D656,078; D569,776 (''the 'D776 patent''); D602,834; D582,328; D542,726 (''the 'D726 patent''); D604,221; D570,760 (''the 'D760 patent''); D544,823 (''the 'D823 patent''); D486,437; D562,207; D635,904; D618,150 (''the 'D150 patent''); D585,802; D532,733 (''the 'D733 patent''); D572,646; D578,949; D638,772 (''the 'D772 patent''); D522,946; D638,766; D610,516; 3,614,891; 4,423,458; 3,305,055; 1,807,353; 1,660,727; 657,386; 285,557; 4,076,271 (''the CLS 500 mark''); 3,224,584 (''the CLS 550 mark''); 3,039,265 (''the CLS 63 mark''); 2,876,643; 2,909,827; 2,654,240 (''the S 550 mark''); 2,712,292; 2,028,111; 2,699,216 (''the CLS–CLASS mark''); 2,716,842 (''the S–CLASS mark''); 2,599,862; 2,028,107; 4,669,601; 3,103,610; 2,028,112; 3,100,860; 2,026,254; 2,815,926; 3,221,423; 2,227,526; 3,019,109; 2,837,833 (''the ML mark''); and 2,529,332 (''the CLS mark''). The complaint further alleges that a domestic industry exists. The Commission's notice of investigation named as respondents O.E. Wheel Distributors, LLC (''OEW'') of Sarasota, Florida; Amazon.com, Inc. (''Amazon'') of Seattle, Washington; A Spec Wheels & Tires, LLC d/b/a A SPEC Wheels & Tires (''ASPEC'') of Hayward, California; American Tire Distributors Holdings, Inc. and American Tire Distributors, Inc. (collectively, ''American Tire''), both of Huntersville, North Carolina; Onyx Enterprises Int'l Corp. d/b/a CARiD.COM (''Onyx'') of Cranbury, New Jersey; Powerwheels Pro, LLC (''Powerwheels Pro'') of Waterford, Michigan; Trade Union International Inc. d/b/a Topline (''Trade Union'') of Montclair, California; and the last remaining respondents. The Office of Unfair Import Investigations (''OUII'') is also a party to the investigation. *Id.* As detailed below, all other respondents have been terminated from the investigation based on settlement, consent order, and/or withdrawal of the allegations in the complaint.

On August 18, 2016, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 11) terminating the investigation as to ASPEC based on a consent order stipulation and proposed consent order. On September 30, 2016, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 14) terminating the investigation as to Powerwheels Pro based on a consent order stipulation and proposed consent order. On November 2, 2016, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 15) terminating the investigation as to the 'D726 patent and the CLS 500 mark based on withdrawal of the complaint as to these allegations. On December 2, 2016, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 16) terminating the investigation as to American Tire based on a consent order stipulation, proposed consent order, and settlement agreements. On December 16, 2016, the Commission issued notice of its determination not to review the ALJ's IDs (Order Nos. 17, 18) terminating the investigation as to Onyx and Trade Union, each based on a consent order stipulation, proposed consent order, and settlement agreement. On the same date, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 19) terminating the investigation as to Amazon based on withdrawal of the allegations in the complaint as to Amazon. On January 6, 2017, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 21) terminating the investigation as to the 'D211, 'D330, 'D776, 'D726, 'D760, 'D823, 'D150, 'D733, and 'D772 patents; and the CLS 500, CLS 550, CLS 63, S 550, CLS–CLASS, S–CLASS, ML, and CLS marks based on withdrawal of the complaint as to these allegations. On February 2, 2017, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 23) terminating the investigation as to OEW based on a consent order stipulation, proposed consent order, and settlement agreement.

On January 17, 2017, the complainant filed an unopposed motion to terminate the investigation as to the last remaining respondents based on withdrawal of the allegations in the complaint as to these respondents. In the motion, the complainant states that there are no other agreements, written or oral, express or implied between the parties concerning the subject matter of the investigation.

The ALJ issued the subject ID on January 23, 2017, granting the motion for termination. He found that the motion satisfied Commission Rule 210.21(a)(1) (19 CFR 210.21(a)(1)) and that there are no extraordinary circumstances that warrant denying the motion. No party petitioned for review of the subject ID.

The Commission has determined not to review the ID and has terminated the investigation.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in part 210 of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

Issued: February 9, 2017.

By order of the Commission.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2017–02987 Filed 2–14–17; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–17–006]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: February 22, 2017 at 11:00 a.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agendas for future meetings: None.
2. Minutes.
3. Ratification List.
4. Vote in Inv. Nos. 701–TA–556 and 731–TA–1311 (Final) (Truck and Bus Tires from China). The Commission is currently scheduled to complete and file its determinations and views of the Commission by March 13, 2017.
5. Vote in Inv. No. 731–TA–1091 (Second Review) (Artists' Canvas from China). The Commission is currently scheduled to complete and file its determination and views of the Commission by March 2, 2017.
6. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: February 9, 2017.

William R. Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2017–03114 Filed 2–13–17; 11:15 am]

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DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Anheuser-Busch InBEV SA/NV, et al.; Public Comments and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h),

the United States hereby publishes below the Response of Plaintiff United States to Public Comments on the Proposed Final Judgment in *United States* v. *Anheuser-Busch InBev SA/NV, et al.,* Civil Action No. 1:16–cv–01483–EGS, which was filed in the United States District Court for the District of Columbia on January 13, 2017, together with copies of the 12 comments received by the United States.

Pursuant to the Court's January 19, 2017 minute order, comments were published electronically and are available to be viewed and downloaded at the Antitrust Division's Web site, at: *https://www.justice.gov/atr/case/us-v-anheuser-busch-inbev-sanv-and-sabmiller-plc.* A copy of the United States' response to the comments is also available at the same location.

Copies of the comments and the response are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street NW., Suite 1010, Washington, DC 20530 (telephone: (202) 514–2481), and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of any of these materials may also be obtained upon request and payment of a copying fee.

Patricia A. Brink,

Director of Civil Enforcement.

United States District Court for the District of Columbia

United States of America, Plaintiff, v. *Anheuser-Busch InBEV, and SABMiller plc,* Defendants.

Civil Action No. 1:16–cv–01483 (EGS)

RESPONSE OF PLAINTIFF UNITED STATES TO PUBLIC COMMENTS ON THE PROPOSED FINAL JUDGMENT

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I. INTRODUCTION

Pursuant to the requirements of the Antitrust Procedures and Penalties Act (the ''APPA'' or ''Tunney Act''), 15 U.S.C. §§ 16(b)–(h), the United States hereby responds to the twelve public comments received regarding the proposed Final Judgment in this case. After careful consideration of the submitted comments, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comments and this response have been published pursuant to 15 U.S.C. § 16(d).[1]

II. PROCEDURAL HISTORY

On November 11, 2015, Anheuser-Busch InBev SA/NV (''ABI'') entered into an agreement to acquire SABMiller plc (''SABMiller'') (collectively, ''Defendants'') in a transaction valued at approximately $107 billion. On July 20, 2016, the United States filed a civil antitrust Complaint, seeking to enjoin ABI from acquiring SABMiller. The Complaint alleges that ABI's proposed acquisition of SABMiller likely would substantially lessen competition in the sale of beer to customers in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment, a Stipulation signed by Plaintiff and Defendants consenting to entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act, 15 U.S.C. § 16, and a Competitive Impact Statement (''CIS'') describing the transaction and the proposed Final Judgment. The United States published the proposed Final Judgment and CIS in the *Federal Register* on August 4, 2016, *see* 81 Fed. Reg. 51465, and caused summaries of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, to be published in *The Washington Post* on August 3, 4, 5, 6, 7, 8, and 9, 2016. The 60-day period for public comment ended on October 4, 2016. The United States received twelve comments (Attachments 1 through 12).

III. STANDARD OF JUDICIAL REVIEW

The APPA requires that proposed consent judgments in antitrust cases

[1] On January 12, 2017, the United States submitted its Unopposed Motion and Supporting Memorandum to Excuse *Federal Register* Publication of Comments and Attachments, requesting that this Court authorize an alternative means for publishing the public comments and attachments received in this action (Doc. 15).

brought by the United States be subject to a 60-day public comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. § 16(e)(1). In making that determination, the court is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

Id.

The public interest inquiry is necessarily a limited one because, as courts have repeatedly held, the government is entitled to deference when determining whether a proposed settlement provides an effective and appropriate remedy for the alleged antitrust violation. *See generally United States v. Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995) (holding that the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest''); *United States v. US Airways Grp., Inc.,* 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (noting that the court's ''inquiry is limited'' because the government has ''broad discretion'' to ''determine the adequacy of the relief secured through a settlement''); *United States v. InBev N.V./S.A.,* No. 08–cv–1965 (JR), 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the proposed Final Judgment are clear and manageable''); *United States v. SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1, 10–11 (D.D.C. 2007) (concluding that the court's public interest inquiry is ''sharply proscribed by precedent and the nature of Tunney Act proceedings'').

Under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether the enforcement mechanisms are sufficient, and whether the decree may harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not '' 'engage in an unrestricted evaluation of what relief would best serve the public.' '' *United States v. BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62 (same); *United States v. Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001) (same); *InBev,* 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3 (same). Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.*'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).

In determining whether a proposed settlement is in the public interest, ''the court 'must accord deference to the government's predictions about the efficacy of its remedies.' '' *US Airways,* 38 F. Supp. 3d at 76 (quoting *SBC Commc'ns,* 489 F. Supp. at 17); *see also Microsoft,* 56 F.3d at 1461 (noting that the government's ''predictions as to the effect of the proposed remedies'' must be afforded deference); *United States v. Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the government's ''prediction as to the effect of the proposed remedies, its perception of the market structure, and its views of the nature of the case''); *United States v. Morgan Stanley,* 881 F. Supp. 2d 563, 567–68 (S.D.N.Y. 2012) (explaining that the government is entitled to deference when crafting proposed remedies for antitrust violations).

Courts ''may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17. Rather, the ultimate question is whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.' '' *Microsoft,* 56 F.3d at 1461. Accordingly, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also United States v. Apple, Inc.,* 889 F. Supp. 2d 623, 631 (S.D.N.Y. 2012) (same).

A ''proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is within the reaches of the public interest.'' *United States v. Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations and internal quotation marks omitted); *see also United States v. Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). And, the risk and uncertainty of further litigation are appropriate factors for the court to consider when evaluating whether a proposed remedy is in the public interest. *See SBC Commc'ns,* 489 F.Supp. 2d at 15 (''[R]oom must be made for the government to grant concessions in the negotiation process for settlements[.]'').

In its 2004 amendments to the Tunney Act,[2] Congress made clear its intent to preserve the practical benefits of using consent decrees in antitrust enforcement actions brought by the government by adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. § 16(e)(2). The procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of the Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11; *see also United States v. Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (''[T]he Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to public comments alone.'');

[2] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that a court's public interest inquiry ''remains sharply proscribed by precedent and the nature of Tunney Act proceedings'' because the 2004 amendments ''effected minimal changes'' to Tunney Act review).

US Airways, 38 F. Supp. 3d at 76 (same).

