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Brewery and Distillery Law in South Carolina

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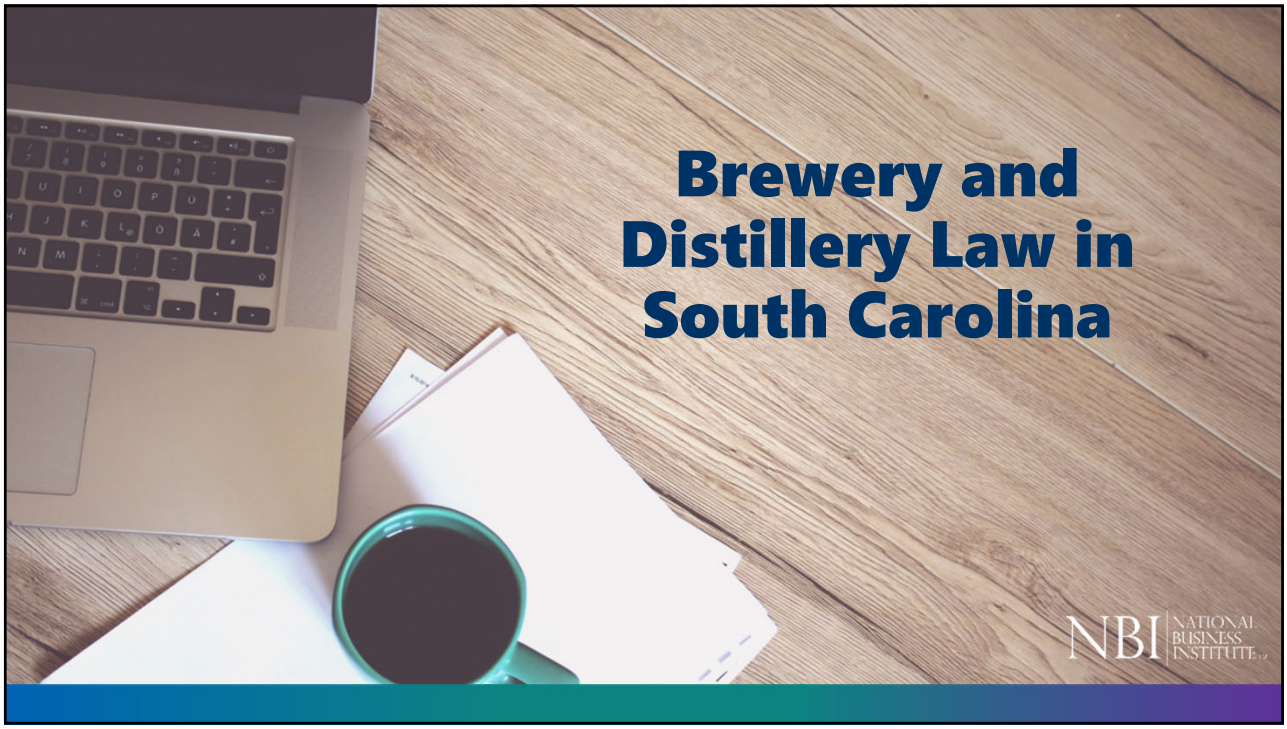
Submitted by Sarah Bennett



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Presented by

Sarah B. Bennett
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Emeric J. Dwyer

Brewery and Distillery Business Entity Selection, Formation, Finance, and Insurance

Sarah B. Bennett

Topics To Be Covered:

- LLC vs. Partnership vs. Corporation
- Tax Considerations
- Operational Issues
- Documentation and State Filing Requirements
- Structuring, Management, and Governance
- Insurance Concerns
- Drafting and Negotiating Formation Agreements
- Crowdfunding and other Financing Challenges
- Language for Employee Handbooks and Policies

Entity Formation

- Partnership
  - Occurs when two or more people agree to conduct business together.
  - No specific documentation is required before a partnership is formed.

Entity Formation

- Limited Liability Partnership
  - Partners in an LLP have limited personal liability.
  - Governed by its own state law separate and distinct from the law of a general partnership.
  - General partners v. limited partners.

Entity Formation

- Subchapter S Corporation ("S Corp")
  - Must make an election with the IRS
  - Restrictions on who can own shares of an S Corp.
  - All shareholders have the same rights
  - Possible SE Tax Minimization
  - Preferable to C Corporation for small, closely held businesses (no double tax)

S Corp vs. LLC

- FICA Tax Minimization – S Corp
- Flexibility – LLC
- BUT: DON'T WORRY: Most state corporation and LLC statutes provide for a mechanism to convert an LLC to a corporation and a corporation to an LLC

Tax Considerations

Operational Issues

Documentation and State Filing Requirements

Standard Documents

S Corporation

- Articles of Incorporation
- Bylaws
- Initial Written Actions of Shareholders/Directors
- Shareholder Controls Agreement (w. Buy-Sell Provisions)
- Form SS-4
- Form 2553 (S Election)

LLC

- Articles of Organization
- Operating Agreement
- Initial Written Actions
- Form SS-4

Structuring, Management, and Governance

Insurance Concerns

Drafting and Negotiating Formation Agreements

Crowdfunding and Other Financing Challenges

Investment Capital

What is a Security?

Investment Capital – Private Offerings of Securities

- 1933 Act default requires registration of any securities offering
- Alternative: find an applicable exemption from registration
- Also need to find an exemption from registration under state Blue Sky Laws (each state where an investor resides)

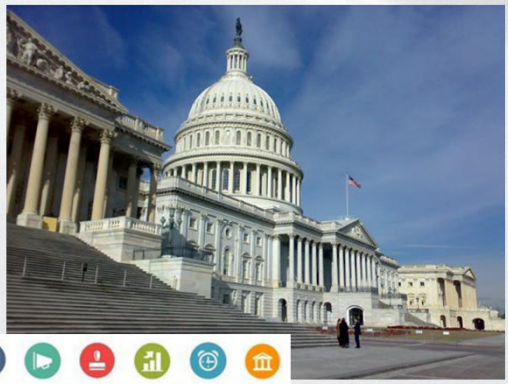
Key Concept: Accredited Investors

Investment Capital

- Section 4(2)
- Regulation D
  - Rule 504
  - Rule 505
  - Rule 506 (now 506(b))

JOBS Act: a Game Changer for Startups

- JOBS Act eases some of the most onerous restrictions on raising capital
  - General Solicitation (506(c))
  - Equity Crowdfunding
  - Regulation A+



JOBS ACT
JUMPSTART OUR BUSINESS STARTUPS

Structuring a Private Offering

- What percentage of ownership to sell?
- Difference between voting and financial rights
- Preferred distributions
- "Sunset" provisions – call rights, put rights, etc.

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Language for Employee Handbooks and Policies

Employee vs. Independent Contractor

- Why does it matter if a worker is deemed an employee – withholding taxes apply and worker may be eligible for benefits
- Misclassified worker = fines, penalties and taxes for employer
- There is no one factor; the IRS has twenty factors
- Look at the level of control that the business owner has over the worker
  - More control ➡ employee

Brewery and Distillery Business Entity Selection, Formation, Finance and Insurance

Submitted by Sarah B. Bennett

A. LLC vs. Corporation

- A business organization is governed by both the laws of the jurisdiction in which it organizes and the laws of all jurisdictions in which it conducts business. This section is an introduction to the major concepts a brewery or distillery may face upon organization and should not be relied upon for any particular jurisdiction.
- An entrepreneur must first decide under which entity type it will operate. Most likely, the choice will come down to LLC, S-Corp, or C-Corp.
- There are many factors to consider when choosing an entity type, including liability, raising capital and control, and taxation.
-

1. Limited Liability Company (LLC)

a. **Governing Law:** Governed by state statute. The affairs of an LLC are governed predominantly through its various governance documents. The most prevalent governance document is the operating agreement, which defines the rights and duties of the LLC's members.

b. **Formation:** File articles of organization with the proper state office, typically the Secretary of State. The limited required articles include the name of the LLC, the LLC's in-state address, its organizer(s), the number of membership interests authorized, and the duration it is to exist.

c. **Management:** Owners are called members. An LLC can have one or more members. The LLC can be member-managed, which means that its members perform the day-to-day management of the company, or it can be manager-managed, wherein managers control the management and governance of the company. In Minnesota, the LLC can also be board-managed, where there are one or more governors who designate officers and managers to act for the LLC who have limited authority granted by the board.

d. **Capital Contributions:** An LLC can receive capital contributions by any and all of it members, in the form of any consideration, such as money, real property, personal property, or services for the company.
e. **Pass Through Taxation Benefits:** Unless it chooses otherwise, an LLC is taxed as a pass-through entity, which means that the taxation passes through to the LLC members based on the member's individual ownership interest. However, the members are taxed for their ownership interest regardless of whether or not they received any actual distributions in that tax year.
f. **Limited Personal Liability:** Members are not personally liability for the obligations and debts of the LLC beyond their initial capital contributions, provided that corporate formalities are observed by the members.
g. **Newer Form with Flexibility:** Not well-developed set of case law. LLC flexibility often results in a limitation of duties owed to minority owners. However, LLCs can be tailored to meet nearly any situation and are the most widely used business entities currently.

2. **Corporation: C-Corporation and S-Corporation**

a. **Governing Law:** State statutes govern. Most states have well-developed case law to interpret statutes governing corporations. Articles of incorporation, bylaws or shareholder control agreements create and enforce the rights and duties of a corporation's shareholders.
b. **Formation:** Both the S-Corp and C-Corp are separate legal entities formed by a state filing. These documents, typically called the Articles of Incorporation or Certificate of Incorporation, are the same for both S-Corps and C-Corps.

c. **Management Structure:** Both have shareholders, directors and officers. Shareholders are the owners of the company and elect the board of directors, who in turn oversee and direct corporation affairs and decision-making, but are not responsible for day-to-day operations. The directors elect the officers to manage daily business affairs.

d. **Liability Protection:** Shareholders are not personally liable for any debts or obligations beyond the amount of capital they have contributed to the corporation, unless the corporation fails to follow proper corporate formalities.

e. **Corporate Formalities:** Both are required to follow the same internal and external corporate formalities and obligations, such as adopting bylaws, issuing stock, holding shareholder and director meetings, filing annual reports, and paying annual fees.

f. **Taxation:** Taxation is often considered the most significant difference for small business owners when evaluating S-Corporations versus C-Corporations.

   (1) C-Corporations: Separately taxable entities. They pay taxes at the corporate level. They also face the possibility of double taxation if corporate income is distributed to business owners as dividends, which are considered personal income. Tax on corporate income is paid first at the corporate level and again at the individual level on dividends.

   (2) S-Corporations: Pass-through tax entities. They do not pay income, tax at the corporate level. The profits/losses of the business are instead "passed-through" the business and reported on the owners' personal tax returns. Any tax due is paid at the individual level by the owners.

g. Corporate ownership: C-Corporations have no restrictions on ownership, but S-Corporations do. The S-Corporation must meet certain characteristics such as:

(1) it cannot have more than 100 shareholders;

(2) its shareholders must be individuals;

(3) its shareholders must be citizens or residents of the United States;

(4) it must be organized in the United States; and

(5) it can only issue one class of stock.

C-Corporations therefore provide a little more flexibility when starting a business if you plan to grow, expand the ownership or sell your corporation.

B. Tax Considerations

1. **LLC:** May be taxed as:
    a. a disregarded entity if it has one member. The member experiences complete pass through taxation. The member gets taxed on all profits based on tax bracket, whether distributed or not; or
    b. a partnership if it has multiple members. The members experience complete pass through taxation. The members get taxed on all profits based on their tax bracket and ownership interest, whether distributed or not; or
    c. it may elect to be taxed as a corporation. The members experience incomplete pass through taxation, which allows the company to retain earnings from year to year and avoid being taxed regardless of a distribution.
2. **Corporation**

a. C-Corporation; Double Taxation: Taxed at the entity level as well as shareholder level, who each get taxed individually for any distributions received from the corporation.

b. S-Corporation; Pass Through Taxation: Shareholders are only taxed individually.

C. Structuring, Management and Governance

1. Management

a. LLC/Corporation: States may require an LLC or corporation to have certain designated officers for assist in the company's day-to-day operations. These officer positions may be held by one or more of the company's owners, but can also be held by a non-owner. Officer positions will also often have statutorily-defined duties that can be general to each officer or specific to a particular position, but can be altered with approval of the members or shareholders through agreements. The officers must carry out their duties in the best interests of the company and its owners.

i. LLC: Can be managed by its members, designated managers, or board of governors. Managers and members of the board of governors can be, but are not required to be, members of the LLC. The individuals responsible for the management of the LLC may also delegate their authority to officers, such as the president, vice president, secretary, or treasurer.

ii. Corporation: Typically, management is vested in the board of directors. The board of directors serve the interests of the shareholders.

- Closely Held Corporation: Generally, the shareholders will serve on the board.

2. **Fiduciary Duties**: Individuals responsible for management and operations of a company are generally required to adhere to the duty of care, duty of loyalty, and duty of good faith in discharging their duties on behalf of the company. If such individuals fail to perform these duties, they may be liable to the company and its owners.
    a. **Duty of Care:** A legal obligation which is imposed on an individual requiring adherence to a standard of reasonable care while performing any acts that could foreseeably harm others.
    b. **Duty of Loyalty:** A legal obligation which requires fiduciaries to put the corporation's interests ahead of their own. Corporate fiduciaries breach their duty of loyalty when they divert corporate assets, opportunities, or information for personal gain.
    c. **Duty of Good Faith:** A general presumption that the parties to a contract will deal with each other honestly, fairly, and in good faith, so as to not destroy the right of the other party or parties to receive the benefits of the contract. It is implied in every contract in order to reinforce the express covenants or promises of the contract.

3. **Corporate Formalities for LLC/Corporation:** Must observe certain formalities in order to maintain the limited liability shield extended to its members/shareholders .
    - Piercing the Corporate Veil: The legal standard for extending personal liability varies by state, but the following suggestions help maintain the limited liability shield after forming a limited liability entity:

    a. Ensure the entity is sufficiently capitalized;
    b. Document any payments to the legal entity from the owners as either paid-in-capital or loans;

c. Do not commingle personal and business funds;

d. Do not pay owners in cash;

e. Owners should never use the business's cash or assets for personal use or pay personal bills with company funds;

f. All of the entity's taxable income should be reported on the entity's tax returns and tax returns should be filed promptly;

g. Shareholders who are actively involved in the business should receive a "reasonable" pre-determined wage or salary for their services;

h. All payments to shareholders should be clearly documented as being wages, expense reimbursements, or profit distributions;

i. All expenses paid to shareholders should be reflected in formal expense reimbursement reports, backed up by appropriate receipts and invoices;

j. Owners should not receive "profit distributions" if the entity is insolvent;

k. All creditors should be paid regularly before distributing any profits;

l. Any purchase of property, computers, equipment, etc. from shareholders should be at commercially reasonable prices and terms and documented in formal written agreement;

m. Obtain appropriate insurance for the type of business in question;

n. Prepare appropriate bylaws, operating agreements, etc.;

o. Hold annual meeting of directors, shareholder, or members and prepare the minutes in a corporate minute book, which should reflect major corporate transactions;

p. Hold elections and appoint officers and directors for the entity;

q. Obtain federal and state tax identification numbers;

r. Obtain sales tax exemption certificates;

s. Issue share certificates to owners (if corporation);

t. File annual registration statement with Secretary of State to remain in "good standing" if the state law requires it;

u. Sign all contracts, agreements, purchases, plans, loan, investments, and accounts in the name of and on behalf of the entity;

v. Train officers and directors how to sign contracts, purchase orders, and agreements on behalf of the entity;

w. Register all "assumed names" being used by the entity;

x. Use the official corporate name on all letterhead, business cards, marketing materials, coupons, websites, etc. to clearly notify third parties that the business has limited liability;

y. If possible, run the business profitably and pay dividends/profit distributions to the owners periodically; document the same;

z. Avoid entering into transactions or incurring debts when the company is insolvent;

aa. Avoid having the dominant owner siphon funds from the business;

bb. Ensure that all officers and directors have a meaningful voice in the business, participate in decision-making, and periodically meet and vote on major corporate decisions;

cc. Avoid using the corporation merely as a façade for individual dealings.

D. Drafting and Negotiating Formation Agreements

1. General Governance Documents

a. Drafting formation agreements is very important for memorializing the rights, responsibilities, and expectations of a business's owners, officers, managers, or board members.

b. 'Governance documents often expressly provide provisions regarding the decision-making process, profit and loss allocations and distributions, fiduciary duties, conduct and procedures for meetings, and delegation of officer positions and duties.

c. A few examples of agreements: operating, member control, partnership, shareholder control, buy-sell, bylaws.

2. Additional Brewery/Distillery Provisions

a. Include provisions that require all proposed members, shareholders, directors or officers to pass the appropriate TTB background check process.

b. Include provisions that require all proposed members, shareholders, directors or officers to pass any applicable local requirements to obtain and hold a liquor license or any other relevant local licensing requirements.

i. Include provisions that require the ownership in the business to be subject to maintaining or passing any required local licensing.

ii. If the owner does not meet these standards or fails to maintain these stands, the governance documents can establish procedures to terminate the relationship with the individual, including a forced buy-out of the owner's interest in the company.

E. Capital Raising, Crowdfunding, and Other Financing Methods

1. Current Regulatory Landscape and Key Definitions

a. Generally: Nearly every means by which a company raises capital involves securities laws. These laws regulate the manner in which securities are sold, the amount of money that may be raised, the persons to whom the

securities may be offered, and the method by which investors may be solicited.

b. **Federal Registrations and Exemptions:** As a general rule, in order to comply with Federal securities laws, a person selling a security must either:
    i. "register" such sale with the Securities Exchange Commission (SEC) or
    ii. identify a specific exemption that allows such sale to be conducted without registration.
        - SEC registration is time consuming and expensive.
        - For most small businesses, SEC registration is not a feasible option.

c. **State Blue Sky Laws:** In addition, an issuer selling securities must adhere to blue sky laws in each state where the securities are being sold, all of which vary from each other.

