Alcohol and Tobacco Tax and Trade Bureau, "Promoting Competition in the Beer, Wine, and Spirits Markets," U.S. Treasury Department, July 28, 2021. <https://www.federalregister.gov/documents/2021/07/28/2021-16115/promoting-competition-in-the-beer-wine-and-spirits-markets>.

⁴ "Competition in the Markets for Beer, Wine, and Spirits," U.S. Treasury Department, February 2022. <https://home.treasury.gov/system/files/136/Competition-Report.pdf>.

⁵ Alcohol and Tobacco Tax and Trade Bureau, "Consideration of Updates to Trade Practice Regulations," U.S. Treasury Department, Nov. 9, 2022. <https://www.federalregister.gov/documents/2022/11/09/2022-24435/consideration-of-updates-to-trade-practice-regulations>.

This latest rulemaking is responsive to the administration’s executive order, directing the TTB to “consider (i) initiating a rulemaking to update the Alcohol and Tobacco Tax and Trade Bureau’s trade practice regulations; (ii) rescinding or revising any regulations of the beer, wine, and spirits industries that may unnecessarily inhibit competition; and (iii) reducing any barriers that impede market access for smaller and independent brewers, winemakers, and distilleries.”⁶

TTB’s Modernization Efforts

The goal of updating and modernizing the TTB’s trade practice regulations to enhance competition is an understandable one; however, there are numerous reasons to proceed cautiously.

One of the TTB’s stated goals in reforming its TTB trade practices, according to the Treasury’s February 2022 report, is to “limit the unintended negative effects on competition of categorical rules, especially on harmless practices ... [TTB can therefore] updat[e] its regulations with an eye to giving a green light to practices that are essentially harmless and inherently procompetitive as it already does for matters like the holding of tastings or the provision of whimsical handles for beer taps.”⁷ The report also suggests revisiting “restrictive Treasury regulations that are not justified by public health,” which could include “streamlining certificates of label approval under the existing statutory requirement, if doing so would reduce barriers to entry without reducing consumer protections, including public health concerns.”⁸ These are all worthy ideas and ones that most stakeholders in the industry are likely to support in at least some form.

Other parts of the report suggest potentially more robust and controversial actions, such as “expanding and sharpening the categorical identification of practices that violate the trade practice rules, and in such course address practices that result in exclusion,” and concluding that “as a matter of enforcement policy, [TTB should] focus its efforts against large entities presumed to have market power.”⁹ When taken together with the report’s recommendation for enhanced Federal Trade Commission and Department of Justice antitrust scrutiny of so-called “horizontal consolidation” (i.e., consolidation within each of the three distinct tiers of the alcohol marketplace), the report seems to presage more aggressive antitrust and competition crackdowns by the TTB and other spheres of the federal government.

Further, the Treasury report concludes by noting the proverbial elephant in the room—the role of Congress and the antiquated nature of the Federal Alcohol Administration Act (FAA), upon which the current proposed rulemaking is premised. As the Treasury’s report notes:

Overall, the FAA Act’s competition provisions take a distinct approach than the antitrust laws. Congress established “rules of the game” intended to ensure that networks, both wholesale and retail, should remain open and available to all competitors (in some ways resembling a common carriage or public callings approach of general availability). ***It seems contrary to Congressional intent to completely harmonize the substantive content of the FAA Act and the antitrust laws. It is true that some of the original justifications for the law, such as combatting criminal alcohol bootleggers, are no longer public priorities, and also true that some entities, like retailers, have grown in ways not contemplated in the***

⁶ “Executive Order on Promoting Competition in the American Economy.” <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy>.

⁷ “Competition in the Markets for Beer, Wine, and Spirits,” p. 62. <https://home.treasury.gov/system/files/136/Competition-Report.pdf>.

⁸ *Ibid.*, p. 63.

⁹ *Ibid.*, p. 62-63.