IV. THE INVESTIGATION AND THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment is the culmination of a thorough nine month investigation conducted by the Antitrust Division of the United States Department of Justice (the ''Department''). In investigating the proposed transaction's likely competitive effects, the Department collected more than 1.4 million documents from the Defendants and third parties, conducted over 70 interviews of beer industry participants, took numerous party depositions, and coordinated with both state and foreign competition agencies reviewing the transaction. The Department carefully analyzed the information it obtained from these sources, as well as publicly available information, and thoroughly considered all of the competitive issues presented.

Based on evidence gathered during its investigation, the Department concluded that ABI's proposed acquisition of SABMiller would likely substantially lessen competition in the sale of beer to U.S. customers both nationally and in every local market in the United States by eliminating head-to-head competition between ABI and MillerCoors LLC (''MillerCoors''). The proposed transaction would have eliminated competition between ABI and MillerCoors—the two largest beer brewers in the United States—because it would have given ABI a majority ownership interest in and 50% governance rights over MillerCoors, which was a joint venture between SABMiller and Molson Coors Brewing Company (''Molson Coors'') through which SABMiller conducted substantially all of its U.S. operations. Accordingly, the Department filed a civil antitrust lawsuit to block the acquisition as a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

The proposed Final Judgment provides an effective and appropriate remedy for the transaction's likely competitive harm by requiring ABI to divest SABMiller's equity and ownership stake in MillerCoors, as well as certain other assets related to MillerCoors' business and the Miller-branded beer business outside of the United States. After the Department filed the proposed Final Judgment, ABI acquired SABMiller and divested these assets to Molson Coors. The divestiture preserves competition in the U.S. beer industry by ensuring that MillerCoors continues to be an independent and viable competitor because it provides MillerCoors with (i) perpetual, royalty-free licenses to products for which it previously had to pay royalties, and (ii) ownership of the rights to the Miller beer brands.

To further help preserve and promote competition in the U.S. beer industry, the proposed Final Judgment (i) imposes certain restrictions on ABI's distribution practices and ownership of distributors, and (ii) requires ABI to provide the United States with notice of future acquisitions, including acquisitions of beer distributors and craft brewers, prior to their consummation. Among other things, the proposed Final Judgment prohibits ABI from:

- Acquiring a distributor if the acquisition would cause more than 10% of ABI's beer in the United States to be sold through ABI-owned distributors;
- Prohibiting or impeding a distributor that sells ABI's beer from using its best efforts to sell, market, advertise, promote, or secure retail placement for rivals' beers, including the beers of high-end brewers;
- Providing incentives or rewards to a distributor who sells ABI's beer based on the percentage of ABI beer the distributor sells as compared to the distributor's sales of the beers of ABI's rivals;
- Conditioning any agreement or program with a distributor that sells ABI's beer on the fact that it sells ABI's rivals' beer outside of the geographic area in which it sells ABI's beer;
- Exercising its rights over distributor management and ownership based on a distributor's sales of ABI's rivals' beers;
- Requiring a distributor to report financial information associated with the sale of ABI's rivals' beers;
- Requiring that a distributor who sells ABI's beer offer its sales force the same incentives for selling ABI's beer when the distributor promotes the beers of ABI's rivals with sales incentives; and
- Consummating non-reportable acquisitions of beer brewers—including craft brewers—without providing the United States with advance notice and an opportunity to assess the transaction's likely competitive effects.

The proposed Final Judgment also authorizes the Department to appoint a Monitoring Trustee—subject to the Court's approval—with the power and authority to monitor ABI's compliance with the terms of the proposed Final Judgment and other powers that the Court deems appropriate. Among other things, the Monitoring Trustee may investigate and report on complaints that ABI has violated the distribution-related restrictions contained in the proposed Final Judgment.

V. SUMMARY OF PUBLIC COMMENTS AND THE UNITED STATES' RESPONSE

During the 60-day comment period, the Department received twelve comments regarding the proposed Final Judgment. These comments came from individuals representing four beer wholesaler associations (Beer Distributors of Oklahoma, Virginia Beer Wholesalers Association Inc., Wholesale Beer Association Executives, and National Beer Wholesalers Association), two brewers (D.G. Yuengling & Son, Inc. and Ninkasi Brewing Company), Consumer Watchdog (a consumer advocacy organization), American Beverage Licensees (a national trade association), the Brewers Association, the North Carolina Department of Justice, the International Brotherhood of Teamsters, and Stephen Calkins, Professor of Law, Wayne State University.

In connection with sharing recommendations on how the proposed Final Judgment could be improved, many commenters acknowledged the meaningful protections for consumers and competition that the Department achieved through the proposed Final Judgment. For example:

- Virginia Beer Wholesalers Association stated that ''[o]verall,'' it ''believes that the proposed Final Judgment addresses the most egregious anticompetitive aspects of the'' ABI/SABMiller transaction; [3]
- American Beverage Licensees stated: ''The DOJ, in its proposed Final Judgment, addresses the concerns that a $100 billion brewer with a publicly-stated interest in expanding its distribution footprint presents to the United States' independent beer distribution system. This is an important recognition of the impact of vertical integration on access to distribution, and the DOJ rightly puts forth reasonable limits for ABI.'' [4]
- Beer Distributors of Oklahoma stated that it ''believes that the Complaint and Proposed Final Judgment (PFJ) identifies key issues and goes a long way towards providing necessary relief designed to protect the consumer by ensuring a more level playing field for brewers.'' [5]
- Consumer Watchdog applauded the Department for ''obtaining a comprehensive remedy to resolve wide-ranging competitive concerns resulting from the combination of the two largest global beer producers,'' and stated that the ''comprehensive remedy demonstrates the DOJ's newfound willingness to impose meaningful remedies to protect consumers and preserve competition when industry megaliths seek to merge.''[6]
- Wholesale Beer Association Executives stated: ''With the caveats expressed [in its comments], WBAE is supportive of the

[3] Virginia Beer Wholesalers Association comment at 1 (Attachment 1).

[4] American Beer Licensees comment at 3 (Attachment 2).

[5] Beer Distributors of Oklahoma comment at 1 (Attachment 3).

[6] Consumer Watchdog comment at 1 (Attachment 4).

[proposed Final Judgment] and expresses its gratitude to the Department of Justice for addressing certain anticompetitive aspects of the proposed transaction and conduct in the mature marketplace after the closing of the transaction.'' [7]

Many of the public comments fall into one of three broad categories: (1) comments related to the restrictions imposed by the proposed Final Judgment on ABI's distribution practices and ownership of distributors, (2) comments related to ABI's ownership of craft brewers and beers, and (3) comments related to the brewery owned by MillerCoors in Eden, North Carolina (the ''Eden brewery''). There were other comments as well. Below are summaries of the issues raised by the commenters and the United States' responses to those issues.

A. Response to Comments on ABI's Distribution Practices

The principal harm alleged in the Complaint is the reduction in competition that would have resulted from ABI's acquisition of SABMiller's interest in MillerCoors. In the absence of a remedy, ABI's proposed acquisition of SABMiller would have given ABI a majority ownership interest in and 50% governance rights over MillerCoors. That would have eliminated head-to-head competition between the two largest brewers in the United States. Thus, the likely effect of the acquisition would have been to substantially lessen competition in the sale of beer to U.S. consumers both nationally and in every local market in the United States.

In addition, the Complaint alleged that ABI's acquisition of SABMiller would have increased ABI's incentive and ability to disadvantage its high-end rivals—such as brewers of craft and import beers—by limiting the distribution of their beers. With the elimination of MillerCoors as a competitive constraint, ABI's high-end rivals would have become a more important constraint on ABI's ability to raise beer prices. ABI would thus have had a greater incentive to invest resources in distributor acquisitions and to use practices that restrict its high-end rivals' access to distribution. Further, with control over the MillerCoors beer brands, ABI could have encouraged the distributors of both ABI brands and MillerCoors brands to limit their sales of ABI's high-end rivals' beer, which would likely have resulted in increased beer prices and fewer choices for consumers.

[7] Wholesale Beer Association Executives comment at 2 (Attachment 5).

The proposed Final Judgment secures a structural remedy to address the harm alleged in the Complaint. Specifically, the proposed Final Judgment requires ABI to divest SABMiller's equity and ownership stake in MillerCoors, as well as certain other assets related to MillerCoors' business and the Miller-branded beer business outside of the United States. The divestiture buyer, Molson Coors, acquired the assets necessary to maintain MillerCoors as an independent competitor. The proposed Final Judgment did not permit ABI to acquire any SABMiller asset that was used to compete in the markets for beer in the United States. Consequently, the divesture ensures that ABI's acquisition of SABMiller will not result in ABI's market share increasing or the U.S. beer industry becoming more concentrated.

1. The Restrictions on ABI's Distribution Practices Were Designed to Ensure that the Divestiture Adequately Addresses the Harm Alleged in the Complaint and Identified in the CIS

As the United States explained in the CIS, however, the divestiture to Molson Coors alone, without additional relief, could lead to conditions that might increase ABI's incentive to disadvantage its high-end rivals by limiting the distribution of their beers. The United States noted that unlike MillerCoors, which competed directly against ABI only in the United States, Molson Coors competes against ABI in multiple countries throughout the world. *See* CIS at 11. The United States also noted that ABI and Molson Coors have cooperative arrangements related to beer brewing and distribution in certain countries in Eastern Europe. *Id.* The United States stated:

The change in ownership of MillerCoors—from a joint venture between SABMiller and Molson Coors to a wholly owned subsidiary of Molson Coors—will increase the number of highly concentrated markets across the world in which ABI competes directly against Molson Coors. By increasing the number of markets in which ABI and Molson Coors compete, the divestiture of SABMiller's interest in MillerCoors to Molson Coors could facilitate coordination between ABI and Molson Coors in the United States. For example, this multimarket contact could lead Molson Coors and ABI to be more accommodating to each other in the United States in order to avoid provoking a competitive response outside the United States or disrupting their cooperative business arrangements in other countries. Coordination could also be facilitated by the existing and newly-created cooperative agreements between ABI and Molson Coors around the world.

If the divestiture facilitates coordination between ABI and Molson Coors, it would also increase ABI's incentive to limit competition from its high-end rivals. This is because competition from high-end rivals would become an even more important constraint on the ability of ABI and Molson Coors to increase the prices of their beers across all segments. As a result, following a divestiture to Molson Coors, ABI may have a greater incentive to impede the growth and reduce the competitiveness of its high-end rivals by limiting their access to effective and efficient distribution. The extent to which craft and other brewers in the United States are able to compete with ABI and Molson Coors will thus affect the likelihood of the divestiture to Molson Coors leading to unilateral or coordinated anticompetitive effects.

Id. at 12.

For these reasons, the restrictions on ABI's distribution practices in Section V of the proposed Final Judgment were crafted in order to preserve and promote competition in the U.S. beer industry by limiting ABI's ability to disadvantage its rivals in their efforts to compete for consumer demand. As a result, Section V of the proposed Final Judgment prevents ABI from engaging in distribution practices that long pre-dated the announcement of its proposed acquisition of SABMiller.

