

Sightlines

[Power Dynamics — Biden’s Executive Order on Anti-Competitive Practices Puts Big Beer Under Scrutiny](#)

Kate Bernot

August 5, 2021

THE GIST

On July 9, President Biden issued [a broad executive order](#) titled “Promoting Competition in the American Economy,” which takes aim at anti-competitive and monopolistic practices in the U.S. economy. The order named some industries specifically, including beer, wine, and spirits.

In the order, Biden directs the Treasury Department to prepare a report within 120 days (before Nov. 6) that scrutinizes the alcohol industry’s market structures, with an eye toward reforming “threats to competition” and/or “barriers to new entrants” posed by industry consolidation. His order further directs the Alcohol and Tobacco Tax and Trade Bureau (TTB) to, within 240 days (by March 5, 2022), consider updating legal trade practices and “reducing any barriers that impede market access for smaller and independent brewers, winemakers, and distilleries.”

While no one can yet say what the Treasury Department or TTB will find, trade groups at all levels of the beer industry are watching closely. The executive order could spell increased regulatory oversight or changes to what constitute legal and accepted trade practices. As global law firm Norton Rose Fulbright wrote [in analysis](#) of the new executive order: “... Given the Administration’s views on competition and consumer protection, the potential impact on alcohol production, distribution, and retail sales is enormous.”

Nowhere in the beer world has consolidation of market control been more evident than at the distributor level, where fewer wholesalers are left to sell beer from an exploding number of breweries. In some states including Arizona, Alaska, and Oregon, one beer distributor controls almost all of the beer made by one large supplier (like MolsonCoors), in effect leaving retailers with only one company from which to buy certain brands.

That’s why most experts believe that within the beer industry, wholesalers stand to receive the most attention under Biden’s executive order. The federal government could amend regulations to make it easier for breweries to sell to retailers directly, including changes like:

- Raising self-distribution caps for breweries.
- Liberalizing distributor-supplier contracts to make it easier for breweries to exit.
- Chipping away at exclusive territory protections that mandate a wholesaler only sell given brands in a particular geographic area.

While no one expects the executive order to dissolve the three-tier system, the idea that it could ease protections that distributors enjoy is not welcome news for powerful wholesalers.

WHY IT MATTERS

The U.S. alcohol industry is highly regulated, but the majority of its business is concentrated among large players. [A July report from the Congressional Research Service](#) indicates that craft beer, wine, and spirits make up 8% of the overall U.S. alcohol market.

The Treasury report Biden ordered will essentially answer the question of which businesses within the alcohol industry need protecting, and from whom. Currently, the Treasury Department and the TTB [are soliciting comments](#) from the industry on the topic. Small and medium-sized breweries are likely to continue advocating for more power in their dealings with distributors. Even hard-fought compromises between small breweries and distributors have proven tenuous, as [the recent lawsuit](#) between Atlantic Importing Company and Jack's Abby Craft Lagers demonstrated.

Trade groups and lobbyists are already getting to work drafting their statements and seeking to influence the report in their favor. Lobbyists (from unspecified industries) [tell Roll Call](#) their companies “see potential opportunities from the executive order, especially if it targets their competitors—bringing long-running market disputes front and center in Washington.”

In beer, this means that small breweries could allege that the largest beer companies engage in anti-competitive practices, or that distributors don't give small breweries enough access to retail shelves. Big breweries have been fined for illegal trade practices in the past: In 2019, Heineken [paid \\$2.5 million in fines](#) for allegedly supplying draft systems to bars for free, a violation of federal law prohibiting breweries from, essentially, giving gifts or free product to retailers. In 2020, Anheuser-Busch InBev (ABI) paid [a record \\$5 million](#) in fines related to illegal dealings with sports and entertainment venues.

Because of such precedent, the largest market players will likely be on the defensive. As the [Norton Rose Fulbright law firm puts it](#): “Dominant players, particularly in the supplier and distributor sectors, should prepare to ... potentially justify their business practices.”

