Mary G. Ryan
Administrator
Alcohol and Tobacco Tax and Trade Bureau
U.S. Department of Treasury

RE: TTB-2022-0011-0001: Consideration of Updates to Trade Practice Regulations

VIA ONLINE SUBMISSION

Dear Administrator Ryan:

Consumer Federation of America (CFA) and Center for Science in the Public Interest (CSPI) appreciate your consideration of these comments on the Alcohol and Tobacco Tax and Trade Bureau's (TTB's) above-referenced advance notice of proposed rulemaking proposing updates to the TTB trade practice regulations ("the notice").

CFA is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. Today, more than 250 of these groups participate in the federation and govern it through their representatives on the organization's Board of Directors. CSPI, "Your Food and Health Watchdog" is one of the oldest independent, science-based consumer advocacy organizations in the country. For more than 50 years, CSPI has worked to improve how the nation eats and hold government and corporations accountable, leveraging scientific and regulatory expertise to advocate for sensible policy solutions in food safety, nutrition, and public health.

We write in support of TTB's efforts to implement the goals of President Biden's Executive Order 14036, and urge the agency to pursue trade practice regulation reforms that both foster competition and support public health goals. In particular, TTB should adopt reforms that will help protect consumers, particularly underage consumers, from unfair competition that promotes overall consumption of alcoholic beverages.

The agency can do this by removing the exception that currently allows manufacturers to provide retailers with shelf plans and shelf schematics that direct prominent placement of alcoholic beverages, and by curbing other anti-competitive stocking practices. We also urge the agency to update its trade practice regulations to define "slotting fees" – fees paid to retailers for stocking and displaying products -- to include display space at retail premises, virtual display space, payments for trade promotion, and the provision of subsidized equipment that is reserved for the member's products.

I. Background

TTB has the authority, and duty, to regulate alcohol in a manner that takes public health into consideration. In 1935, Congress passed the Federal Alcohol Administration Act ("FAA Act") to regulate the production, sale, labeling and advertising of alcoholic beverages so as to "prevent deception of the consumer" and "prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guaranties, and scientific or irrelevant matters as the Secretary of the Treasury finds to be likely to mislead the consumer."[1] Of particular relevance to this rulemaking, the FAA Act prohibits "tied house" inducements, "subject to such exceptions as the Secretary of the Treasury shall by regulation prescribe, having due regard for public health."[2] The role of the FAA in promoting public health was again emphasized in the Alcoholic Beverage Labeling Act of 1988, which added a second section to the Act requiring a specified "government warning" statement on alcoholic beverage container labels, and directing the Secretary to "consult and coordinate" with the Surgeon General on related "health awareness efforts."[3] These provisions make clear that the TTB has a duty to consider public health in the regulation of alcohol, and in particular must consider the impact on public health when developing exceptions to its trade rules.

On July 9, 2021, President Biden issued Executive Order 14036 "Promoting Competition in the American Economy." The Order points out that "over the last several decades, as industries have consolidated, competition has weakened in too many markets, denying Americans the benefits of an open economy and widening racial, income, and wealth inequality."[4] In some ways, the alcoholic beverage industry has emerged as a notable exception to this trend, with tens of thousands of small businesses selling "craft" beer, wines and spirits now accounting for an estimated 8% of U.S. alcohol sales.[5] At the same time, the alcohol distribution and retail sectors are becoming more consolidated than ever, as are the food and beverage industry writ large.[6] The state of competition in the alcoholic beverage sector has been made possible in part by regulatory structures put in place after the repeal of Prohibition, which the TTB is now considering updating.[7] These structures establish a three-tier distribution system that prevents vertical integration between producers, distributors, and retailers, and conveys the benefit of protecting the public from abusive alcohol industry practices.[8]

President Biden's E.O. 14036 directed the Secretary to submit a report assessing the market for alcohol and to consider initiating rulemaking to update the TTB's trade practice regulations. Last February, TTB issued its report entitled "Competition in the Markets for Beer, Wine, and Spirits," after soliciting public comment.[9] According to the report, the competitive effects of the trade practice regulations subject to this rulemaking are "hard to measure." At the same time, the report acknowledges that "the results may speak for themselves: the industry is vibrant, has made room for thousands of new competitors, and offers consumers a great variety of alcohol beverages, often made locally." Nevertheless, the report notes that many commenters recommend reforms of TTB's trade practice regulation, including clearer standards and more effective enforcement.[10]

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[1] 27 U.S.C.A. § 205 (e), (f).

[2] 27 U.S.C.A. § 205 (b).

[3] 27 U.S.C.A. § 215 (d).

