AMERICAN CIDER ASSOCIATION

August 18, 2021

Director, Regulations and Rulings Division
Alcohol and Tobacco Tax and Trade Bureau
1310 G Street NW
Suite 400
Washington, DC 20005

SUBMITTED
08.18.21

American Cider Association
401 NE 19th Ave, #200
Portland, OR 97232

Re: Comments on Promoting Competition in the Beer, Wine, and Spirits Markets

Dear, Director Greenburg:

The American Cider Association is the national association of cider and perry producers in the United States. Our mission is to grow a diverse and successful U.S. cider industry by providing valuable information, resources and services to our members and by advocating on their behalf.

We respectfully submit the following comments on the Department of Treasury's Request for Information (RFI) regarding the current market structure and conditions of competition in the American markets for cider, including an assessment of any threats to competition and barriers to new entrants.

Background

The American Cider Association (ACA) is the national trade organization for all cider and perry producers in the United States. ACA membership is open to all cider producers which means our membership includes the vast majority of mid- to large-size producers while simultaneously two-thirds of our members are small-scale producers (less than 25,000 gallons a year). Although it is challenging to know how many cideries there are in the U.S., we estimate there are 1000 cideries nationwide including over 700 small cideries. A fair, open, and competitive marketplace is essential for the continued success of the American cider economy.

Cider is an alcoholic beverage produced by fermenting apple juice. It is not the sweet cider sold by many orchards, but rather, the beverage alcohol produced from that juice. It is an inherently agricultural product that relies heavily on American grown apples. Across the country cider is allowing apple orchards to diversify their revenue either by selling apples to local cideries or producing cider themselves. The success of small orchards supports the cider industry and vice versa. The ACA estimates that one-half of U.S. cideries grow at least some of their own apples.

Cider is produced like wine—fruit is pressed and fermented. There is no heat step as in brewing or distilling and malt is not included. Cider is regulated as wine for both tax and labeling purposes. Cider that includes apples or pears as the only fruit ingredient is taxed as cider (27 CFR Part 24). Cider that includes non-pomme fruits in addition to apples or pears is taxed as wine. Because cideries have federal wine licenses and are regulated as wineries, our comments use cider to indicate cider tax rate product and wine to indicate fruit ciders taxed as wine. We also represent perry producers (made from fermenting pears) who are subject to almost all the same regulations and rules as cider producers. When our comments mention cider we are including pear-based products.

The ACA has worked closely with the TTB since our founding in 2013, and we are grateful for our ongoing conversations about the policies and rules impacting the cider industry. The TTB has been a tremendous partner in educating our growing sector, and we thank the agency for their investment in our community of producers. We appreciate the opportunity to share our thoughts on barriers to fair competition and market entry for small cideries with the Department of Treasury. Due to the broad nature of the information request, our comments span the scope of challenges that may or may not be addressed through Federal legislative action.

1. **Consolidation**

- **Consolidation of wholesalers** limits market entry to new and small cideries. Small- and mid-size wholesalers often have unique portfolios and specialties, but as smaller wholesalers are absorbed by larger companies, offerings lend toward high-volume beverage alcohol producers. This is often at the expense of opportunity for smaller producers to find a distributor partner. Less choice in wholesalers is bad for the fair competition of cider in the beverage alcohol market landscape. This disproportionately impacts small cidermakers.

- **Packaging supply monopolization**: Canned products are a fast growing segment of the beverage alcohol sector but can supply access is nearly impossible for small cideries. Packaging producers designate all their supply to the largest volume buyer. Packaging supply is further complicated by aluminum tariffs. It is not unheard of for producers to be forced to wait 6 months or more for cans. Limited access to cans is creating a market barrier for new entrants and small producers.

2. Policy.

- **Tied-House Laws:** Enforcement of tied-house laws helps to create a landscape in which small cideries have greater access to fair competition.

Recent TTB budgets have included increased funding for the agency to investigate unlawful practices by producers, retailers and wholesalers. We applaud this funding and support investment in addressing fraudulent practices such as pay-to-play in the three-tier system. Fair competition for retail shelf-space and on-premise accounts is essential for the success of small cideries.