For example, Section V of the proposed Final Judgment eliminates certain restrictions that ABI had placed on Independent Distributors [8] that were designed to encourage them to sell and promote ABI's Beer brands over the Beer brands of ABI's competitors. Section V also prohibits ABI from compensating Independent Distributors based upon the amount of sales the Independent Distributor makes of ABI Beer relative to the Beer of ABI's competitors. Moreover, Section V broadly prohibits ABI from rewarding, penalizing, or in any other way conditioning its relationship with Independent Distributors on the Distributor's sales, marketing, advertising, promotion, or retail placement of Third-Party Brewers' Beers.

Accordingly, the proposed Final Judgment provides an effective and appropriate remedy for the likely competitive harm arising out of ABI's acquisition of SABMiller by:

- preventing ABI from increasing its market share in the U.S. and further concentrating the U.S. beer industry through its acquisition of SABMiller;
- preserving head-to-head competition between ABI and its largest U.S. competitor, MillerCoors;
- granting MillerCoors ownership rights of Miller beer brands and perpetual, royalty-free licenses to products for which it previously paid royalties;

[8] Capitalized terms not otherwise defined herein have the meaning ascribed to them in the proposed Final Judgment.

- placing certain restrictions on ABI's distribution practices and ownership of distributors; and
- requiring ABI to provide the United States with notice of future acquisitions, including non-reportable acquisitions of beer distributors and craft brewers, prior to their consummation.

As described below, some commenters urged the Department to place additional restrictions on ABI's relationships with Independent Distributors.

2. Comments Regarding ABI's Ability Under Section V.D to Condition Incentives, Programs, or Contractual Terms on ABI's Percentage of Beer Industry Sales in a Geographic Area

a. Summary of Comments

So long as ABI does not ''require or encourage an Independent Distributor to provide less than best efforts to the sale, marketing, advertising, retail placement, or promotion of any Third-Party Brewer's Beer or to discontinue the distribution of a Third-Party Brewer's Beer,'' Section V.D of the proposed Final Judgment permits ABI to ''condition incentives, programs, or contractual terms based on an Independent Distributor's volume of sales of Defendant ABI's Beer, the retail placement of Defendant ABI's Beer, or on Defendant ABI's percentage of Beer industry sales in a geographic area (such percentage not to be defined by reference to or derived from information obtained from Independent Distributors concerning their sales of any Third-Party Brewer's Beer).'' Three commenters urged that Section V.D be revised to eliminate entirely ABI's ability to condition incentives, programs, or contractual terms on ABI's percentage of Beer industry sales in a geographic area.[9]

b. Allowing ABI to Condition Incentives, Programs, or Contractual Terms on ABI's Percentage of Beer Industry Sales in a Geographic Area Does Not Undermine the Effectiveness of the Proposed Final Judgment

At the time the Complaint was filed, ABI's Wholesaler Equity Agreement prohibited an Independent Distributor from requesting that a bar replace an ABI tap handle with a competitor's tap handle, requesting that a retailer replace ABI shelf space with a competitor's beer, and compensating its salespeople for their sales of competing beer brands (such as a dollar-per-case incentive), unless the Independent Distributor provided the same incentives for sales of certain ABI beer brands. *See* Compl. at ¶¶ 27–28.

Section V of the proposed Final Judgment prohibits ABI from continuing these practices which encouraged Independent Distributors to favor ABI beer over competing beers in their portfolios. Consequently, the proposed remedy secures substantial benefits for millions of Americans and advances competition. At the same time, the proposed Final Judgment recognizes that ABI has a legitimate interest in Independent Distributors growing ABI's percentage of all Beer industry sales in the areas in which the Distributors sell ABI's Beer. As a result, the proposed Final Judgment appropriately acknowledges ABI's interest in competing while at the same time prohibiting ABI's prior practices of conditioning incentives, programs, and contractual terms on an Independent Distributor's sale of ABI beer relative to the sale of Third-Party Brewers' beer *in the Distributor's portfolio.*

Thus, giving deference to the Department's assessment, and considered in conjunction with the proposed Final Judgment's other distribution-related relief, allowing ABI to condition incentives, programs, and contractual terms on ABI's percentage of Beer industry sales in a geographic area is within the reaches of the public interest.

3. Comments Regarding the Allocation to ABI's Beers of an Independent Distributor's Annual Spending on Beer Promotions and Incentives

a. Summary of Comments

Section V.D of the proposed Final Judgment provides that ''Defendant ABI may require an Independent Distributor to allocate to Defendant ABI's Beer a proportion of the Independent Distributor's annual spending on Beer promotions and incentives not to exceed the proportion of revenues that Defendant ABI's Beer constitutes in the Independent Distributor's overall revenue for Beer sales in the preceding year.'' Three commenters urged that this language be revised, either to make the allocation based on the proportion of the Independent Distributor's revenues received in the current year[10] or to provide a carve-out for products newly added to the Distributor's portfolio.[11] In particular, commenter National Beer Wholesalers Association (''NBWA'') described marketing as a forward-looking investment and expressed concern that Section V.D allows ABI to require an Independent Distributor to set marketing spend on backward-looking sales data.[12] Commenter Virginia Beer Wholesalers Association, Inc. expressed concern that Section V.D ''would expose an Independent Distributor to demands that it spend 100% of its promotion funds on ABI products in the *current* year if that distributor derived 100% [of] its revenues from the sale of ABI products in the *prior* year. In such case, ABI could block the distributor from spending *any* of its own budget dollars towards the marketing of newly acquired Third-Party Brewer's products for an entire year.'' [13]

b. Allowing ABI to Require a Proportional Allocation of an Independent Distributor's Annual Spending on Beer Promotions and Incentives Based on Previous-Year Beer Sales Does Not Undermine the Effectiveness of the Proposed Final Judgment

This provision protects competition while also recognizing that ABI has a legitimate competitive interest in encouraging Independent Distributors to allocate to ABI a proportion of their annual spending on Beer promotions and incentives. As the Department explained in the CIS, in any geographic area, an Independent Distributor ''provides the exclusive path to market for ABI's beers, and therefore ABI may be reluctant to invest in its distributors without some assurance that those investments will not be used primarily to benefit its rivals.'' CIS at 21. As a result, the proposed Final Judgment allows ABI to require a proportional allocation of an Independent Distributor's spending on Beer promotions and incentives based on the Independent Distributor's previous-year overall revenues. The primary reason that prior-year data were chosen as the measure was to promote accuracy and certainty for the calculations—something that would not be possible if, as proposed by some commenters, the allocation were based on projections for current-year revenues.

The Department acknowledges that, because the proposed Final Judgment does not provide a carve-out for products newly added to an Independent Distributor's portfolio, the possibility exists that if an Independent Distributor derived 100% of its prior-

[9] Consumer Watchdog comment at 6–7; Brewers Association comment at 4 (Attachment 6); Professor Calkins comment at 3–4 (Attachment 7).

[10] Brewers Association comment at 6–7; NBWA comment at 20–21 (Attachment 8).

[11] Brewers Association comment at 7; NBWA comment at 20–22; Virginia Beer Wholesalers Association, Inc. comment at 4.

[12] NBWA comment at 20–21.

[13] Virginia Beer Wholesalers Association, Inc. comment at 4 (emphasis in original).

year revenues from ABI Beer, and the Independent Distributor added to its portfolio a Third-Party Brewer's Beer, ABI could prevent a Distributor from allocating any of its own promotional spending to the Third-Party Brewer's Beer in the year the Distributor started selling it. However, this possibility does not take the proposed Final Judgment outside the public interest.

First, at the time the Department filed the Complaint, the vast majority of Independent Distributors already derived some of their revenues from Third-Party Brewers' Beer. Second, there are alternative avenues for promotion of a newly added product to an Independent Distributor's portfolio. For example, the proposed Final Judgment does not restrict or prevent Third-Party Brewers from providing money to Independent Distributors to promote and incentivize Independent Distributors to sell the Third-Party Brewers' Beer—including products newly added to an Independent Distributor's portfolio. If a Third-Party Brewer provides to an Independent Distributor a dollar-per-case incentive to sell a new Beer product, that dollar-per-case amount would not be promotional spending *by the Independent Distributor* and therefore would not be included in the calculation of the Distributor's spending on Beer promotions and incentives. As a result, an Independent Distributor that sold only ABI Beer in the previous year could use funds provided by the Third-Party Brewer to promote a Third Party Brewer's Beer that it was newly distributing—even in the first year the Distributor added the Beer to its portfolio. Moreover, once an Independent Distributor established revenues for a newly distributed product, ABI could not demand in the next year that the Distributor spend 100% of its promotion funds on ABI products.

Finally, Section V.D of the proposed Final Judgment improves the status quo by placing a restriction—where none existed before—on ABI's ability to demand that Independent Distributors allocate more than a proportional amount of their spending on Beer promotions and incentives to the ABI Beer in their portfolios. Thus, giving deference to the Department's assessment, allowing ABI to require a proportional allocation of an Independent Distributor's annual spending on Beer promotions and incentives based on the Independent Distributor's previous-year overall revenues is within the reaches of the public interest.

4. Comments Regarding the Effect of the Proposed Final Judgment on Independent Distributors' Best Efforts to Market, Advertise, Place, Promote, and Sell Third-Party Brewers' Beer

a. Summary of Comments

Two comments questioned how ABI can both be prohibited from preventing Independent Distributors from using their best efforts to sell, market, advertise, or promote any Third-Party Brewer's Beer while at the same time being allowed to require Independent Distributors to use their best efforts to sell, market, advertise, or promote ABI's Beer.[14]

b. Allowing ABI to Require Best Efforts From Independent Distributors to Market and Sell ABI Beer Does not Conflict With Independent Distributors Also Providing Best Efforts to Market and Sell Third-Party Brewers' Beer

The Department does not find the provisions (a) allowing ABI to require an Independent Distributor to provide best efforts to sell, market, advertise, or promote ABI's Beer and (b) prohibiting ABI from preventing an Independent Distributor from providing its best efforts regarding Third-Party Brewers' Beer, to be in conflict. Section V.D.5 of the proposed Final Judgment prohibits ABI from ''[p]reventing an Independent Distributor from using best efforts to sell, market, advertise, or promote any Third-Party Brewer's Beer, which may be defined as efforts designed to achieve and maintain the highest practicable sales volume and retail placement of the Third Party Brewer's Beer in a geographic area.'' Section V.D continues in relevant part: ''Notwithstanding the foregoing, nothing in this Final Judgment shall prohibit Defendant ABI from entering into or enforcing an agreement with any Independent Distributor requiring the Independent Distributor to use best efforts to sell, market, advertise, or promote Defendant ABI's Beer, which may be defined as efforts designed to achieve and maintain the highest practicable sales volume and retail placement of Defendant ABI's Beer in a geographic area.'' An Independent Distributor may provide its best efforts to competing brands of Beer in its portfolio.

[14] Yuengling comment at 13, 15 (Attachment 9); Professor Calkins comment at 3.