[4] Federal Register :: Promoting Competition in the American Economy

[5] U.S. Department of the Treasury. (2022). Competition in the markets for beer, wine, and spirits, *available* at: https://home. Treasury.gov/system/files/136/Competition-Report.pdf, p 2. [hereinafter "Competition Report"]

[6] *See, e.g.* https://docs.house.gov/meetings/JU/JU05/20220119/114345/HHRG-117-JU05-20220119-SD006.pdf

[7] https://www.antitrustlawyerblog.com/getting-distribution-right-is-the-key-to-successful-beer-remedies/

[8] *See* National Alcohol Beverage Control Association. *The Three-Tier System: A Modern View*, (2015), *available at*: https://www.nabca.org/three-tier-system-modern-view-0

[9] Competition Report.

[10] Competition Report. pp. 42-43

II. The public health burden of alcohol-related harms is large and growing.

TTB's efforts to foster competition in the alcoholic beverage market come amidst steep increases in alcohol-related harms, emphasizing the need to ensure consumers are educated about alcohol's health risks and protected from unfair advertising campaigns aimed at boosting profits at the expense of public health. During the first year of the COVID-19 pandemic, acute alcohol-related deaths spiked 25.5%.[11] Self-reported alcohol consumption and risky drinking patterns rose significantly as well, particularly among women, Black consumers, and consumers with minor children in the home.[12] According to the CDC, alcohol-related harms, such as increased deaths from chronic liver disease and cirrhosis, were among the primary factors contributing to the historic decline in life expectancy in the United States for two consecutive years.[13]

Alcohol-attributable cancers are also major contributors to the public health burden, yet most consumers are unaware of this hazard. Alcohol consumption represents the third leading modifiable cancer risk factor, after cigarette smoking and excess body weight—ahead of factors including UV radiation exposure.[14] Nevertheless, in survey after survey, a majority of U.S. adults fail to identify alcohol consumption as a risk factor associated with cancer,[15] and a substantial minority believes that drinking wine lowers cancer risk.[16] To remedy this confusion, our groups and others petitioned TTB in October of 2020 to fulfill its duty under the Alcoholic Beverage Labeling Act and report to Congress on the need to update the health warning statement on alcoholic beverages to include a cancer warning.[17] TTB has yet to respond to that petition.

III. Trade practice regulations aimed at fostering competition also protect public health

As noted above, the TTB has a statutory directive to maintain "due regard for public health" in considering exceptions to it tied house rules. Yet neither the notice, nor TTB's February 2022 report on competition, which informs this rulemaking and is housed in the same docket, discusses the impact of trade practice regulations on public health, despite the rising toll of alcohol-related harms, and high levels of consumer confusion regarding those harms. In the words of one commentary, the "report accomplished the remarkable feat of discussing alcohol regulation in the United States for 64 pages without providing a single fact about alcohol's burden on health."[18] Such lack of consideration is a serious omission, as the current TTB rulemaking presents an opportunity

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[11] White AM, Castle IP, Powell PA, Hingson RW, Koob GF. Alcohol-Related Deaths During the COVID-19 Pandemic. JAMA. 2022 May 3;327(17):1704-1706. doi: 10.1001/jama.2022.4308. PMID: 35302593; PMCID: PMC8933830.

[12] Barbosa, Carolina PhD; Dowd, William N. BA; Barnosky, Alan MA; Karriker-Jaffe, Katherine J. PhD. Alcohol Consumption During the First Year of the COVID-19 Pandemic in the United States: Results From a Nationally Representative Longitudinal Survey. Journal of Addiction Medicine 17(1):p e11-e17, 1/2 2023. | DOI: 10.1097/ADM.0000000000001018

[13] https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/20220831.htm

[14] Farhad Islami et al., *Proportion and number of cancer cases and deaths attributable to potentially modifiable risk factors in the United States*, 68 CA CANCER J. CLIN. 31, 36 (2018), https://doi.org/10.3322/caac.21440.

[15] *See* https://www.aicr.org/assets/can-prevent/docs/2019-Survey.pdf; https://aacrjournals.org/cebp/article/28/7/1195/71974/Evaluating-Correlates-of-Awareness-of-the

[16] https://hints.cancer.gov/view-questions/question-detail.aspx?PK_Cycle=13&qid=1816

[17] https://consumerfed.org/testimonial/consumer-public-health-groups-petition-for-cancer-warning-on-alcohol/

[18] https://www.jsad.com/doi/pdf/10.15288/jsad.22-00133

to amend the trade practice regulations to eliminate exceptions in a manner that will likely benefit public health while preserving market access for smaller producers.