2. Private Placements

a. **Section 4(2):** The most common federal exemption entrepreneurs rely on is Section 4(2) of the Securities Act, which exempts "transactions...not involving any public offering" - i.e., a **private placement**. A company seeking to determine whether an offering will be exempt from registration under Section 4(2) will need to evaluate a number of factors which, although routinely addressed by courts, seldom lead to a definitive answer as to whether an offering is a "public offering" under Section 4(2). Different courts emphasize different factors critical to the Section 4(2) exemption, no single one of which necessarily controls. The factors are guidelines, and include:
    i. Offeree qualification (i.e., whether the investors are sophisticated);

ii. Manner of the offering (i.e., whether the company will engage in advertising or other promotional activities);

iii. Availability and accuracy of information given to offerees and purchasers (i.e., whether the people to whom the company proposes to sell securities have access to basic financial information about the company);

iv. The number of offerings and number of purchasers (i.e., whether the company solicited investment from a large group of people); and;

v. Absence of intent to redistribute (i.e., whether the people to whom the company proposes to sell securities have an intention to hold the securities for investment purposes - generally for a minimum holding period of 24 months).

b. **Regulation D:** The SEC provides a clear set of "safe harbor" rules that issuers can follow to ensure that they are conducting a valid private placement under Section 4(2). The most common safe harbors that small companies have customarily relied upon in conducting private placements are Rule 504 and Rule 506 (now called Rule 506(b) - see below).

i. **General Solicitation:** Rule 502(c) provides that "neither the issuer nor any person acting on its behalf shall offer or sell the securities by any form of general solicitation or general advertising, including, but not limited to, the following:

1. any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio; and
2. any seminar or meeting whose attendees have been invited by any general solicitation or advertising." In general, this

means that issuers will need to have a substantial pre-existing relationship with a potential investor before making an offer of securities under Rule 504 or Rule 506(b).

ii. **Accredited investor:** Under Rule 501(a), an accredited investor is a person who meets certain qualifications and, therefore, is deemed able to protect himself or herself in making investment decisions without additional protections under the securities laws, such as those obtained through the SEC registration process and the public disclosure of information about the company that is made through the process of becoming an SEC reporting company. There are several ways to qualify as an accredited investor with the most common being:

1. an individual with at least $200,000 (or $300,000 jointly with a spouse) in annual income over the past 2 years or at least $1 million in net worth (excluding the value of a principal residence); or
2. an entity in which all of the equity owners are accredited investors or the entity has at least $5 million in net assets.

3. The "Old Rules" For Raising Capital

a. **Rule 504:** Generally speaking, Rule 504 allows companies to raise up to $1 million from an unlimited number of accredited and non-accredited investors (subject to counterpart state Blue Sky registrations and exemptions). Companies are not permitted to engage is general solicitation except for in states where the securities have been registered or states that provide an exemption from registration that allows the company to generally solicit to accredited investors only.

i. **State law counterpart:**- Limited Offering Exemption: Most states have a "limited offering" exemption that is often relied on by companies who are conducting Rule 504 offerings. Normally, sales by a company to no more than 35 non-accredited investors (and an unlimited number of accredited investors) during any 12 consecutive months are exempt from registration.

b. **Rule 506:** Rule 506 is the most common "safe harbor" relied on by companies conducting private placements. Generally speaking, Rule 506 allows an issuer to raise an unlimited amount of capital from an unlimited number of accredited investors and up to 35 non-accredited investors. However, if even one non-accredited investor becomes a purchaser in the offering, then the company must provide all investors with a very detailed disclosure document that satisfies other SEC requirements. For this reason, the practical reality is that Rule 506 offerings are usually restricted to accredited investors only.

   i. **State law counterpart:** Securities issued in reliance on Rule 506 are considered Federal "covered securities" and the offer and sale of such securities are exempt from registration as long as the issuer makes a notice filing.

   ii.

4. **The "New" Rules:** Jumpstart Our Business Startups (JOBS) Act: On April 5, 2012, Congress passed the JOBS Act in an effort to foster job growth by modernizing Federal securities laws. The JOBS Act consisted of three key parts that are relevant for securities crowdfunding:

Title II	Title III	Title IV
Advertising in Connection with Sales to Accredited Investors	**Crowdfunding for All**	**Reg A+/"Mini-IPOs"**
Also called Rule 506(c)	SEC released proposed rules in October 2013	SEC released final rules in March 2015
Became effective in October 2013	The proposed rules have been almost universally criticized	Became effective in June 2015
Growing in popularity	Revised rules went into effect in May 2016	Not very useful for small businesses

a. Title II and Rule 506(c) - Advertising to Accredited Investors: In late 2013, the SEC (pursuant to the authority granted to it under Title II of the JOBS Act), finalized new Rule 506(c) which allows companies to generally solicit (or advertise) their securities offerings so long as all of the investors who actually purchase securities in the offer are accredited. This means that companies may now talk about their offerings in public seminars, send out email blasts, push offering information out on social media sites, as well as run ads on TV, radio, and the Internet. Companies who comply with Rule 506(c) are now free to talk about their offering to whomever they want (including non-accredited investors). Companies who generally solicit under Rule 506(c) may only sell the securities to accredited investors.

(1) Verification Steps: Using Rule 506(c), however, comes with certain additional compliance requirements. Companies must take additional steps to verify that all purchasers actually are accredited. In Rule 506(c), the SEC listed several non-exclusive methods that are deemed to satisfy the verification requirements (provided that the issuer does not

have knowledge that the purchaser is non-accredited). The "safe harbors" include:

(i) Income verification by checking federal tax forms, including W-2' s and tax returns, and a statement by the investor that he or she expects enough income in the current year to remain accredited;

(ii) Net worth verification by checking a recent credit report (with the past 3 months) and bank or investment account statements, together with a written representation from the purchaser that he or she has disclosed all liabilities necessary to make a determination of net worth; and

(iii) Certification of accredited investor status by a registered broker-dealer, SEC-registered investment advisor, licensed attorney, or CPA who has verified the purchaser's accredited investor status.

Comparison of Rules 504, 506(b) and 506(c)

	Rule 504	Rule 506(b)	Rule 506(c()
How much money can I raise?	Up to $1M	Unlimited	Unlimited
Can I advertise the sale of my securities?	No, unless coupled with a state exemption or registration that allows advertising.	No, unless coupled with a state exemption or registration that allows advertising.	Yes.
To whom can I sell securities?	Anyone. However, counterpart state exemptions or	Unlimited number of accredited investors.	Unlimited number of accredited investors

	registrations may impose additional restriction on number to non-accredited investors	Up to 35 non-accredited investors if you believe they are "sophisticated".	
Do I have to comply with SEC's formal information delivery requirements?	No, but counterpart state exemption or registration may impose additional requirements.	No, if only accredited investors are included. Yes, if any non-accredited investors are included.	No.
Do I have to verify that any accredited investors are truly accredited?	No, accredited investors can "self-certify".	No, accredited investors can "self-certify".	Yes, you must take "reasonable steps" to verify that the investors are, in fact, accredited.

b. Title III "retail" crowdfunding and Regulation CF: Title III of the JOBS Act was meant to democratize the business funding process by allowing non-accredited individuals the opportunity to participate online and invest into private companies. The SEC delayed releasing final rules for years, and the system finally went live in May 2016. Issuers must comply with multiple requirements and limitations, namely:

- Issuer may only raise up to $1M in any 12-month period.
- Individual investor limits:

    - If the investor's annual net income OR net worth is < $100k, then the investor may invest the greater of: (a) $2,000; or (b) 5% of the investor's annual income or net worth.
    - If the investor's annual net income AND net worth is > $100k, then the investor may invest 10% of the investor's annual income or net worth
  - Investors are subject to a $100k max across all Reg CF offerings in any 12-month period.
  - Issuer must provide financial statements based on offering size:
    - < $100k -› Internally prepared, certified statements
    - $100k - $500k 4 CPA reviewed statements
    - $500k - $1M -› CPA audited financials (or CPA reviewed statements if the issuer is a first time user of the system).
  - Issuer must file a robust disclosure document with the SEC.
  - Issuer is subject to annual SEC reporting obligations.
  - Offerings must be made through registered portals. The portals must be either (a) registered with the SEC as a broker-dealer; or (b) registered as a portal operator with the SEC and be a member of FINRA.

c. Title IV and Regulation A+: Reg A+, which went into effect in June 2015, has been described as a mini-IPO or "IPO-Lite," in that it allows nearly any company with principal offices in the U.S. or Canada to use internet crowdfunding to raise up to $50 million per year from any number of both accredited and non-accredited investors under a regulatory scheme that is far less burdensome than that of a traditional IPO. There is no prohibition on general solicitation, and offering companies are not required to

independently verify the sophistication (income or net worth) of their investors. Corporations, limited liability companies, and limited partnerships can take advantage of Reg A+'s two-tiered offering scheme and can sell nearly all types of securities, including equity, debt, and debt securities convertible into equity securities. Furthermore, the securities issued in Reg A+ will be unrestricted and freely transferable. One of the most exciting changes for companies seeking to raise capital under Reg A+ is that Tier 2 offerings are not subject to state Blue Sky registration and merit review (further explained below).

a. **Tier 1:** Tier 1 offerings are largely similar to old Regulation A offerings, but the old limit of $5 million raised in a 12-month period per issuer has now been increased to $20 million. Unlike Tier 2, there is no limit on the amount a non-accredited investor may invest in any Tier 1 offering.
    i. State Registration: Tier 1 still requires that offerors register under the Blue Sky laws of every state in which money is raised. However, the NASAA (North American Securities Administrators Association) recently launched a multi-state coordinated review program for Regulation A offerings that, if successful, would allow an issuer to register with multiple states by filing just one package with a relatively quick turnaround time. This could make Tier 1 much more attractive for many issuers, given its lower cost.
    ii. **Reporting:** Tier 1 is less burdensome than Tier 2 in terms of SEC requirements for initial filing and ongoing reporting. Tier 1 does not require audited financial statements nor ongoing

reporting. The only requirement is that offering companies file a Form 1-Z to report the completion of their offering.

b. Tier 2: Under Tier 2, companies are allowed to raise up to $50 million in a 12-month period and, most importantly, there is no requirement that the offering company register under any state Blue Sky laws because the federal Reg A+ preempts state law. Tier 2 offerings must only be registered with and approved by the SEC. On the other hand, Tier 2 limits investment by non-accredited investors to the greater of 10% of their annual income or net worth, excluding their primary residence, per offering. Tier 2 also includes substantially more onerous reporting requirements than Tier 1.

i. **Audited Financial Statements:** Tier 2 issuers must provide the SEC with two years of audited financial statements before approval, while Tier 1 issuers only need to provide "reviewed" statements.

ii. **Ongoing Reporting:** After a successful Tier 2 raise, Tier 2 issuers who have 300 or more record holders of the security offered must also file the following ongoing reports:

1. Detailed annual reports, using Form 1-K;
2. Semiannual reports, using Form 1-SA, including unaudited interim financial statements and a management discussion; and
3. Current event reports, using Form 1-U, reporting all fundamental changes.

Comparison of Rule 506(c), Reg CR and Reg A+

	Title II **Rule 506(c)**	**Title III** **Reg CR**	**Regulation A+** **Tier 1**	**Regulation A+** **Tier 2**
Maximum Dollars Raised	No maximum	$1 million per 12 months, including affiliates	$20 million per 12months	$50 million per 12 months
Permitted Investors	Only Accredited	Anyone	Anyone	Anyone
Per-Investor Limits	None	Yes-depends on income and net worth of investor, and applies to all Reg CF deals per year.	None	For non-accredited investors, 10% of income or net worth whichever is more, per deal
General Solicitation (Advertising) Permitted?	Yes	Yes, but only through portal	Yes	Yes
Testing the Waters Permitted	Yes	Yes	Yes	Yes
Securities Sold Through Third Party Portal?	Yes (but not required)	Yes (required)	Yes (but not required)	Yes (but not required)
Can Issuer Run Its Own Portal?	Yes	No	Yes	Yes
Pre-Sale Information Required	Moderate	Substantial	Very substantial, akin to a registration statement for a public company.	Very substantial, akin to a registration statement for public company.
Audited/Reviewed Financial Statements	No	Depends on size of offering; most	No	Yes

	Title II Rule 506(c)	Title III Reg CR	Regulation A+ Tier 1	Regulation A+ Tier 2
Required?		first time users will have to provide reviewed statements.		
Pre-Sale Approval Required	No	No	Yes-submission must be approved by SEC and the states where the securities will be sold (through a coordinated review).	Yes-Submission must be approved by SEC; state approval not required.
Investor Verification	Verification required	Self-certification	N/A	Self-certification
Ongoing Reporting	None	Moderate	None	Substantial ongoing reporting, akin to a min-public company, but waived depending on number of investors.
Length of Process	Fast	Moderate	Very Slow	Very Slow

5. **Other Crowdfunding Methods**

   a. **Rule 504 + State registration:** Theoretically, a company may legally conduct a small (less than $1 million) crowdfunding campaign by combing a Federal Rule 504 exemption with state registered offering.

      i. **General Solicitation under Rule 504:** Rule 504 allows an issuer to engage in general solicitation to accredited and non-accredited investors if the issuer either:

1. Registers the offering exclusively in one or more states that require a publicly filed registration statement and delivery of a substantive disclosure document to investors; or
2. Registers and sells the offering in a state that requires registration and disclosure delivery and also sells in a state without those requirements, so long as the company delivers the disclosure documents required by the state where the company registered the offering to all purchasers (including those in the state that has no such requirements).

ii. **SCOR Offering Option:** Some states provide a simplified process for "small corporate offering registrations" that otherwise are exempt from Federal registration under Rule 504.

b. Federal intrastate exemption + State crowdfunding exemption

i. **Section 3(a)(11) and Rule 147:** Another lesser known Federal securities exemption is the "intrastate" exemption embodied by Section 3(a)(11) of the Securities Act and Rule 147 promulgated by the SEC. Generally speaking, Section 3(a)(11) exempts from SEC registration any offering that is confined to the borders of a single state. To qualify for this exemption, the company must meet requirements of Rule 147, which include:

1. The company must be incorporated in the state in which it is offering the securities;

ii. The company must only sell the securities to individuals residing in that state;

iii. 80% of the company's consolidated gross revenues must be derived from the state in which the offering is conducted;

iv. 80% of the company's consolidated assets must be located within the state in which the offering is conducted; and

v. 80% of the offering's net proceeds must be intended to be used, and actually used, in connection with the operation of a business or real property, the purchase of real property located in, or the rendering of services, within the state in which the offering is conducted.

In addition to complying with the Federal "intrastate" exemption, the issuer must also satisfy the requirements of the state crowdfunding exemption. The requirements vary on a state-by-state basis, but they often impose:

i. Limits on the amount of money the issuer can raise;

ii. Limits on the amount of money that investors can invest (there are usually different limits for accredited investors vs. non-accredited investors);

iii. Disclosure requirements, including whether the issuer must provide purchasers with audited or reviewed financial statements;

iv. Escrow requirements;

v. Use of third party Internet portal; and

vi. Ongoing reporting requirements of the issuer.

c. General Solicitation in Intrastate Crowdfunding Offerings: There is no prohibition in Section 3(a)(11) or Rule 147 regarding general solicitation as long as such solicitation:

- complies with applicable state law; and
- does not result in an offer or sale to nonresidents of such state.

i. **SEC Guidance on Online Advertising:** In recent months, the SEC has provided guidance on how intrastate issuers can use the internet to publicize their offerings without having those online

advertisements result in an offer or sale to nonresidents of that state.

a. **Limiting Access to Out of State Residents:** In April 2014, the SEC clarified in Questions 141.03-141.05 that issuers hoping to utilize the Rule 147 exemption could use the Internet for general advertising and solicitation if they implemented measures to limit the offers to people within the issuer's state. In the context of an offering conducted within state crowdfunding requirements, those measures have to include:
    i. limiting access to information about a specific investment opportunity to persons who confirm they are residents of the relevant state "(for example, by providing a representation...such as a zip code or residence address)" and
    ii. providing a disclaimer and restrictive legend clarifying "that the offer is limited to residents of the relevant state under applicable law." (Question 141.04).
b. **IP Address Blocking:** In recent years, the SEC suggested what might be a simpler method of limiting the offer to those within the relevant state. The issuer can "implement technological measures" that limit any offers to persons with an IP address originating within the issuer's state and prevent offers to any individuals outside of the issuer's state (Question 141.05). However, the offer should still contain a disclaimer and restrictive legend. Presumably, this clarification allows issuers to skip the opt-in step where the viewer must verify they are residents of the relevant state before viewing the solicitation or advertisement. The simplification could greatly

increase the number of views and potentially improve the effectiveness of the communication.

6. **Capital Raising Pitfalls**

   a. **Rights of Ownership:** When considering whether to engage in a private offering to raise investment capital, a company must consider that investors will be owners of the company following the offering (albeit likely constituting a minority stake in the entity) and as, such, those investors will have certain rights afforded to them by law.

   b. **Limited Liability Companies**

      i. **Governance Rights:** A member's governance rights (i.e., the right to vote and control) in a limited liability company (LLC) depends upon whether the LLC is member-managed, board-managed or manager-managed. If the LLC is member-managed, each member has equal rights in the management and conduct of the company's activities. Even if the LLC is manager-managed, certain proposed actions require consent of the members. In a board-managed LLC, while the board of governors manages the LLC's affairs, the board is selected by a majority vote of the members.

      ii. **Right to Profits:** Unless otherwise provided in the LLC operating agreement, each member is entitled to participate in any distribution(s) of the company's profits (although as noted herein, some additional incentives may be necessary).

      iii. **Right to Information:** Members have the right to access information from the LLC that is material to the member's interest as a member.

      iv. **Minority Rights Regarding Oppressive Conduct:** A member does not have the right to dissent from a proposed course of action and

require the LLC to purchase his/her membership interest. However, some states provide for certain rights and remedies upon a court finding of "oppressive conduct" towards a minority member or members. Note, however, that the LLC operating agreement can limit the remedies that a court may impose, including but not limited to a court-ordered buyout.

c. **Corporations**
    i. **Voting Rights:** Unless otherwise provided within the corporation's articles of incorporation, a shareholder in a corporation has one vote per share. In addition, even if the articles provide that the holders of a particular class of shares are not entitled to voting rights, in some instances, these shareholders are entitled to voting rights as a matter of law.
    ii. **Rights to Information:** Shareholders are entitled to inspect books and certain records of the corporation.
    iii. **Dissenters Rights:** Most significantly, a shareholder of a corporation may dissent from, and obtain payment for the fair value of the shareholder's shares in the event of certain actions.
d. **Maintaining Control:** Frequently in private offerings for startup ventures, the capital contributed by investors through the offering often exceeds the amount of capital contributed by the company's founders. This can prove problematic for the founders seeking to maintain control of the entity by offering a minority ownership stake in the company through the offering. However, various incentives can be employed to make ownership of a minority interest in the business more palatable for investors.
e. **Changes to Terms of Offering; Rescission Offers:** Frequently a prospective investor will propose a counteroffer which differs from the

terms outlined in the offering document. If accepted, be aware that changed terms for even a single investor will trigger an obligation to make a rescission offer to prior investors.