5. Comments Regarding the Restrictions on ABI's Ability to Disapprove the General Managers and Successor General Managers of Independent Distributors

a. Summary of Comments

Section V.E of the proposed Final Judgment prohibits ABI from disapproving ''an Independent Distributor's selection of a general manager or successor general manager based on the Independent Distributor's sales, marketing, advertising, promotion, or retail placement of a Third-Party Brewer's Beer.'' Three comments argued for broadening or clarifying these restrictions. Virginia Beer Wholesaler Association urged the Department to prohibit ABI from requiring that the general manager of an Independent Distributor purchase an equity stake in the Independent Distributor.[15] Professor Calkins urged the Department to prohibit ABI from disapproving an Independent Distributor's selection of a general manager or successor general manager based on the Independent Distributor's sale of craft beer or failure to meet certain ABI-imposed thresholds for Beer sales or tap handles.[16] NBWA recommended that the language in Section V.E describing ABI's disapproval rights be made identical to certain language in Section V.F.[17] None of these concerns should affect the Court's public interest determination.

b. Section V.E Appropriately Restricts ABI's Ability to Disapprove the General Managers and Successor General Managers of Independent Distributors

First, the fact that ABI may require a general manager of an Independent Distributor to purchase an equity stake in the Independent Distributor was not at issue in the ABI/SABMiller transaction. For that reason, the Complaint does not allege and the CIS does not identify any harm to competition resulting from requiring any such equity stake. Accordingly, a remedy directed to such a requirement is beyond the scope of this APPA proceeding, and the absence of such a remedy does not provide a basis for rejecting the proposed Final Judgment. *See US Airways,* 38 F. Supp. 3d at 76 (' 'Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint. . . .' '' (quoting *United*

[15] Virginia Beer Wholesalers Association comment at 3–4.

[16] Professor Calkins comment at 4.

[17] NBWA comment at 23.

States v. Graftech Int'l, No. 10–cv–2039, 2011 WL 1566781, at *13 (D.D.C. Mar. 24, 2011)). The proposed Final Judgment should not be measured by how it might resolve general industry concerns about ownership of Independent Distributors that are not implicated in this matter.

Second, while Section V.E of the proposed Final Judgment does not refer to specific measures of an Independent Distributor's success in selling ABI Beer such as ABI-imposed volume thresholds for Beer sales or tap handles, it does restrict ABI's general manager disapproval rights related to an Independent Distributor's success in selling Third-Party Brewers' Beer. Accordingly, Section V.E properly balances ABI's legitimate interest in ensuring that Independent Distributors have managers that can successfully market and sell ABI Beer in their respective distribution territories against the danger of allowing ABI to disapprove a general manager or successor general manager based on the Independent Distributor's sales, marketing, advertising, promotion, or retail placement of a Third-Party Brewer's Beer.

Finally, with respect to commenter NBWA's characterization of the restrictions on ABI in Section V.E as inconsistent with the restrictions on ABI in V.F,[18] no problematic inconsistency exists. Both Sections V.E and V.F restrict ABI's ability to consider ''the Independent Distributor's sales, marketing, advertising, promotion, or retail placement of a Third-Party Brewer's Beer'' as appropriate to the respective circumstance.

Thus, giving deference to the Department's assessment, the restrictions in the proposed Final Judgment on ABI's ability to disapprove the general manager and successor general manager of Independent Distributors are within the reaches of the public interest.

6. Comment Regarding Restrictions on ABI's Exercise of Rights Related to the Transfer of Control, Ownership, or Equity of Distributors

a. Summary of Comment

Section V.F of the proposed Final Judgment places restrictions on ABI in connection with its exercise of rights related to the transfer of control, ownership, or equity of Distributors. Commenter D.G. Yuengling & Son, Inc. (''Yuengling'') asks that ABI's ability to exercise those rights be eliminated or, alternatively, that Section V.F be broadened to require ABI to explain any decision that it makes when exercising a right related to the transfer of control, ownership, or equity of a Distributor and to set forth a procedure by which the Department will review ABI's decision.[19]

b. Section V.F Appropriately Restricts ABI's Exercise of Rights Related to the Transfer of Control, Ownership, or Equity of Distributors

Section V.F restricts ABI's ability to exercise any rights related to the transfer, ownership, control, or equity of Distributors by prohibiting ABI from giving weight to or basing its decision to exercise such rights on a Distributor's business relationship with a Third-Party Brewer. These restrictions are intended to prevent ABI from using its rights over management or ownership changes to promote alignment by selecting new owners because they have demonstrated a willingness not to carry or promote rival brands. Thus, the restrictions help ensure that ABI cannot exercise its rights related to the ownership or control of Distributors in a manner that harms competition or disadvantages ABI's rivals. An absolute ban is unnecessary, especially because competitively permissible reasons could exist for ABI to seek to exercise such rights. In addition, pursuant to Section VIII.B, a Monitoring Trustee will monitor ABI's compliance with Section V.F and recommend appropriate remedial measures if the Monitoring Trustee determines that ABI has violated its provisions. Should the Monitoring Trustee or anyone else bring an alleged violation to the Department's attention, the Department already has well-established procedures for reviewing such allegations. No additional procedures need be specified in the proposed Final Judgment.

Giving deference to the Department's assessment, imposing the Section V.F restrictions on ABI's exercise of rights related to the transfer of control, ownership, or equity in any Distributor to any other Distributor is within the reaches of the public interest.

7. Comments Regarding Restrictions Related to ABI-Owned Distributors

a. Summary of Comments

Section V.B of the proposed Final Judgment prohibits ABI from acquiring any equity interests in, or any ownership or control of the assets of, a Distributor if more than 10% of ABI's Beer in the United States would be sold by ABI-Owned Distributors after the acquisition. Five comments called for the proposed Final Judgment to be amended to place additional restrictions on ABI's ownership of Distributors, ranging from a total ban on ABI's acquisition of additional Distributors to a state-by-state rather than a nationwide volume cap to requiring ABI to divest all ABI-Owned Distributors.[20] Two comments also called for a more expansive definition of ABI-Owned Distributor.[21]

b. Additional Restrictions Related to ABI-Owned Distributors Are Not Necessary

Commenter Beer Distributors of Oklahoma urged that ABI be required to divest all ABI-Owned Distributors,[22] and commenters Consumer Watchdog, Brewers Association, NBWA, and Ninkasi Brewing Company (''Ninkasi'') urged that ABI be prevented from acquiring any additional Distributors during the term of the proposed Final Judgment.[23] Such restrictions are not necessary to remedy the harms alleged in the Complaint or identified in the CIS. *See US Airways,* 38 F. Supp. 3d at 76 (''[T]he court 'must accord deference to the government's predictions about the efficacy of its remedies.''' (quoting *SBC Commc'ns,* 489 F. Supp. at 17)).

Moreover, nothing in the proposed Final Judgment provides ABI with any antitrust exemption for acquisitions of Distributors—even if ABI remains below the 10% limit set forth in Section V.B of the proposed Final Judgment. To the contrary, the notification provisions in Section XII of the proposed Final Judgment, which require ABI to notify the Department about certain Distributor acquisitions that are not otherwise reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the ''HSR Act''), ensure that the Department will have the opportunity to evaluate the likely competitive effects of such Distributor acquisitions before they are completed—even if the acquisition would keep ABI under the 10% cap.

Thus, giving deference to the Department's assessment, neglecting to place a total ban on future Distributor acquisitions does not place the proposed Final Judgment outside the reaches of the public interest.

[18] NBWA comment at 23.

[19] Yuengling comment at 9–12, 14.

[20] Beer Distributors of Oklahoma comment at 3–5; Consumer Watchdog comment at 6; Brewers Association comment at 5–6; NBWA comment at 13–15; Ninkasi comment at 1–2 (Attachment 10).

[21] NBWA comment at 16–19; Wholesale Beer Association Executives comment at 7–9.

[22] Beer Distributors of Oklahoma comment at 3–4.

[23] Consumer Watchdog comment at 6; Brewers Association comment at 5–6; NBWA comment at 15; Ninkasi comment at 1–2.

c. Section V.B Appropriately Restricts ABI's Ability to Increase the Volume of Beer Sold By ABI-Owned Distributors

(i) A Nationwide Restriction is Appropriate

Commenters Beer Distributors of Oklahoma, NBWA, and Consumer Watchdog questioned the proposed Final Judgment for imposing a 10% cap under Section V.B on a nationwide level, rather than imposing a 10% cap in each state in which ABI-Owned Distributors operate.[24] The fact that the 10% cap is calculated based on ABI's national Beer sales does not provide a basis for concluding that the proposed Final Judgment is not in the public interest.

The Department was aware when it negotiated the proposed Final Judgment that ABI is prohibited in some states from owning Distributors and, accordingly, in states where it is allowed to own Distributors, ABI may sell more than 10% of its Beer volume through ABI-Owned Distributors. The imposition of a 10% nationwide cap—where no cap existed before—on the volume of Beer ABI can sell through ABI-Owned Distributors is a meaningful restriction on ABI's ability to restrict the sale of Third-Party Brewer's Beer through the acquisition of Distributors, especially considering, as the Department alleged in the Complaint, that ABI already sells approximately 9% of its beer in the United States through ABI-Owned Distributors. *See* Compl. ¶ 25.

In addition, as discussed above, the proposed Final Judgment does not convey antitrust immunity upon ABI for any future Distributor acquisitions. Should a future proposed Distributor acquisition implicate competitive concerns in a particular state or region due to high concentration levels or other reasons, the Department will have the opportunity to review such acquisition. And Section XII of the proposed Final Judgment ensures that the Department will have the necessary notice to do so.

Thus, giving deference to the Department's assessment, the 10% nationwide cap placed on the volume of Beer ABI-Owned Distributors may sell in the Territory is within the reaches of the public interest.

(ii) Safeguards Exist to Prevent ABI From Circumventing the Cap

Commenters NBWA and Brewers Association additionally suggested that ABI could circumvent the 10% limit by selling existing ABI-Owned Distributors to ''friendly'' Independent Distributors and then buying more Distributors.[25] The purpose of the Section V.B cap, however, is to limit the volume of Beer sold by ABI-Owned Distributors; other provisions in the proposed Final Judgment provide safeguards that reduce ABI's influence and control over Independent Distributors, including Sections V.D, V.E, and V.F.

Commenter Professor Calkins asked the Department to clarify whether ABI can circumvent the 10% cap by acquiring a Distributor that specialized in non-ABI craft Beers and then, post-acquisition, having the Distributor sell ABI craft Beers instead.[26] The Department clarifies that under the proposed Final Judgment, once a Distributor becomes an ABI-Owned Distributor, the volume of ABI Beer the Distributor sells will count toward the 10% cap.

