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BLOG

Competition EO: Changing Tides in Beer, Wine, and Spirits Industries

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President Biden's July 2021 Executive Order on Competition in the American Economy (the Executive Order) calls on federal regulators to actively "protect the vibrancy of the American markets for beer, wine, and spirits." In addition to calling for the U.S. Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) to ramp up antitrust enforcement across a range of industries, the Executive Order directs the Secretary of the Treasury, in conjunction with the DOJ and FTC, to review and report on the competitive landscape in the markets for alcoholic beverages. The report will focus on: (i) unlawful or anticompetitive trade practices that hinder small businesses; (ii) patterns of consolidation among market participants; and (iii) superfluous regulations that hinder competition. The Executive Order also calls for the Secretary of the Treasury, through the Alcohol and Tobacco Tax and Trade Bureau (TTB), to consider withdrawing or amending regulations that pose unnecessary barriers to entry.

The regulators' report on competition in alcohol markets is due in early November 2021, and any regulatory changes must be considered by March 2022. While the Executive Order could trigger future regulatory changes, it may also foreshadow increasing antitrust scrutiny in the beer, wine, and spirits industries, and especially in alcohol distribution.

In some respects, the Executive Order's alcohol-specific mandates may come as a surprise. Notwithstanding the setbacks resulting from the COVID-19 pandemic, demand for craft beer, wine, and spirits has grown in recent years and small producers have been entering the market in increasing numbers. For example, according to data from the Brewers Association, the number of craft breweries in operation nearly doubled between 2015 and 2020, with nearly 4,000 small producers opening for business.

Despite the steady stream of new producers, a recent report from the Congressional Research Service revealed that craft producers accounted for only 8% of the total alcoholic beverage market in 2020. With most of the market controlled by a smaller number of large players, regulators will be looking carefully at how existing regulations and business practices affect competition.

Indeed, the TTB has already sought public comments on how current regulations are affecting competition. The overwhelming theme in the comments submitted by small brewers, distillers, and vintners is frustration with the three-tier distribution system.[1] Under this system, beer, wine, and spirit producers generally rely on distributors (or wholesalers) to move their products to the retail market. The frameworks for regulating alcohol distribution in many states offer protections for wholesalers and distributors, including exclusive regional territories and caps on the amount of beer, wine, and liquor that producers can distribute and sell themselves.

Many commenters have argued that territorial exclusivity and rigid rules governing distribution agreements give distributors unjustified leverage in negotiations. Some have also voiced concerns that consolidation among distributors further limits the distribution options available to small producers, making it even more challenging to compete for retail shelf space, as larger brands are generally more profitable for, and hold more sway over distributors.[2]

As possible solutions, some commentators are calling for regulations that limit distributors' ability to consolidate and claim exclusive territory, as well as promote producers' ability to self-distribute and negotiate for more favorable distribution contracts. Many are also calling for more liberal rules allowing producers to sell their products directly to consumers.

In fact, the antitrust regulators have been focused on competition policy in the alcoholic beverage markets for some time. For example, in March 2020, the FTC and DOJ sent a joint letter urging the California State Assembly to vote against a proposed bill that would limit beer producers' ability to cancel, alter, or decline renewal of their agreements with distributors. The agencies argued that the bill was "likely to diminish competition between California beer wholesalers and increase manufacturers' costs of obtaining distribution services from wholesalers."[3] The proposed bill never received a vote in the California State Assembly.

The Executive Order may also drive the DOJ and FTC to begin paying more attention to mergers among distributors, as well as to potentially anticompetitive business practices in the industry. Larger market participants may face investigations and be called upon to respond to civil investigative demands concerning their business practices. The agencies may be looking carefully for any practices or arrangements among larger producers, distributors, and retailers that limit smaller players' ability to compete.

Key Takeaways

- Large producers and distributors of alcoholic beverages should review their business practices and be prepared to justify any that may be seen to disadvantage smaller competitors.
- Market participants, and especially distributors and producers, should proactively advocate to regulators and lawmakers, either individually or through trade associations, to ensure that their positions are adequately represented in any future revisions to state and federal alcohol regulations.

This article is part of our "Unpacking the Executive Order on Promoting Competition" series. Click here for other related articles. Please contact a member of the Winston & Strawn Antitrust/Competition Practice Group or your Winston relationship attorney for further information.

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[1] The TTB's request for information and the public comments submitted to date in response can be viewed here.

[2] *See, e.g.,* Comment 29: Anonymous (Aug. 6, 2021).

[3] Ltr. from FTC and DOJ Antitrust Division to the Hon. Jim Wood, Cal. State Assembly (March 20, 2020).

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