7. **Other Sources of Funds**

   a. **Debt Financing:** Before embarking upon a private offering, it is best to consult with one or more lending institutions regarding a small business loan. Banks offer several small business loan programs, ranging from their own private loan programs to those loan programs established by the U.S. Small Business Administration (SBA). These types of programs are particularly useful when seeking financing to acquire equipment and/or real estate, given the ability to pledge these assets as collateral. Personal guaranties of those owners holding 20% or more is also generally required.

   b. **"Gap" Financing:** "Gap" financing refers to state and local financing incentives that can bridge the gap between a bank loan and an equity capital investment.

      i. **State Initiatives:** Some states have financing programs available for small businesses. These initiatives provide financing to help add new workers and retain high-quality jobs on a statewide basis. The focus is usually on industrial, manufacturing, and technology-related industries to increase the local and state tax base and improve economic vitality statewide.

      ii. **Local Financing Incentives:** Some cities have financing programs and incentives available for small businesses that locate within those cities. For example, some cities have a "Two-Percent Loan" program. Two-Percent Loans provide financing to small businesses (retail, service or light manufacturing) to purchase equipment

and/or to make building improvements. A private lender provides half the loan at market rate and the City provides the rest, up to $50,000 at 2 percent interest (up to $75,000 in designated neighborhood commercial districts). The loan term is set by the private lender and can be for up to 10 years. Bank fees vary, but the City charges a 1 percent origination fee with a minimum of $150 due at closing.

iii. **Tax Increment Financing:** Tax increment financing, or TIF, is a public financing method that is used as a subsidy for redevelopment, infrastructure, and other community-improvement projects. Through the use of TIF, municipalities can dedicate future tax revenues of a "particular business or group of businesses toward an economic development project in the community.

c. **Kickstarter/Rewards Based Crowdfunding:** In recent years, websites such as Kickstarter.com have popularized "rewards-based" crowdfunding. Kickstarter.com is a web portal that allows individuals to make a contribution to a particular project in exchange for some reward, typically some type of tangible product. Other variations of rewards-based crowdfunding include "founders clubs" (often used by local breweries and distilleries) which offer a variety of member benefits (but not any voting rights or share of profits in the enterprise so as to steer clear of the definition of a "security") in exchange for payment of a one-time membership fee. These types of rewards-based incentives should be structured in a way that minimizes liability for the company; i.e., the terms and conditions of membership should be in writing and should specify what happens to the memberships if the company is sold or ceases to do

business, that the memberships are non-transferrable and that the membership does not carry with it the rights of ownership.

8. **Practical Considerations in Structuring a Private Offering**
    a. **Put Rights:** A put or put option is a device which gives the owner of the put the right, but not the obligation, to sell his/her shares, at a specified price (the put price), by a pre-determined date to a given party (typically the company).
    b. **Call Rights:** In contrast to put rights, call rights or a call option refers to the right, but not the obligation, to buy an agreed number of shares within a certain time for a certain price (the "call price"). The seller is obligated to sell his/her shares to the buyer if the buyer so decides.
    c. **Preferred Distributions:** In some instances, it may be necessary or advantageous to incentivize potential investors by including a preferred distribution for investors. Most closely held companies give their board the discretion to make (or not make) distributions of profits and the amount of such distributions. A preferred distribution constitutes the company's contractual obligation to pay a minimum amount to the holders of such preferred distribution rights ahead of making any discretionary distributions to all owners. Often times preferred distributions are "cumulative", meaning that a preferred distribution which is not made in one year cumulates and is to be paid when the company has funds available to pay it.
    d. **Preferential/Accelerated Distributions:** In regards to general distributions of profits, in order to maintain governing control of the company following a private offering, and in addition or alternative to preferred distributions it may be necessary to offer investors a distribution

preference. For example, suppose the investors as a group own 40% of the company. A distribution preference would be to make 60% of the company's operating distributions to the investor class for a period of years until the investors recoup their initial investment. Upon doing so, distributions would then be made pro rata based upon ownership percentages.

e. Written Agreement. All of these mechanisms should be included in a written agreement between the owners (an operating agreement for an LLC or a shareholder agreement for a corporation), and new investors should be required to execute a joinder to the agreement in order to bind themselves to the agreement.

Licensing, Labeling, and Regulatory Compliance

Submitted by Jeff C. O'Brien

Licensing, Labeling, and Regulatory Compliance

Jeffrey C. O'Brien

Topics To Be Covered:

- The Regulatory Framework at the Local, State, and Federal Levels
- State and Federal Registration Requirements
  - (1) State-Level Requirements
  - (2) FDA and the Alcohol and Tobacco Tax and Trade Bureau (TTB)
- Overcoming Permitting/Licensing Issues
- How to Obtain Label Approval, Step by Step
  - (1) Distilled Spirits and Beer Labels – Requirements and Pitfalls
  - (2) Submission, Review and Approval
  - (3) How to Handle Appeals
- Land Use, Zoning, and Environmental Issues
- Considerations for Clients Doing Business in Multiple States

The Regulatory Framework at the Local, State, and Federal Levels

chestnut cambronne
ATTORNEYS AT LAW

The Goal:

State and Federal Registration Requirements:

(1)State-Level Registration

(2)FDA and the Alcohol and Tobacco Tax and Trade Bureau (TTB)

Overcoming Permitting/Licensing Issues

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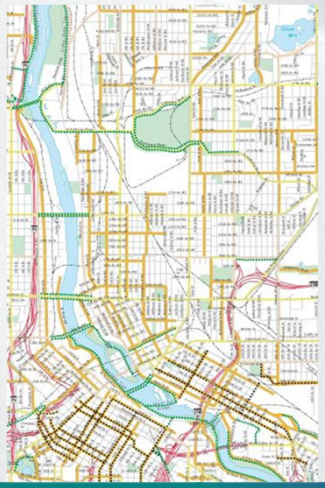
How to Obtain Label Approval, Step by Step

(1)Distilled Spirits and Beer Labels: Requirements and Pitfalls

(2)Submission, Review and Approval

(3)How to Handle Appeals

Land Use, Zoning, and Environmental Issues



Considerations for Clients Doing Business in Multiple States

Licensing, Labeling and Regulatory Compliance

Submitted by Jeffrey C. O'Brien

The Regulatory Framework at the Local, State and Federal Levels

A. Federal

i. Alcohol and Tobacco Tax and Trade Bureau (TTB)

a) The Alcohol and Tobacco Tax and Trade Bureau (TTB) regulates craft beer at the federal level. (Brew Law 101 at 59).

b) Anyone brewing beer for sale must obtain a Brewer's Notice from the TTB. You can find the form online at their website but be aware the process can take on average 129 days. *Id.*

c) The application requires a heavy amount of paperwork, including personal information for every officer, director, and shareholder who holds at least 10% interest in the company. *Id.*

ii. Food and Drug Administration (FDA)

a) Federally regulates any "facility that manufactures, processes, packs, or holds food or beverages – including alcoholic beverages – for consumption in the United States." *Id* at 60.

b) You must register with the FDA biannually, but there is no fee involved. *Id.*

B. State

1. Brewery License

   a. Qualifications:

   - An applicant must be 21 years of age, be of good moral character, be a legal resident of the United States and if applying as a Sole Proprietor, must be a legal resident of South Carolina for 30 days prior to submitting an application to this Department.
   - The applicant must be the owner of the business seeking the permit and must not previously have had a permit revoked within the past two (2) years.

- All principals, officers, agents, and employees listed on the permit must be over the age of 21 and be of good moral character. A current criminal history of not more than 90 days old, on each principal, officer, and employee must accompany this application.
- Please check with the city and/or county authorities to ensure you are in compliance with zoning laws and local business license requirements.

b. Tax Liabilities:

- A permit cannot be issued is the applicant has any outstanding tax liabilities with the SCDOR.

c. Sign Posting:

- An agent of the SC Law Enforcement Division (SLED) must post and remove a sign at the proposed place of business.
- This sign must remain posted at the location for at least 15 days, and maybe removed only by the SLED agent.
- Permits will not be issued until the afternoon of the fourth day after the sign is taken down; unless your published ad provides for a later date.

d. Newspaper Advertisements:

- A notice of application must be placed at least once a week for three (3) consecutive weeks in a newspaper approved by the department for your area.
- This notice must:
    - Be in the legal notices section of the newspaper or an equivalent section if the newspaper has no legal notices section;
    - Be in large type, covering a space of one column wide and at least two inches deep; and

- State the type of license applied for and the exact location of the proposed business.
- To complete your application you must submit your Affidavit of Publication and a copy of the ad furnished by the approved newspaper office.
- The ABL-32 lists all approved newspapers.

e. Requirements

- Completed application, signed, dated, and notarized.
- Submit nonrefundable filing fees: $300.00
- LICENSE FEES SHOULD NOT BE SUBMITTED UNTIL PERMIT IS APPROVED.
- Must complete ABL-946 (Consent and Waiver).
- Must attach copy of Articles of Incorporation, if applying as a corporation.
- Must attach a Certificate of Authority to do Business in South Carolina, obtained from the Secretary of State's office, if applying as a foreign corporation.
- Must attach a copy of Articles of Organization and Operating Agreement, if applying as a Limited Liability Corporation.
- Must attach copy of partnership agreement, if applying as a partnership or Limited Liability Partnership.
- All principals must attach a Criminal Records Check (CRC), not more than 90 days old.
- If the principal has lived in SC for more than two (2) years, obtain the CRC from SLED at www.sled.state.sc.us or from SLED Headquarters, Criminal Records Department, 4400 Broad River Rd., P.O. Box 21398, Columbia, SC 29221.
- If the principal has lived in SC less than two (2) years, obtain a CRC from previous state of residency AND a CRC from SLED.
- If principal is not a SC resident, obtain a CRC from current state of residency.

    - If you own the property, you must submit a copy of the deed or tax bill; if not, submit a copy of your lease.
    - Must attach completed residency status verification affidavit. Use Verification of Lawful Presence in the United States-Applicant and Principals (ABL-920) for each principal. Each principal, officer, owner, member, and/or partner MUST sign the form. If applicable include his/her non-citizen alien registration number and attach a copy of all appropriate immigration documents.
- General Location Requirements for Brewery to offer Samples:
- Sales to or samplings must be held in conjunction with a tour by the consumer of the licensed premise and the entire brewing process utilized at the licensed premise;
- Sales or samplings shall not be offered or made to, or allowed to be offered, made to, or consumed by an intoxicated person or a person who is under the age of 21;
- No more than a total of 48 ounces of beer brewed at the licensed premises, including amounts of samples offered and consumed with or without cost, shall be sold to a consumer for on-premises consumption within a 24 hour period.
- Of that 48 ounces of beer available to be sold to a consumer within a 24 hour period, no more than 16 ounces of beer with an alcoholic weight of above eight (8) percent, including any samples offered and consumed with or without cost, shall be sold to a consumer for on-premises consumption within a 24 hour period.
- General Location Requirements for Brewery to sell On-Premises Beer/Wine:
- A brewery licensed in this State is authorized to sell beer produced on its licensed premises to consumer for on-premises consumption within an area of its licensed premises approved by the rules and regulations DHEC governing each and drinking establishments and other food service establishments.
- Breweries approved through DHEC for eating and drinking establishments may also apply for a retail on-premises consumption permit for the sale of beer and wine of a producer that has been

purchased from a wholesaler through the three-tier distribution chain set forth in Section 61-4-730 and Section 61-4-940.

- The brewery must comply with all state and local laws concerning house of operation.
- The brewery must remit taxes to the Department of Revenue for beer sales in an amount equal to and in a manner required for taxes assessed by Section 12-21-1020and Section 12-21-1030. The brewery also must remit appropriate sales and use taxes and local hospitability taxes.

2. Brewpub Beer/Wine License

a. 120 Day Temporary

- The existing business must have a biennial permit that has not expired, been suspended or revoked.
- This permit must be attached with the completed ABL-901 application. A $25.00 fee is required for each temporary permit requested.
- Attach a copy of the receipt from the approved newspaper indicating you have paid for the Notice of Application.
- Attach a copy of the bill of sale, lease, probate document, divorce decree, eviction order, or document showing how the business was acquired.
- Be sure to indicate the Retail Sales Tax Number on the ABL-901 application.

b. Qualifications

- Authorizes the sale of beer and wine, the manufacture of beer and the consumption of these products on the permitted premises.
- An applicant must be 21 years of age, be of good moral character, be a legal resident of the United States and if applying as a sole proprietor, must be a legal resident of South

Carolina for 30 days prior to submitting an application to this department.

- The applicant must be the owner of the business seeking the license and must not previously have had a license revoked within the past five years.
- All principals, officers, agents, and employees listed on the license must be over the age of 21 and be of good moral character. A current criminal history background check of not more than 90 days old, on each principal, officer, and employee must accompany this application.
- Please check with the city and/or county authorities to insure you are in compliance with zoning laws and local business license requirements.

c. Tax Liabilities:

- A license or permit cannot be issued if the applicant or any principal has any outstanding tax liabilities with the SCDOR.

d. Sign Posting:

- An agent of the SC State Law Enforcement Division (SLED) must post and remove a sign at the proposed place of business.
- This sign must remain posted for at least 15 days, and may be removed only by the SLED agent. If the sign disappears before the SLED agent removes it, contact the SCDOR or SLED immediately.
- Permits/Licenses will not be issued until the afternoon of the fourth day after the sign is taken down by agent; unless your published ad provides for a later date.

e. Newspaper Advertisements:

- A notice of application must be placed at least once a week for three (3) consecutive weeks in a newspaper approved by the department for your area.
- This notice must:

    - Be in the legal notices section of the newspaper or an equivalent section if the newspaper has no legal notices section;
    - Be in large type, covering a space of one column wide and at least two inches deep; and
    - State the type of license applied for and the exact location of the proposed business.
    - To complete your application, you must submit your Affidavit of Publication and a copy of the ad furnished by the approved newspaper office.
    - Please refer to the ABL-32 for a complete list of approved newspapers.

f. Requirements

- Authorizes the sale of beer and wine, the manufacture of beer and the consumption of these products on the permitted premises.
- Completed application (ABL-901), signed, dated and notarized
- Submit nonrefundable filing fees - $300.00
- LICENSE FEES SHOULD NOT BE SUBMITTED UNTIL LICENSE IS APPROVED
- Submit an Affidavit of Publication from the newspaper running your ad. The affidavit must include a copy of your ad. If you just started your ad in the newspaper and have not received the ad and affidavit, you MUST include the receipt from the newspaper with your application. Forward the ad and affidavit as soon as the newspaper provides it to you. Your permit cannot be issued until this is received.
- Must complete the ABL-946 (Consent and Waiver)
- Must attach copy of Articles of Incorporation, if applying as a corporation.

- Must attach a Certificate of Authority to do Business in South Carolina, obtained from the Secretary of State's office, if applying as a foreign corporation.
- Must attach a copy of Articles of Organization and Operating Agreement, or LLC Supplemental Information Form (ABL-919), if applying as a Limited Liability Corporation.
- Must attach copy of partnership agreement, if applying as a partnership or Limited Liability Partnership.
- All principals must attach a criminal records check (CRC), not more than 90 days old.
- If the principal has lived in SC for more than 2 years, obtain the CRC from SLED at www.sled.state.sc.us or SLED Headquarters, Criminal Records Department 4400 Broad River Rd., P.O. Box 21398, Columbia, SC 29221.
- If the principal has lived in SC less than 2 years, obtain a statewide CRC from previous state of residency AND a CRC from SLED.
- If principal is not a SC resident, obtain a statewide CRC from current state of residency.
- Must attach a copy of your lease, deed or tax bill for the location for which you are seeking a license. The lease, deed, or tax bill must be in the applicant's name and list the physical address of the business location.
- Must attach completed residency status verification affidavit. Use Verification of Lawful Presence in the United States– Applicant and Principals (ABL-920) for each principal. Each principal, officer, owner, member, and/or partner MUST sign the form. If applicable, include his/her non-citizen alien registration number and attach a copy of all appropriate immigration documents.

3. In State Liquor Manufacturer

   a. Qualifications

      - An entity operating a plant or place of business in this State for distilling, rectifying, brewing, fermenting, blending, or bottling alcoholic liquors.

