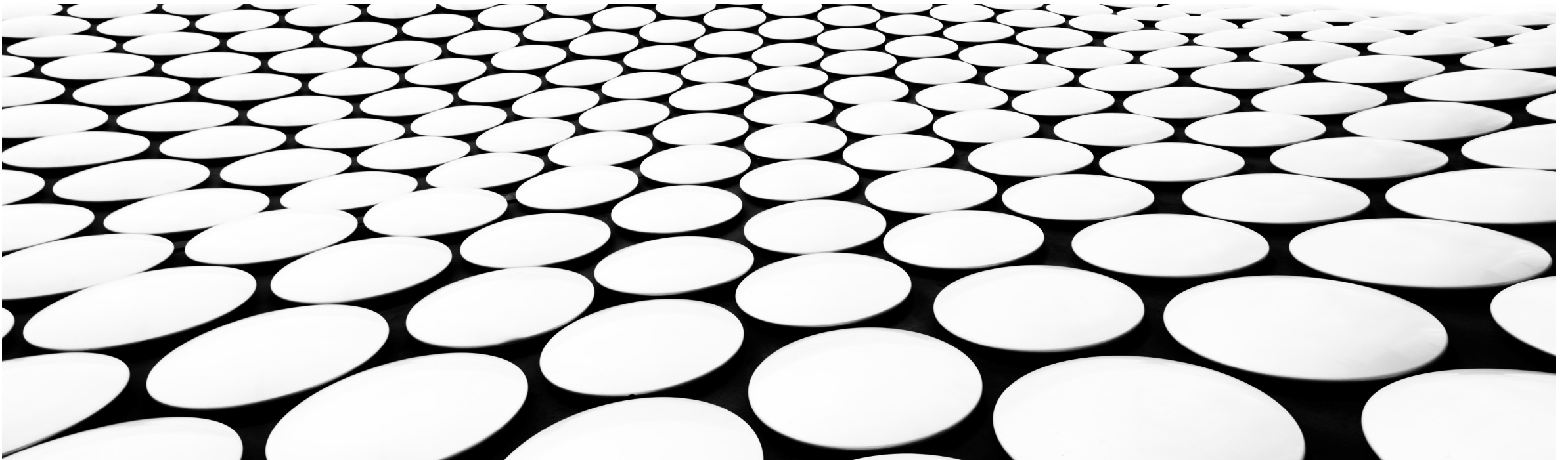

EXECUTIVE ORDER ON PROMOTING COMPETITION A NEW AMERICAN DREAM OR A PIPE DREAM OR A NIGHTMARE.

*CAN THE WHITE HOUSE, FEDERAL TRADE COMMISSION, AND ANTI-TRUST DIVISION OF THE DEPARTMENT OF JUSTICE
UNDUE 40 YEARS OF ECONOMIC POLICY?*



EXECUTIVE ORDER ON PROMOTING COMPETITION

2022 Annual Summit

National Association of Wine Retailers (NAWR)

MdR Doubletree Hotel, Marina Del Rey, California

May 5-6, 2022

Panel Presentation by:

Robert M. Tobiassen, President, National Association of Beverage Importers (NABI), Washington, DC*

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John Hinman, Founding Partner, Hinman & Carmichael LLP, San Francisco, California

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*“District of Chaos” with apologies to the District of Columbia

Opening Question: What do you see in the title slide?

Think Rorschach Test

EXECUTIVE ORDER ON PROMOTING COMPETITION

Conversation Framework Today

- Background and Context of how the President got here to signing the Executive Order
- Focusing Questions from Tom Wark, NAWR to Speaker
- Question, Answers, Comments, Observations and Frustrations from all of you

Let's go!!!

(PowerPoint is a take-away resource)

EXECUTIVE ORDER ON PROMOTING COMPETITION

The Background

"2020, '21 was probably the greatest year for M&A [mergers and acquisitions] that we've ever seen," says Rob McMillan, executive vice president Silicon Valley Bank (SVB), and founder of its wine division.

Deals included the private equity firm Sycamore Partners' acquisition of Washington's Ste Michelle Wine Estates for \$1.2B, E. & J. Gallo Winery and Constellation exchanging brands for an estimated \$810M, and Duckhorn and Vintage Wine Estates both holding public offerings.

Source: <https://www.winemag.com/>

March 27, 2022

EXECUTIVE ORDER ON PROMOTING COMPETITION

Many Factors Leading to Competition Debate:

- Cheap Money – Historically low rates designed by the Federal Reserve Board and Federal Reserve Banks
- Income inequality increasing and getting more attention. Context of COVID crisis
- Reduction in the presence and bargaining influence of Unions
- Presidential Administrations since Ronald Reagan with lax antitrust enforcement

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Major Factors (cont.)