TTB's prohibition on slotting fees is important for public health in addition to competition. As TTB's report on competition notes, slotting fees, or fees paid to retailers for stocking and displaying products, are generally allowed for food and other products sold at retail, but TTB and its predecessors have prohibited these fees for most alcoholic drinks as a *per se* inducement in violation of the FAA's "tied house" provision, codified at 27 U.S.C. 205(b). As TTB's report on competition explains, the rationale for "banning such side-payments is their tendency to distort competition among producers and their potential to further entrench dominant players by serving as a barrier to entry for new market participants, particularly innovators."[19] However, the report neglects another important rationale for this prohibition: slotting fees create retail environments that distort consumer behavior by encouraging unhealthy purchasing.

In 2016, CSPI published *Rigged: Supermarket Shelves for Sale*, which outlines the history of slotting fees in U.S. food retail and its many pernicious effects. The report shows how slotting fees allow soda and candy manufacturers to boost profits by enticing impulse buys of high-profit, single-serving items. The slotting fees "determine the selection of products available to consumers and how they are presented to them, influencing which foods and beverages consumers buy and eat," creating a system that is "rigged against consumers, the produce industry, and small businesses—against everyone except big food manufacturers and retailers."[20] In other words, the experience of slotting fees in food retail suggests that not only have these fees decimated competition and consumer choice, they have also spawned unhealthy retail environments that peddle junk food to unsuspecting shoppers when they are least able to resist the temptation.

TTB should not permit large alcohol producers to similarly manipulate the retail environment. The agency's report on competition gives a nod to arguments in favor of slotting fees—"as efficiency-promoting, as reasonable compensation for the gatekeeper, allocation of risk, or a potential means for new and unknown entrants to gain access to a market."[21] However, even if these arguments have economic merit, they fail to account for the public health impacts associated with slotting fees, impacts that are only poorly understood in the food and alcohol retail space because of the secrecy surrounding payment arrangements.[22]

Recent collaborations between soda companies and the alcohol industry raise new concerns over these arrangements. The same food and beverage companies that have long used slotting fees to promote sugary drinks and snack foods now appear poised to use the same tactics to increase alcohol consumption among young people. An extensive body of literature has documented how increased availability of "alcopops," which combine alcohol with sugar and sweet, fruit flavorings, has led to increases in underage alcohol consumption and related harms.[23] Companies like Pepsi and

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[19] TTB, Competition Report, *supra* note __, at 38.
[20] https://www.cspinet.org/sites/default/files/media/documents/misc/CSPI_Rigged_4_small.pdf
[21] TTB, Competition Report, supra note __, at 38.
[22] Rigged, at 10.
[23] *See, e.g.,* Rossheim. https://psycnet.apa.org/record/2020-65459-001 (noting that alcopops "are very commonly consumed by underage drinkers"); Lintonen, https://journals.sagepub.com/doi/pdf/10.1177/1455072520910547

Coca-Cola, both of which have introduced alcoholic variants of their existing sugar sweetened beverages—e.g. Hard Mountain Dew,[24] Fresca Mixed[25]--currently pay vast sums to strategically place their non-alcoholic beverages, which are not subject to TTB rules, in a manner that maximizes profits. Independent wholesalers have presented evidence that soda companies are "leveraging slotting fees for their non-alcohol brands to ensure preferential shelf space for the alcohol counterparts," and pointed out that these new "hard soft drink" products have been found on display alongside their non-alcoholic versions.[26] Indeed, regulators in Illinois recently issued an emergency rule banning the display of "co-branded alcoholic beverages immediately adjacent to soft drinks, fruit juices, bottled water, candy, or snack foods portraying cartoons or youth-oriented photos."[27] These "co-branding" relationships erode TTB rules, impeding competition at the same time they undermine consumer health by promoting alcohol consumption.

Advertising beyond slotting fees also has the effect of reducing competition while increasing overall consumption of harmful products, negatively impacting public health. According to a 2014 Federal Trade Commission report, just 14 companies representing 79% of U.S. alcohol sales by volume, spent an estimated $3.45 billion on marketing activities.[28] More recently, researchers have estimated that the two largest beer companies alone—Anheuser-Busch (now AB-Inbev) and Molson Coors, spent an estimated 2.427 billion dollars in 2017 on "measured media" and "other marketing activities, including digital."[29] According to the researchers, this outsized spending on marketing, which puts several major alcohol companies among the world's largest advertisers in the world, "creates a significant barrier to entry for new firms and products, which in turn helps to support the oligopoly structure and profits of the industry."[30] This is bad for competition but also for consumers, particularly parents, because studies show that increased exposure to alcohol marketing leads to increases in underage drinking.[31] TTB regulations serve as an important check on large

(demonstrating that Finnish law reform allowing alcopops, beer and cider to be sold in grocery stores coincided with significant increases in consumption of alcopops by underage drinkers).