- An applicant must be 21 years of age, be of good moral character, be a legal resident of the United States and if applying as a sole proprietor, must be a legal resident of South Carolina for 30 days prior to submitting an application to this department.
- The applicant must be the owner of the business seeking the license and must not previously have had a license revoked within the past five years.
- All principals, officers, agents, and employees listed on the license must be over the age of 21 and be of good moral character. A current criminal history background check of not more than 90 days old, on each principal, officer, and employee must accompany this application.
- Please check with the city and/or county authorities to ensure you are in compliance with zoning laws and local business license requirements.

b. Tax Liabilities:

- A license cannot be issued if the applicant or any principal has any outstanding tax liabilities with the SCDOR.

c. Sign Posting:

- An agent of the SC State Law Enforcement Division (SLED) must post and remove a sign at the proposed place of business.
- This sign must remain posted for at least 15 days, and may be removed only by the SLED agent. If the sign disappears before the SLED agent removes it, contact the SCDOR or SLED immediately.
- Licenses will not be issued until the afternoon of the fourth day after the sign is taken down by the agent; unless your published ad provides for a later date.

d. Newspaper Advertisements:

- A notice of application must be placed at least once a week for three (3) consecutive weeks in a newspaper approved by the department for your area.
- This notice must:
    - Be in the legal notices section of the newspaper or an equivalent section if the newspaper has no legal notices section;
    - Be in large type, covering a space of one column wide and at least two inches deep; and
    - State the type of license applied for and the exact location of the proposed business.
    - To complete your application, you must submit your Affidavit of Publication and a copy of the ad furnished by the approved newspaper office.

e. Requirements

- An entity operating a plant or place of business in this State for distilling, rectifying, brewing, fermenting, blending, or bottling alcoholic liquors.
- Completed application (ABL-902), signed, dated and notarized
- Submit nonrefundable filing fees: $200.00
- Submit an Affidavit of Publication from the newspaper running your ad. The affidavit must include a copy of your ad. If you just started the ad in the newspaper and have not received the ad and affidavit, you MUST include the receipt from the newspaper with your application. Forward the ad and affidavit as soon as the newspaper provides it to you. Your license cannot be issued until this is received.
- Must complete the ABL-946 (Consent and Waiver)
- Must attach copy of Articles of Incorporation, if applying as a corporation

- Must attach a Certificate of Authority to do Business in South Carolina, obtained from the Secretary of State's office, if applying as a foreign corporation
- Must attach a copy of Articles of Organization and Operating Agreement, if applying as a Limited Liability Corporation, LLC
- Must attach copy of partnership agreement, if applying as a partnership or Limited Liability Partnership.
- All principals must attach a criminal records check (CRC), not more than 90 days old.
- If the principal has lived in SC for more than 2 years, obtain the CRC from SLED at www.sled.state.sc.us or SLED Headquarters, Criminal Records Department, 4400 Broad River Rd., P.O. Box 21398, Columbia, SC 29221.
- If the principal has lived in SC less than 2 years, obtain a statewide CRC from previous state of residency AND a CRC from SLED.
- If principal is not a SC resident, obtain a statewide CRC from current state of residency.
- If you own the property, you must submit a copy of the deed or tax bill; if not, submit a copy of your lease
- Must attach completed residency status verification affidavit. Use Verification of Lawful Presence in the United States– Applicant and Principals (ABL-920) for each principal. Each principal, officer, owner, member, and/or partner MUST sign the form. If applicable, include his/her non-citizen alien registration number and attach a copy of all appropriate immigration documents

C. <u>Local</u>

a) Growlers

b) Tap Rooms/ Cocktail Rooms

c) Zoning/Land Use

Top Permitting/Licensing Issues

a) First and foremost, it is imperative to understand what permits and licenses must be obtained at each level of government before operations can legally begin.

b) At the Federal level, when you are seeking a brewer's notice or distilled spirits plant license, be sure that your application is complete and accurate, as incomplete applications will not be reviewed and will ultimately be dismissed.

c) At the state level, be aware of which agency or agencies are responsible for reviewing your application and provide such agency/agencies with all required and requested documentation in order to ensure expeditious review and approval.

d) It is also imperative to understand what local requirements exist as to the brewery or distillery, be they taproom/cocktail room licenses or other issues (such as growler sales restrictions and/or garden variety land use/zoning requirements).

D. <u>Navigating TTB Labeling Regulations – and Landmines to Avoid!</u>

i. **TTB:** At the federal level, breweries and distilleries are regulated via the Alcohol Tobacco Tax and Trade Bureau, an agency falling under the U.S. Department of Treasury. Commonly referred to as the "TTB", this agency grew out of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") in 2003. The TTB handles all federal liquor law issues including tax revenues, permits, licenses, tax audits, trade investigation and labels.

ii. Navigating Local, State and Federal Rules, Regulations and Requirements:

While the TTB's licensing requirements and regulations apply for breweries and distilleries in any state within the U.S., state and local laws vary by jurisdiction.

iii. State and Federal, TTB Registration Requirements

a. <u>Federal</u>

1. The TTB requires anyone brewing beer for sale to acquire a Brewer's Notice. Historically, the process for obtaining a Brewer's Notice through the TTB was time consuming, but with the recent craft brewing and distilling boom, the TTB has streamlined the process through its Permits Online site, https://www.ttbonline.gov/permitsonline.
2. Information and documents to be submitted to the TTB in connection with the Brewer's Notice application include the following:
    - Articles of Organization (LLC) / Articles of Incorporation Corp.)
    - Operating Agreement (LLC) / By Laws (Corp.)
    - Federal EIN (from IRS)
    - Owner Officer Questionnaires (for each owner of 10%+ and each officer)
    - List of all owners and officers identifying percentage of voting ownership, amount of funds invested, etc. (if owner is an entity, EIN)
    - Source of Funds Documents (bank statements, loan documents, etc.)
    - Diagram of Premises
    - Description of Property (usually metes & bounds is best)
    - Description of Equipment (more reviewers are requiring this, at least provide size of tanks)
    - Description of the Building (walkthrough of the brewery premises)

- Environmental Questionnaire (number of employees, amount of waste, disposal of liquid and solid waste, electric/gas provider name, etc.)
- Supplemental (disposal of waste into navigable waterways, etc.)
- Brewer's Bond
- Consent of Surety (if using a non-contiguous warehouse, alternating premises between a brewery and a distillery, running an alternating proprietorship, etc.)
- Lease agreement or mortgage (with permission to use premises as a brewery/distillery)
- Assumed name registration (if applicable)
- Security statement
- Designation of a main contact person
- Copy of ID for main contact person
- Signing authority resolution for application contact
- TTB's Signing Authority Form
- Power of attorney (if being filed by an attorney)
- Other (historic buildings, variance request, etc.

3. Similarly, anyone seeking to produce distilled spirits must obtain a distilled spirits plant license through the TTB with similar requirements as for the Brewer's Notice.

b. <u>State Licensing Issues</u>

i. While the TTB's licensing requirements and regulations apply for breweries and distilleries in any state within the U.S., state and local laws vary by jurisdiction.

c. Formula Approvals

i. <u>Beer Formulas</u>

1. Beers do not typically require a formula approval, unless they contain a non-traditional beer ingredient or are made using a non-traditional brewing method.

2. In 2015, TTB issued a ruling broadly expanding the definition of "traditional." Under the new rule, traditional ingredients and processes have been expanded, and are listed in the attachment on the next page.

3. If the beer includes a "non-traditional" fruit, spice (e.g., elderberry), or "sweetener" (e.g., aspartame), or contains a coloring (e.g., Blue No. 1), flavoring (e.g., an extract), or TTB limited ingredient (e.g., calcium chloride), or is made by a "non-traditional" process (e.g., "ice distilling"), the beer requires a TTB formula approval before TTB will issue a COLA approval. For more information on ingredient issues, see Appendix 1.

ii. <u>Spirits formulas</u>

1. Most traditional spirits do not require a formula approval, unless they contain a restricted product (e.g., thujone), or are infused with flavors or colored. Occasionally, a product must also be sent in to TTB's lab for analysis. Lab analysis is more typically required for imported products to make sure certain requirements are met. TTB's chart is attached hereto as Appendix 2, which shows if/when formula and/or laboratory approval is required for a distilled spirits product prior to label submission.

iii. <u>Labeling</u>

1. Another integral responsibility of the TTB is to regulate and approve labels for packaging beer and spirits. Section 105(e) of the Federal

Alcohol Administration Act (27 USC 205(e)) authorizes the Secretary of the Treasury to issue regulations regarding product labeling that:

- (1) ensure that consumers are provided with adequate information as to the identity and quality of alcohol beverages, and

- (2) prevent consumer deception. The Secretary has delegated to the Alcohol and Tobacco Tax and Trade Bureau (TTB) authority to administer the regulations promulgated under section 105(e). Section 105(e) and the TTB regulations require a Certificate of Label Approval ("COLA") for each alcohol beverage product regulated by the agency. TTB issues COLAs on TTB Form 5100.31.

2. First, you must register for the COLA's. Appendix 3 contains instructions on how to successfully register using the online system. If you choose not to file electronically, you must TTB Form 5100.3, in duplicate form, to the following address:

Advertising, Labeling and Formulation Division
Alcohol and Tobacco Tax and Trade Bureau
1310 G Street, NW, Box 12
Washington, DC 20005

3. A copy of Form 5100.3 is included at Appendix 4.

4. NOTE: You must obtain label approval prior to bottling if you are shipping out of state.

5. For many alcohol beverage products, TTB requires a product evaluation to determine whether a proposed label identifies the product in an adequate and non-misleading way. Pre-COLA product evaluation entails a review of a product's ingredients and formulation and also

may include a laboratory analysis of the product. Laboratory analysis involves a chemical analysis of a product.

6. Such pre-COLA product evaluations ensure that:

- No alcohol beverage contains a prohibited ingredient.
- Limited ingredients are used within prescribed limitations or restrictions.
- Appropriate tax and product classifications are made.
- Alcohol beverages labeled without a sulfite declaration contain less than 10 parts per million (ppm) of sulfur dioxide.

7. The type of pre-COLA product evaluation required for a particular product depends on that product's formulation and origin. TTB regulations require formulas most commonly when flavoring or coloring materials are added. Field investigations can be used to verify the accuracy of these documents. Since TTB does not have access to foreign plants, some imported products are subject to laboratory analysis or pre-import letter approval.

8. The relevant Federal regulations for labeling and advertising of malt beverages can be found Part 7 of Title 27 of the Code of Federal Regulations. Processing times for COLA's can be found : https://www.ttb.gov/labeling/processing-times.shtml.

§7.11 Use of ingredients containing alcohol in malt beverages; processing of malt beverages

(a) *Use of flavors and other nonbeverage ingredients containing alcohol—*

i. (1) *General.* Flavors and other nonbeverage ingredients containing alcohol may be used in producing a malt beverage. Except as provided in paragraph (a)(2) of this section, no more than 49% of the overall alcohol content of the finished product may be derived from the addition of flavors and other nonbeverage ingredients containing alcohol. For example, a finished malt beverage that contains 5.0% alcohol by volume must derive a minimum of 2.55% alcohol by volume from the fermentation of barley malt and other materials and may derive not more than 2.45% alcohol by volume from the addition of flavors and other nonbeverage ingredients containing alcohol.

ii. (2) In the case of malt beverages with an alcohol content of more than 6% by volume, no more than 1.5% of the volume of the malt beverage may consist of alcohol derived from added flavors and other nonbeverage ingredients containing alcohol.

(b) *Processing.* Malt beverages may be filtered or otherwise processed in order to remove color, taste, aroma, bitterness, or other characteristics derived from fermentation.

iv. Labeling Requirements

Permission to Re-label: Application for permission to re-label shall be accompanied by two complete sets of the old labels and two complete sets of any proposed labels, together with a statement of the reasons for

relabeling, the quantity and the location of the malt beverages, and the name and address of the person by whom they will be relabeled.

Land Use, Zoning and Environmental Issues

A. Industrial Waste & Water

- **a.** Breweries use a substantial amount of water and create a large amount of byproduct waste through their operations. (Brewlaw p. 47). The spent grain is considered "industrial waste and must be handled accordingly". *Id*.
- **b.** Be aware that some cities and locations are not friendly to breweries because they use a substantial amount of water. *Id*. Additionally, at drought-stricken areas, your brewery will need to expend more on water as it may be more expensive. *Id*.

B. Pollutants

- **a.** Brewing creates pollutants that must be handled appropriately. These pollutants are governed by different agencies. *Id*.
- **b.** "The wastewater created by boilers, referred to as effluent, is regulated by the Environmental Protection Agency (EPA) for nitrogen oxide level." *Id*.
- **c.** Plan to have a silo? You need to obtain a permit from the Air Pollution Control District (APCD). *Id* at 48.

C. Zoning & Licenses

Considerations for Clients Doing Business in Multiple States

A. Onus is on the brewery to ensure they are compliant with each state and federal law.

B. Non-extensive checklist for laws:

a. Environmental laws in different states;

b. Zoning;

c. Licensing;

d. Labeling;

APPENDIX 1

Exempt Ingredients and Processes Determined to be Traditional Under TTB Ruling 2015–1

TTB Ruling 2015-1
Attachment 1

Exempt Ingredients Under the Conditions of TTB Ruling 2015-1

Industry members are responsible for ensuring that all ingredients, including any parts of fruit, used in the production of malt beverages or beer are wholesome products suitable for human food consumption and comply with applicable ingredient safety regulations of the Food and Drug Administration.

INGREDIENT	DESCRIPTION/LIMITATION
AGAVE	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
ALLSPICE	As outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
ANISE	As outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
APPLES	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
APRICOTS	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
BASIL	Includes bush basil and sweet basil, as outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
BILBERRIES	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
BLACKBERRIES	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
BLUEBERRIES	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
BLACK CURRANTS	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups. *Also see RED CURRANTS*
BLOOD ORANGES	Whole, juice, puree, concentrate, peel, or zest. ***Does not*** include extracts, essential oils, or syrups.
BOYSENBERRIES	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
BROWN SUGAR	When brewers use brown sugar in the fermentation of a malt beverage, the designation is not required to refer to the ingredient. Instead, the malt beverage may be labeled as a "beer" or "ale" and so forth.
CANDY (CANDI) SUGAR	When brewers use candy/candi sugar in the fermentation of a malt beverage, the designation is not required to refer to the ingredient. Instead, the malt beverage may be labeled as a "beer" or "ale" and so forth.
CAMOMILE (CHAMOMILE)	Includes English, Roman, German, and Hungarian, as outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
CAPSICUM	As outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.

OPR: RRD Updated 12/17/2015

INGREDIENT	DESCRIPTION/LIMITATION
CARAWAY, BLACK CARAWAY (BLACK CUMIN)	Includes caraway, black caraway (black cumin), as outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
CARDAMOM (CARDAMON)	As outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
CASSIA	Includes Chinese, Padang, Batavia, and Saigon cassias, as outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
CHERRIES	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
CHICORY	Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
CHOCOLATE	***Does not*** include extracts, essential oils, or syrups. Brewers may make non-misleading references to the use of chocolate malt by designating a product as, for example, "chocolate stout," even though it contains no added chocolate.
CINNAMON	Includes Ceylon, Chinese, and Saigon cinnamons, as outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
CLEMENTINE	Whole, juice, puree, concentrate, peel, or zest. ***Does not*** include extracts, essential oils, or syrups.
CLOVE	Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
COCOA	Includes cocoa powder or cocoa nibs. ***Does not*** include extracts, essential oils, or syrups.
COCONUT	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
COFFEE	Coffee beans, coffee grounds, or coffee brewed with water. ***Does not*** include extracts, essential oils, or syrups.
CORIANDER	As outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
CRANBERRIES	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
CUMIN (CUMMIN), BLACK CUMIN (BLACK CARAWAY)	Includes cumin (cummin) and black cumin (black caraway), as outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
DATES	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
ELDER FLOWERS	As outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
FIGS	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
GINGER	As outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
GRAINS OF PARADISE	As outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.

INGREDIENT	DESCRIPTION/LIMITATION
GRAPES	Whole, juice, puree, concentrate, or grape must. ***Does not*** include extracts, essential oils, or syrups. **REMINDER:** As set forth in the ruling, any exemption from the formula requirement applies only when used in the production of a malt beverage as defined at 27 CFR 7.10.
GRAPEFRUIT	Whole, juice, puree, concentrate peel, or zest. ***Does not*** include extracts, essential oils, or syrups.
HIBISCUS	Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
HONEY	***Does not*** include extracts, essential oils, or syrups.
HUCKLEBERRIES	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
JASMINE	Spices may be whole or ground. ***Does not include extracts, essential oils, or syrups.***
JUNIPER BERRIES	Spices may be whole or ground. ***Does not include extracts, essential oils, or syrups.***
KALE	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
KIWI	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
KUMQUAT	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
LACTOSE	When brewers use lactose in the production of a malt beverage, the designation is not required to refer to the ingredient. Instead, the malt beverage may be labeled as a "beer" or "ale" and so forth.
LEMONS	Whole, juice, puree, concentrate, peel, or zest. ***Does not*** include extracts, essential oils, or syrups.
LEMON GRASS	Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
LIME	Whole, juice, puree, concentrate, peel, or zest. ***Does not*** include extracts, essential oils, or syrups.
MACE	As outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
MANGO	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
MARIONBERRIES	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
MAPLE SUGAR/SYRUP	When brewers use maple sugar/syrup in the fermentation of a malt beverage, the designation is not required to refer to the ingredient. Instead, the malt beverage may be labeled as a "beer" or "ale" and so forth.
MOLASSES/BLACKSTRAP MOLASSES	When brewers use molasses/blackstrap molasses in the fermentation of a malt beverage, the designation is not required to refer to the ingredient. Instead, the malt beverage may be labeled as a "beer" or "ale" and so forth.
NECTARINE	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
NUTMEG	As outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.

INGREDIENT	DESCRIPTION/LIMITATION
ORANGES	Whole, juice, puree, concentrate, peel, or zest. ***Does not*** include extracts, essential oils, or syrups.
ORANGE BLOSSOM/FLOWER	Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
OYSTERS/OYSTER SHELLS	Whole oysters, juice, or puree. ***Does not*** include extracts, essential oils, or syrups. Oyster shells may be used when consistent with good commercial practice.
PASSIONFRUIT	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
PEARS	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
PEACHES	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
PEPPER, BLACK OR WHITE	Includes black pepper and white pepper, as outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
PEPPER, CAYENNE OR RED	Includes cayenne peppers and red peppers, as outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
PEPPERS	Includes hot, chili and bell peppers. Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
PEPPERMINT	As outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
PINEAPPLE	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
PLUM	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
POMEGRANATE	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
PUMPKINS	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
RAISINS	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
RASPBERRIES	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
RED CURRANTS	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups. *Also see BLACK CURRANTS*
ROSEMARY	As outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
SAFFRON	As outlined in FDA's GRAS listing at 21 CFR 182.10. *Exempt when used only as a flavor and not exclusively as a coloring material.* Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
SAGE, GREEK SAGE	As outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.