However, some aspects of the tied-house laws could be perceived as creating market barriers for small producers. The best example of this is the social media advertising of small producers, who often rely on social media for low-cost advertising of their products. Unfortunately, because of tied-house laws, these small producers are not allowed to promote their retail locations. A more right-sized approach to tied-house laws might make an exception for small producers to cross-promote their products with single retailers.

- **Franchise Law:** The inability for producers to freely switch distribution partners in states with franchise laws is a barrier to success for new and small cideries. Self-distribution is often a better model for these producers, but this is not legal in all states.

- **Access to Common Carrier for Direct-to-consumer shipping.** Recent trends demonstrate that adult consumers have increased demand for having beverage alcohol products delivered directly to their door from both producers and retailers of alcohol. This demand is already being reflected in new state laws, which permit alcohol producers, restaurants, and retailers to deliver and/or ship beverages, depending on the state. Furthermore, direct-to-consumer shipping serves as an important complement to the traditional three-tier system of beverage alcohol distribution.

  For this reason, we support the United States Postal Service (USPS) Shipping Equity Act (H.R. 3287/S. 1663), that would enable the USPS to ship beverage alcohol where allowed by state and local law. This legislation creates a new revenue stream for the USPS in addition to supporting consumer choice and businesses across the country. New estimates suggest that the USPS could gain $180 million annually in revenue if allowed to ship beverage alcohol products where currently allowed by state and local law.

3. **<u>Taxation Impacting Small Cideries.</u>** The following tax regulations create market barriers for small cideries:

- **Sparkling Wine Taxes:**
  - **Fruit Wine (and Fruit Cider)—not eligible as cider, perry, mead or low-abv grape wine for tax purposes** is subject to sparkling wine taxes beginning at 0.392 grams of carbon dioxide per hundred milliliters of wine, whereas, cider, perry, mead or low-abv grape wine are not subject to sparkling wine tax until 0.64 grams of carbon dioxide per hundred milliliters of product.

- **All sparkling wine taxes** limit innovation and competition for the cider, mead and wine segments as beer, malt beverages and hard seltzer are not subject to such "bubble taxes," as they are often referred to.

- **Small Producer Tax Credit for Nano-sized Cider Producers:** Small cideries making less than 30,000 gallons a year are taxed at more than twice the rate than other wine producers making less than 30,0000 gallons a year—16.4 cents vs 7 cents a gallon, respectively. As mid-size wine and cider producers making between 30,000 gallons and 130,000 gallons a year have tax parity at 17 cents a gallon, this is an odd artifact of the Craft Beverage Modernization and Tax Reform Act. We believe it was an error, but it creates an unfair tax disparity for the smallest cideries.

- **Lack of Taxation Parity with Beer for Small Producers:**
    - Breweries are taxed at 11.2 cents per gallon ($3.50 / barrel) up to 1,860,000 gallons (60,000 barrels). Meanwhile, cider and wine are taxed at 17 cents per gallon between 30,000 gallons and 130,000 gallons in annual production and cideries making less than 30,000 gallons a year are taxed at 16.4 cents a gallon. The tax rate for small beer producers is lower than cider and wine and the production level threshold for benefiting from such a tax rate is much higher in beer. The result is a tax-incentive for mid-sized beverage producers to make beer instead of cider or wine.
    - The small producer tax credit tops out at 750,000 gallons for cider and wine, but at 186 million gallons (6M barrels) for beer.
    - "Sugar-brews" in Malt Beverages: The growth of the flavored malt beverage category has benefited from the lack of packaging restrictions (see Volumes of Fill comments below) and tax levels. Malt beverages are taxed at a lower rate than other segments. Many of the "Ready to Drink" and "Hard Seltzer" products sweeping the market are made from fermented cane sugar rather than malt—some are even cold-fermented just like a wine might be. Yet, these products are taxed as a malt beverage. It is puzzling that a product made from fermenting pure fruit juice is taxed as wine at a much higher rate than a product made from fermenting liquid cane sugar which is taxed as beer. In fact, cideries have been known to reformulate their product to decrease their tax rate. Such reformulation is not something small cideries can do quickly, cheaply or easily, so it creates an additional disparity between large and small producers.

