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Ms. Amy Greenberg
Director, Regulations and Rulings Division
Alcohol and Tobacco Tax and Trade Bureau
1310 G Street NW, Box 12
Washington, D.C. 20005

Re: Notice of Proposed Rulemaking – Notice 216
Consideration of Updates to Trade Practice Regulations.

The Virginia Beer Wholesalers Association ("VBWA") has represented the interests of Virginia's family owned, independent beer distributors since its founding in 1937. Our members operate some 30 separate facilities throughout the Commonwealth of Virginia employing over 4,000 Virginians. VBWA member companies distribute a countless, ever growing number of brands of imported and domestic beer, including craft beers brewed both in Virginia and in dozens of other states.

The VBWA's primary mission is the preservation and protection of Virginia's three-tier system of alcohol distribution. The VBWA believes that the three-tier system provides the best method of ensuring distributor and retailer independence, which results in healthier competition, better consumer choice, and a more orderly alcoholic beverage market.

The Virginia General Assembly, in exercise of its core powers under the Twenty-first Amendment to the United States Constitution, has directed that the Board of the Virginia Alcoholic Beverage Control Authority shall have plenary power to prescribe and enforce regulations and conditions under which alcoholic beverages are possessed, sold, transported, distributed and delivered. The purpose of this grant of plenary authority to the Board is "to prevent any corrupt, incompetent, dishonest, or unprincipled practices."

Although primarily guided by Virginia's extensive regulatory scheme governing tied house and trade practices by and between industry members and Virginia retailers, VBWA members nevertheless have a significant interest in the Bureau's review and amendment of regulations

governing industry members across the country. For these reasons, VBWA respectfully requests that the Bureau accept the comments and recommendations offered below.

I. GENERAL QUESTIONS

1. **Digital Marketplace** – VBWA believes that retailers operating in "digital marketplace" should be subject to the same trade practice constraints as their "bricks & mortar" counterparts. It is counterproductive to the goals of the FAA to permit online sellers of alcoholic beverages to obtain from industry members, directly or indirectly, "things of value" and other benefits denied their physical-world competitors. VBWA strongly urges the Bureau to consider including digital retailers in its definition of "trade buyer."

II. SPECIFIC TOPICS

1. **Category management** – Industry member-developed category management can generate genuine concern among suppliers and wholesalers when the scheme appears to favor the brands of the developer member over those of its competitors. Determining whether the management plan has "crossed the line" such that the industry member is making purchasing decisions for the retailer, or at least strongly influencing the retailer's purchasing decisions, is inevitably bound-up in the facts of each case. For example, were a national retail chain to rotate the duties of category captain among competing industry members, it is unlikely that any one industry member could accumulate the power to influence the retailer's purchasing decisions. If, on the other hand, a national retailer repeatedly assigned the same industry member as category manager, that might indicate that the industry member has established undue influence over the purchasing decisions of the retailer. A bright-line regulatory rule prohibiting an industry member from acting as a "category manager" may resolve the Bureau's trade practices concerns, but VBWA is unaware of any well-publicized investigation or enforcement action in recent times involving category management that would warrant such a drastic response at this time.

2. **Shelf Plans** – As with category management, the furnishing of "shelf plans" by industry members to retailers is bound to generate concern of favoritism from competing members. Much like category management, repeated use of shelf plans developed by the same industry member would tend to indicate the likelihood of undue influence over the retailer by that member. Unlike category management, however, the shelf plan exception from tied-house prohibitions has been in place since 1995 – nearly 28 years, and has been widely-incorporated into the business relationships between industry members and retailers. Moreover, the clarification issued by the

Bureau in its Ruling No. 2016-1 (February 1, 2016) made doubly sure that industry members were informed that the shelf plan exception granted by 27 C.F.R. §6.99(b) prohibits the performance of any *additional* services for the retailer. VBWA believes that the Bureau has made the limitations of the shelf plan exception abundantly clear to industry members and that no further regulatory amendment is necessary at this time.

3. **Slotting Fees** – The use of "slotting fees," be they in the form of monetary payments, equipment, services, promotional allowances, or other things of value, has become wide-spread in the non-alcoholic beverage retail sector. Thus far, courts have held the practice to be permissible on its face, and have set a high bar to prove such payments are anticompetitive in application. As the negotiation and payment of slotting fees for non-alcoholic products are not transparent or regulated in any manner, at present there is little hard evidence to support the concern that the payment of slotting fees for non-alcoholic products influences a retailer's decision to purchase alcoholic beverages. The Bureau, however, should make clear its authority to investigate and review slotting fee arrangements where it has reason to believe that such payments indirectly result in the unlawful inducement of a retailer.