INGREDIENT	DESCRIPTION/LIMITATION
SODIUM CHLORIDE	When brewers use sodium chloride in the fermentation or flavoring of a malt beverage, the designation is not required to refer to the ingredient. Instead, the malt beverage may be labeled as a "beer" or "ale" and so forth.
SPEARMINT	As outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
STAR ANISE	As outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
STRAWBERRIES	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
SWEET POTATOES	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
TANGERINE	Whole, juice, puree, concentrate, peel, or zest. ***Does not*** include extracts, essential oils, or syrups.
TEA	Tea may be whole leaves or ground. ***Does not*** include extracts, essential oils, or syrups. **REMINDER:** as set forth in the ruling, the exemption from any formula requirement applies only when used in the production of a malt beverage as defined at 27 CFR 7.10, and would not apply to products (such as many kombucha products) fermented solely from tea and sugar, which are beer under the IRC, but is not a "malt beverage."
THYME/WILD OR CREEPING THYME	Includes thyme and wild or creeping thyme, as outlined in FDA's GRAS listing at 21 CFR 182.10. Spices may be whole or ground. ***Does not*** include extracts, essential oils, or syrups.
VANILLA	As outlined in FDA's GRAS listing at 21 CFR 182.10. **REMINDER:** As set forth in the ruling, the exemption of vanilla from the formula requirement applies only to the use of vanilla in the form of whole or crushed vanilla beans. ***Does not*** include vanilla powders, extracts, essential oils, or syrups.
WATERMELON	Whole, juice, puree, or concentrate. ***Does not*** include extracts, essential oils, or syrups.
YUZU	Whole, juice, puree, concentrate, peel, or zest. ***Does not*** include extracts, essential oils, or syrups.

Processes Determined to be Traditional

Industry members may use woodchips, staves, or spirals derived from barrels that were previously used in the production or storage of distilled spirits or wine as part of the process of aging beer, as well as woodchips previously used in the aging of distilled spirits or wine, provided that this process does not add any discernible quantity of distilled spirits or wine to the beer.

- Aging beer in plain barrels or with plain woodchips, spirals or staves made of any type of wood.
- Aging beer in barrels, containing no discernible quantity of wine or distilled spirits, that were previously used in the production or storage of wine or distilled spirits.
- Aging beer with woodchips, spirals or staves derived from barrels, containing no discernible quantity of wine or distilled spirits, that were previously used in the production or storage of wine or distilled spirits, or with woodchips, containing no discernible quantity of wine or distilled spirits, that were previously used in the aging of wine or distilled spirits.

APPENDIX 2

PRE-COLA PRODUCT EVALUATIONS FOR DISTILLED SPIRITS PRODUCTS

The following chart lists the current pre-COLA product evaluation requirements for a number of distilled spirits products. An "X" in the table indicates that a pre-COLA product evaluation of the type shown is required as a condition of COLA approval for the product and must be obtained prior to applying for label approval. A copy of the approved pre-COLA document must be submitted with the COLA application. In addition to the pre-COLA product evaluations noted below, a sulfite analysis is required for standard wines that do not have a sulfite declaration on the label. Descriptions of the pre-COLA product evaluations are provided in the text of Industry Circular 2007–4.

This chart is provided as general guidance. Particular circumstances may dictate the need for a pre-COLA product evaluation for a specific product even though no such requirement is indicated on the chart.

PRODUCT	DOMESTIC (D) OR IMPORTED (I)	LABORATORY ANALYSIS	PRE-IMPORT LETTER	FORMULA (TTB F 5100.51 or TTB F 5110.38)	COMMENT
A Blend Of Straight Bourbon Whiskies Or Blended Straight Bourbon Whiskies	D	-	-	-	PRODUCT OF U.S. ONLY
	I	-	-	-	
A Blend Of Straight Corn Whiskies Or Blended Straight Corn Whiskies	D	-	-	-	
	I	X	-	-	
A Blend Of Straight Malt Whiskies Or Blended Straight Malt Whiskies	D	-	-	-	
	I	X	-	-	
A Blend Of Straight Rye Malt Whiskies Or Blended Straight Rye Malt Whiskies	D	-	-	-	
	I	X	-	-	
A Blend Of Straight Rye Whiskies Or Blended Straight Rye Whiskies	D	-	-	-	
	I	X	-	-	
A Blend Of Straight Wheat Whiskies Or Blended Straight Wheat Whiskies	D	-	-	-	
	I	X	-	-	
A Blend Of Straight Whiskies Or Blended Straight Whiskies	D	-	-	-	
	I	X	-	-	
Advocaat	D	-	-	X	
	I	-	X	-	
Alcohol	D	-	-	-	
	I	-	-	-	
Amaretto	D	-	-	X	
	I	-	X	-	
Anise	D	-	-	X	
	I	-	X	-	
Anisette	D	-	-	X	
	I	-	X	-	

PRODUCT	DOMESTIC (D) OR IMPORTED (I)	LABORATORY ANALYSIS	PRE-IMPORT LETTER	FORMULA (TTB F 5100.51 or TTB F 5110.38)	COMMENT
Applejack	D	-	-	X*	*If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	X	-	-	
Apricot Sour	D	-	-	X	
	I	-	X	-	
Aquavit	D	-	-	X	
	I	-	X	-	
Arack/Arak	D	-	-	X	
	I	-	X	-	
Armagnac	D	-	-	X*	*PRODUCT OF FRANCE ONLY; however, harmless coloring/flavoring/ blending materials may be added in the U.S. If harmless coloring/ flavoring/blending materials are added in the U.S., a formula is required.
	I	-	-	-	
Bitters	D	-	-	X	
	I	-	X	-	
Black Russian	D	-	-	X	
	I	-	X	-	
Blended Applejack Or Applejack – A Blend	D	-	-	X	
	I	X	-	-	
Blended Bourbon Whisky Or Bourbon Whisky – A Blend	D	-	-	X	PRODUCT OF U.S. ONLY
	I	-	-	-	
Blended Canadian Whisky Or Canadian Whisky – A Blend	D	-	-	-	PRODUCT OF CANADA ONLY
	I	-	-	-	
Blended Corn Whisky Or Corn Whisky – A Blend	D	-	-	X	
	I	X	-	-	
Blended Irish Whisky Or Irish Whisky – A Blend	D	-	-	-	PRODUCT OF THE REPUBLIC OF IRELAND OR NORTHERN IRELAND ONLY
	I	-	-	-	
Blended Light Whisky Or Light Whisky – A Blend	D	-	-	X	PRODUCT OF U.S. ONLY
	I	-	-	-	
Blended Malt Whisky Or Malt Whisky – A Blend	D	-	-	X	
	I	X	-	-	
Blended Rye Malt Whisky Or Rye Malt Whisky – A Blend	D	-	-	X	
	I	X	-	-	
Blended Rye Whisky Or Rye Whisky – A Blend	D	-	-	X	
	I	X	-	-	
Blended Scotch Whisky Or Scotch Whisky – A Blend	D	-	-	-	PRODUCT OF SCOTLAND ONLY
	I	-	-	-	
Blended Wheat Whisky Or Wheat Whisky – A Blend	D	-	-	X	
	I	X	-	-	

PRODUCT	DOMESTIC (D) OR IMPORTED (I)	LABORATORY ANALYSIS	PRE-IMPORT LETTER	FORMULA (TTB F 5100.51 or TTB F 5110.38)	COMMENT
Blended Whisky Or Whisky – A Blend	D	-	-	X	
	I	X	-	-	
Bourbon Cordial/Bourbon Liqueur	D	-	-	X	PRODUCT OF U.S. ONLY
	I	-	-	-	
Bourbon Whisky	D	-	-	-	PRODUCT OF U.S. ONLY
	I	-	-	-	
Brandy (Grape Only)	D	-	-	X*	*If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	-	-	-	
Brandy Alexander	D	-	-	X	
	I	-	X	-	
Brandy Cordial/ Brandy Liqueur	D	-	-	X	
	I	-	X	-	
Calvados	D	-	-	X*	*PRODUCT OF FRANCE ONLY; however, harmless coloring/flavoring/ blending materials may be added in the U.S. If harmless coloring/ flavoring/blending materials are added in the U.S., a formula is required.
	I	-	-	-	
Canadian Whisky	D	-	-	-	PRODUCT OF CANADA ONLY
	I	-	-	-	
Cognac	D	-	-	X*	*PRODUCT OF FRANCE ONLY; however, sugar, caramel and/or oak chip infusion may be added in the U.S. If sugar, caramel and/or oak chip infusion are added in the U.S., a formula is required.
	I	-	-	-	
Cordial	D	-	-	X	
	I	-	X	-	
Corn Whisky	D	-	-	X*	*If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	X	-	-	
Crème De _____	D	-	-	X	
	I	-	X	-	
Curacao	D	-	-	X	
	I	-	X	-	
Distilled Spirits Specialty (Product requiring a statement of composition)	D	-	-	X	
	I	-	X	-	
Dried Fruit Brandy (e.g., "Raisin Brandy")	D	-	-	X*	*If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	X	-	-	
Egg Nog	D	-	-	X	
	I	-	X	-	

PRODUCT	DOMESTIC (D) OR IMPORTED (I)	LABORATORY ANALYSIS	PRE-IMPORT LETTER	FORMULA (TTB F 5100.51 or TTB F 5110.38)	COMMENT
Flavored Brandy	D	-	-	X	
	I	X	-	-	
Flavored Gin	D	-	-	X	
	I	X	-	-	
Flavored Rum	D	-	-	X	
	I	X	-	-	
Flavored Vodka	D	-	-	X	
	I	X	-	-	
Flavored Whisky	D	-	-	X	
	I	X	-	-	
Fruit Brandy (Other Than Grape, e.g., "Pear Brandy")	D	-	-	X*	*If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	X	-	-	
Gin - Compound	D	-	-	X	
	I	-	X	-	
Gin - Distilled	D	-	-	-	
	I	-	X	-	
Gin - Redistilled	D	-	-	X	
	I	-	X	-	
Gin Cordial/Gin Liqueur	D	-	-	X	
	I	-	X	-	
Goldwasser	D	-	-	X	
	I	-	X	-	
Grain Spirits	D	-	-	-	
	I	-	-	-	
Grappa/Grappa Brandy	D	-	-	X*	*If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	X	-	-	
Imitation Distilled Spirits	D	-	-	X	
	I	X	-	-	
Immature Brandy (Grape Only)	D	-	-	X*	*If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	-	-	-	
Irish Whisky	D	-	-	-	PRODUCT OF THE REPUBLIC OF IRELAND OR NORTHERN IRELAND ONLY
	I	-	-	-	
Kirschwasser	D	-	-	X	
	I	X	-	-	
Kummel	D	-	-	X	
	I	-	X	-	
Lees Brandy (Any Kind)	D	-	-	X*	*If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	X	-	-	

PRODUCT	DOMESTIC (D) OR IMPORTED (I)	LABORATORY ANALYSIS	PRE-IMPORT LETTER	FORMULA (TTB F 5100.51 or TTB F 5110.38)	COMMENT
Light Whisky	D	-	-	X*	PRODUCT OF U.S. ONLY *If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	-	-	-	
Liqueur	D	-	-	X	
	I	-	X	-	
Malt Whisky	D	-	-	X*	*If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	X	-	-	
Marc Brandy (Any Kind)	D	-	-	X*	*If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	X	-	-	
Mescal/Mezcal	D	-	-	-	PRODUCT OF MEXICO ONLY
	I	-	-	-	
Neutral Brandy (Any Kind)	D	-	-	X*	*If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	X	-	-	
Neutral Spirits	D	-	-	-	
	I	-	-	-	
Ouzo	D	-	-	X	
	I	-	X	-	
Peppermint Schnapps	D	-	-	X	
	I	-	X	-	
Pisco	D	-	-	X*	*If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	-	-	-	
Pisco Sour	D	-	-	X	
	I	-	X	-	
Pomace Brandy (Any Kind)	D	-	-	X*	*If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	X	-	-	
Powdered Distilled Spirits	D	-	-	X	
	I	X	-	-	
Raki	D	-	-	X	
	I	-	X	-	
Recognized Cocktails	D	-	-	X*	*The product must appear in an industry recognized bartending guide such as "Mr. Bostons"©
	I	-	X*	-	
Residue Brandy (Any Kind)	D	-	-	X*	*If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	X	-	-	
Rock And Bourbon	D	-	-	X	PRODUCT OF U.S. ONLY
	I	-	-	-	
Rock And Brandy	D	-	-	X	
	I	-	X	-	

PRODUCT	DOMESTIC (D) OR IMPORTED (I)	LABORATORY ANALYSIS	PRE-IMPORT LETTER	FORMULA (TTB F 5100.51 or TTB F 5110.38)	COMMENT
Rock And Rum	D	-	-	X	
	I	-	X	-	
Rock And Rye	D	-	-	X	
	I	-	X	-	
Rum	D	-	-	X*	*If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	-	-	-	
Rum Cordial/Rum Liqueur	D	-	-	X	
	I	-	X	-	
Rye Cordial/Rye Liqueur	D	-	-	X	
	I	-	X	-	
Rye Malt Whisky	D	-	-	X*	*If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	X	-	-	
Rye Whisky	D	-	-	X*	*If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	X	-	-	
Sambuca	D	-	-	X	
	I	-	X	-	
Scotch Whisky	D	-	-	-	PRODUCT OF SCOTLAND ONLY
	I	-	-	-	
Slivovitz	D	-	-	X*	*If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	X	-	-	
Sloe Gin	D	-	-	X	
	I	-	X	-	
Spirit Whisky	D	-	-	X	
	I	X	-	-	
Straight Bourbon Whisky	D	-	-	-	PRODUCT OF U.S. ONLY
	I	-	-	-	
Straight Corn Whisky	D	-	-	-	
	I	X	-	-	
Straight Malt Whisky	D	-	-	-	
	I	X	-	-	
Straight Rye Malt Whisky	D	-	-	-	
	I	X	-	-	
Straight Rye Whisky	D	-	-	-	
	I	X	-	-	
Straight Whisky	D	-	-	-	
	I	X	-	-	
Substandard Brandy	D	-	-	X	
	I	X	-	-	
Tequila	D	-	-	-	PRODUCT OF MEXICO ONLY
	I	-	-	-	
Triple Sec	D	-	-	X	
	I	-	X	-	

PRODUCT	DOMESTIC (D) OR IMPORTED (I)	LABORATORY ANALYSIS	PRE-IMPORT LETTER	FORMULA (TTB F 5100.51 or TTB F 5110.38)	COMMENT
Vodka	D	-	-	X*	*If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	X	-	-	
Wheat Whisky	D	-	-	X*	*If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	X	-	-	
Whisky	D	-	-	X	
	I	X	-	-	
Whisky Distilled From Bourbon Mash	D	-	-	X*	PRODUCT OF U.S. ONLY *If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	-	-	-	
Whisky Distilled From Malt Mash	D	-	-	X*	PRODUCT OF U.S. ONLY *If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	-	-	-	
Whisky Distilled From Rye Malt Mash	D	-	-	X*	PRODUCT OF U.S. ONLY *If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	-	-	-	
Whisky Distilled From Rye Mash	D	-	-	X*	PRODUCT OF U.S. ONLY *If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	-	-	-	
Whisky Distilled From Wheat Mash	D	-	-	X*	PRODUCT OF U.S. ONLY *If harmless coloring/ flavoring/blending materials are added, a formula is required.
	I	-	-	-	

COLAs Online

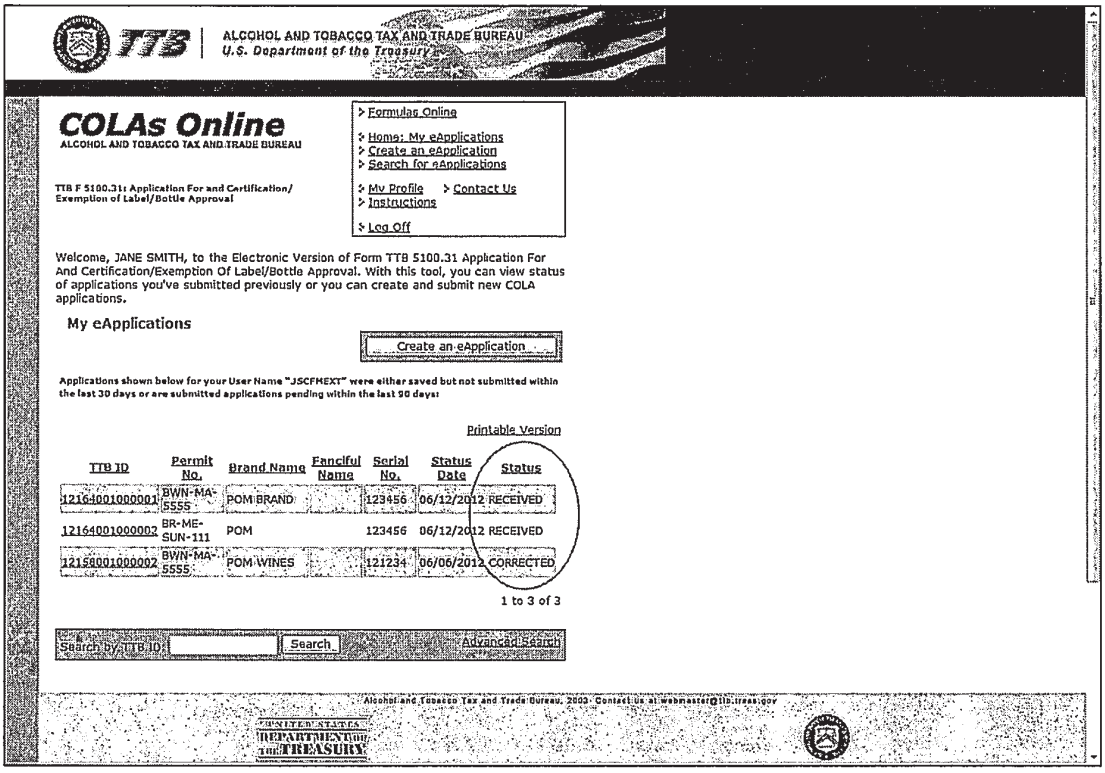
eApplication Statuses in COLAs Online

You may view the status of your eApplications in COLAs Online through the Home: My eApplications page. You may also view the status of your eApplications through the Search Results: eApplications page by performing a Search for eApplications. There is a description of the eApplication statuses provided at the end of this document.

