

**Vermont Wholesale Beverage Association
H.710, An Act Relating to Beer and Wine Franchises
February 22, 2018**

BEER PROPOSAL

- A small brewer producing less than 775,000 gallons (25,000 barrels) of malt beverages per year and whose sales to a distributor are one percent or less of a distributor's total annual sales of malt beverage may terminate a franchise agreement without cause upon written notice and payment to the distributor of 5 times gross profits for the last 12 months of sales.
- For new franchise agreements entered into after the effective date of the act (prospective contracts), this small brewer exception from the good cause requirement would take effect on the effective date of the act. For franchise agreements in effect when the act takes effect (existing contracts), the small brewer exception from the good cause requirement in the franchise law would be effective 7/1/2022.
- Franchise agreements have to be in writing effective 7/1/2022. If the parties in a franchise agreement in existence on the effective date of the act cannot agree to a written franchise agreement by 7/1/2022, the small brewer must pay the distributor 5 times gross profits to leave.

RATIONALE FOR THE PROPOSAL

Volume Limits & Percent of Distributor Portfolio

300,000 barrels raises potential constitutional issues if implemented because every Vermont brewer, but not every out-of-state brewer, could terminate a franchise agreement without cause. *See Family Winemakers of California v. Jenkins*, 592 F.3d 1 (1st Cir. 2010).

The federal Alcohol and Tobacco Tax and Trade Bureau (TTB) recognized in a rulemaking in 2012, "[t]here is no specific statutory or regulatory definition as to who is a 'small' brewer." As a result, they undertook a comprehensive review of the size of breweries and settled on 7,142 barrels as the threshold for small brewer tax and paperwork reduction.

According to data the TTB published in 2016:

- 74% of all reporting US breweries make less than 1,000 barrels.
- 95% of all reporting US brewers make less than 15,000 barrels.

According to national Brewers Association data from 2016, 96 percent of breweries in the United States produce 25,000 barrels of malt or less. To better understand who these breweries are, attached is a document from the Brewers Association listing their craft brewery members by state and the volume of beer each brewery produced in 2016.

25,000 barrels per year is a lot of beer. At 31 gallons per barrel that is 775,000 gallons of beer. At 2.25 gallons per case that is 344,444 cases of beer. And at 24 bottles per case, that is 8,266,666 bottles of beer.

A brewery making over 8 million bottles of beer a year, and is in the top four percent in terms of production of all brewers in the United States, is undeniably big.

The Vermont Brewers Association (VBA) cites the definition of “craft” brewer from the national, Colorado-based Brewers Association as 6 million barrels. This trade association uses 6 million barrels to define who can become a member. In 2011, the Brewers Association increased the production ceiling for a “craft” brewery from 2 million to 6 million barrels per year to enable its largest member to still be considered “craft”.

No other state has a number as high as 300,000 barrels alone to define a small brewer carve out to its franchise law. New York uses 300,000 barrels AND the brewery is 3 percent or less of a distributor’s portfolio. The 3 percent recognizes the impact a brewer leaving will have on its distributor. Colorado has many craft brewers like Vermont and uses 300,000 gallons (not barrels) which is 9,677 barrels.

Fair Market Value/Gross Profits

Fair market value is important to distributors in instances where a small brewer is terminating a franchise agreement without cause. Distributors have often spent years building a brand and if a brewer leaves for no cause it is only fair the distributor be compensated for its investment. We will agree to VBA’s request to put a specific fair market value in the statute. This should hopefully avoid litigation and make it easier for a small brewer to move if it wishes. However, we do not agree with the definition of “reasonable compensation” in H.710 or the VBA proposal, which is based on average gross profits for the last three fiscal years. It is standard industry practice to base gross profits on the last 12 months of sales.

Transition Period

“Good cause” termination for beer franchises has been the law in Vermont since 1976. For over 40 years there has been no requirement that franchise agreements be in writing in Vermont. We are willing to compromise and agree with the VBA’s recommendation that all franchise agreements must be in writing after 7/1/2022. This change will mean that hundreds of franchise agreements will need to be renegotiated or put in writing for the first time. That is why our proposal includes a transition period of 3.5 to 4 years (depending on when the statute goes into effect) when “good cause” will remain in effect for existing contracts. However, the termination without cause provision will be in effect immediately for any new contracts with small brewers after the effective date of the act. All other non-termination related provisions in the franchise law will continue to apply to all franchise agreements involving small brewers before, during and after the transition period (exclusive territories, prohibited acts by manufacturers, etc.).

Finally, we are concerned that under H.710 and the VBA proposal that a small brewery with an existing contract with a distributor on the date the act goes into effect could avoid paying 5 times gross profits by simply running the clock to July 1, 2022, when all agreements must be in writing. To avoid this, we are requesting that if the parties have not reached a written agreement by July 1, 2022, that a small brewer must pay the distributor 5 times gross profits for the last 12 months of sales to leave.

As the committee balances the competing interests in this bill, we hope you keep in mind that Vermont distributors employ approximately 700 Vermonters. The average annual wages and benefits for an employee in Vermont at the four VWBA member distributors is \$50,830 in salary, \$10,920 in benefits for a total of \$61,750 per employee per year. Vermont distributors are longstanding Vermont-based, family owned businesses that are important for Vermont's economy.

We do not address wine at this time. We have been focusing our full efforts on working with members of the VBA to reach a compromise on beer as beer seems to be more the focus of the committee. We have not been in discussions with the Vermont Grape and Wine Council regarding wine to date.

We'd be happy to answer questions the committee has about this proposal or provide additional information.

Thank you for considering this proposal.

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