1930s. But other then-extant public concerns, such as combatting the power of the Trusts, concerns over retailer independence, and the promotion of lower prices, retain their relevance despite the passage of nearly a century. ***We leave it to Congress to determine whether reform of the FAA Act trade practice provisions is necessary.***¹⁰

While it is laudable that Treasury is consciously grappling with the topic of statutory authority under a nearly century-old piece of authorizing legislation, this analysis curiously takes place toward the *end* of the report, instead of where it organically belongs: the beginning.

In other words, before deciding *how* to update the regulations for a large sector of the American economy, it seems most appropriate to first consider *whether* that is the right course of action and if it is a proper use of agency authority. To borrow a phrase from the U.S. Constitution, the TTB should undertake a “necessary and proper” analysis of its proposed rulemaking by starting with consideration of the following: 1) is this proposed action needed?; and 2) is it an appropriate use of underlying statutory authority to take this proposed action?

Submission of this comment seeks to address both questions in turn.

“Necessary” or Not?: Identifying the Problem and How to Fix It

We talked extensively about whether a competition problem exists in alcohol markets in our original comments, which were submitted in response to the TTB’s RFI in 2021.¹¹ We noted at that time that the blog post accompanying the current administration’s competition executive order defined terms such as “monopoly,” “monopsony” and “winner take all” markets, the latter defined as one in which “a single firm tends to dominate, even if the dominant firm’s product is only slightly better than the other products, and the market may have originally been competitive.”¹²

Producer Consolidation Data: Less Concentrated

We took these guidelines and, as suggested by the administration, looked at “patterns of consolidation.” Specifically, we reviewed data to determine whether alcohol markets have become “more concentrated” over time. As we pointed out, the producer tier of the alcohol industry has gone in the opposite direction, becoming *less* concentrated over time:

At the producer level, the alcohol industry has become less consolidated over time. In the beer market—the one most often associated with consolidation concerns—market share has shifted from large brewers to small brewers by at least 5 percent since 2010. The explosive rise of the craft beer revolution can be credited with this trend. In 2004, craft beer made up 5 percent of the American take-home beer market, but by 2018 craft brewers had “more than doubled their volume share to 12 percent and quadrupled their revenue share to 20 percent.” In 2019, the retail dollar value market share of craft beer grew to 25.2

¹⁰ Ibid., p. 63 (emphasis added).

¹¹ C. Jarrett Dieterle and Teri Quimby, “R Street Institute Regulatory Comment on Executive Order Regarding Competition in the Beer, Wine, and Spirits Markets,” Docket No. TTB-2021-0007, Aug. 18, 2021. <https://www.rstreet.org/outreach/49799>.

¹² Heather Boushey and Helen Knudsen, “The Importance of Competition for the American Economy,” The White House, July 9, 2021, FN 1-3. <https://www.whitehouse.gov/cea/blog/2021/07/09/the-importance-of-competition-for-the-american-economy>.

percent, a 6 percent increase from 2018. Likewise, the market share by volume for craft beer grew to 13.6 percent in 2019, up from 13 percent in 2018 and 12.5 percent in 2017...

The number of breweries in America has also grown at an explosive rate over the past few decades. In 1991, there were 312 breweries in America; in 2020, there were 8,884 (of these breweries, only 120 are categorized as non-craft/large breweries). Other small alcohol producers, such as craft distillers, have also seen increases in growth in recent years: As of August 2019, there were over 2,000 craft distillers and overall market share was continuing to increase for these distillers. (Market concentration analysis of the wine industry is more difficult given the varieties of wine and definitional issues over how products like ciders and meads are counted, although it is clear the number of wineries has also drastically increased in recent years.)¹³

We also asked an often-overlooked question: if antitrust and competition scrutiny of the producer tier was not deemed necessary during the 1980s, 1990s and early 2000s when the industry was *more* consolidated, why is it suddenly needed now that the industry is more fragmented?¹⁴

Interestingly, the current administration itself seems less than certain about whether the producer tier of the alcohol industry is sufficiently competitive. At a recent brewer's conference, an administration spokesman described America's craft beer industry as "the envy of the world" and "a model for how the U.S. economy should be."¹⁵ Then, a few moments later, he expressed the administration's "concern" about consolidation among brewers.¹⁶ He added that the administration didn't want to take on "small technical violations" but rather "to take on the big cases against the entities that have market power."¹⁷