Home: My eApplications

The Home: My eApplications page is your home page and displays the list of your most recent 300 e-filed applications (submitted or saved but not submitted). The eApplications initially display in descending order by Status Date, regardless of status, but may be sorted by selecting the column headings. Figure 1 details the Home: My eApplications page.

Figure 1: Home: My eApplications



View Statuses in My eApplications

Follow these steps to view your list of e-filed applications and their statuses:

1. Select the Home: My eApplications link from the menu box on any page. The Home: My eApplications page displays. See Figure 1.
2. To sort the list of e-filed applications, click on one of the column headings.

►**Note:** You can sort the list by any column heading.

3. To view more e-filed applications, select the Next link.

►**Note:** Each page displays 20 applications.

The statuses display next to the eApplications in the Status column.

Search for eApplications

The Search for eApplications page allows you to search for your e-filed COLAs. Figure 2 and Figure 3 detail the Search for eApplications page.

Figure 2: Search for eApplications (Top)

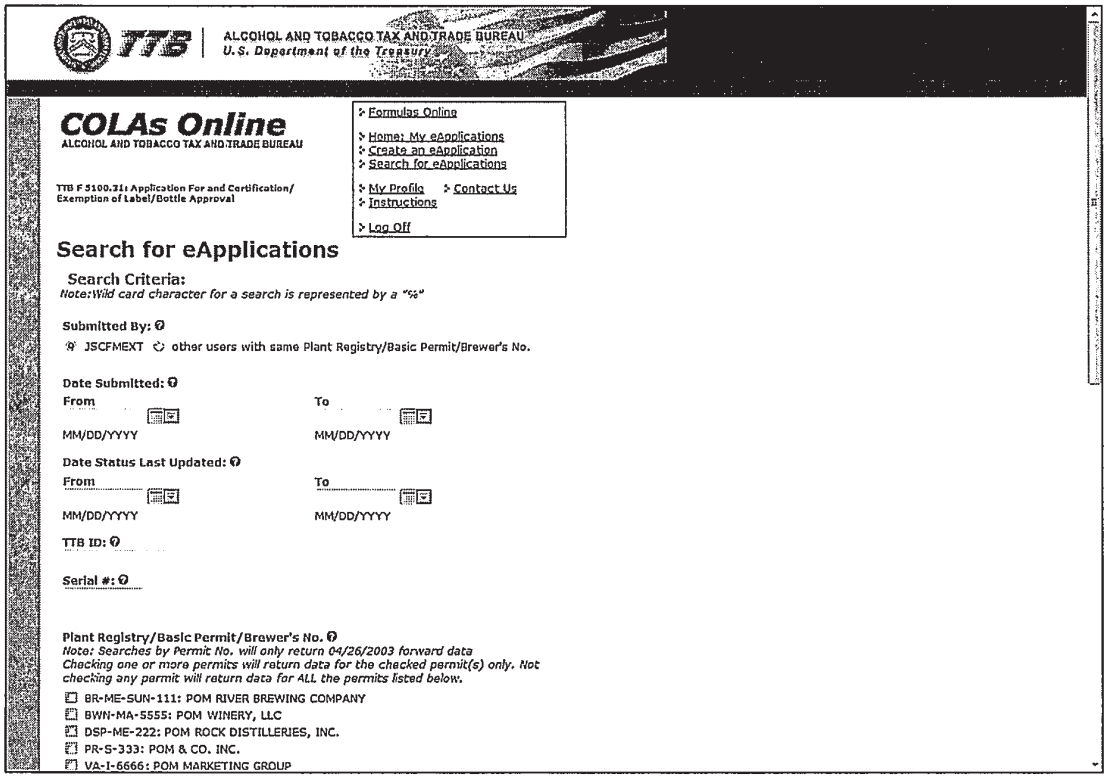
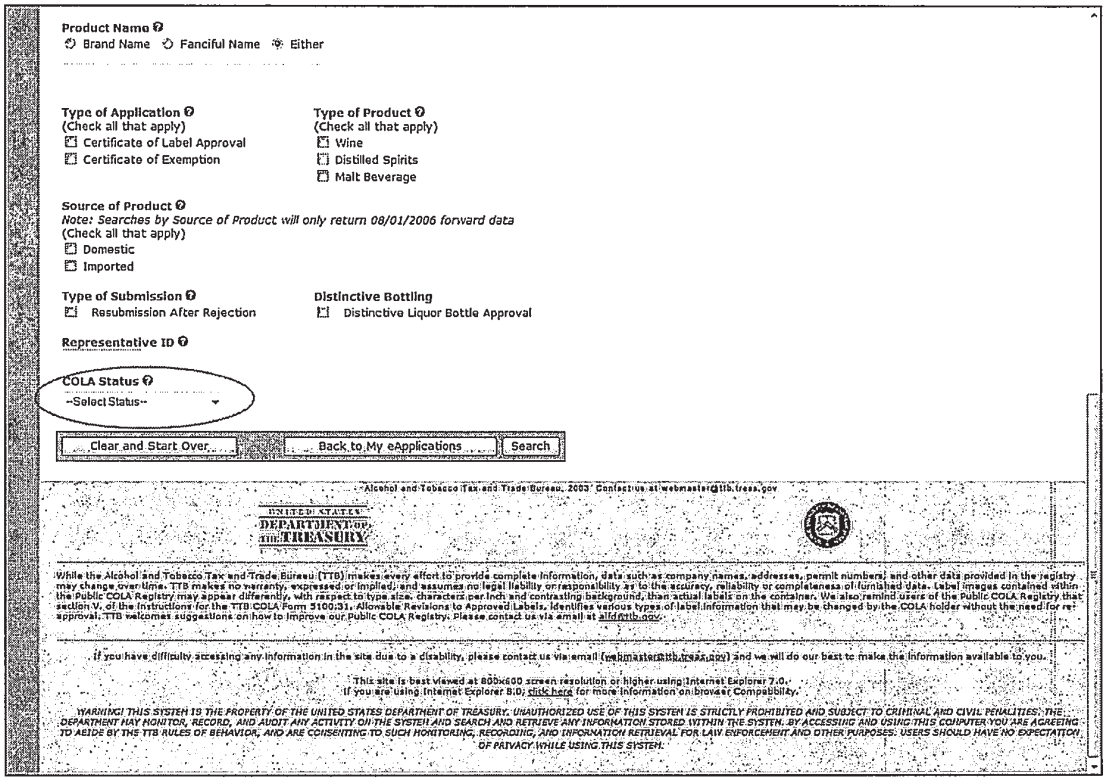


Figure 3: Search for eApplications (Bottom)



Follow these steps to begin searching:

1. Select the Search for eApplications link from the main menu on any page. The Search for eApplication page displays. See Figure 1 and Figure 2.
2. Select the Submitted By radio button to include either those submitted only by you or to include all others with the same signing authority.

►**Note:** Enter one or more fields of search criteria.

3. Enter Date Submitted Range (From Date and To Date).

►**Note:** The format is MM/DD/YYYY. Select the  icon to display a pop-up calendar to find the correct date.

4. Enter Date Status Last Updated Range (Last Updated From Date and To Date).

►**Note:** The format is MM/DD/YYYY. Select the  icon to display a pop-up calendar to find the correct date.

5. Enter a TTB ID.

6. Enter a Serial #.
7. Select the Plant Registry/Basic Permit/Brewer's No. value(s) in the list provided.
8. Enter the Product Name.
9. Select the Brand Name, Fanciful Name or Either radio option. Enter name text.
10. Select the Type of Application.

►**Note:** Select all that apply.

11. Select the Type of Product for the search.

►**Note:** Select all that apply.

►**Note:** If Type of Product is "Wine," then the Grape Varietal(s) field displays as a search criterion.

12. Select Source of Product
13. Select Type of Submission.
14. Select Distinctive Liquor Bottle.
15. Enter the Representative ID in the field provided.
16. Select the COLA Status from the drop-down list provided.
17. Select the **Search** button to view your search results. The Search Results: eApplications page displays with the records that match your search criteria. See Search Results: eApplications.
18. Select the **Clear and Start Over** button to reset all data fields to perform a new search.
19. Select the **Back to My eApplications** button to return to the home page.

►**Note:** To perform a wildcard search, enter a "%" at the beginning or end of the search criteria value.

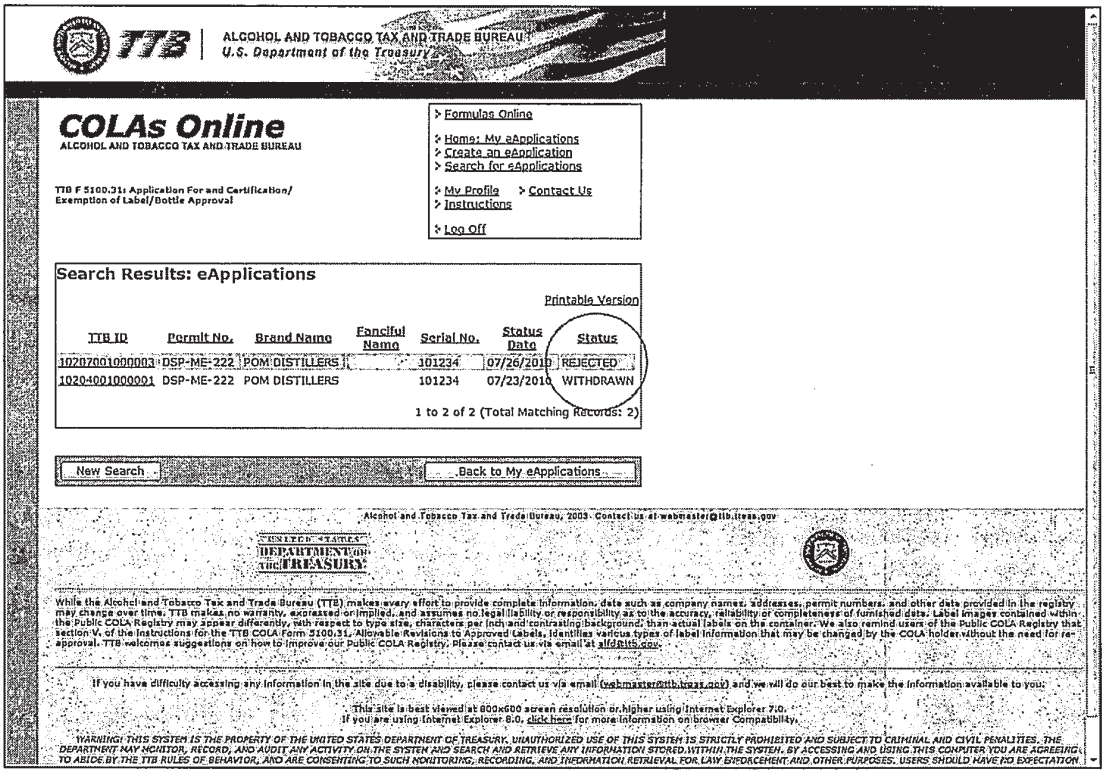
►**Note:** Search results are limited to a maximum of 500 items.

►**Note:** You cannot search for paper filed COLA applications from within COLAs Online. To check on the status of a paper filed application, call ALFD Customer Service at 866-927-2533.

View Statuses in Search Results: eApplications

The Search Results: eApplications page provides detailed results information on e-filed COLA applications based on search criteria. Figure 4 details the Search Results: eApplications page.

Figure 4: Search Results: eApplications



Follow these steps to view the search results of your e-filed applications and their statuses:

1. Select the Search for eApplications link from the menu box on any page.
2. Enter search criteria.
3. Select the **Search** button. The search results based on the value entered display. See Figure 3.

►**Note:** Search results are limited to a maximum of 500 items.

4. To sort the search results, click on any column heading.
5. To view more search results, select the Next link.

   The statuses display next to the eApplications in the Status column.

eApplication Statuses

The following available statuses display next to the eApplications in the Status column:

- **Approved** – This status indicates a final action regarding a particular application. Applications enter this status when both the application and the labels meet all applicable requirements. At this point an application becomes a Certificate. This status authorizes the Certificate holder to either bottle or remove from Customs custody alcohol beverages that bear labels identical to those shown on the Certificate.
- **Assigned** – Applications enter this status when they are assigned to a specialist and the internal evaluation begins.
- **Corrected** – Applications change from "Needs Correction" to "Corrected" after the applicant makes the required revisions and resubmits the application back to TTB for review. Once the review process starts the status changes to "Assigned," once again until the internal evaluation is complete.
- **Expired** – While generally "Approved" Certificates never expire, under certain limited conditions Certificates are given an expiration date by TTB at the time of approval. The status of an "Approved" Certificates changes to "Expired" when the expiration date is reached.
- **Needs Correction** – Applications in this status have been reviewed by TTB but cannot be approved as submitted. The application is returned to the submitter with a list of corrections that need to be made to either the application or to the label itself. The submitter has 30 days to make the corrections. If the application is not returned to TTB within 30 days from the date the application is returned then the status changes to "Rejected." If the submitter makes the corrections and resubmits the application to TTB within 30 days, the status changes to "Corrected." Applications in the "Needs Correction" status may also be "Withdrawn" by the applicant.
- **Received** – Applications enter this status when they are received by TTB and remain in this status until internal evaluation begins. Once the evaluation process starts the status changes to "Assigned," until the internal evaluation is complete.
- **Rejected** – This status indicates a final TTB action regarding a particular application. Paper applications enter this status when initial TTB review discloses that either the application or the label does not comply with Federal requirements. Electronic applications are generally returned for correction rather than rejected; however, an electronic application may be rejected if all the necessary corrections are not made to an application that was returned for correction. Electronic applications that have been returned for correction enter this status if the application is not resubmitted to TTB within 30 days. A rejection does not restrict the ability to resubmit a new application with corrected labels at a later date.
- **Revoked** – "Approved" Certificates will change to this status when TTB rescinds approval because either the labeling laws or regulations have changed rendering the Certificate invalid or the Certificate was approved by TTB in error.
- **Saved not submitted** – An application in this status has been either completely or partially created, but has not yet been submitted to TTB for review. TTB cannot view applications in this status. An application may only remain in this status for up to 30

days. After 30 days in this status the application is automatically deleted. If the application is submitted, the status changes to "Received."

- **Surrendered** – "Approved" Certificates will change to this status when the Certificate holder voluntarily communicates to TTB that they no longer need the Certificate. Generally "Approved" Certificates do not expire, however, TTB encourages all industry members to surrender obsolete Certificates either by written communication for paper filed applications or electronically if applications were e-filed.
- **Withdrawn** – This status indicates that the applicant withdrew the application before TTB took final action. A withdrawal does not restrict the ability to resubmit a new application at a later date.

OMB No. 1513-0020

FOR TTB USE ONLY

TTB ID

DEPARTMENT OF THE TREASURY
ALCOHOL AND TOBACCO TAX AND TRADE BUREAU
APPLICATION FOR AND CERTIFICATION/EXEMPTION OF LABEL/BOTTLE APPROVAL

(See Instructions and Paperwork Reduction Act Notice Below)

1. REP. ID. NO. *(If any)* | CT | OR

2. PLANT REGISTRY/BASIC PERMIT/BREWER'S NO. (Required)

3. SOURCE OF PRODUCT *(Required)*
☐ Domestic ☐ Imported

4. SERIAL NUMBER *(Required)*
YEAR | - | | | | |

5. TYPE OF PRODUCT *(Required)*
☐ WINE
☐ DISTILLED SPIRITS
☐ MALT BEVERAGES

6. BRAND NAME *(Required)*

7. FANCIFUL NAME *(If any)*

PART I - APPLICATION

8. NAME AND ADDRESS OF APPLICANT AS SHOWN ON PLANT REGISTRY, BASIC PERMIT, OR BREWER'S NOTICE. INCLUDE APPROVED DBA OR TRADENAME IF USED ON THE LABEL *(Required)*

8a. MAILING ADDRESS, IF DIFFERENT

9. E-MAIL ADDRESS

10. GRAPE VARIETAL(S) *Wine only*

11. FORMULA

12. NET CONTENTS

13. ALCOHOL CONTENT

14. WINE APPELLATION *(If on label)*

15. WINE VINTAGE DATE *(If on label)*

16. PHONE NUMBER

17. FAX NUMBER

18. TYPE OF APPLICATION *(Check applicable box(es))*
a. ☐ CERTIFICATE OF LABEL APPROVAL
b. ☐ CERTIFICATE OF EXEMPTION FROM LABEL APPROVAL *"For sale in _____ only" (Fill in State abbreviation)*
c. ☐ DISTINCTIVE LIQUOR BOTTLE APPROVAL. TOTAL BOTTLE CAPACITY BEFORE CLOSURE_____ *(Fill in amount)*
d. ☐ RESUBMISSION AFTER REJECTION TTB ID_____

19. SHOW ANY INFORMATION THAT IS BLOWN, BRANDED, OR EMBOSSED ON THE CONTAINER *(e.g., net contents)* ONLY IF IT DOES NOT APPEAR ON THE LABELS AFFIXED BELOW. ALSO, SHOW TRANSLATIONS OF FOREIGN LANGUAGE TEXT APPEARING ON LABELS.

PART II - APPLICANT'S CERTIFICATION

Under the penalties of perjury, I declare: that all statements appearing on this application are true and correct to the best of my knowledge and belief; and, that the representations on the labels attached to this form, including supplemental documents, truly and correctly represent the content of the containers to which these labels will be applied. I also certify that I have read, understood, and complied with the conditions and instructions which are attached to an original TTB F 5100.31, Certificate/Exemption of Label/Bottle Approval. I consent to the return of processed applications in the manner indicated on this application and set forth in the applicable instructions.

20. DATE OF APPLICATION | 21. SIGNATURE OF APPLICANT OR AUTHORIZED AGENT | 22. PRINT NAME OF APPLICANT OR AUTHORIZED AGENT

PART III - TTB CERTIFICATE

This certificate is issued subject to applicable laws, regulations, and conditions as set forth in the instructions portion of this form.