- Globalization of Business – Netting gains and losses in regions/markets worldwide
- The business-lization of business
 - MBA Executives and CEOs – Fungible skills presumed
 - No ties to business via internal promotions to the C-Suites
 - Business Practice/Philosophy of the sole role of a corporation is its duty to maximize shareholder/owner return on investment
 - Employee Relations to Human Resources to Human Capital to Human Assets – Welcome to the life of a lump of coal in the steel mill furnace
- **President Biden's life experience.** - No other 2020 candidate for President could do this. Elected to the Senate in 1972 and grew up in a pre-President Reagan time and place. He had “walked the talk” experience.

EXECUTIVE ORDER ON PROMOTING COMPETITION

Executive Order 14036, dated July 9, 2021, “Promoting Competition in the American Economy” Overall Goals:

1. Reduce the trend of corporate consolidation
2. Increase competition
3. Delivery concrete benefits to U.S. consumers, workers, and small businesses
 - More choices and better services
 - Lower consumer prices by a more competitive market
 - Fairer opportunities for small business and entrepreneurs to compete in the U.S. market

White House Fact Sheet on EO: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>

EXECUTIVE ORDER ON PROMOTING COMPETITION

President's Remarks at the Signing Ceremony - Key Points - Text

“The heart of American capitalism is a simple idea: open and fair competition — that means that if your companies want to win your business, they have to go out and they have to up their game; better prices and services; new ideas and products. That competition keeps the economy moving and keeps it growing. Fair competition is why capitalism has been the world’s greatest force for prosperity and growth.”

“But what we’ve seen over the past few decades is less competition and more concentration that holds our economy back. We see it in big agriculture, in big tech, in big pharma. The list goes on. Rather than competing for consumers, they are consuming their competitors. Rather than competing for workers, they’re finding ways to gain the upper hand on labor. And too often, the government has actually made it harder for new companies to break in and compete.”

“Now, look, I’m a proud capitalist. I spent most of my career representing the corporate state of Delaware. I know America can’t succeed unless American business succeeds. But let me be very clear: Capitalism without competition isn’t capitalism; it’s exploitation. Without healthy competition, big players can change and charge whatever they want and treat you however they want. And for too many Americans, that means accepting a bad deal for things that can’t go — you can’t go without.”

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Key Points (cont.)

“Forty years ago, we chose the wrong path, in my view, following the misguided philosophy of people like Robert Bork, and pulled back on enforcing laws to promote competition.

“We’re now 40 years into the experiment of letting giant corporations accumulate more and more power. And where- — what have we gotten from it? Less growth, weakened investment, fewer small businesses. Too many Americans who feel left behind. Too many people who are poorer than their parents.

“I believe the experiment failed. We have to get back to an economy that grows from the bottom up and the middle out.

“The executive order I’m soon going to be signing commits the federal government to full and aggressive enforcement of our antitrust laws. No more tolerance for abusive actions by monopolies. No more bad mergers that lead to mass layoffs, higher prices, fewer options for workers and consumers alike.”

Reaganomics has failed the country, workers, small businesses, and consumers

<https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/>

EXECUTIVE ORDER ON PROMOTING COMPETITION

Executive Order 14036 - Text

Whereas decades of industry consolidation have often led to excessive market concentration, this order reaffirms that the United States retains the authority to challenge transactions whose previous consummation was in violation of the Sherman Antitrust Act (26 Stat. 209, 15 U.S.C. 1 et seq.) (Sherman Act), the Clayton Antitrust Act (Public Law 63-212, 38 Stat. 730, 15 U.S.C. 12 et seq.) (Clayton Act), or other laws. See 15 U.S.C. 18; *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

My Administration further reaffirms the policy stated in Executive Order 13725 of April 15, 2016 (Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy), and the Federal Government's commitment to the principles that led to the passage of the Sherman Act, the Clayton Act, the Packers and Stockyards Act, 1921 (Public Law 67-51, 42 Stat. 159, 7 U.S.C. 181 et seq.) (Packers and Stockyards Act), the Celler-Kefauver Antimerger Act (Public Law 81-899, 64 Stat. 1125), the Bank Merger Act (Public Law 86-463, 74 Stat. 129, 12 U.S.C. 1828), and the Telecommunications Act of 1996 (Public Law 104-104, 110 Stat. 56), among others.