VBWA finds virtually no distinction between the payment of slotting fees to a "brick and mortar" retailer of alcoholic and non-alcoholic beverages and an online retailer of the same products. Whereas the traditional street-side retail business receives slotting fees in return for providing large or more prominent placement of products on its shelves, the virtual retailer accepts the same fees for more prominent placing of products on its website. If the payment of slotting fees constitutes an unlawful inducement of a "brick and mortar" retailer, then the same payment must produce the same result at an online retailer. The Bureau's regulations should ensure that online retailers are subject to the same constraints as their street-side counterparts.

4. Interest in Retailers property – Virginia law generally prohibits an industry member (whether licensed in Virginia or not) from acquiring or holding any direct or indirect financial interest in either the business of a retail licensee, or in the premises occupied by such licensee. Virginia's General Assembly believes that <u>any</u> ownership of a retail licensee by an industry member cannot but result in an unlawful inducement of that licensee, and so the Commonwealth makes no allowance for the percentage of industry member ownership involved, nor for the active or passive nature of such ownership. However, Virginia will permit an industry

member to have a financial interest in a licensed retailer business or premises provided that the industry member does not furnish, directly or indirectly, alcoholic beverages or other merchandise to the retailer in which it holds an interest. This constraint permits the industry member to choose between entering into a financial engagement with a retailer's business or supplying that retailer with alcoholic beverages but, in either case, prevents undue influence by the industry members and preserves the retailer's independence. VBWA believes that this model has served Virginia well, and suggests that the Bureau consider adopting a similar posture in its regulations.

5. Third-party companies - Current Bureau regulations explicitly prohibit the furnishing of money, equipment, services, supplies, or other things of value to a third-party where the benefits of such things of value "flow to individual retailers." 27 C.F.R. §6.42. VBWA finds it difficult to improve on such a clear-cut statement of the law. Although in its request for comments the Bureau seems to narrow the scope of "third party" to that of an "affiliate" of the industry member, the plain language of §6.42 makes no such distinction, but only excludes situations where the industry member lacked the knowledge or intent that the third party would give the thing of value to a retailer (which would be an extraordinary case). Nevertheless, VBWA would suggest to the Bureau that it consider clarifying that the long-standing prohibition against the indirect furnishing to a retailer of a "thing of value" to include specific reference to slotting fees paid for product placement through third-parties and other forms of brokered advertising appearing on online-retail websites.

6. **Consumer specialty items and point of sale advertising materials -** Although current Bureau regulations limit the dollar value of display racks that can be furnished by an industry member to a single retailer at $300, there is virtually no limit placed on the type, amount, or cost of point-of-sale and consumer specialties that can be furnished to a retailer. In VBWA's view, such unchecked industry member largess can easily result in retailer inducement. Moreover, the virtually unrestricted furnishing of point-of-sale advertising and consumer specialties to retailers works to severely disadvantage smaller producers, such as craft breweries, that cannot reasonably be expected to match the advertising and novelty budget of their industry-leading counterparts.

Virginia has addressed this issue by limiting the type and cost of point-of-sale materials and consumer novelty items that may be provided by industry and their vendors. VBWA believes

that Virginia's point-of-sale limitations has preserved the independence of its roughly 20,000 retail businesses without inflicting undue hardship or commercial inequity among industry members. It is VBWA's view that the Bureau should, at the very least, institute a cost-per-item cap on point-of-sale and consumer novelties to better reflect its commitment to combating trade practices that endanger retailer independence.

7. Tied House payment terms - Virginia does not permit its licensed wholesalers to extend credit to retailers for alcoholic beverages. To do otherwise would undercut the Commonwealth's policy of maintaining independence among its manufacturing, wholesale, and retail tiers for the sale of alcoholic beverages. In the view of Virginia's General Assembly, the extension of credit to retailers is a "thing of value" that jeopardizes the independence of the retailer. In VBWA's view, any expansion of the current 30-day credit payment window authorized by Bureau regulations would undermine the goal of maintaining retailer independence. Consequently, VBWA urges that the Bureau take no action on this issue at this time.

