

Amendments Proposed by the Vermont Brewers Association

H.710 AS PASSED BY THE HOUSE

An act relating to beer franchises

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. REDESIGNATION; ADDITION OF SUBCHAPTER

7 V.S.A. chapter 23, subchapter 1, which shall include 7 V.S.A. §§ 701-709, is added to read:

Subchapter 1. General Provisions

Sec. 2. 7 V.S.A. § 701 is amended to read:

§ 701. DEFINITIONS

~~As~~ Except as otherwise provided pursuant to section 752 of this chapter, as
used in this chapter:

* * *

(7) “Wholesale dealer” means a packager licensed pursuant to section 272 of this title or a wholesale dealer licensed pursuant to section 273 of this title.

Sec. 3. 7 V.S.A. § 702 is amended to read:

§ 702. PROHIBITED ACTS BY MANUFACTURER

A manufacturer shall not:

* * *

(3) fail or refuse to deliver promptly to a wholesale dealer after the receipt of its order any malt beverages or vinous beverages when the product is ~~publicly advertised~~ available for immediate sale. If an approval holder or manufacturer does not believe in good faith that it has sufficient product

available for immediate sale to satisfy demands of all customers, it shall allocate available product among its customers in a fair and equitable manner.

Sec. 4. 7 V.S.A. chapter 23, subchapter 2 is added to read:

Subchapter 2. Small Manufacturers and Certificate of Approval Holders

§ 751. APPLICATION

(a) The provisions of this subchapter shall apply to any franchise between a wholesale dealer and either:

(1) a certificate of approval holder that produces ~~or distributes~~ not more than ~~50,000~~ 300,000 barrels of malt beverages per year ~~and whose products comprise three percent or less of the wholesale dealer's total annual sales of malt beverages by volume;~~ ~~or~~

(2) a manufacturer that produces not more than ~~50,000~~ 300,000 barrels of malt beverages per year ~~and whose products comprise three percent or less of the wholesale dealer's total annual sales of malt beverages by volume.~~

(b) The provisions of sections 702, 705, and 706 of this title shall apply to any franchise that is subject to the provisions of this subchapter.

(c)(1) The amount of malt beverages manufactured by a certificate of approval holder or manufacturer shall include the worldwide, aggregate amount of all brands of malt beverages that are manufactured directly or indirectly, by or on behalf of the certificate of approval holder or manufacturer, and any entity that controlled, was controlled by, or was under common control with the certificate of approval holder or manufacturer during the year.

(2) The amount of malt beverages distributed by a certificate of approval

Comment [jo1]: The distributors requested this change the underlying law from "publicly advertised" to "available." They argued that they were concerned that a brewer could unfairly withhold product by not "publicly advertising" it. I don't think that they alleged that brewers have done this, just that they could. If this change continues, the VBA thinks it is important to clarify that brewers are allowed to decide how to fairly and equitably allocate their stock to ensure that all of their customers have access to product.

Comment [jo2]: Volume changes explained in testimony.

distributed by or on behalf of the certificate of approval holder both inside and outside Vermont during the year.

§ 752. DEFINITIONS

As used in this subchapter:

(1) “Barrel” means 31 gallons of malt beverages.

(2) “Certificate of approval holder” means a holder of a certificate of approval issued by the Liquor Control Board pursuant to section 274 of this title that produces ~~or distributes~~ not more than ~~50,000~~ 300,000 barrels of malt beverages per year and whose products comprise three percent or less of a wholesale dealer’s total annual sales of malt beverages by volume.

(3) “Compensation” means the cost of a wholesale dealer’s laid-in inventory related to a franchise that has been or is about to be terminated plus ~~two~~ five times the average annual gross profits earned by the wholesale dealer on the sale of products pursuant to the franchise during the last three fiscal years or, if the franchise has not been in existence for three years, the period of time during which the franchise has been in existence. “Gross profits” shall equal the revenue earned by the wholesale dealer on the sale of products pursuant to the franchise minus the cost of those products, including shipping and taxes ~~net any returns, credits, margin support payments or other similar~~ income.

(4) “Franchise” means an agreement governing a relationship between a wholesale dealer and a certificate of approval holder or manufacturer that ~~was entered into on or after January 1, 2019 and~~ has existed for at least one year

Comment [jo3]: VBA believes that 2 times is more fair than 5 times. Parties are encouraged to negotiate the agreement that works best for them. Each relationship is different. Explained in testimony.

Comment [jo4]: Technical amendment to ensure that calculation of “profit” is accurate.

Comment [jo5]: VBA believes that all small brewers should be able to terminate without cause during the transition period. They feel strongly that without this option they will not have any leverage to negotiate fair contracts with their distributor. Discussed in testimony.

and has one or more of the following characteristics

(A) the wholesale dealer is granted the right to offer and sell the brands of malt beverages offered by the certificate of approval holder or manufacturer;

(B) the wholesale dealer, as an independent business, constitutes a component of a certificate of approval holder's or manufacturer's distribution system;

(C) the wholesale dealer's business is substantially associated with the certificate of approval holder's or manufacturer's brand, advertising, or other commercial symbol designating the manufacturer;

(D) the wholesale dealer's business is substantially reliant on the certificate of approval holder or manufacturer for the continued supply of malt beverages; and

(E) the certificate of approval holder or manufacturer has granted the wholesale dealer a license to use a trade name, trade mark, service mark, or related characteristic, and there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, or otherwise.