Finally, commenter Wholesale Beer Association Executives urged the Department to include in the Section V.B 10% calculation the sales volume of any Distributor for which ABI exercises its ''match-and-redirect'' right—that is, assigning to the Independent Distributor of ABI's choice the ability to purchase another Distributor upon certain agreed-upon terms—because ABI ''often [assigns] that right to a preferred distributor who often conforms to the policies regarding competing brand portfolios that are prohibited by the [proposed Final Judgment].'' [27]

As noted above with respect to NBWA and Brewers Association's concerns about ABI circumventing the Section V.B cap, the purpose of the cap is to limit the volume of Beer sold by ABI-Owned Distributors; other provisions in the proposed Final Judgment provide safeguards that reduce ABI's influence and control over Independent Distributors, including ''friendly'' Independent Distributors and those who may benefit from ABI's exercise of its ''match-and-redirect'' right. For example, Section V.D.1 of the proposed Final Judgment prohibits ABI from conditioning the availability of ABI's Beer on an Independent Distributor's sales, marketing, advertising, promotion, or retail placement of a Third-Party Brewer's Beer, and Section V.D.3 prohibits ABI from conditioning any agreement or program with an Independent Distributor on the fact that an Independent Distributor sells a Third-Party Brewer's Beer outside of the geographic area in which the Independent Distributor sells ABI's Beer.

(iii) The Definition of ABI-Owned Distributor is Appropriate

Commenters NBWA and Wholesale Beer Association Executives urged the Department to broaden the definition of ABI-Owned Distributor to include additional, partially-owned Distributors, because they contend that ABI effectively controls Distributors in which it has a less-than-50% ownership stake.[28] The proposed Final Judgment defines an ABI-Owned Distributor as ''any Distributor in which ABI owns more than 50% of the outstanding equity interests or more than 50% of the assets.'' [29] The 50% ownership threshold is appropriate because it provides certainty for determining which Distributors are ABI-Owned Distributors for purposes of enforcing the Final Judgment. A 50% ownership threshold is also consistent with how the Department defined ABI-Owned Distributors in the ABI/Grupo Modelo decree.[30]

Additionally, safeguards in other parts of Section V that reduce ABI's influence and control over Independent Distributors apply even where ABI has less than 50% ownership. For example, Section V.E of the proposed Final Judgment prohibits ABI from disapproving an Independent Distributor's selection of a general manager or successor general manager based on the Independent Distributor's sales, marketing, advertising, promotion, or retail placement of a Third-Party Brewer's Beer, and Section V.F provides that, when exercising any right related to the transfer of control, ownership, or equity in any Distributor to any other Distributor, ABI shall not give weight to or base any decision to exercise such right upon either

[24] Beer Distributors of Oklahoma comment at 5–6; NBWA comment at 13–15; Consumer Watchdog comment at 6.

[25] NBWA comment at 13–14; Brewers Association comment at 5–6.

[26] Professor Calkins comment at 2.

[27] Wholesale Beer Association Executives comment at 9. The commenter refers to ABI's ''match-and-redirect'' right as ABI's right of first refusal.

[28] NBWA comment at 16–19; Wholesale Beer Association Executives comment at 8–9 (recommending a 25% ownership threshold).

[29] Similarly, the proposed Final Judgment defines ABI to include certain other entities ''in which there is majority (greater than 50%) or total ownership or control between [ABI] and any other person.'' Proposed Final Judgment at II.A. Thus, in response to NBWA's request for clarification (*see* NBWA comment at 14), if ABI owns a 31.6% share of Craft Brew Alliance, Craft Brew Alliance does not meet the definition of ABI, and Craft Brew Alliance Beer thus does not count as ABI Beer for the purpose of Section V.B's 10% cap.

[30] *See* Final Judgment at 3, *United States v. Anheuser-Busch InBev SA/NV,* 1:13–CV–00127 (Oct. 24, 2013) ('''ABI-Owned Distributor' means any Distributor in which ABI owns more than 50 percent of the outstanding equity interests as of the date of the divestiture of the Divestiture Assets.'').

Distributor's business relationship with a Third-Party Brewer—including, but not limited to, such Distributor's sales, marketing, advertising, promotion, or retail placement of a Third-Party Brewer's Beer.

For these reasons, the ownership threshold for ABI-Owned Distributors does not undermine the effectiveness of the proposed Final Judgment.

8. Comments Requesting that Section V's Distribution Restrictions Also be Made to Apply to Molson Coors

a. Summary of Comments

Four commenters asked that the distribution restrictions in Section V of the proposed Final Judgment—which apply only to ABI—also be made to apply to Molson Coors.[31] In support of its comment, Wholesale Beer Association Executives reported that Molson Coors has already begun to implement tactics of concern similar to those of ABI, such as aggressive acquisition of craft brewers.[32]

b. Molson Coors' Distribution Practices Are Outside the Scope of this Proceeding

Molson Coors is neither a defendant in this case nor a party to the proposed Final Judgment.[33] Final judgments typically do not apply to divestiture buyers, and this case does not warrant an exception. The Complaint does not allege that either MillerCoors or Molson Coors—unlike ABI—engaged in the type of restrictive distribution practices alleged in the Complaint. In fact, at the time the Complaint was filed, MillerCoors owned only one beer distributor in the United States, a Coors distributor in Denver, Colorado, and Molson Coors owned none.

If in the future Molson Coors were to acquire distributors or change its distribution practices in a manner that the Department believes might be anticompetitive, or to otherwise implement anticompetitive tactics as commenter Wholesale Beer Association Executives complains, the Department would have the ability to investigate those practices and seek appropriate relief if it determines that the practices violated the antitrust laws. Limiting the applicability of the proposed Final Judgment to ABI does not place the proposed Final Judgment outside the reaches of the public interest.

9. Comment Related to ABI's Obligation to Inform Independent Distributors of the Requirements of the Proposed Final Judgment

a. Summary of Comment

NBWA urged that the proposed Final Judgment be amended to require ABI to (1) include the Final Judgment as an amendment to ABI's agreements with Independent Distributors, and (2) state in its agreements with Independent Distributors that the Final Judgment will govern any conflict between the agreements and the Final Judgment.[34]

b. The Proposed Final Judgment Adequately Requires ABI to Inform Independent Distributors of the Requirements of the Final Judgment

Section V.I of the proposed Final Judgment requires that, within ten days of the entry of the Final Judgment, ABI provide the United States, for the United States to approve in its sole discretion, with a proposed form of written notification to be provided to any Independent Distributor that distributes ABI's Beer in the Territory. Such notification must (1) explain the practices prohibited by Section V of the Final Judgment, (2) describe the changes ABI is making to any programs, agreements, or any interpretations of agreements required to comply with Section V of the Final Judgment, and (3) inform the Independent Distributor of its right, without fear of retaliation, to bring to the attention of the Monitoring Trustee any actions by ABI which the Independent Distributor believes may violate Section V of the Final Judgment.

Requiring that the Final Judgment be made an amendment to ABI's existing agreements with its Independent Distributors would not increase the protections afforded to the Independent Distributors under Section V of the proposed Final Judgment. Requiring agreements with Independent Distributors to state that the Final Judgment will control in the event of a conflict with the language of the agreements would not increase the protections afforded to Independent Distributors. Nor would either requirement provide additional levels of notice to affected Distributors.

ABI will be required to provide notice of the Final Judgment to all of its Independent Distributors [35] and to comply with Section V of the proposed Final Judgment irrespective of any language to the contrary in its existing distribution agreements. Independent Distributors can raise their concerns with the Department or the Monitoring Trustee without fear of retaliation if ABI implements any programs, policies, or practices that an Independent Distributor believes violate Section V.

10. Comment Related to ABI's Ability to Terminate Independent Distributors

a. Summary of Comment

NBWA recommends that the proposed Final Judgment be modified to explicitly state that ABI may not terminate Independent Distributors based on their sales, promotion, advertising, marketing, or retail placement of Third-Party Brewers' Beer.[36]

b. The Proposed Final Judgment Already Prohibits ABI from Terminating an Independent Distributor Based on the Distributor's Sales, Promotion, Advertising, Marketing, or Retail Placement of a Third-Party Brewer's Beer

The proposed Final Judgment already explicitly prohibits ABI from terminating an Independent Distributor based on the latter's sales, promotion, advertising, marketing, or retail placement of a Third-Party Brewer's Beer. Section V.D prohibits ABI from penalizing or ''in any other way condition[ing] its relationship with'' an Independent Distributor based on ''the amount of sales the Independent Distributor makes of a Third-Party Brewer's Beer or the marketing, advertising, promotion, or retail placement of such Beer.'' Section V.H additionally prohibits ABI from discriminating against, penalizing, or otherwise retaliating against any Distributor because such Distributor raises, alleges, or otherwise brings to the attention of the Department or the Monitoring Trustee an actual, potential, or perceived violation of Section V of the Final Judgment.

[31] Virginia Beer Wholesalers Association comment at 3; Wholesale Beer Association Executives comment at 10–11; NBWA comment at 11–13; Consumer Watchdog comment at 7–8.

[32] Wholesale Beer Association Executives comment at 10–11.

[33] As required by Section V.A of the proposed Final Judgment, however, Molson Coors—in an amendment to its purchase agreement with ABI—has agreed not to cite the divestiture required by the proposed Final Judgment as a basis for modifying, renegotiating, or terminating any contract with any Distributor.

[34] NBWA comment at 22–23; *see also* Wholesale Beer Association Executives comment at 9–10.

[35] Independent Distributors will also be able to review the proposed Final Judgment and other court filings in this matter on the Department's public Web site. The Department will make the Final Judgment publicly available once the Court enters it. *See https://www.justice.gov/atr/case/us-v-anheuser-busch-inbev-sanv-and-sabmiller-plc.*

[36] NBWA comment at 25.

11. Other Comments Requesting that the Restrictions in Section V be Broadened

a. Summary of Comments

In addition to the above, commenters requested that the relief in Section V of the proposed Final Judgment be broadened in a variety of ways. For example, commenters asked that:

- ABI be prohibited from rewarding, penalizing, or otherwise conditioning its relationship with Independent Distributors based on their ''storage, warehousing, transportation or administration'' of a Third-Party Brewer's Beers; [37]
- ABI be prohibited from exercising its match-and-redirect right if the originally-proposed purchaser is otherwise qualified to sell ABI's Beer; [38]
- ABI be prohibited from exercising its match-and-redirect right or required when exercising its match-and-redirect right to pay the seller the full purchase price in consideration of its release of all brand rights for Third-Party Brewers' Beer without any additional consideration; [39]
- ABI be barred from financing, directly or indirectly, the operations of any Independent Distributor; [40] and
- ABI be barred from manipulating ''delivered price'' amounts to similarly situated Independent Distributors as a way to incentivize Independent Distributors to carry only ABI Beer brands.[41]

b. Section V Meaningfully Restricts ABI's Ability to Reward or Penalize Independent Distributors Based on Their Relationships with Third-Party Brewers

As discussed in the preceding sections, the changes to ABI's practices regarding Independent Distributors imposed by the proposed Final Judgment appropriately address the competitive effects of the transaction that are alleged in the Complaint and will increase Third-Party Brewers' access to effective distribution to the substantial benefit of millions of consumers nationwide. The failure to include the additional restrictions suggested by these commenters does not move the proposed Final Judgment outside the scope of the public interest.