This kind of language on the heels of an executive order instructing the TTB to examine competition in the industry—and in light of the Treasury's own claim in its February 2022 report that the TTB should "focus its efforts against large entities"—seems to suggest the presence of a pre-determined regulatory agenda against "Big Alcohol."¹⁸

Once again, it is far from clear whether large entities are in fact dominating the marketplace in a previously unforeseen way. As the data referenced above shows, the producer tier is becoming less consolidated, not more.

An additional nuance is the importance of determining *what the market is* when it comes to analyzing competition concerns within that market. Much of the debate and analysis has looked at the beer sector or the spirits sector, without considering the extent to which this type of siloed analysis is outdated in the modern beverage marketplace.

For instance, not only are large beer companies losing market share to smaller brewers, as noted above, but beer as a beverage category is losing market share to distilled spirits. For over a decade, spirits have

¹³ C. Jarrett Dieterle and Teri Quimby, "R Street Institute Regulatory Comment on Executive Order Regarding Competition in the Beer, Wine, and Spirits Markets," Docket No. TTB-2021-0007, Aug. 18, 2021.

<https://www.rstreet.org/outreach/49799>.

¹⁴ Ibid.

¹⁵ C. Jarrett Dieterle, "The Biden Administration Can't Make Up Its Mind About Alcohol," *Reason*, July 26, 2022.

<https://reason.com/2022/07/26/the-biden-administration-cant-make-up-its-mind-about-alcohol>.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ "Competition in the Markets for Beer, Wine, and Spirits."

<https://home.treasury.gov/system/files/136/Competition-Report.pdf>.

chipped away at beer's share of the alcohol marketplace.¹⁹ Consumers are increasingly drinking across the beverage categories and demonstrating reduced brand loyalty, further fragmenting the market.²⁰ A final spin is the rise of the non-ABV and low-ABV movement—sometimes referred to as the “sober curious” crowd—which has proven particularly popular with the Millennial and Gen Z population.²¹

Wholesaler Consolidation Data: More Concentrated

In contrast to the producer tier, the wholesaler tier is clearly becoming *more* consolidated over time. Again, as noted in our prior comments:

The same wholesalers often distribute both wine and spirits, and as one recent wine industry survey noted: “The proliferating number of North American wineries has an inverse correlation with the shrinking number of distributors. According to winery and distributor sources, in 1995 the United States had about 1,800 wineries and 3,000 distributors. Today [2017], there are more than 9,200 wineries and nearly 1,200 distributors.”

A more recent analysis from 2021 found under one thousand wine distributors, and included a stunning graphic that illustrates market concentration levels across all tiers of the wine industry: The beer industry shows similar trends, as the number of beer wholesalers decreased from 4,595 in 1980 to 3,000 by 2020.

Also, unlike the producer level, the market share dominance of the largest distributors has *increased* over time, rather than decreased. Whereas the top 10 wine and spirits distributors combined for 59 percent of the market share in 2010, they comprised 75 percent of market share just 10 years later in 2020. Therefore, when analyzing trends to measure whether a particular market has become “more concentrated” over time, as suggested by the administration’s guidance, it is clear that the wholesaler tier of alcohol markets would be the most likely sector of the alcohol industry to fall under this definition.²²

While the consolidation trends at the wholesaler tier are certainly worth keeping an eye on, the best options for addressing the issue lie at the state level, rather than with the federal government. That is because the very nature of the state-level three-tier system, with its mandated wholesaler tier as well as strict state franchise laws, works to cement the market concentration powers of alcohol wholesalers.

Given the above data, the most natural remedies are reforms to these state-level three-tier systems, such as allowing more producers to engage in self-distribution, and overhauling restrictive franchise laws that make it difficult for small producers to disentangle from their contracts with powerful wholesalers. Another promising option is more states passing laws authorizing Direct-to-Consumer shipping laws for spirits and beer. This allows smaller brewers and distillers to access their customer base directly and no longer be beholden to large wholesalers who may not have interest in selling craft beverages.