(5) "Manufacturer" means a manufacturer licensed pursuant to section 271 of this title that produces not more than 50,000 barrels of malt beverages per year and whose products comprise three percent or less of a wholesale dealer's total annual sales of malt beverages by volume.

§ 753. CANCELLATION OF FRANCHISE

(a) A certificate of approval holder or manufacturer may cancel, terminate, refuse to continue, or cause a wholesale dealer to relinquish a franchise as provided pursuant to the terms of a written franchise between the certificate of approval holder or manufacturer and the wholesale dealer.

(b) In the absence of a provision of a franchise governing termination for good cause, or if the franchise between the parties is not in writing, the certificate of approval holder or manufacturer may cancel, terminate, refuse to continue, or cause the wholesale dealer to relinquish the franchise for good cause as provided pursuant to section 754 of this subchapter.

(c) In the absence of a provision of a franchise governing termination for no cause, or if the franchise between the parties is not in writing, the certificate of approval holder or manufacturer may cancel, terminate, refuse to continue, or cause the wholesale dealer to relinquish the franchise for no cause as provided pursuant to section 755 of this subchapter.

§ 754. CANCELLATION FOR GOOD CAUSE; NOTICE;

RECTIFICATION

(a)(1) Except as otherwise provided pursuant to subsection 753(a) of this subchapter and subsection (d) of this section, a certificate of approval holder or manufacturer that wishes to terminate or cancel a franchise for good cause shall provide the franchisee with at least ~~120~~ 30 days' written notice of the intent to terminate or cancel the franchise.

(2) The notice shall state the causes and reasons for the intended termination or cancellation.

Comment [j06]: Rarely used provision in current law because 120 days is an unreasonable notice period when there is cause to terminate. 30 days is a more reasonable time.

(b) A franchisee shall have ~~the 30 day notice period~~ ~~120 days~~ in which to rectify any claimed deficiency.

(c) The Superior Court, upon petition and after providing both parties with notice and opportunity for a hearing, shall determine whether good cause exists to allow termination or cancellation of the franchise.

(d) The notice provisions of subsection (a) of this section may be waived if the reason for termination or cancellation is insolvency, the occurrence of an assignment for the benefit of creditors, bankruptcy, or if the certificate of approval holder or manufacturer is able to prove to the court that providing the required notice would do irreparable harm to the marketing of its product.

§ 755. CANCELLATION FOR NO CAUSE; NOTICE; COMPENSATION

Except as otherwise provided pursuant to subsection 753(a) of this subchapter, a certificate of approval holder or manufacturer that wishes to terminate or cancel a franchise for no cause shall:

(1) provide the franchisee with written notice of the intent to cancel or terminate the franchise at least 30 days before the date on which the franchise shall terminate; and

(2) on or before the date the franchise shall be canceled or terminated, pay, or have paid on its behalf by a designated wholesale dealer, compensation for the franchisee's interest in the franchise. ~~Compensation as defined herein shall constitute a wholesale dealer's sole and exclusive remedy for any termination, non-renewal, or other loss of a franchise under this Chapter.~~

§ 756. SALE OR TRANSFER BY WHOLESALE DEALER

Comment [j07]: Clarification to ensure that a distributor will not attempt to seek additional damages.

(a)(1) In the absence of a provision of the franchise to the contrary, or if the franchise between the parties is not in writing, a wholesale dealer wishing to sell or otherwise transfer its interests in a franchise shall give at least 90 days' written notice of the proposed sale or transfer to the certificate of approval holder or manufacturer.

(2) The notice of intended sale or transfer shall give the full name and address of the proposed transferee, along with a disclosure of the consideration that the proposed transferee in good faith has offered to the transferring wholesale dealer and that the wholesale dealer in good faith proposes to pay, along with full details outlining the qualifications of the proposed transferee which, in the opinion of the wholesale dealer, make the proposed transferee competent to operate the franchise.

Comment [jo8]: VBA believes this is important for fairness and transparency.

(b) If the certificate of approval holder or manufacturer opposes the proposed sale or transfer to the proposed transferee, the certificate of approval holder or manufacturer may either:

(1) prevent the proposed sale or transfer from occurring by paying compensation for the wholesale dealer's interest in the franchise in the same manner as if the franchise were being terminated for no cause pursuant to section 755 of this subchapter; or

(2) not less than 60 days before the date of the proposed sale or transfer, file a petition with the Superior Court that clearly states the certificate of approval holder's or manufacturer's reasons for resisting the proposed sale or transfer.

(c)(1) Upon receipt of a petition pursuant to subdivision (b)(2) of this section, the Superior Court shall hold a hearing on the proposed transfer or sale. The court shall make a full inquiry into the qualifications of the proposed transferee and shall determine whether or not the proposed transferee is in a position to substantially continue the operations of the franchise, to assume the obligations of the franchise holder, and to conduct the business in a manner that will protect the legitimate interests of the certificate of approval holder or manufacturer.