B. Comments Related to ABI's Ownership of Craft Breweries

1. Summary of Comments

One commenter maintained that ABI should be prohibited from acquiring any brewers during the period of the Final Judgment.[42] Another commenter asked that craft beers owned by ABI be required to identify ABI's ownership on their packaging.[43]

2. The Proposed Final Judgment Adequately Ensures that the Department May Evaluate ABI's Acquisition of Craft Brewers

Restricting ABI from acquiring craft breweries or requiring ABI to label its craft beer as brewed by ABI is not necessary for the proposed divestiture to be effective in remedying the harms alleged in the Complaint. Although ABI has acquired multiple craft breweries over the past several years, those acquisitions were not at issue with respect to ABI's proposed acquisition of SABMiller, and the Complaint does not contain any allegations related to those acquisitions. Beer labeling similarly was not an issue implicated by the transaction and was not made a part of the Complaint. Accordingly, a remedy directed to such requirements is beyond the scope of this APPA proceeding, and the absence of such a remedy does not provide a basis for rejecting the proposed Final Judgment. *See US Airways,* 38 F. Supp. 3d at 76 (''`Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint. . . .'`'' (quoting *Graftech,* 2011 WL 1566781, at *13)).

In addition, Section XII of the proposed Final Judgment provides the Department with the ability to review ABI's acquisition of craft brewers in the United States, even if those acquisitions do not otherwise meet the filing thresholds of the HSR Act. As a result, the Department will be able to evaluate the likely competitive effects of any proposed acquisition of craft brewers by ABI and to challenge the transaction if the Department concludes that the proposed acquisition—whether by itself or in combination with other transactions or other conduct—is likely to substantially lessen competition in the U.S. beer industry.

C. Comments Related to the Eden Brewery

1. Summary of Comments

Both the North Carolina Department of Justice (''NC DOJ'') and the International Brotherhood of Teamsters (''Teamsters'') submitted comments asserting that the Department should have required the divestiture of the MillerCoors brewery in Eden, North Carolina. MillerCoors closed the Eden brewery in September 2016. Both the NC DOJ and Teamsters assert that the Department should have required such relief because the fact that MillerCoors announced the closure of its Eden brewery two days before ABI and SABMiller announced their merger negotiations raises concerns that MillerCoors had anticompetitive motives when deciding to close this brewery and declining to sell it to another brewer.[44] As additional support for their comments, the NC DOJ and the Teamsters also point to the Department's requirement in the final judgment in the ABI/Grupo Modelo transaction [45] that Constellation Brands, the divestiture buyer in that transaction, purchase and expand a legacy Grupo Modelo brewery in Mexico.

2. The Requested Divestiture of the Eden Brewery is Outside the Scope of this Action

The Department took the allegations about the closing of the Eden brewery seriously and considered the circumstances surrounding that closure during the Department's investigation of the transaction. Among other things, the Department obtained and reviewed documents related to the brewery closure, asked questions about its closure, and met with the relevant parties. In reviewing such information, the Department did not uncover evidence suggesting that MillerCoors' decision to close the Eden brewery was related to ABI's proposed acquisition of SABMiller. Accordingly, the Complaint did not allege that the Eden brewery closure was an anticompetitive effect of the transaction, nor did the Department seek relief related to the Eden brewery as part of the proposed Final Judgment.

The Department understands that the NC DOJ is conducting its own investigation into whether any competition-related laws have been violated in connection with the closure of the Eden brewery.[46] The NC DOJ's comment indicates that the evidence it has reviewed to date ''confirms [the NC DOJ's concerns] that anticompetitive motives may have played a part regarding the closure of the Eden brewery and the accompanying lack of meaningful effort to sell it.'' [47] The Department has great respect for the NC DOJ and has worked with that office cooperatively on many occasions. However, the Department made a

[37] NBWA comment at 20.

[38] Wholesale Beer Executives Association comment at 9.

[39] Yuengling comment at 14.

[40] Yuengling comment at 15.

[41] Yuengling comment at 15.

[42] Consumer Watchdog comment at 6.

[43] Ninkasi comment at 2.

[44] NC DOJ comment at 2 (Attachment 11); Teamsters comment at 23 (Attachment 12).

[45] Final Judgment at 13–16, *United States* v. *Anheuser-Busch InBev SA/NV,* 1:13–CV–00127 (Oct. 24, 2013).

[46] NC DOJ comment at 3.

[47] NC DOJ comment at 3.

decision, based on the evidence available to it at the time, not to allege that closure of the Eden brewery was a competitive effect of the transaction. Should the NC DOJ develop additional evidence, nothing in the proposed Final Judgment prevents the NC DOJ from seeking further relief under applicable federal or state laws—including relief related to the Eden brewery.

Additionally, the circumstances here are distinguishable from those in the ABI/Grupo Modelo matter. In ABI/Grupo Modelo, the Department required the divestiture buyer, Constellation, to purchase and expand the brewery in question because, in order for the divestiture to be effective, Constellation needed to be able to produce all Modelo-branded beer in Mexico but did not have its own Mexican brewery. As the Department noted in the Competitive Impact Statement in ABI/Grupo Modelo: ''Requiring the buyer of divested assets to improve those assets for the purposes of competing against the seller is an exceptional remedy that the United States found appropriate under the specific set of facts presented here. . . . No other combination of Modelo's brewing assets would have properly addressed the competitive harm caused by the proposed merger and allowed the acquirer of the Divestiture Assets to compete as effectively and economically with ABI as Modelo does today.'' [48] By contrast, in this case, the ABI/SABMiller transaction and divestiture to Molson Coors does not affect the brewing capacity of MillerCoors in the United States.

Accordingly, the NC DOJ's and the Teamsters' concerns about the closure of the Eden brewery do not provide a basis for questioning the Department's determination—which is entitled to deference—that the proposed Final Judgment provides an effective and appropriate remedy for the likely anticompetitive harm arising out of ABI's proposed acquisition of SABMiller.

D. Other Comments

Commenters raised a variety of other procedural and substantive concerns, recommending that the proposed Final Judgment be amended in numerous respects. As discussed below, these recommendations include: requiring ABI to adopt an updated antitrust compliance policy; [49] expanding the role of the Monitoring Trustee; [50] expressly stating that any action taken by ABI remains subject to applicable antitrust laws; [51] preventing ABI-Owned Distributors from managing or making recommendations concerning the schematics of retailers; [52] restricting ABI from vertically integrating into the retail channel; [53] preventing ABI from using sales data from third parties to punish distributors; [54] modifying the term of the proposed Final Judgment; [55] and clarifying certain references to Third Party Brewers.[56] Commenters also raised questions about the Department's use of certain data sources in the Complaint and proposed Final Judgment [57] and recommended that in the future the Department publish on its public website the end of the 60-day public comment period.[58]

1. Comments Related to a Potential Antitrust Compliance Policy

a. Summary of Comments

Consumer Watchdog and NBWA urged the Court to require ABI to update its antitrust compliance policy, with mandatory employee training.[59] Consumer Watchdog contended that the Department should approve ABI's antitrust compliance policy, while NBWA recommended that the Monitoring Trustee be tasked with drafting and overseeing ABI's compliance policy. NBWA noted that the Department required mandatory compliance programs in *United States* v. *Apple, Inc.* and *United States* v. *Bazaarvoice, Inc.*[60]

b. The Absence of a Required Compliance Policy Does Not Undermine the Effectiveness of the Proposed Final Judgment

The circumstances here do not warrant requiring ABI to have an antitrust compliance policy approved by the Department or the Monitoring Trustee. The Complaint does not allege that ABI has previously violated the antitrust laws. Rather, it asserts that ABI's acquisition of SABMiller would violate Section 7 of the Clayton Act. Moreover, the Complaint does not contain any allegations related to ABI's antitrust compliance policies.

Those circumstances distinguish this case from *Apple* and *Bazaarvoice.* In *Apple,* the Department argued that ''serious violations of the antitrust laws occurred at Apple while its current program was in effect, and they were orchestrated by key executives and even a member of Apple's legal team.'' [61] In addition, Apple's counsel and a person involved in the antitrust violation could not recall receiving antitrust compliance training.[62] *Bazaarvoice* involved a Final Judgment that was ordered after a trial had determined that the defendant had violated the antitrust laws.[63] Neither of those circumstances is analogous to this case where ABI has agreed to a settlement with the Department without an allegation or finding that ABI previously violated the antitrust laws. Thus, the lack of a requirement for a compliance policy does not undermine the effectiveness of the proposed Final Judgment.

2. Comments Related to the Monitoring Trustee

a. Summary of Comments

Consumer Watchdog recommended that the Monitoring Trustee be given the ability to interpret the proposed Final Judgment broadly to prevent ABI from ''getting around'' its terms.[64] As discussed above, NBWA recommended that the Monitoring Trustee be tasked with drafting and overseeing the compliance policy that NBWA urged was necessary.[65] NBWA also recommended that the Monitoring Trustee's appointment should be for the full ten-year term of the proposed Final Judgment.[66] The Virginia Beer

[48] Competitive Impact Statement at 13, *United States* v. *Anheuser-Busch InBev SA/NV,* 1:13–CV–00127 (Apr. 19, 2013).

[49] Consumer Watchdog comment at 7; NBWA comment at 24–25.

[50] Consumer Watchdog comment at 8; NBWA comment at 23–24.

[51] Professor Calkins comment at 2–3.

[52] Ninkasi comment at 2.

[53] American Beverage Licensees comment at 1–3.

[54] NBWA comment at 20–22.

[55] NBWA comment at 24.

[56] Brewers Association comment at 3.

[57] American Beverage Licensees comment at 4; Beer Distributors of Oklahoma comment at 2.

[58] Professor Calkins comment at 1–2.

[59] NBWA comment at 24–25; Consumer Watchdog comment at 7.

[60] NBWA comment at 25; *see* Final Judgment at 11, *United States* v. *Apple, Inc.,* No. 1:12–cv–02826 (S.D.N.Y. Sept. 5, 2015) (''The External Compliance Monitor shall have the power and authority to review and evaluate Apple's existing internal antitrust compliance policies and procedures and the training program required by Section V.C of this Final Judgment, and to recommend to Apple changes to address any perceived deficiencies in those policies, procedures, and training.''); Third Amended Final Judgment at 9, *United States* v. *Bazaarvoice, Inc.,* No. 3:13–cv–00133 (N.D. Cal. Dec. 2, 2014) (''Defendant shall designate, within ninety (90) days of entry of this Final Judgment, an internal Compliance Officer who shall be an employee of Defendant with responsibility for administering Defendant's antitrust compliance program and helping to ensure compliance with this Final Judgment.'').

[61] Memorandum in Support of Plaintiffs' Revised Proposed Injunction at 5–6, *United States* v. *Apple, Inc.,* No 1:12–cv–02826 (S.D.N.Y. Aug. 13, 2013).

[62] Memorandum in Support of Plaintiffs' Revised Proposed Injunction at 6, *United States* v. *Apple, Inc.,* No 1:12–cv–02826 (S.D.N.Y. Aug. 13, 2013).

[63] *See United States* v. *Bazaarvoice, Inc.,* No. 13–cv–00133, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014).

[64] Consumer Watchdog comment at 8.

[65] NBWA comment at 24–25.

[66] NBWA comment at 23–24.