EXECUTIVE ORDER ON PROMOTING COMPETITION

Timeline of Events Following Executive Order Signing

- Actions required or urged by EO generally – 72 actions by Executive Departments and Independent Commissions
- Actions required by EO for Treasury Department and TTB (120 day timeframes)
- Treasury's notice for public comments
- Treasury's report on "Competition in the Markets for Beer, Wine, and Spirits" dated February 2022 (released on a Friday)
- Next steps with TTB responding to Treasury Report and EO
- Federal Trade Commission and Justice Department's Antitrust Division Roles

EXECUTIVE ORDER ON PROMOTING COMPETITION

Treasury Department

(j) To protect the vibrancy of the American markets for beer, wine, and spirits, and to improve market access for smaller, independent, and new operations, the Secretary of the Treasury, in consultation with the Attorney General and the Chair of the FTC, not later than 120 days after the date of this order, shall submit a report to the Chair of the White House Competition Council, assessing the current market structure and conditions of competition, including an assessment of any threats to competition and barriers to new entrants, including:

- (i) any unlawful trade practices in the beer, wine, and spirits markets, such as certain exclusionary, discriminatory, or anticompetitive distribution practices, that hinder smaller and independent businesses or new entrants from distributing their products;
- (ii) patterns of consolidation in production, distribution, or retail beer, wine, and spirits markets; and
- (iii) any unnecessary trade practice regulations of matters such as bottle sizes, permitting, or labeling that may unnecessarily inhibit competition by increasing costs without serving any public health, informational, or tax purpose.

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Alcohol and Tobacco Tax and Trade Bureau (TTB)

(k) To follow up on the foregoing assessment, the Secretary of the Treasury, through the [Administrator of the Alcohol and Tobacco Tax and Trade Bureau](#), shall, not later than 240 days after the date of this order, **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.

<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>

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Treasury Department Notice Requesting Information, TTB Notice #204, 86 Federal Register 40678 (July 28, 2021) (All EO Agencies published FR requests)

Purpose is “to solicit input regarding the current market structure and conditions of competition in the American markets for beer, wine, and spirits, including an assessment of any threats to competition and barriers to new entrants.”

827 Comments Received and posted on TTB website during the 21-day comment period, including:

American Beverage Licensees Brewers Association International Brotherhood of Teamsters
National Association of Wine Retailers National Beer Wholesalers Association (2 letters) Wine Institute
Wine and Spirits Wholesalers of America Anonymous Comment 14 National Association of Beverage Importers

EXECUTIVE ORDER ON PROMOTING COMPETITION

Treasury Report

Assembled and written by Treasury Department, Federal Trade Commission (FTC), and Antitrust Division of the Justice Department (DOJ)

- Treasury DAS Tim Skud declined to say how much was prepared by each agency (NABCA Conference Panel in March 2022)

White House Leadership

Columbia University Law Professor Tim Wu's video comments at NABCA and earlier this week at the BA Craft Beverage Conference spoke favorably of the many entrants to the craft brewing industry and the craft distillers more recently. Mr. Wu is the economic advisor and project manager at the White House on the Executive Order and FTC Chair Lina Khan was a facility colleague with Mr. Wu.

Mr. Wu's remarks:

- U.S. craft brewing industry is “the envy of the world” and a “model for how the U.S. economy should be.”
- Concerned about consolidation by mainline beer producers and spirits distributors

Mr. Wu appears to say that an industry sector may have a vibrant small business/new entrants presence but that sector still has major larger players who still control too much market share

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Treasury Report (cont.)

- Urged industry members to report trade practice violations before a small one grows into a large one.
- Wants Federal enforcers to pursue big cases against entities that have market power and the ability to make big arrangements that have anti-competitive effects.
- TTB Trade practice law assumes a “tiny store” model for retailers when the retailer tier has consolidated considerably with large market share companies.

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

Treasury Report Summary -

Competition in the Beverage Alcohol Industry Continues Under the Microscope – Part 3
February 10, 2022 on Hinman and Carmichael Law Firm webpage under Blogs – Booze Rules

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Next step is TTB responding to Treasury Report and EO

TTB report is due 120 days after the Treasury Report was issued on February 9, 2022, that is, June 9, 2022

Note: Treasury Report leaves a lot of discretion to TTB to “consider”

“TTB should consider rulemaking to update its trade practice regulations.” (Page 62)

“(T)he Bureau should continue to exercise enforcement discretion to avoid bringing cases that target entities lacking discernable market power. The Bureau should, as a matter of enforcement policy, focus its efforts against large entities presumed to have market power, such as the larger brewers, distributors, and similar 267 See TFWS v. Schaefer, 242 F.3d 198 (4th Cir. 2001) (striking down post-and-hold). -63- actors. In bringing such cases, which may be complex, it should collaborate with states, as is current practice, but also with the DOJ and the FTC to the extent they have similar concerns.” (Page 62)

“TTB could continue to explore 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. Congress could consider a statutory change to remove the pre-approval requirement from the FAA Act. TTB should consider rulemaking on standards of identity that would allow flexibility and innovation within the existing regulatory framework to recognize changes in industry practices and consumer expectations. These might help small businesses and new entrants get their products to market faster. (Page 63)

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Federal Trade Commission and Justice Department's Antitrust Division Roles

- FTC Commissioner Lina Khan
- Assistant Attorney General (Antitrust Division) Jonathan Kanter

Both have strong antitrust backgrounds and professional reputations.