¹⁹ Stefan Sykes, “Beer is on pace to lose its leading share of the U.S. alcohol market as spirits surge,” CNBC, Oct. 27, 2022. <https://www.cnbc.com/2022/10/27/beer-is-on-pace-to-lose-its-leading-share-of-the-us-alcohol-market.html>.

²⁰ Jan Conway, “Share of consumers that only or mostly purchase the same brand of alcohol in the United States in 2022, by segment,” Statista, Oct. 11, 2022. <https://www.statista.com/statistics/1336982/us-alcohol-brand-loyalty-by-segment/#:~:text=Wine%20had%20the%20lowest%20level,one%20or%20mostly%20one%20brand>.

²¹ Sara Karlovitch, “Alcohol purchasing trends are changing — here’s what the numbers say,” *Marketing Dive*, May 8, 2023. <https://www.marketingdive.com/news/alcohol-purchasing-marketing-gen-z-2023/649546>.

²² Dieterle and Quimby. <https://www.rstreet.org/outreach/49799>.

Removing Regulatory Barriers vs. Placing New Obstacles

To summarize, the producer level of the alcohol sector is moving toward *less* consolidation, undermining claims that robust federal action is necessary to address competition concerns. In contrast, the wholesale level has seen significant consolidation in recent years, although the most targeted remedies for this reside at the state level through three-tier system reforms.

To the extent that the TTB can target its final rulemaking toward clearing away arbitrary regulatory barriers with “an eye to giving a green light to practices that are essentially harmless and inherently procompetitive,” as the Treasury put it in the February 2022 report, its efforts appear to be productive, sensible and appropriately humble.²³ However, if a significant portion of the rulemaking is focused on expanding trade practice regulations to ensnare more conduct, or beefing up enforcement efforts against “large entities” as part of the current administration’s focus on “Big Alcohol”, the TTB will be venturing into more precarious waters.

Put simply, there is little evidence to suggest that robust antitrust and competition enforcement efforts and policy initiatives are necessary in the alcohol marketplace at the federal level. The producer tier is de-consolidating, and the best remedies for wholesaler consolidation reside at the state level. As such, the TTB should proceed with due caution and humility as it considers its next steps.

“Proper” or Prohibited?: Determining the Propriety of TTB Action Without Modern Congressional Action

Even if the TTB determines that intervention is necessary in alcohol markets through new antitrust and competition-focused regulatory action, there are still reasons to exercise restraint. For an agency to initiate a rulemaking, it must do so pursuant to relevant statutory authorization.

Born in 1935: Is the FAA Act Antiquated or Activated?

As the authority for its proposed rulemaking, the TTB cites to several subsections of the FAA Act.²⁴ Section 205 prohibits producers, wholesalers and importers from engaging in certain trade practices that undermine retailer independence or provide an unfair advantage over competitors.²⁵ These trade practice rules specifically prohibit exclusive outlets, tied houses, commercial bribery and consignment sales.

Over the years, the TTB has promulgated regulations under these statutory provisions. But it notes that it has not revised its trade practice regulations in over two decades, and therefore the rules “may not take into account current marketplace realities.”²⁶ Once again, the devil is in the details. If the TTB is simply seeking to “updat[e] its regulations with an eye to giving a green light to practices that are

²³ “Competition in the Markets for Beer, Wine, and Spirits.”

<https://home.treasury.gov/system/files/136/Competition-Report.pdf>.

²⁴ 27 U.S.C. 205(a)-(d). Cornell Law School, Legal Information Institute.

<https://www.law.cornell.edu/uscode/text/27/205>.

²⁵ Ibid.