Wholesalers Association urged that the proposed Final Judgment include specific timelines for both the submission of recommendations by the Monitoring Trustee and the acceptance, modification, or rejection of those recommendations by the Department, and also that the proposed Final Judgment be amended to require timely publication of the Monitoring Trustee's recommendations to the Department and the ultimate disposition of the recommendations.[67]

b. The Monitoring Trustee Already Has the Ability to Monitor ABI's Compliance with the Proposed Final Judgment

The Monitoring Trustee has been appointed by the Department and approved by the Court to help ensure that the proposed Final Judgment will be properly enforced. (*See* Docket Entry 13 (Order approving United States' appointment of Monitoring Trustee)). The Monitoring Trustee works closely with and regularly reports to the Department and, as appropriate, will report to the Court. If the Monitoring Trustee has particular concerns, he can bring those concerns to the attention of the Department and the Court. The Department and the Court can then appropriately respond to those concerns or empower the Monitoring Trustee to take appropriate actions to address those concerns. The powers possessed by the Monitoring Trustee are adequate to effectively monitor ABI's compliance with the proposed Final Judgment.

Under Section VIII.I of the proposed Final Judgment, the Monitoring Trustee must serve until the sale of all the Divestiture Assets is finalized, the Transition Services Agreements and the Interim Supply Agreements have expired, and all other relief has been completed as defined in Section V—unless the Department, in its sole discretion, authorizes the early termination of the Monitoring Trustee's service. Because ABI's obligations under Section V of the proposed Final Judgment will continue throughout the ten-year term of the decree, the Department may determine in its discretion that the Monitoring Trustee should serve the full ten-year term. NBWA has provided no basis for the Court to substitute NBWA's opinion that the Monitoring Trustee must be appointed for the full ten-year term of the proposed Final Judgment for the Department's discretion as to the appropriate length of the Monitoring Trustee's appointment, which, as noted above, could last throughout the duration of the decree.

Section VIII.H of the proposed Final Judgment requires the Monitoring Trustee to file reports every 90 days—or more frequently as needed—with the Department and, when appropriate, with the Court setting forth ABI's efforts to comply with its obligations under the proposed Final Judgment. Under Section VIII.B, if the Monitoring Trustee determines that ABI has violated the Final Judgment or breached a related agreement, the Monitoring Trustee must recommend an appropriate remedy to the Department, which, in its sole discretion, can accept, modify, or reject a recommendation to pursue a remedy. There is no sound basis for the Court to substitute for the Department's discretion a preference that the Monitoring Trustee's recommendations, and their resolutions, be made public.

3. Comment Related to the Application of Law to ABI

a. Summary of Comment

Wayne State University Law Professor Stephen Calkins indicated that the proposed Final Judgment should make clear that, notwithstanding the proposed Final Judgment, ABI remains subject to all existing antitrust laws.[68]

b. ABI Remains Subject to All Applicable Antitrust Laws

ABI remains subject to all applicable antitrust laws. The proposed Final Judgment does not restrict the application of those laws to ABI or provide an antitrust exemption to ABI for conduct addressed by the proposed Final Judgment. In fact, Section XII of the proposed Final Judgment, relating to future ABI acquisitions, places greater reporting requirements on ABI than required under the HSR Act to help ensure its compliance with applicable antitrust laws. Expressly stating in the proposed Final Judgment that the proposed Final Judgment does not supplant the antitrust laws is unnecessary.

4. Comment Related to ABI's Ability to Make Recommendations Regarding Retailer Schematics

a. Summary of Comment

Ninkasi asked that ABI-Owned Distributors be prohibited from managing shelf schematics at retailers that sell Beer.[69] Ninkasi states that ABI-Owned Distributors typically do not carry non-ABI Beer brands and that they set retailers' shelves in a way that maximizes ABI Beer sales ''over any rational set that would otherwise better serve the retail customer and consumer.''[70]

b. The Harms Alleged in the Complaint Do Not Justify the Requested Restrictions on Retail Shelf Schematics

As discussed above, the 10% cap in Section V.B appropriately restricts ABI's ability to use ABI-Owned Distributors to disadvantage Third-Party Brewers. Moreover, the Complaint does not include allegations related to ABI's influence over retailers, through ABI-Owned Distributors or otherwise. Nor do such concerns arise from the merger of ABI and SABMiller. Thus, Ninkasi's assertion that the Department should restrict ABI-Owned Distributors from managing retail shelf schematics concerns a matter outside the scope of this APPA proceeding. *See US Airways,* 38 F. Supp. 3d at 76 (''' 'Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint. . . .' '' (quoting *Graftech,* 2011 WL 1566781 at *13)).

5. Comment Related to ABI's Ability to Vertically Integrate into Retail Sales

a. Summary of Comment

American Beverage Licensees expressed concern that the ABI/SABMiller transaction, ''along with recent actions by ABI and the market reactions they might trigger, could lead to increased vertical integration and tied-house opportunities in the beverage alcohol marketplace,'' which American Beverage Licensees argues would ''be to the detriment of a competitive retail beverage alcohol environment.''[71] American Beverage Licensees stated that, over the past decade, ABI has ''encroached on traditional beer retailing establishments across the country, and now has direct brewery control of 30 or more on-premise beer retailing establishments that include thousands of seats with tied house opportunities.''[72] American Beverage Licensees further stated that the proposed Final Judgment ''stops at the water's edge and does not wade into concerns that [the ABI/SABMiller] merger could have future anticompetitive implications for America's independent beverage retailers.''[73]

[67] Virginia Beer Wholesalers Association comment at 2.

[68] Professor Calkins comment at 2–4.

[69] Ninkasi comment at 2.

[70] Ninkasi comment at 2.

[71] American Beverage Licensees comment at 1.

[72] American Beverage Licensees comment at 2.

[73] American Beverage Licensees comment at 3.

b. The Proposed Final Judgment Prevents ABI from Further Vertically Integrating as a Result of the SABMiller Acquisition and Provides the Department with Advance Notice of, and an Opportunity to Review, Future Acquisitions by ABI

The proposed Final Judgment requires ABI to divest SABMiller's entire U.S. business, which ABI did on October 12, 2016. Accordingly, the proposed Final Judgment prevents ABI from further vertically integrating through its acquisition of SABMiller. Moreover, Section XII of the proposed Final Judgment requires ABI to provide the Department with advance notice of, and an opportunity to evaluate, ABI's acquisition of Beer brewers—including brewers that own restaurants or tap rooms. This provision applies to acquisitions of brewers by ABI that would not otherwise be reportable under the HSR Act. Accordingly, the proposed Final Judgment provides the Department with an increased ability to evaluate ABI's acquisitions of brewers that own retail establishments and determine whether any such acquisitions could lead to anticompetitive effects.

Moreover, ABI's previous acquisitions of on-premise beer retailers were not at issue with respect to the ABI/SABMiller transaction, and the Complaint does not allege any harm to competition resulting from ABI's ownership of such retailers. Accordingly, a remedy directed to ABI's existing ownership of on-premise beer retailers would be outside of the scope of this APPA proceeding. *See US Airways,* 38 F. Supp. 3d at 76.

6. Comments Related to Use of Certain Data Sources in the Complaint and Proposed Final Judgment

a. Summary of Comments

American Beverage Licensees and the Beer Distributors of Oklahoma noted that in the Complaint, the Department uses IRI data to define ABI's market share and claim that IRI data is not an appropriate measure of market share because it focuses on large stores in the off-premise channel.[74] Separately, the Wholesale Beer Association Executives and NBWA each expressed concern that Section V.B of the Final Judgment relies on ABI's BudNet data to measure the percentage of Beer volume sold through ABI-Owned Distributors. NBWA stated that ''currently, there is no method for independently verifying the accuracy of ABI's self-reporting BudNet data and the accuracy of its reporting to DOJ.'' [75] Similarly, Wholesale Beer Association Executives stated, ''ABI's BudNet system is completely reliant on ABI's self-reporting, is not subject to transparent oversight, and could be subject to manipulation by ABI in calculating whether future acquisitions exceed the 10% threshold established by the [proposed Final Judgment].'' [76]

b. The Data Sources Referenced in the Complaint and the Proposed Final Judgment are Appropriate

The IRI data relied upon by the Department in calculating market shares provided the best available indicator of brewers' future competitive significance for the harms alleged in the Complaint. Using IRI data was therefore appropriate. Moreover, the Department did not use market share data to exclude any geographic areas from the required divestiture. Rather, the proposed Final Judgment required ABI to divest SABMiller's business throughout the United States. The Department's use of IRI data to measure market shares therefore does not affect whether the proposed Final Judgment was in the public interest.

The proposed Final Judgment does not require the use of BudNet data to measure the percentage of ABI Beer sold through ABI-Owned Distributors. Section V.B of the proposed Final Judgment prohibits ABI from acquiring ''any equity interests in, or any ownership or control of the assets of, a Distributor if (i) such acquisition would transform said Distributor into an ABI-Owned Distributor, and (ii) as measured on the day of entering into an agreement for such acquisition more than ten percent (10%), by volume, of Defendant ABI's Beer sold in the Territory would be sold through ABI-Owned Distributors after such acquisition.'' Attachment C to the proposed Final Judgment states that Beer volume shall be calculated based on ''the most comprehensive data [used by ABI at the time of the calculation] (currently, ABI's BudNet system), during the Relevant Period.'' As a result, the proposed Final Judgment contemplates the use of the most comprehensive data ABI has available. The Department believes that ABI, rather than a third party, will possess the most robust data to show the volume of its Beer sales. Moreover, both the Department and the Monitoring Trustee are well-positioned to investigate whether BudNet remains the most comprehensive data for ABI's Beer volume and ensure that ABI uses for this calculation the most comprehensive data then available.

7. Comments Related to ABI's Use of Third-Party Sales Data

a. Summary of Comments

The NBWA and Professor Calkins asserted that the proposed Final Judgment permits ABI to access sales information of its Independent Distributors, including Independent Distributors' sales of the Beers of Third-Party Brewers. They contended that ABI could use such information to take action against Independent Distributors due to the Independent Distributors' treatment of Third-Party Brewers or sales of Third-Party Brewers' Beer.[77]

b. The Proposed Final Judgment Protects Distributors Against ABI's Unauthorized Use of Third-Party Sales Data

The proposed Final Judgment limits the information that ABI can request or require an Independent Distributor to report. Under Section V.G, ABI cannot request or require that Independent Distributors report, ''whether in aggregated or disaggregated form, the Independent Distributor's revenues, profits, margins, costs, sales volumes, or other financial information associated with the purchase, sale, or distribution of a Third-Party Brewer's Beer.'' ABI can, however, request that Independent Distributors report ''general financial information . . . [for ABI] to assess the overall financial condition and financial viability of such Independent Distributor, or the percentage of total Beer revenues received by the Independent Distributor in the prior year associated with the purchase, sale, or distribution of Defendant ABI's Beer distributed by the Independent Distributor.'' But, as Section V.G makes clear, ABI cannot request from Independent Distributors information that would ''disclose or enable Defendant ABI to infer the disaggregated revenues, profits, margins, costs, or sales volumes associated with the Independent Distributor's purchase, sale, or distribution of Third-Party Brewers' Beer.''