Consolidations must be addressed here and not by TTB.

Relevant marketplace: For FTC and DOJ, it is market concentration in a defined geographical region.

For TTB, it is the individual retailer who is required or induced to exclude a competitor's product.

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Treasury Report Observations on State Regulation – Long but important

“The intersection of the 21st Amendment and the Commerce, Contract, and Equal Protection Clauses leaves the alcohol market subject to both state and federal oversight, each with its own focus. Even though the three-tier system is not a federal creation, many consumers, small businesses, and new entrants submitted comments criticizing the three-tier system. Commenters were also critical of restrictive state franchise laws and restrictions on direct-to-consumer shipping. States might explore changes in these areas to eliminate anticompetitive effects and to bolster competition. For example, state 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.²⁶⁷ 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. Additionally, the FTC and the Antitrust Division should continue their antitrust scrutiny of the alcohol markets, both as to consolidation and as to conduct, and continue to analyze how state regulations affect competition in the alcohol markets. The FTC and DOJ should also engage with state actors on these laws, including by submitting letters in response to state legislative requests for technical assistance.” (Page 62)

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Other Actors and Cases

Industry Litigation – Tiz, Inc. dba Provi v. Southern Glaser Wine and Spirits LLC and Republican National Distributing Company

Supreme Court Litigation on 21st Amendment Interplay with Other Constitution Provisions:

Hostetter v. Idlewild Liquor Corporation (1964)

California Liquor Dealers v. Midcal Aluminum (1980)

Bacchus Imports, Ltd v. Dias (1984)

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Overall Conclusions

- President Biden aims for a fundamental change in the structure and functioning of the U.S. economy that reflects the U.S. capitalism he experienced where competition benefitted small businesses, corporations, unions, employers, employees, consumers, and the promotion of the economic health of the entire population.
- Recall, the EO lists 72 action plans throughout the Executive Branch and Commissions, not just Treasury/TTB
- Success, if it comes, will take years of efforts and political capital by many people in Washington, DC and outside the Beltway in the U.S
- The Treasury Report contains no real factual conclusions; rather, it poses specific questions about the health of competition within the entire beverage alcohol sector leaving more work to be done
- Starting the public debate on these competition questions in the beverage alcohol industry is the goal of the Treasury Report; yet the immediate harsh public relations statements critiquing the report and those praising the report dampens the opportunity for a fair debate
- TTB Report will be the next step in moving the debate forward.
- The Treasury Report is a valuable milestone because it puts in the forefront of the industry and public many key competition questions about the regulation of the beverage alcohol industry that previously have always been selectively acknowledged and discussed in the shadows or margins of meetings

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Further Reading

Timothy Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports 2018)

Hinman and Carmichael Blogs – Booze Rules

Competition in the Beverage Alcohol Industry Now Under the Microscope

Executive Order on “Promoting Competition in the American Economy” Takes a Laser Target on Consolidations and Trade Practices *July 12, 2021*

Competition in the Beverage Alcohol Industry Under the Microscope – Part 2

Adjusting and Focusing the Microscope Lens *August 5, 2021*

Competition in the Beverage Alcohol Industry Continues Under the Microscope – Part 3

February 10, 2022

<https://www.beveragelaw.com/booze-rules>

EXECUTIVE ORDER ON PROMOTING COMPETITION

Robert M. Tobiassen became President of the National Association of Beverage Importers in October 2018. Prior to that Robert had a 34 year career with the United States Treasury Department (in both Washington, DC and San Francisco, California) working on alcohol and tobacco tax, regulations, compliance investigations, international trade matters including free trade agreements and World Trade Organization negotiations.

Robert was Chief Counsel at the Alcohol and Tobacco Tax and Trade Bureau (TTB) from 2003 to 2012. He was an independent consultant between 2012 and 2018 for the alcohol industry members, trade associations, and law firms. He served in the career Senior Executive Service.

Robert holds a B.A. degree with distinction from the University of California, Berkeley; a J.D. degree from Lewis and Clark Law School, Portland, Oregon, with an emphasis in Environmental Law and served on law review; and a Masters in Tax Law (L.L.M.) from Georgetown University Law Center, Washington, DC. He is a native of California having grown up well aware of the wine industry.

The views expressed in these slides are those of Mr. Tobiassen and do not represent the positions of the National Association of Beverage Importers, Inc. (NABI). They do not represent legal advice.

Please inform Mr. Tobiassen of the scope of any redistribution of this PowerPoint beyond the NAWR membership at nabipresident@bevimporters.org Such redistribution is permissible when such informed advice is given to him.