Large breweries are likely to argue that there aren't significant barriers to market entry; if there were, how could more breweries exist today in the U.S. than at any other time in history? They'll also likely point out that ABI is already subject to scrutiny of its mergers and acquisitions by the Department of Justice (DOJ). In approving ABI to purchase SABMiller in 2016 and Craft Brew Alliance in 2020, the DOJ required ABI to [divest itself of certain business interests](#) and submit future acquisitions to the agency's approval. And in 2013, the DOJ and Federal Trade Commission [blocked ABI's proposed purchase](#) of rival Grupo Modelo, forcing ABI to divest Grupo Modelo's U.S. business to Constellation Brands.

However, other breweries and distributors have generally not been subject to this type of scrutiny when it comes to mergers and acquisitions (except for those that [meet the \\$94 million threshold](#), previously a \$50 million threshold, set by the Hart Scott Rodino Antitrust Improvements Act of 1976.) From 2019-2020, for example, Reyes Beverage Group acquired 10 distributors in California alone, adding 12.65 million case equivalents in the Golden State—nearly as much Coors Banquet as was sold in the entire U.S. in 2019—without federal oversight. But former TTB chief counsel and current president of the National Association of Beverage Importers, Robert Tobiassen, in a post for law firm Hinman & Carmichael LLP's Booze Rules blog, [writes](#): “Clearly [the executive order] means future mergers and acquisitions within the three-tiers of the beverage alcohol industry will be much more closely scrutinized. The unknown is whether some mergers and acquisitions that did not require antitrust review will now be scrutinized after the fact?”

Large distributors, then, are the group with the most to potentially lose from changes to the status quo—and they seem to realize it.

In a statement to Good Beer Hunting, the National Beer Wholesalers Association (NBWA) said it looks forward to working with its members and the administration on “maintaining a vibrant beer industry,” but cautioned:

“As the administration reviews the expansion and growth of big business, it is important that the alcohol industry’s regulatory system and state alcohol laws are not misinterpreted, preempted, or weakened.”

The NBWA also refers to the DOJ’s [2016 ruling](#) surrounding the ABI/SABMiller deal as an “antitrust review of the beer industry” that “should remind policymakers of the role played by independent distribution.”

Large distributors generally succeed under the existing three-tier system. Their money-maker is the status quo; changes that would give breweries more control in contracts or break up exclusive territories would diminish their businesses’ value. The question is whether their concentration of market power is justified, or whether it’s a result of what could be considered anti-competitive practices.

As Tobiassen notes in his blog post, it’s been more than 25 years since the TTB last revised its unfair trade practice regulations. At the very least, he states, “Seeking public input on the need for revisions to reflect the reality of today’s global and consolidated and its results on smaller and independent industry members and retailers is appropriate.”

Some groups have alleged the latter. In 2020, anti-alcohol advocacy group Alcohol Justice called upon the California Attorney General’s office to open an investigation [into wholesaler consolidation](#). In that state, Reyes Beverage Group controls 43% of all beer sold; wholesalers aligned with ABI control much of the rest.

“Franchise protections that distributors are afforded could be considered, by some, to be monopolies, because they have exclusive territories. Some people would think that prohibits competition in certain marketplaces,” says Kimberly Clements, co-founder of Pints LLC consulting firm and former owner of Arizona’s Golden Eagle Distributors.

Yet those exclusive territories and other contractual advantages that distributors enjoy are wholesalers’ very lifebloods.

“A distributor lives and breathes by its exclusive territories and its distribution contracts,” Clements says. “It doesn’t matter how big their warehouse is, how nice it is, how plush the lobby is—they live by their distribution contracts and exclusive territories so if those get blown up, that’s going to be a problem for distributors.”

Of course, there is a scenario in which none of these changes happen. The Treasury Department and TTB’s reports could end up being rather innocuous, and the system of U.S. beer production and distribution could remain largely unaffected. The executive order could even be the end in and of itself, signalling the Biden’s administration’s desire to promote economic competition for small companies across many sectors, while most of its actual effort is spent battling the largest firms in technology, social media, and pharmaceuticals.

But until both agencies release their findings, the biggest businesses in beer are likely to feel the uncomfortable glare of a federal magnifying glass.