²⁶ Alcohol and Tobacco Tax and Trade Bureau. <https://www.federalregister.gov/documents/2022/11/09/2022-24435/consideration-of-updates-to-trade-practice-regulations>.

essentially harmless and inherently procompetitive,” then periodic modernization of outdated rules makes sense.²⁷

Conversely, if the greater import of the rulemaking is to advance an agenda against “Big Alcohol” by expanding trade practice violations and bringing more enforcement actions against industry stakeholders, then the question becomes this: is doing so pursuant to the FAA Act, sans new congressional action, appropriate?

To answer this question, it is important to understand the history of the FAA Act. After Prohibition was repealed, temperance advocates such as John D. Rockefeller still sought ways to strictly control and regulate alcoholic beverages.²⁸ A particular area of focus was the prevalence of the aforementioned “tied houses,” in which large alcohol producers controlled or exerted undue influence on less-powerful alcohol retailers, such as the local saloon.²⁹

After Prohibition, a section of the Franklin D. Roosevelt’s National Industrial Recovery Act (NIRA) included a Code of Fair Competition for the Alcoholic Beverage Wholesale Industry and a Code of Fair Competition for the Distilled Spirits Industry.³⁰ After the NIRA was struck down as unconstitutional by the U.S. Supreme Court, Congress moved to enact the FAA Act in 1935.³¹

Critically, the FAA Act was “drafted in the context of the developing three-tier system that was established under State laws,” and:

The unfair trade practice provisions respected this market structure and were intended to level the playing field in the distribution and sale of alcohol beverages to prevent the promotional practices that would lead to abusive consumption that had several decades earlier inspired the Temperance Movement and led to the adoption of Prohibition. The public policy goal was an alcohol beverage retail marketplace reflecting the products that the consumer wanted and not a marketplace controlled by the alcohol industry attempting through unfettered trade practices to dictate to the consumer what he or she should want and causing abusive consumption via overstimulation of sales.³²

Put simply, there is a dearth of evidence available that the current alcohol marketplace is failing to provide products the consumer wants or is being controlled by the alcohol industry through unfettered trade practices that “dictate” what the consumer should or should not want, while at the same time causing “abusive consumption” and an “overstimulation of sales.” These concerns, while important, speak to a very different era than the one we find ourselves in now. Our current era is one of

²⁷ “Competition in the Markets for Beer, Wine, and Spirits,” p. 62.

<https://home.treasury.gov/system/files/136/Competition-Report.pdf>.

²⁸ Harry G. Levine, “The Birth of American Alcohol Control: Prohibition, the Power Elite and the Problem of Lawlessness” *Contemporary Drug Problems* (Spring 1985), pp. 14-20. <https://qcpages.gc.cuny.edu/~hlevine/The-Birth-of-American-Alcohol-Control.pdf>.

²⁹ “Understanding Trade Practice Laws Under the Federal Alcohol Administration Act,” National Beer Wholesalers Association, September 2016, p. 5. <https://img1.wsimg.com/blobby/go/21f6e7f3-c96c-49b5-8c7b-56a86a720474/downloads/Guide-to-Unfair-Trade-Practices-Under-the-FAA-.pdf?ver=1596072170839>.

³⁰ Ibid.

³¹ Ibid., p. 6.

³² Ibid.

unprecedented choices for consumers and a declining number of Americans who drink alcohol.³³ This reality should act as a caution flag for the TBB as it considers its final rulemaking.

Engaging in a thorough and careful analysis of whether an agency is acting pursuant to appropriate congressional authority while undertaking a substantial new rulemaking is especially important in lieu of the recent U.S. Supreme Court case of *West Virginia v. Environmental Protection Agency*.³⁴ While the details of the case are beyond the purview of this comment, the Supreme Court's holding fleshed out the so-called "Major Questions Doctrine."³⁵ The Supreme Court held that an agency may not undertake administrative action of major "economic and political significance" without "clear congressional authorization."³⁶

Various factors can help determine whether a specific agency action might run afoul of the Major Questions Doctrine, including whether it involves "a significant portion of the U.S. economy," a matter of "great political significance," or if the agency claims to "discover an unheralded power" in the "vague language" of a "long-extant statute."³⁷

We leave it for another day and forum to determine the exact extent to which the Major Questions Doctrine may apply to the present rulemaking under consideration by the TTB. Certainly, the spirit of the doctrine—that agencies should be hesitant to undertake expansive regulatory action pursuant to long-existing statutes—counsels a posture of humility. Modest updates to "green light" harmless and inherently procompetitive practices is one thing; vastly expanding the agency's rules and power to crack down on perceived abuses by "Big Alcohol" is another.