[24] *https://www.law.com/thelegalintelligencer/2023/02/11/how-will-pepsis-new-alcohol-distribution-co-and-hard-sodas-fit-into-the-industry/?slreturn=20230430151734* (noting that Pepsi Co.'s requirement that Boston Beer use its Blue Cloud Distribution company appears to violate the tied house law).

[25] https://vinepair.com/booze-news/fresca-canned-cocktails/ "Coca-Cola is utilizing Constellation's leverage and vertical integration of the three-tier distribution system as the latter firm brings the brand to market later this year.")

[26] Comment 20: 22 Independent Alcohol Wholesalers (Dec. 19, 2022), https://www.regulations.gov/comment/TTB-2022-0011-0024

[27] Illinois Liquor Control Commission. "Emergency Rule – Co-branded Alcoholic Beverages" *available at*: https://ilcc.illinois.gov/; *see also* Tara Molina. "New Illinois state rule forbids stores from placing co-branded alcoholic beverages near soft drinks" (June 14, 2023) *available at*: https://www.cbsnews.com/chicago/news/new-illinois-rule-co-branded-alcoholic-beverages-soft-drinks/

[28] Federal Trade Commission. Self-regulation in the alcohol industry: Report of the Federal Trade Commission. 2014, *available at*: https://www.ftc.gov/system/files/documents/reports/self-regulation-alcohol-industryreport-federal-trade-commission/140320alcoholreport.pdf.

[29] Jernigan. The Alcohol Marketing Landscape: Alcohol Industry Size, Structure, Strategies, and Public Health Responses. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7064002/

[30] *Id.*

[31] https://www.jsad.com/doi/10.15288/jsads.2020.s19.113; *see also* https://scholarsarchive.jwu.edu/cgi/viewcontent.cgi?article=1034&context=health_fac

producers that might otherwise leverage these substantial budgets to limit competition in the retail environment and promote consumption of unhealthy products.

We therefore urge the TTB to aggressively pursue anti-competitive practices, which harm both small producers and consumers, alike. Our specific recommendations include:

i. Removing the exception for shelf plans and shelf schematics.

The notice asks "Should TTB remove the exception which allows industry members to provide retailers with shelf plans and shelf schematics? What additional services, whether furnished in conjunction with providing shelf plans or schematics or otherwise, place or have the potential to place a retailer's independence at risk?" We urge the TTB to remove this exception. As documented in CSPI's *Rigged* report, the control of shelf plans by "category captains" in the food retail environment dramatically undermines competition by allowing one manufacturer the ability to determine the shelf placement of its competitors, reserving the most prominent locations (e.g. eye-level, end caps) for its own products, which all too often are not healthy.

ii. *Maintaining and better defining the prohibition on slotting fees*

The notice invites comment on the current TTB regulations, which prohibit companies from paying or crediting a retailer for any advertising, display, or distribution service as an inducement. The TTB has asked whether it "should update the trade practice regulations to include a definition of slotting fees, and, specifically, the extent to which such a definition should account for display space in the retail premises (e.g., shelves, designated high-visibility areas behind the bar, tap lines, well/rail placement, prominent placement on menus, or in featured drinks) as well as virtual display space (e.g., digital retail storefront, associated digital ad campaigns where products may be purchased online)." We urge the TTB to affirm that the payment of slotting fees is prohibited, and adopt a definition for such fees that includes any payment made to a retailer for display space in the retail premises, as well as any payment for trade promotion practices whereby the manufacturer makes a payment to a retailer to promote the manufacturer's products, e.g. by providing placement in a newspaper circular or website, in-store signage, or seasonal promotions. Not only do such "trade fees" represent a sizeable barrier to competition, they will also increase alcohol consumption, negatively impacting public health.

Finally, the agency seeks comment on "whether the slotting fee definition should include free or subsidized equipment that is, by agreement or design, only able to display or dispense the furnishing industry member's products." We urge the agency to include free or subsidized equipment into the definition of slotting fees, and prohibit the practice of furnishing such equipment with the requirement or effect that it only display or dispense the member's products. The provision of a floor-to-ceiling display cooler, for example, could provide a sizeable inducement, particularly for a small retailer, that could result in a monopoly on the display for the furnishing industry member, to the detriment of small businesses and consumers alike.

IV. <u>Conclusion</u>

In conclusion, we support the TTB in implementing the objectives outlined in President Biden's Executive Order 14036. It is crucial for TTB to prioritize the protection of consumers, particularly underage individuals, by adopting reforms that both prevent unfair competition and promote public health. By retaining the exception that currently permits manufacturers to provide retailers with shelf plans and schematics, reducing other anti-competitive stocking practices, and updating its definition of "slotting fees," the agency can ensure greater transparency and fairness in the industry, promoting healthy competition in alignment with public health.

Sincerely,

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Director of Regulatory Affairs
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