8. Consignment sale payment terms – VBWA's comments above regarding credit payments apply equally to the issue of consignment sale payments.

9. **Definition of trade buyer** – The Bureau asks whether it should include "importers that wholesale" within the definition of "trade buyer" irrespective of whether such an importer is permitted as a wholesaler pursuant to 27 U.S.C. §203(a)(2). VBWA believes that any person engaged in the practice of purchasing alcoholic beverages, and that either sells, contracts for sale, offers or delivers for sale, *or ships* alcoholic beverages is a "trade buyer" subject to the Bureau's tied-house and trade practices regulatory scheme, irrespective of whether federal law requires that persons obtain a federal permit.

10. **Private label arrangements** – VBWA recommends that the Bureau take no regulatory action on this item at this time.

11. **Brand sharing with retail establishments –** The Bureau notes that some industry members are now licensing their trademarks (including their brand names) to retailers for use by the retailer as the name of its establishment. Although VBWA is troubled by this emerging trend, in VBWA's view it is simply advertising and should be regulated as such. VBWA does not believe that the Bureau can prohibit a trademark owner from licensing its marks to a retailer without explicit authority from Congress, but it most certainly has the authority to investigate such

agreements to determine whether the "licensing" is not merely a device to evade the Bureau's tied house and trade practices regulations against commercial bribery and exclusive outlets. VBWA believes that well-publicized enforcement of the Bureau's existing regulations will sufficiently inform industry participants of the limits of such licensing arrangements.

12. **Sponsorships –** VBWA notes that in December 2021 and January 2022, the Bureau successfully extracted offers in compromise from two permitted beer wholesalers in Illinois and Iowa for purchasing sponsorships at Liberty Bank Amphitheater and Drake University arena granting the wholesalers exclusive rights to malt beverage sales, and thus violating 27 C.F.R. §6.21. In light of these recent actions, VBWA does not believe that further clarification of the rule against exclusionary sponsorships is necessary.

13. Activities which can result in exclusion or place retailer independence at risk The Bureau is seeking specific guidance as to which practices "have the potential to place retailer independence at risk." VBWA believes that the activities listed in 27 C.F.R. §6.152 adequately reflect what actions are prohibited, but that the Bureau might consider expanding the list to include practices that have the potential of diminishing a retailer's independence, such as the payment of slotting fees for non-alcoholic products or an industry member's financial interest in the retailer's premises. Those "practices which result in exclusion" listed in 27 C.F.R.§8.52 (i.e., threats or acts of physical or economic harm) need no improvement.

The Bureau also seeks comment on whether to update the regulations' definition of "exclusion" found in 27 C.F.R. §6.151 (a)(2), §8.51(a)(2), and §10.51(a)(2). In particular, those sections state that exclusion occurs (in whole or in part) when a practice or activity of an industry member "results in the retailer purchasing less than it would have of a competitor's product." VBWA believes the level of causation necessary to prevail against an industry member under this definition of exclusion to be rarely attainable except in the most egregious instances. Nevertheless, the universe of circumstances warranting a charge of "exclusion" should at least be limited to those where a retailer has purchased "*substantially less"* of a competitor's product than it "*normally would have"* as the result of the industry member's prohibited activities.

14. Criteria for determining a risk to retailer independence - VBWA notes that the criteria currently listed in 27 C.F.R. §6.153, §8.54 and §10.54 are identical and fairly reflect the

proper criteria to determine whether a retailer's independence has been compromised. Consequently, VBWA does not believe any amendments to the criteria are necessary at this time.

15. Third-party contracts - TTB regulation 27 C.F.R. §8.52 provides that exclusion results when a contract between an industry member and a retailer requires the retailer to purchase alcoholic beverages from the industry member and "*expressly restrict[s] the retailer from purchasing, in whole or in part, such products from another industry member."* The Bureau asks how it might clarify that exclusion also results when an industry member's contract is with a third party, and that third party controls the retailer. VBWA believes that where a third party controls a retailer, for all intents and purposes that third party is the retailer. Consequently, VBWA believes that the Bureau specify in §8.52(b) that the term "retailer" includes "any third party that is in control of a retailer."

Sincerely,

Philip H. Boykin
President & CEO
Virginia Beer Wholesalers Association