A Different Century and a Different Time

The relevant text of the FAA Act itself—Section 105(a)-(d)—comprises a grand total of 907 words (taking out titles and subsection letters and numbers). If the TTB uses the forthcoming rulemaking to drastically expand its regulatory posture and enforcement actions to push an antitrust and competition agenda against the industry, it would be doing so pursuant to a near-100-year-old law that is the just over the length of a newspaper op-ed.

To underscore the incongruence of using the FAA Act as an anchor for significant regulatory action in 2023, one only need to look to the text of the original act itself. Among other things, it stipulated that the head of the **Federal Alcohol Administration** (which no longer exists) will be paid a **salary of \$10,000** (a handsome wage ... in 1935) for **his** compensation (the first female head of *any* federal agency was only appointed two years earlier in 1933).³⁸

³³ Erica Pandey, "Axios Finish Line: Americans are drinking less," *Axios*, Oct. 18, 2022.

<https://www.axios.com/2022/10/19/axios-finish-line-americans-are-drinking-less>.

³⁴ *West Virginia v. Environmental Protection Agency*, United States Supreme Court, No. 20-1530, June 30, 2022.

https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf.

³⁵ *Ibid.*, p. 4

³⁶ *Ibid.*, p. 4.

³⁷ *Ibid.*, p. 10, 18 and 20.

³⁸ U.S. Federal Alcohol Administration, *Legislative History of the Federal Alcohol Administration Act: Public No. 401, Seventy-Forth Congress (H.R. 8870); Office of the General Counsel, September 15, 1935 (Classic Reprint)*, (Forgotten Books, 2018) p. 1 (emphasis added) ("The Administrator shall for his services receive compensation at the rate of \$10,000 per annum").

The legislative history of the FAA Act further illustrates the point. When submitting the bill in Congress, Rep. Thomas H. Cullen, the original sponsor, discussed the purposes behind the legislation by stating:

This bill provides for Federal regulation of the liquor industry. It has as its major objectives the protection of the Federal revenue and the prevention of the recurrence of those *evils in the liquor traffic which existed prior to and after prohibition* ... The committee sessions disclosed that it is necessary by some method of Federal control to provide means by which *unscrupulous racketeers may be prohibited from entering or remaining in the liquor business*. Until we can do that the Government's efforts to collect the revenue to which it is entitled will be frustrated at least in part. Further, we must do something to *prevent the unfair trade activities of those in the industry who chisel and take advantage of the ignorance of the consumer* by dishonest labeling and advertising and by preying on the weakness of others in the industry. Finally, we must do something to *supplement legislation by the States* to carry out their own policies.³⁹

From addressing “evils” that existed immediately before and after Prohibition, to stopping “unscrupulous racketeers” and “those in the industry who chisel and take advantage of the ignorance of the consumer,” it can be seen that the FAA Act was focused on a very different set of issues than those that beset the alcohol industry today. Additionally, the federal government does not need to “supplement” legislation at the state level currently; rather, as explained above, the states are actually the ones in the best position to address consolidation concerns at the wholesaling level through three-tier system reforms to increase direct access to markets by suppliers.

As the Finance Committee report from the time put it in addressing the bill's purpose:

[D]uring prohibition, unscrupulous persons entered into the liquor business with the consequences known to all. *The bootlegger and the racketeer have not yet disappeared from our national life*. Under existing Federal law there is *no means of keeping the criminal from entering the legalized liquor field*. The executive branch of the Government ... is powerless to prevent the most notorious criminal from entering into the business of production or distribution of alcoholic beverages. The revenue cannot be adequately protected, the “tied house” control cannot be curbed, the public cannot be protected from unscrupulous advertising, the consumer cannot be protected from deceptive labeling practices: in short, the legalized liquor traffic cannot be effectively regulated, if the door is left open for *highly financed gangs of criminals* and racketeers to under into the business of liquor production and distribution.⁴⁰

Even the most virulent critics of the current alcohol industry would be hard pressed to argue that the real issue is a proliferation of modern-day “bootleggers,” “racketeers,” “criminals” and “highly financed gangs” that the federal government is impotent to stop. In reality, everything highlighted in the committee report is something that *can be* and *is* protected against in today's marketplace.