4. <u>Labeling Regulations & Rules Impacting Small Cideries</u>

- Cider shares the importance of terroir and varietal influence on the final product with grape wines. Due to the specificity of wine labeling regulations, cidermakers lack the tools to promote these influences on their labels. Small producers are more likely to make products over 7% ABV that require COLAs.
    - **Harvest Dates:** Cidermakers are not allowed to list the year their apples or pears were harvested on their labels. Analogous to vintage dating in wine, annual

variation in apple growing conditions and the resulting flavor impacts are part of how a small cidermaker distinguishes their new products from year to year. Unfortunately, listing the date of harvest is prohibited on COLA-approved labels over 7%. This creates a disadvantage to small cidermakers who are more likely to work with one or a couple orchards every year.

   - **Geographic Indicators:** Although COLA-approved labels exist for state and county appellations, other geographic indicators (e.g., Hudson Valley) are prohibited for use in cider over 7% ABV. As mentioned earlier, terroir is influential on cider. Cidermakers are prohibited from listing growing areas on their labels by the regulations that create viticultural areas. This creates a disadvantage to small cidermakers who are unable to associate their product with the known-region where the apples were grown.

- **"Carbonation" & "Sparkling" Labeling Requirement** for Cider & Wine Carbonated Less Than 0.64 g / 100mL CO_2: The tax definition for cider, mead and low-abv grape wine (CFR 27 Part 24) and the labeling definition for cider, mead and low-abv grape wine (CFR 27 Part 4) do not agree. Cider, mead and grape wine under 8.5% ABV and over 0.32 g / 100mL CO_2 will have their COLA rejected if they are a carbonated product—even when that product is considered "still" for tax purposes (<0.64 g / 100mL CO_2). The COLA rejection comes when the product type is not indicated as carbonated (for injected CO_2) or sparkling (for natural CO_2) on the label. **This disagreement between CFR 27 Part 24 and CFR 27 Part 4 has cost small producers thousands of dollars to appeal and address COLA rejections.**

- **Brand Name and Product Type Contradiction**: The brand name convention in cider has been to use the word "CIDER" unaltered in the brand—e.g., Joe's Family Cider. This has been the primary convention for years, and for cider under 7% ABV, it is permitted. Likewise, for ciders over 7% ABV, there is a decade's worth of TTB COLAs that reinforced this naming convention. A couple years ago, cidermakers started receiving COLA rejections using this naming formula because the brand name seemingly conflicted with the product class if the product was considered carbonated or sparkling cider. For example, if Joe's Family Cider wanted to make a Sparkling Cider, they would be required by the TTB to rebrand to Joe's Cider House or Joe's Cider Co regardless of any other cider products in their lineup. Small cideries were unable to put their products on the market because they were tied up with seemingly out of the blue label rejections after a decade of approvals. Small cideries paid thousands of dollars and lost many hours rebranding or appealing COLA rejections. Because apples may ferment above or below 7% ABV naturally, having a different brand naming convention for cider above and below this level does not make sense. It limits innovation as well as cidermakers ability to feature seasonal variation based on apple characteristics. The TTB has acknowledged that the consumer relationship with the word Cider is different than what is in the code, but this has not translated into approving COLAs for cideries using the consumer-driven naming convention of "Joe's Family Cider."

5. **<u>Volumes of Fill Requirements in Wine</u>**

   Cider and fruit cider are unique in that products below 7% ABV and over 7% ABV are common due to the nature of where apples naturally ferment. Ciders and fruit ciders under 7% ABV are not restricted to approved packaging volumes, but ciders over 7% ABV are. Today's beverage market is largely driven by innovation in packaging. These packaging restrictions therefore create unnecessary barriers to competitive market entry. Beer and malt-beverages are not subject to these restrictions.

   <u>We seek parity with beer and malt-beverages and recommend the elimination of volumes of fill requirements for cider, perry, mead and non-grape wine to increase competitive opportunities for small producers in these categories.</u>

We appreciate the opportunity to comment on fair competition for small cider producers in addition to your time and attention to these matters. Please let us know if we can provide any further details on the issues addressed in our comments.

Sincerely,

Michelle McGrath
Executive Director
American Cider Association

American Cider Association is a 501(c)6 non-profit organization.