23. DATE ISSUED | 24. AUTHORIZED SIGNATURE, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU

FOR TTB USE ONLY

QUALIFICATIONS

EXPIRATION DATE (If any)

AFFIX COMPLETE SET OF LABELS BELOW *(See General Instructions 4 and 6)*

I. PURPOSE OF THIS CERTIFICATE

This certificate authorizes you to bottle and remove the product identified on the certificate from the plant(s) identified on the certificate where it was bottled or packed, or to remove products in containers from Customs custody. NOTE: This certificate does not constitute trademark protection.

II. CONDITIONS OF THIS CERTIFICATE

A. This certificate does not relieve you from liability for violations of the Federal Alcohol Administration Act, the Alcoholic Beverage Labeling Act of 1988, the Internal Revenue Code of 1986, or related regulations and rulings.

B. You must ensure that: 1) all the information on your application is true and correct and 2) any and all information (including words, text, illustrations, graphics, etc.) shown or presented on the label(s) affixed to this certificate is truthful, accurate and not misleading.

C. The Alcohol and Tobacco Tax and Trade Bureau (TTB) does not routinely review submitted labels for compliance with applicable requirements for mandatory label information regarding type size, characters per inch or contrasting background. You must ensure that the mandatory information on the actual labels is legible and displayed in the correct type size, number of characters per inch, and on a contrasting background in accordance with the TTB labeling regulations, 27 CFR parts 4, 5, 7, and 16, as applicable. TTB does reserve the right to review applications for compliance with these requirements and to return non-compliant applications.

III. INSTRUCTIONS FOR COMPLETING AND SUBMITTING THIS APPLICATION

NOTE: Applications may be filed electronically by accessing the TTB website at https://www.ttbonline.gov/colasonline/.

A. GENERAL INSTRUCTIONS

1. You must print or type your application and sign it in ink. Submit your application in duplicate to the ADVERTISING, LABELING AND FORMULATION DIVISION, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, 1310 G STREET N.W., BOX 12, WASHINGTON, DC 20005. (paper filers only)

2. You may use exact copies of TTB F 5100.31 in lieu of an original form. Copies do not have to include the instruction page; however, you remain subject to all the provisions and instructions outlined on the form. We suggest that you use an original form whenever possible. See Section IV for how to obtain a supply of forms. (paper filers only)

3. Generally, the person, firm, or corporation who will bottle or pack the product must file the application. However, for a product to be imported in containers intended for sale at retail, the application must be filed by the importer. In the case of a product to be relabeled by a wholesaler, the application must be filed by the wholesaler.

4. You must firmly affix (with glue or tape - DO NOT STAPLE) all labels that will appear on the container. Printer's proofs and photocopies are acceptable. If labels are in the form of can flats, photocopies are requested. (paper filers only)

5 . You may NOT make pen and ink changes, white out information, type over or cross out information, or paste information over labels affixed to this application. (Paper filers only)

6. You must reduce oversized labels so that they fit in the space provided. You must indicate in Item 19 that labels have been reduced and the percentage of reduction.

B. SPECIFIC INSTRUCTIONS

ITEM 1. Include a third party representative ID Number if your application will be submitted by a third party representative, and if you consent to the disclosure of information about the application to this representative, as well as the return of the processed application to this representative. Third party filers who do not already have a Representative ID Number, please contact TTB to obtain one. (See section IV for contact information.)

ITEM 2. For bonded wine cellars, taxpaid wine bottling houses, and distilled spirits plants, enter the applicable registry number (BW- or TPWBH- or DSP- number). Importers must enter the TTB basic permit number and brewers must enter the brewer's notice number. Wholesalers applying to relabel must enter the wholesaler's basic permit number. If you intend to bottle this product at more than one of your locations (distilled spirits and malt beverages only), show the registry number/brewer's notice number of each location where the product will be bottled. In this instance, Item 8 should reflect your principal place of business. You may also use Item 8a to reflect additional registry//brewer's notice numbers if the space provided in item 2 is insufficient. In this instance, cross out the words "Mailing Address, if different."

ITEM 3. Indicate the source of the product by checking the appropriate box.

ITEM 4. You must assign a sequential serial number beginning with the last two digits of the current calendar year to each application and its duplicate, not to exceed 6 characters; e.g., 12-1, 12-2, etc.

ITEM 5. Indicate the type of product by checking the appropriate box. For Sake, check the "wine" box.

ITEM 6. A brand name is the name under which the product is sold. If the product is not sold under a brand name, enter the name of the bottler, packer, or importer, as applicable.

ITEM 7. A fanciful name is a name that further identifies the product and is required for some specialty products. It is optional for other products.

ITEM 8. Indicate your company name and address exactly as they appear on your plant registry, basic permit, or brewer's notice (include your approved DBA or trade name if you use it on the label). In the case of distilled spirits and malt beverages that are bottled at more than one location indicate your principal place of business address in this field.

ITEM 8a. You may enter a mailing address here if you receive mail at an address other than the address shown in Item 8.

ITEM 9. You may provide the e-mail address of the person who should receive TTB's response to this application. TTB will process and return all paper applications to this e-mail address if one is provided.

ITEM 10. You must list in this block each grape varietal (if any) that appears on wine labels.

ITEM 11. The term "Formula" encompasses the following pre-COLA product evaluations: domestic beverage alcohol formulas, pre-import approval letters, lab analyses, and submissions formerly known as statements of process (SOPs). A formula is a quantitative list of ingredients and a step-by-step method of manufacture for alcohol beverages (wine, distilled spirits, and malt beverages) requiring approval from TTB prior to production or importation as set out in Industry Circular 2007-4. TTB's regulatory authority for such products may also be found in 27 CFR parts 4, 5, 7, 19, 24, 25, and 26. Please visit http://www.ttb.gov/formulation/pre_cola.shtml for more information about when a formula is required. For any domestic or imported alcohol beverage product requiring formula approval, specify the TTB Formula ID/TTB ID number, or TTB lab number. A copy of the approved formula or pre-import approval letter must accompany this label application. If the formula approval was obtained electronically through Formulas Online, the system- generated TTB Formula ID number must be provided.

ITEM 12. Indicate the container size(s) (net contents) covered by label(s) affixed to the application. You may indicate a range of sizes. You are not required to obtain separate certificates for each size container on which a label or set of labels will be used.

ITEM 13. Enter the alcohol content stated on the label.

ITEM 14. Fill in only if a wine appellation of origin is stated on the label.

ITEM 15. Fill in only if the wine vintage date is stated on the label.

ITEM 16. Provide the phone number of the person responsible for the application.

ITEM 17. Provide the fax number of the person responsible for the application.

ITEM 18. You must check "a" OR "b." You must also check "c" if you intend to bottle distilled spirits in a distinctive container. You must check "d" and enter the TTB ID number as shown in the upper left hand corner of the rejected application if you are submitting an application that was previously rejected. If you check "b": 1) you may only sell this product in the State where it is bottled AND 2) the statement "For sale in _____ only" (using State abbreviation) must appear on each container. We do not issue certificates of exemption for products imported in bottles or for malt beverages.

ITEM 19. The instructions for this item are on the front of the form.

ITEM 20. Enter date application is prepared or submitted.

ITEM 21. The applicant or authorized agent must sign in this block.

ITEM 22. The signer's name must be printed in this block.

IV. CONTACT INFORMATION

For Additional Information Contact:
Advertising, Labeling and Formulation Division (ALFD)
Alcohol and Tobacco Tax and Trade Bureau
1310 G. Street, N.W., Box 12
Washington, DC 20005
Phone (202) 453-2250
1-866-927-2533 (Toll Free)
E-mail address: alfd@ttb.gov

For A Supply Of This Form (TTB F 5100.31) Contact:
The form may be ordered electronically by accessing the TTB Web site at http://www.ttb.gov/forms/ordering_forms.shtml
The form may be electronically accessed at the TTB Web site at http://www.ttb.gov/forms/f510031.pdf

V. ALLOWABLE REVISIONS TO APPROVED LABELS

Once a label receives TTB approval, you are permitted to make certain changes to that label without submitting it to TTB. The label(s) identified on and affixed to this certificate may be revised without resubmission as follows:

NOTE: Any revision(s) you make to your approved label(s) must be in compliance with the applicable regulations in 27 CFR parts 4, 5, 7, and 16, and any other applicable provision of law or regulation, including, but not limited to, the conditions set forth in the "Comments" below.

YOU MAY...	REVISION APPLIES TO: WINE	DISTILLED SPIRITS	MALT BEVERAGE	COMMENTS
1. Delete any non-mandatory label information, including text, illustrations, graphics, etc.	YES	YES	YES	If the non-mandatory information in question relates to other information that remains on the label, it is your responsibility to ensure that the remaining information is not misleading after the deletion.
2. Reposition any label information, including text, illustrations, graphics, etc.	YES	YES	YES	The repositioning must comply with any placement requirements applicable to mandatory information. For example, some types of mandatory information must appear on the brand label or must appear together with other label information.
3. Change the color(s) (background and text), shape and proportionate size of labels. Change the type size and font, and make appropriate changes to the spelling (including punctuation marks, changing letters from upper case to lower case and vice versa, and abbreviations) of words, in compliance with the regulations. Change from an adhesive label to one where label information is etched, painted or printed directly on the container and vice versa.	YES	YES	YES	All mandatory information must be readily legible and appear on a contrasting background. If you received approval for a single label then you may not divide the label into multiple labels without re- approval. All changes must comply with applicable regulations, and changes in spelling (including punctuation marks and abbreviations) must not change the meaning of the previously approved information.
4. Change the stated percentages for blends of grape varietals and appellations of origin for wine labels.	YES	N/A	N/A	When used for any of these items, the total percentages for each element must equal 100%. You may not change the name of the stated varietals or appellations without submitting a new application.
5. Add, change or delete a vintage date for wine labels.	YES	N/A	N/A	If the vintage date is deleted, no reference to *"vintage"* may be made on any label or other materials (e.g., caps, capsules, corks, etc.) affixed to the bottle. When adding a new vintage date, you must comply with all applicable regulations, including the requirements regarding appellations of origin.
6. Change the optional "produced" or "made" by statements on wine labels to "blended," "vinted," "cellared" or "prepared" by statements.	YES	N/A	N/A	
7. Add, change or delete the stated amount of acid and/or the pH level for wine labels.	YES	N/A	N/A	
8. Change the stated amounts of sugar at harvest and/or residual sugar for wine labels.	YES	N/A	N/A	See ATF Ruling 82-4 for policy regarding use of sugar content statements and when such statements are required.
9. Add or delete bonded winery or taxpaid wine bottling house number for wine labels.	YES	N/A	N/A	If used, the number must appear in direct conjunction with the bottler's name and address.
10. Change the net contents statement.	YES	YES	YES	Revisions must comply with all applicable regulations governing net content statements and standards of fill. Please ensure that all applicable type size requirements are met for each container size.
11. Change the mandatory statement of alcohol content, as long as the change is consistent with the labeled class and type designation, and all other labeling statements.	YES	YES	YES (Flavored Malt Beverages Only)	For example, you may change the alcohol content of a grape wine labeled with a varietal designation from 13 percent to 15 percent alcohol by volume even though it results in a change to the product's tax classification. However, if the product was designated and labeled as a "table wine," an alcohol content of 15 percent alcohol by volume would be inconsistent with the rules for use of that designation, so this change would not be permitted Similarly, a label bearing a "rum" designation may not be changed to state an alcohol content of less than 40 percent alcohol by volume. The revised alcohol content statement must be consistent with all other mandatory or optional labeling statements.
12. Add, delete, or change an optional statement of alcohol content for malt beverage labels.	N/A	N/A	YES	Malt beverages that contain alcohol derived from added flavors or other added nonbeverage ingredients (other than hops extract) containing alcohol are subject to mandatory alcohol content statement requirements.
13. Change the statement of percentage of neutral spirits and the name of the commodity from which a distilled spirit is produced.	N/A	YES	N/A	These changes must not result in a change to the class or type designation of the distilled spirits product.
14. Change the mandatory age statement, or delete or change an optional age statement for distilled spirits labels.	N/A	YES	N/A	These changes must not result in a change to the class or type designation. See 27 CFR 5.22 and 5.40 for further information about age statements and minimum aging requirements applicable to certain classes and types of spirits.
15. Delete or change an optional age statement, including a barrel aging statement, for wine and malt beverage labels.	YES	N/A	YES	Statements of age on wine labels must comply with 27 CFR 4.39(b).
16. Add, delete, or change statements or information in order to comply with the requirements of the State in which the malt beverage is to be sold.	N/A	N/A	YES	Applies only to malt beverages sold in that particular state (including the District of Columbia or the Commonwealth of Puerto Rico).
17. Add a new Serving Facts statement or statement of average analysis, add a Serving Facts statement to replace a statement of average analysis, or change the numerical values for calories, carbohydrates, protein, and fat contained in an existing statement.	YES	YES	YES	The statement must be in compliance with TTB Ruling 2013-2 and TTB Ruling 2004-1. A new Serving Facts statement is an allowable revision only if it is in one of the formats that is set forth in the examples attached to TTB Ruling 2013-2.
18. Add, delete, or change stated bottling date, production date (day, month, and/or year) or freshness information including bottling, production or expiration dates or codes.	YES	YES	YES	Bottling dates added to wine labels must comply with 27 CFR 4.39(c).
19. Change the name or trade name to reflect a different name already approved for use by the responsible bonded wine cellar, taxpaid wine bottling house, distilled spirits plant, brewery, or importer. Change the address where it is within the same State.	YES	YES	YES	This means that a bonded wine cellar, taxpaid wine bottling house, distilled spirits plant, brewery or importer may revise the label to include the use of a name or trade name that is already approved for that particular industry member. The name or trade name must appear on the basic permit, brewer's notice, or other qualifying documents for the company to whom the original certificate was issued. If the name or trade name is also used as the brand name on the label, resulting in a change of brand name, you must submit a new application. The change in address is ONLY allowed for in-state moves or other changes to the COLA holder's address that have already been reflected on the industry member's basic permit, brewer's notice, or other qualifying documents.
20. Add, delete, or change the name and/or address of the foreign producer, bottler, or shipper.	YES	YES	YES	The producer, bottler, or shipper must be located in the same country originally shown.
21. Add, delete, or change the name, address, and/or trademark of the wholesaler, retailer, or persons for whom the product is imported or bottled.	YES	YES	YES	

22. Add, delete, or change bottle deposit information, or recycling information or logos.	YES	YES	YES	
23. Add, delete, or change UPC barcodes and/or 2D mobile barcodes, e.g., QR codes or Microsoft Tags.	YES	YES	YES	Addition or change of UPC Code must be in compliance with Industry Circular 77-23. Any information retrieved from 2D barcodes must be in compliance with all applicable advertising regulations.
24. Add, delete, or change a Web site address, phone number, fax number, or zip code.	YES	YES	YES	
25. Add, delete, or change a lot or batch identification number or other serial numbers.	YES	YES	YES	
26. Add, delete, or change trademark, copyright symbols (e.g., TM, ©, ®), kosher symbols, company logos, and/or social media icons.	YES	YES	YES	Symbols, logos and icons may not violate TTB regulations. Advertisements on social media sites must be in compliance with all applicable advertising regulations.
27. Add, delete, or change optional information about awards or medals, or the signature of the brewer, winemaker, or distiller of the product.	YES	YES	YES	
28. Add, delete, or change holiday- and/or seasonal-themed graphics, artwork and/or salutations.	YES	YES	YES	Holiday/seasonal-themed information or graphics must not conflict with or qualify the mandatory information and must comply with all applicable regulations, including the rules governing prohibited practices.
29. Delete or change promotional sponsorship-themed graphics, logos, artwork, dates, event locations and/or other sponsorship-related information. (Examples: sports leagues, team organizations, annual sporting events, and annual or semi-annual festivals.) Delete or change charitable endorsement information to include information about the proceeds.	YES	YES	YES	If authorization by a third party was required for use of such promotional sponsorship-themed information on a label when first approved, it is the responsibility of the industry member to have any necessary documentation of authorization to cover the revisions to the approved label(s). The labeling statements may not create a misleading impression.
30. Add, delete, or change a label or sticker that provides information about a rating or recognition provided by an organization (e.g., "Recognized as one of the top values in vodka by x Magazine" or "Rated as the best 2012 wine by x Association"), as long as the rating or recognition reflects simply the opinion of the organization and does not make a specific substantive claim about the product or its competitors.	YES	YES	YES	These statements or graphics must not conflict with or qualify any mandatory information and must comply with all applicable laws and regulations. Substantive claims about the product or its competitors are not covered by this exemption.
31. Delete all organic references from the label.	YES	YES	YES	If you choose to delete one organic claim on a label on which you have received approval to make organic claims, then all organic claims, references and certification statements must be deleted on the revised label. The deletion of individual references or certification statements is not permitted without a new COLA.
32. Change an approved sulfite statement to any of these options: "*Contains Sulfites*", "*Contains (a) Sulfiting Agent(s)*", "*Contains [name of specific sulfating agent]*", "*Contains Naturally Occurring and Added Sulfites*"; or "*Contains Naturally Occurring Sulfites.*" "Sulphites" may be used in lieu of "Sulfites."	YES	YES	YES	A sulfite statement is required when sulfur dioxide or a sulfiting agent is detected at a level of 10 or more parts per million, measured as total sulfur dioxide. The statement used must accurately reflect all of the sulfur dioxide or sulfiting agent(s) present in the alcohol beverage. For wine: Any other variation of the statement or removal of the statement requires a lab analysis. For sulfite waivers, the proprietor must have proof of sample analysis from a TTB-certified laboratory or from the TTB Compliance Laboratory.
33. Add, delete, or change information about the number of bottles that were "made," "produced," "brewed," or "distilled" in a batch; respectively.	YES	YES	YES	Example: "100 bottles produced"
34. Add certain instructional statements to the label(s) about how best to consume or serve the product. Only the statements listed in the comments section may be added.	YES	YES	YES	Only the following statements are approved to be added to a label: *"Refrigerate After Opening"* *"Do Not Store In Direct Sunlight"*, *"Best If Frozen For___ to___ Hours"*, *"Shake Well"*, *"Pour Over Ice"*, *"Best When Chilled"*, *"Best Served Chilled"*, *"Serve Chilled"*, *"Serve at Room Temperature"*

If you have questions about what is mandatory information and what is non-mandatory information, please consult the applicable regulations in 27 CFR parts 4, 5, 7 and 16, or contact TTB. See Section IV for how to contact TTB.