The information that ABI is permitted to receive under the proposed Final Judgment is relevant to ABI's ordinary course business decisions that are unrelated to an Independent Distributor's sale of Third-Party Brewers' Beers. ABI has a legitimate interest in information about Independent Distributors' sales of ABI

[74] American Beverage Licensees comment at 4; Beer Distributors of Oklahoma comment at 2.

[75] NBWA comment at 15.

[76] Wholesale Beer Association Executives comment at 7.

[77] NBWA comment at 22; Professor Calkins comment at 4.

products. ABI also has a legitimate interest in assessing the financial health of Independent Distributors, and an Independent Distributor's total sales may be relevant to that assessment. The proposed Final Judgment properly balances ABI's legitimate need for information about its business partners against the danger of ABI's obtaining information that it could use to punish Independent Distributors for their sales of the Beers of Third-Party Brewers.

Nevertheless, the NBWA argues that the information that ABI is permitted to receive ''allows ABI to infer the aggregated revenue attributable to non-ABI beer'' and is thus ''sufficient to enable ABI to continue to target distributors that carry and promote rival brands.'' [78] The NBWA requests that ''any actions taken against distributors based on this information or any difference in treatment between distributors with a high proportion of ABI sales and those with a low proportion of ABI sales be seen as a violation of the [proposed Final Judgment].'' [79]

In fact, Section V.D of the proposed Final Judgment prohibits ABI from taking any adverse action against an Independent Distributor based upon that distributor's sales of a Third-Party Brewer's Beer. The proposed Final Judgment thus protects against the harm that the NBWA's comment seeks to prevent.

8. Comment Requesting to Extend and Periodically Reopen the Period for Public Comments

a. Summary of Comment

The Virginia Beer Wholesalers Association requested that the period for public comment be extended until after the Final Judgment has been entered and periodically reopened to allow interested parties the opportunity to review and comment on the changes that ABI proposes to make to its programs and agreements with Distributors to comply with the proposed Final Judgment.[80] The association writes that the closing of the public comment period prior to ABI's issuance of proposed amendments to its Distributor agreements and programs ''would severely limit the ability of distributors and regulators in Virginia, and in those states with similar franchise laws, to determine'' whether the proposed amendments would comply with state laws.[81]

b. No Extension or Reopening of the Comment Period is Necessary Because the Department Will Approve ABI's Descriptions of its Changes to its Programs and Agreements with Distributors

The Tunney Act sets forth specific procedures for the Court to approve consent judgments such as the proposed Final Judgment in this case. *See* 15 U.S.C. §§ 16(b)–(f). As Virginia Beer Wholesalers Association suggested, those procedures contemplate that the period for public comment will precede the entry of the Final Judgment. *See* 15 U.S.C. § 16(b). No extension or reopening of the comment period is necessary because the Department must approve ABI's descriptions of its changes to its programs and agreements with Independent Distributors. Section V.I requires ABI to obtain the Department's approval of the notification that ABI must provide to Independent Distributors (1) explaining the practices prohibited by Section V of the Final Judgment, (2) describing the changes ABI is making to any programs, agreements, or any interpretations of agreements required to comply with Section V of the Final Judgment, and (3) informing the Independent Distributor of its right, without fear of retaliation, to bring to the attention of the Monitoring Trustee any actions by ABI which the Independent Distributor believes may violate Section V. As discussed above, the Monitoring Trustee will monitor ABI's compliance with the proposed Final Judgment, including with respect to changes to its agreements and programs with Independent Distributors. Industry participants and other interested parties are also welcome to contact the Department to express concerns about ABI's compliance with, or potential violations of, the proposed Final Judgment. As expressly stated in Section XVII, during the ten-year term of the proposed Final Judgment, the Department may apply to the Court ''for further orders and directions as may be necessary or appropriate to carry out or construe [the] Final Judgment, to modify any of its provisions, to ensure and enforce compliance, and to punish violations of its provisions.''

Finally, nothing in the proposed Final Judgment prevents state regulators from determining whether ABI's programs or agreements with Independent Distributors violate state franchise or other laws.

9. Comments Related to Use of the Terms ''Third-Party Brewer's Beer'' and ''Third-Party Brewers' Beers''

a. Summary of Comments

Commenter Brewers Association requested that the Department clarify that the proposed Final Judgment's prohibitions related to ABI's distributor incentive programs apply not only to programs that specifically reference a particular Third-Party Brewer's Beer but rather to incentive programs that apply to Third-Party Brewers' Beer in the aggregate.[82] Similarly, Professor Calkins requested that the Department clarify that references to ''a Third-Party Brewer's Beer'' in proposed Final Judgment Sections V.D, V.E, and V.G apply individually and collectively to Third-Party Brewers.[83]

b. References to ''Third-Party Brewer's Beer'' Apply Individually and Collectively to Third-Party Brewers

The Department hereby clarifies that references to Third-Party Brewer's Beer apply individually and collectively to Third-Party Brewers.

10. Comment Related to the Term of the Proposed Final Judgment

a. Summary of Comment

Commenter NBWA requested that the proposed Final Judgment terminate not of its own accord at the end of a ten-year term but rather only after the Department, with the assistance of the Monitoring Trustee, has provided a report evaluating the competitive conditions in the U.S. beer industry and the Court has determined that the proposed Final Judgment has been effective.[84]

b. The Ten-Year Term is Appropriate

The typical term of the Department's consent decrees resolving violations of Section 7 of the Clayton Act is ten years. In addition, Section XVIII contemplates that the ten-year term of the proposed Final Judgment may be extended by the Court.

The purpose of the proposed Final Judgment is not to broadly ensure that the U.S. beer market is competitive, but rather to cure the antitrust violations alleged in the Complaint. Thus, it is not appropriate to extend the term of the proposed Final Judgment based on a determination that the competitive conditions of the U.S. beer industry are unsatisfactory. Although the proposed

[78] NBWA comment at 22.

[79] NBWA comment at 22.

[80] Virginia Beer Wholesalers Association comment at 1.

[81] Virginia Beer Wholesalers Association comment at 2.

[82] Brewers Association comment at 3.

[83] Professor Calkins comment at 2–4.

[84] NBWA comment at 24.

Final Judgment includes provisions that the Department believes will preserve competition in the U.S. beer industry that would likely be lost due to ABI's acquisition of SABMiller, generally improving the competitive conditions in the U.S. beer industry is beyond the scope of this APPA proceeding.

11. Comment Requesting the Department Publicize the Last Day of the 60-day Public Comment Period

a. Summary of Comment

Commenter Professor Calkins requested that the Department state on its public website the last day of the 60-day period for public comments on proposed consent decrees.[85]

b. The APPA Does Not Require the Department to State on its Public Website the Last Day for Public Comments on Consent Decrees

The APPA sets forth specific procedures for the Court to approve consent judgments such as the proposed Final Judgment in this case. *See* 15 U.S.C. §§ 16(b)–(f). Those requirements do not include notice on the Department's public website of the last day of the 60-day period for public comments. The Department nevertheless appreciates Professor Calkins' suggestion and will consider implementing it in connection with future proposed final judgments.

VI. CONCLUSION

After careful consideration of the public comments, the Department continues to believe that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The Department will move this Court to enter the proposed Final Judgment after the comments and this response are published pursuant to 15 U.S.C. § 16(d).

Dated: January 13, 2017

Respectfully submitted,

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[FR Doc. 2017–03029 Filed 2–14–17; 8:45 am]

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[85] Professor Calkins comment at 1–2.

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (OJP) Docket No. 1734]

Meeting of the Office of Justice Programs' Science Advisory Board

AGENCY: Office of Justice Programs (OJP), Justice.

ACTION: Notice of meeting.

SUMMARY: This notice announces a forthcoming meeting of OJP's Science Advisory Board (''the Board''). This meeting is scheduled for March 27–28, 2017. General Function of the Board: The Board is chartered to provide OJP, a component of the Department of Justice, with valuable advice in the areas of science and statistics for the purpose of enhancing the overall impact and performance of its programs and activities in criminal and juvenile justice.

DATES: The meeting will take place on Monday, March 27 2017, from approximately 12 noon p.m. to 5:30 p.m., and on Tuesday, March 28 2017 from approximately 9 a.m. to 12 noon.

ADDRESSES: The meeting will take place in the Main Conference Room on the third floor of the Office of Justice Programs, 810 7th Street NW., Washington, DC 20531.

FOR FURTHER INFORMATION CONTACT: Katherine Darke Schmitt, Designated Federal Officer (DFO), Office of the Assistant Attorney General, Office of Justice Programs, 810 7th Street NW., Washington, DC 20531; Phone: (202) 616–7373 [Note: This is not a toll-free number]; Email: *katherine.darke@usdoj.gov.*

SUPPLEMENTARY INFORMATION: This meeting is being convened to brief the OJP Acting Assistant Attorney General and the Board members on the progress of the subcommittees, discuss any recommendations they may have for consideration by the full Board, and brief the Board on various OJP-related projects and activities. The final agenda is subject to adjustment, but the meeting will likely include briefings of the subcommittees' activities and discussion of future Board actions and priorities. This meeting is open to the public. Members of the public who wish to attend this meeting must register with Katherine Darke Schmitt at the above address at least seven (7) calendar days in advance of the meeting. Registrations will be accepted on a space available basis. Access to the meeting will not be allowed without registration. Persons interested in communicating with the Board should submit their written comments to the DFO, as the time available will not allow the public to directly address the Board at the meeting. Anyone requiring special accommodations should notify Ms. Darke Schmitt at least seven (7) calendar days in advance of the meeting.

Katherine Darke Schmitt,

Senior Policy Advisor and SAB DFO, Office of the Assistant Attorney General, Office of Justice Programs.

[FR Doc. 2017–02986 Filed 2–14–17; 8:45 am]

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DEPARTMENT OF LABOR

Mine Safety and Health Administration

Brookwood-Sago Mine Safety Grants

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Funding Opportunity Announcement (FOA).

Announcement Type: New.

Funding Opportunity Number: FOA 17–3BS.

Catalog of Federal Domestic Assistance (CFDA) Number: 17.603.

SUMMARY: The U.S. Department of Labor (DOL), Mine Safety and Health Administration (MSHA), is making up to $1,000,000 available in grant funds for education and training programs to help identify, avoid, and prevent unsafe working conditions in and around mines. The focus of these grants for Fiscal Year (FY) 2017 will be on training and training materials to better identify, avoid and prevent unsafe working conditions in and around mines. Applicants for the grants may be States (to include the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Commonwealth of the Mariana Islands) and private or public nonprofit entities, to include Indian tribes, tribal organizations, Alaska Native entities, Indian-controlled organizations serving Indians, and Native Hawaiian organizations. MSHA could award as many as 20 grants. The amount of each individual grant will be at least $50,000.00 and the maximum individual award will be $250,000. MSHA may incrementally fund these grants based on milestones and availability of funds. This notice contains all of the information needed to apply for grant funding.

DATES: The closing date for applications will be March 24, 2017, (no later than 11:59 p.m. EST). MSHA will award grants on or before April 10, 2017.

ADDRESSES: Grant applications for this competition must be submitted