While the current administration has made clear its desire to undertake robust antitrust and competition action across various sectors of the economy, federal agencies are still required to act pursuant to a firm statutory anchor in any actions that they take.

Construing 900 words from an almost century-old statute—and one whose legislative history is largely focused on stamping out “gangs” and “bootleggers”—as “clear congressional authorization” for a more aggressive regulatory posture against supposed anti-competitive practices across a large industry, seems to raise the very sort of Major Question Doctrine concerns that agencies would be wise to avoid.

³⁹ Ibid., p. 52 (emphasis added).

⁴⁰ Ibid., p. 56 (emphasis added).

If Congress—the nation’s lawmaking branch—was concerned about competition or antitrust issues in the alcohol industry, it could pass modern legislation instructing the TTB (or other agencies) to address the issue. In fact, various members of Congress have raised the issue before, only to have it fail to gain traction.⁴¹ The fact that Congress has declined to act, or even shown much interest in the topic, further militates against TTB action in this sphere. (Another factor of note in *West Virginia v. EPA* is whether Congress has “conspicuously and repeatedly declined” to act in a certain sphere).⁴²

Regulators’ best actions are those undertaken judiciously. Using a 1935 law as a sudden fount of legal authority to pursue an antitrust and competition agenda pushed by the current administration is the opposite of judicious and careful regulatory action. This assertion is strengthened by the fact that for many decades the alcohol industry was *more* consolidated than it is now—and the TTB never thought it necessary or proper to undertake a rulemaking to address the topic.

As one commentator wrote about a TTB trade practice enforcement initiative in a different context: “Looking at it from a larger picture of public policy, the omnipresent question is always what exact public interest is being advanced by any program [undertaken by the TTB].”⁴³ This question should be at the forefront of the agency’s mind as it contemplates its next steps.

Sincerely,

C. Jarrett Dieterle⁴⁴

Teri Quimby⁴⁵

⁴¹ “Klobuchar Renews Call to Protect Competition in the Beer Market,” United States Senator Amy Klobuchar, June 22, 2016. <https://www.klobuchar.senate.gov/public/index.cfm/2016/6/klobuchar-renews-call-to-protect-competition-in-the-beer-market>; Chris Furnari, “To Promote ‘A Better Deal,’ Dems Criticize MegaBrew,” *Brewbound*, July 25, 2017. <https://www.brewbound.com/news/promote-better-deal-dems-criticize-megabrew>.

⁴² *West Virginia v. Environmental Protection Agency*. https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf.

⁴³ Robert M. Tobiassen, “Is a 1935 Alcohol Beverage Federal Trade Practice Law Stifling Innovation?,” *Booze Rules Blog*, April 22, 2019. <https://www.beveragelaw.com/booze-rules/2019/3/12/ttb-stifling-innovation>.

⁴⁴ Jarrett Dieterle is a resident senior fellow at the R Street Institute, a nonpartisan public policy research organization located in Washington, D.C. R Street is the only national think tank with a dedicated alcohol policy research team that studies and analyzes the laws and regulations governing alcohol in the United States. R Street favors rational alcoholic beverage policies that respect individual freedom, free enterprise and the public well-being.

⁴⁵ Teri Quimby, JD, LLM, is an attorney, author and consultant. Quimby served as a member of the Michigan Liquor Control Commission from 2011-2019. She utilizes her LLM in corporate law and many years working on legislation and regulations in highly regulated sectors to encourage dialogue on public policy issues and to advise organizations on governance and compliance.