(2) If the Superior Court finds the proposed transferee is qualified to operate the franchise, it shall approve the transfer of the franchise to the proposed transferee.

§ 757. MERGER OF FRANCHISOR

In the absence of a provision of the franchise to the contrary, or if the franchise between the parties is not in writing, the merger of a certificate of approval holder or manufacturer with a third party shall not void the franchise unless good cause is shown pursuant to section 754 of this subchapter, or the franchise is terminated pursuant to section 755 of this subchapter.

§ 758. HEIRS, SUCCESSORS, AND ASSIGNS

In the absence of a provision of the franchise to the contrary, or if the franchise between the parties is not in writing, the provisions of this subchapter shall apply to the heirs, successors, and assigns of any party to a franchise that is subject to this subchapter

Sec. 5. 7 V.S.A. § 759 is added to read:

§ 759. WRITTEN AGREEMENT

All franchises entered into pursuant to this subchapter shall be in writing.

Sec. 6. 7 V.S.A. § 752 is amended to read:

§ 752. DEFINITIONS

As used in this subchapter:

* * *

(4) “Franchise” means ~~an~~ a written agreement governing a relationship between a wholesale dealer and a certificate of approval holder or manufacturer that ~~was entered into after January 1, 2019 and~~ has existed for at least one year and has one or more of the following characteristics:

* * *

Sec. 7. 7 V.S.A. § 753 is amended to read:

§ 753. CANCELLATION OF FRANCHISE

(a) A certificate of approval holder or manufacturer may cancel, terminate, refuse to continue, or cause a wholesale dealer to relinquish a franchise as provided pursuant to the terms of a ~~written~~ franchise between the certificate of approval holder or manufacturer and the wholesale dealer.

~~(b) In the absence of a provision of a franchise governing termination for good cause, or if the franchise between the parties is not in writing, the certificate of approval holder or manufacturer may cancel, terminate, refuse to continue, or cause the wholesale dealer to relinquish the franchise for good cause as provided pursuant to section 754 of this subchapter.~~

~~(c) In the absence of a provision of a franchise governing termination for no cause, or if the franchise between the parties is not in writing, the certificate of approval holder or manufacturer may cancel, terminate, refuse to continue, or cause the wholesale dealer to relinquish the franchise for no cause as provided pursuant to section 755 of this subchapter.~~

Comment [jo9]: After July 1, 2022, written contracts will govern these relationships. VBA believes that there is no need for any statutory back up.

Sec. 8. 7 V.S.A. § 756 is amended to read:

§ 756. SALE OR TRANSFER BY WHOLESALE DEALER

(a)(1) In the absence of a provision of the franchise to the contrary, ~~or if the franchise between the parties is not in writing,~~ a wholesale dealer wishing to sell or otherwise transfer its interests in a franchise shall give at least 90 days' written notice of the proposed sale or transfer to the certificate of approval holder or manufacturer.

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Sec. 9. 7 V.S.A. § 757 is amended to read:

§ 757. MERGER OF FRANCHISOR

In the absence of a provision of the franchise to the contrary, ~~or if the franchise between the parties is not in writing,~~ the merger of a certificate of approval holder or manufacturer with a third party shall not void the franchise unless good cause is shown pursuant to section 754 of this subchapter, or the franchise is terminated pursuant to section 755 of this subchapter

Sec. 10. 7 V.S.A. § 758 is amended to read:

§ 758. HEIRS, SUCCESSORS, AND ASSIGNS

In the absence of a provision of the franchise to the contrary, ~~or if the~~

~~franchise between the parties is not in writing~~, the provisions of this subchapter shall apply to the heirs, successors, and assigns of any party to a franchise that is subject to this subchapter.

Sec. 11. TRANSITION TO WRITTEN CONTRACTS

(a) A certificate of approval holder or manufacturer and a wholesale dealer who are parties to a franchise agreement that was entered into before January 1, 2019 and is not in writing shall negotiate a written franchise agreement to take effect on or before July 1, 2022.

(b) If the certificate of approval holder or manufacturer and the wholesale dealer are unable to reach agreement on the terms of a written franchise agreement on or before July 1, 2022 or if the parties mutually agree that the franchise shall not continue beyond that date, the franchise shall be deemed to terminate on July 1, 2022 and the certificate of approval holder or manufacturer shall pay the wholesale dealer compensation for its interest in the franchise in the same manner as if the franchise were terminated for no cause pursuant to 7 V.S.A. § 755.

(c) As used in this section,

(1) “certificate of approval holder” has the same meaning as in 7 V.S.A. § 752;

(2) “manufacturer” has the same meaning as in 7 V.S.A. § 752; and

(3) “wholesale dealer” has the same meaning as in 7 V.S.A. § 701.

Sec. 12. EFFECTIVE DATES

(a) This section and Secs. 1, 2, 3, 4, and 11 shall take effect on January 1,

2019.

(b) The remaining sections shall take effect on July 1, 2022.