PAPERWORK REDUCTION ACT NOTICE

This request is in accordance with the Paperwork Reduction Act of 1995. We collect this information to verify your compliance with the Federal laws and regulations we administer for the labeling of alcohol beverages. The information is mandated by statute (27 U.S.C. 205) and is used to obtain a benefit.

We estimate 31 minutes as the average burden for you to complete this form depending on your individual circumstances. You may comment to us about the accuracy of this burden estimate and suggest ways for us to reduce the burden. Address your comments or suggestions to: Reports Management Officer, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Box 12 Washington, DC 20005.

We may not conduct this collection of information, and you are not required to respond to this request, unless it displays a valid, current OMB control number.

DISCLOSURE STATEMENT

We require this information under the authority of 27 U.S.C. 205(e). You must disclose this information so we may verify your compliance with the Federal laws and regulations we administer for the labeling of alcohol beverages.

We use this information for the purposes described in the preceding paragraph. In addition, the information may be disclosed to other Federal, State, and local law enforcement and regulatory agency personnel to verify information on the application and to aid in the performance of their duties. The information may further be disclosed to the Justice Department if it appears that the furnishing of false information may contribute to a violation of Federal law. If you fail to supply complete information, then there will be a delay in the processing of your application.

After TTB issues a certificate of label approval, a certificate of exemption from label approval, or a distinctive liquor bottle approval, copies of the approved applications are made available for public inspection.

Federal Reporting Requirements

Submitted by Jeff C. O'Brien

Federal Reporting Requirements

Jeffrey C. O'Brien

Topics To Be Covered:

- Craft Beverage Modernization and Tax Reform Act
- TTB Audits – Common Errors and Penalties
  - (1) Critical Recordkeeping, Production, and Inventory Mistakes
  - (2) Frequent Mishaps: Tanks and Measuring Devices
  - (3) Conversion Factors in Calculating Barrel Equivalent Amounts
  - (4) Excise Tax Returns, Computation of Tax and Determination Mistakes
  - (5) Brewer's Report of Operations (BROP) – Top Blunders and Tips

Craft Beverage Modernization and tax Reform Act

TTB Audits – Common Errors and Penalties

- TTB Audits – Common Errors and Penalties
  - (1) Critical Recordkeeping, Production, and Inventory Mistakes
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  - (3) Conversion Factors in Calculating Barrel Equivalent Amounts
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  - (5) Brewer's Report of Operations (BROP) – Top Blunders and Tips

Federal Reporting Requirements

Submitted by Jeffrey C. O'Brien

A. Craft Beverages Modernization and Tax Reform Act

SEE ATTACHED FAQ APPENDIX:

- Recalibrated the federal beer excise tax small brewers pay on each barrel of beer produced
- $16 per barrel on first 6 million barrels
- $18 per barrel for remaining barrels
- $3.50 per barrel for first 60,000 barrels for production under 2 million barrels
- Reduced tax rates on distilled spirits

- **Reduced Beer Tax Rates**
    - **General:** In general, the Act provides for a tax rate of $16 per barrel on the first six million barrels of beer brewed by the brewer and removed during the calendar year or imported by the importer into the United States during the calendar year. The Act provides for a rate of $18 per barrel on the remaining barrels not subject to the $16 rate.
    - **Foreign Manufacturer Election:** In the case of beer brewed or produced outside of the United States and imported, the Act provides for foreign brewers to assign the reduced rate described in the previous bullet to importers who elect to receive it.
    - **Small Domestic Brewers:** In the case of brewers in the United States who produce no more than two million barrels of beer during the calendar year, the Act provides for a rate of $3.50 per barrel on the first 60,000 barrels

removed during such calendar year which have been brewed or produced by such brewer.

- **Transfer of Beer in Bond:** The Act authorizes the transfer of beer in bond between brewers who are not owned by the same corporation or other entity.

- **Wine Tax Credits**

    - **General:** The Act allows three different credits on wine produced by the producer and removed during the calendar year or imported by the importer into the United States during the calendar year. The credits available under section 5041(c)(1) and (2) of the IRC do not apply during calendar years 2018 and 2019. Under the Act, the credits are equal to $1 per wine gallon on the first 30,000 wine gallons of wine removed or imported, 90 cents on the next 100,000 wine gallons removed or imported, and 53.5 cents on the next 620,000 wine gallons removed or imported. The tax credits apply to all wine tax rates, except that the Act provides adjusted credits for the hard cider tax rate under section 5041(b)(6) of the IRC (6.2 cents, 5.6 cents, and 3.3 cents, respectively).

    - **Foreign Manufacturer Election:** In the case of wine produced outside of the United States and imported, the Act provides for foreign wine producers to assign the tax credits described in the previous bullet to importers who elect to receive them.

- **Adjustment of Alcohol Content for Certain Still Wines:** The Act authorizes application of the wine tax rate of $1.07 per wine gallon under section 5041(b)(1) to still wines containing not more than 16% alcohol by volume.

- **Mead and Low Alcohol by Volume Wine**

    - **General:** The Act provides that certain "meads" and "low alcohol by volume wines" are deemed still wines subject to the wine tax rate of $1.07 per wine gallon under section 5041(b)(1) of the IRC.

    - **Definition of Mead:** For purposes of this provision, the term "mead" means a wine containing not more than 0.64 gram of carbon dioxide per hundred milliliters of wine, which is derived solely from honey and water, which contains no fruit product or fruit flavoring, and which contains less than 8.5% alcohol by volume.

    - **Definition of Low Alcohol by Volume Wine:** For purposes of this provision, the term "low alcohol by volume wine" means a wine containing not more than 0.64 gram of carbon dioxide per hundred milliliters of wine, which is derived primarily from grapes or from grape juice concentrate and water, which contains no fruit product or fruit flavoring other than grape, and which contains less than 8.5% alcohol by volume.

- **Reduced Distilled Spirits Tax Rates**

    - **General:** The Act provides for reduced tax rates on distilled spirits distilled or processed and removed during the calendar year or imported by the importer into the United States during the calendar year. These rates are equal to $2.70 per proof gallon on the first 100,000 proof gallons removed or imported, and $13.34 per proof gallon on the next 22.13 million proof gallons removed or imported. The tax rate for distilled spirits not subject to the reduced rates is $13.50 per proof gallon.

- **Foreign Manufacturer Election:** In the case of distilled spirits produced outside the United States and imported, the Act provides for foreign distilled spirits manufacturers to assign the reduced tax rates to importers who elect to receive them.

- **Amendment of Section 7652(f)(2):** The Act amends section 7652(f)(2) of the IRC to provide that the reduced rates of tax for distilled spirits are not taken into account when determining the amounts covered into the treasuries of Puerto Rico and the U.S. Virgin Islands.

- **Transfer in Bond of Non-Bulk Distilled Spirits:** The Act authorizes the transfer in bond of distilled spirits between distilled spirits plants irrespective of whether the distilled spirits are transferred in bulk or non-bulk containers.

- **Controlled Group:** The Act provides that the quantities to which the credits and reduced rates apply shall be applied to the controlled group. The Act also provides that an importer electing to receive an assignment of a credit or reduced tax rate from a foreign manufacturer shall be deemed a member of the controlled group of the foreign manufacturer.

- **Single Taxpayer:** The Act provides that two or more entities (whether or not under common control) that produce products marketed under a similar brand, license, franchise, or other arrangement shall be treated as a single taxpayer for purposes of the credits and reduced rates.

- **Conversion Factors in Calculating Barrel Equivalent Amounts**

  a. 1 Barrel (bbl) = 31 gallons

  b. 1 US Keg = 15 gallons

c. 1 US sixtel (pony keg) = 5.166667 gallons

d. 1 US case of beer = 2.25 gallons

B. Excise Tax Returns, Computation of Tax and Determination Mistakes

a. Tax is calculated on the beer which is reported to be removed for consumption or sale in the United States

b. Reported tax amounts should match Brewer's Report of Operations

c. Any adjustments should be documented/explained in the appropriate section on form

ii. Brewer's Report of Operations (BROP)- Top Blunders and Tips

a. Required form to report operations such as:

1. Inventory levels
2. Production and waste amounts
3. Packaging amounts
4. Removals of product

b. Timely records are required to ensure reported data is accurate

C. Import, Export, and Multi-State Tax Issues

Distilled Spirits Importation Information Resources

U.S. Requirements for Importing Alcohol Beverages: This web page outlines all requirements that must be met to import alcohol beverages into the U.S.

1. Apply for a Federal Basic Importer's Permit. The importer must file an "Application for Basic Permit" under the FAA Act. This may be done online through the TBB.
2. Must maintain and staff a business office in the US
3. If you plan to sell wholesale, you must also apply for a Wholesaler's Basic Permit. This may be done at the same time as the Importer's Permit online through the TBB.
4. Importer's must register as alcohol dealers and complete Alcohol Dealer Registration before beginning business. This form can also be found through the TBB.
5. After receiving the Importer's Permit, you must obtain a TBB issued Certificate of Label Approval (COLA) for each product/label. To obtain a COLA, you must file an "Application for and Certification/Exemption of Label/Bottle Approval. This form can be found through COLA online.
6. A certificate of age and origin is also required and can be found on The Certificate of Age and Origin Requirements for Imported Alcohol Beverages webpage.

In addition to these requirements, the importer must also be aware and be in compliance with requirements of other federal agencies.

D. **Natural Wine Certificate**

Importers of wine made from sound ripe grapes or other sound, ripe fruit produced after December 31, 2004, must comply with certification requirements set forth under the Miscellaneous Trade and Technical Corrections Act of 2004 to ensure that the practices and procedures used to produce the imported wine constitute proper cellar treatment. For some grape wines imported from countries with which the United States has an enological practices agreement, no certification is required. Please refer to our list of excepted countries.

Certification may consist of:

- a statement from the producing country's government or government-approved entity having oversight or control of enological practices. This form of certification includes the results of a laboratory analysis of the wine performed by either a government laboratory or a laboratory certified by the government of the producing country.

or…

- a statement from the importer, that is, a "self-certification."

Distilled Spirits Exportation Information Resources

The requirements for exporting alcoholic beverages vary depending on what product is being exported and whether the exporter is also the producer of the product. The regulations and resources can be found at https://www.ttb.gov/itd/export-alcohol-beverages-from-the-u-s

E. TTB Audits

1. Federal compliance and reporting

a. The Alcohol and Tobacco Tax and Trade Bureau (TTB) is the governing body which regulates the:

   i. Brewer's Report of Operations
   ii. Federal excise taxes

b. Reporting Requirements:

   i. Brewer's Report of Operations - monthly or quarterly filing frequency
   ii. Federal excise tax - Semi-monthly or quarterly filing frequency

2. Compliance — Brewer's Report of Operations

a. Required form to report operations such as:
   i. Inventory levels
   ii. Production and waste amounts
   iii. Packaging amounts
   iv. Removals of product

b. Timely records are required to ensure reported data is accurate

3. Compliance — Federal excise tax

a. Tax is calculated on the beer which is reported to be removed for consumption or sale in the United States
b. Reported tax amounts should match Brewer's Report of Operations

c. Any adjustments should be documented/explained in the appropriate section on form

4. Recordkeeping, production and inventory

a. Maintain daily records of activity
b. Keep track of inventory adjustments
c. Account for waste and disposal of product
d. Have controls in place to ensure information entered and pulled for reporting is timely — i.e., daily rather than weekly
e. Records should be retained for a minimum of 3 years

5. Recordkeeping

a. Software options available to assist with record keeping - Only as accurate as the data entered

b. Most common daily recordkeeping mistakes:

i. Accurately report the amount of beer returned to the brewery
ii. Properly maintain records regarding destruction of beer
iii. Appropriately record lab sample removals
iv. Appropriately report, record, or maintain supporting documents regarding losses or shortages

6. Inventory remedy

a. Take inventory of product on the first of each month
b. Document the inventory count(s)
c. Required information:

i. Date taken
ii. Quantity of beer and cereal beverage on hand;
iii. Losses, gains, and shortages; and
iv. Signature — under penalties of perjury — of the brewer or person taking inventory.

7. Beer returned to brewery

a. Keep records to document product which is returned to the brewery
b. If multiple locations, ensure locations are noted in records
c. Offset is allowed for returned product upon which excise tax has already been paid

8. Destroy beer

b. A brewer must give written notice, Notice of Intent (NOI), to destroy beer at a location other than the brewery
c. Notice must be on letterhead and signed under penalty of perjury
d. Needs to include:

i. Quantity of beer
ii. Date received for destruction
iii. Information, if beer was returned
iv. Location for destruction, etc.

9. Other common issues

e. Recording beer that is removed for lab samples
f. Every tank, vat, cask, or other container that a brewer uses or intends to use as a receptacle for wort, beer, or concentrate must be "durably marked with a serial number and capacity."

10. Testing and measuring devices

g. All measuring devices must be tested periodically
h. Records of these tests must be made available to TTB officers upon inspections
i. Records required:

i. Date of test
ii. Identification of device(s) tested
iii. Test results
iv. Any corrective actions (adjustment/repair) taken

11. Conversion factors

j. 1 Barrel (bbl) = 31 gallons
k. 1 US Keg = 15 gallons
l. 1 US sixtel (pony keg) = 5.166667 gallons
m. 1 US case of beer = 2.25 gallons

12. Excise tax returns

n. Tax is determined on the beer at the time of removal from the brewery
o. Quantities removed should be calculated to the fifth decimal place
p. A brewery is required to file the return, even if no liability exists for the period
q. Semi-monthly filing requirement (unless annual liability does not exceed $50,000)

13. Brewer's Report of Operations (BROP)

r. All quantities reported are in the form of barrels, not gallons
s. Breweries producing more than 10,000 bbls per year file monthly
t. Breweries producing less than 10,000 bbls (and do not report on the BrewPub Report of Operations) file quarterly

14. Sales and use tax compliance

- Sales tax

i. Most states impose a sales tax on the sale of all tangible personal property (unless an exemption applies)

ii. Taproom sales of product and other merchandise would be subject to state sales tax (and local sales tax)

15. Sales and use tax compliance

a. Use tax

i. Use tax is the complement to sales tax and is required to be paid to the state on purchases where sales tax isn't paid
ii. Use tax is most often owed on:

A. Items which were purchased for an exempt use and used in a taxable manner

B. Purchases from out of state and online vendors

C. Examples:

I. If you purchase glassware to sell in the taproom, and later give away glasses for an event, you would need to remit use tax on the cost of the glasses given away.

II. If you donate or give away beer for an event, to a customer, etc., you would need to remit use tax on the cost of the beer.

16. Exempt sales

a. Sales for resale are exempt from sales tax

b. Examples include:

i. Sales to a distributor

ii. Sales to a bar/restaurant for resale

iii. Sales to a liquor store for resale

c. An exemption/resale certificate must be kept to document the exemption

17. Brewery exemptions

a. Many exemptions from sales tax exist for businesses involved in manufacturing

b. Examples of items which may be purchased exempt from sales tax:

i. Capital equipment

ii. Materials and supplies used directly in production activities (including cleaning and testing)

iii. Utilities consumed in production

v. Packaging materials

*Some exemptions vary from state to state

Tax Cuts and Jobs Act of 2017

Craft Beverage Modernization and Tax Reform

On December 22, 2017, the President signed into law the Tax Cuts and Jobs Act (Public Law 115-97) ("the Act"), which makes extensive changes to the Internal Revenue Code of 1986 (IRC), including provisions related to alcohol that are administered by TTB. Those changes are effective January 1, 2018.

TTB is currently assessing the impact of these changes on TTB forms, regulations, and systems, and will update this page with additional guidance and information as it becomes available. You can subscribe to receive notification of updates through GovDelivery.

- Please visit our Tax and Fee Rates page to see **tax rates** for distilled spirits, wine, and beer removed or imported in calendar years 2018 and 2019.

Summary of Distilled Spirits, Wine, and Beer Excise Tax Provisions

The highlights of the provisions of the Act related to distilled spirits, wine, and beer excise tax are summarized below. This summary is not intended to establish any policies regarding these provisions, but merely to summarize them.

Effective Dates

The provisions of the Act discussed below are effective only during calendar years 2018 and 2019.

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Beer

- **Reduced Beer Tax Rates**
  - **General:** In general, the Act provides for a tax rate of $16 per barrel on the first six million barrels of beer brewed by the brewer and removed during the calendar year or imported by the importer into the United States during the calendar year. The Act provides for a rate of $18 per barrel on the remaining barrels not subject to the $16 rate.
  - **Foreign Manufacturer Election:** In the case of beer brewed or produced outside of the United States and imported, the Act provides for foreign brewers to assign the reduced rate described in the previous bullet to importers who elect to receive it.
  - **Small Domestic Brewers:** In the case of brewers in the United States who produce no more than two million barrels of beer during the calendar year, the Act provides for a rate of $3.50 per barrel on the first 60,000 barrels removed during such calendar year which have been brewed or produced by such brewer.
- **Transfer of Beer in Bond:** The Act authorizes the transfer of beer in bond between brewers who are not owned by the same corporation or other entity.

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Wine

- **Wine Tax Credits**
  - **General:** The Act allows three different credits on wine produced by the producer and removed during the calendar year or imported by the importer into the United States during the calendar year. The credits available under section 5041(c)(1) and (2) of the IRC do not apply during calendar years 2018 and 2019. Under the Act, the credits are equal to $1 per wine gallon on the first 30,000 wine gallons of wine removed or imported, 90 cents on the next 100,000 wine gallons removed or imported, and 53.5 cents on the next 620,000 wine gallons removed or imported. The tax credits apply to all wine tax rates, except that the Act provides adjusted credits for the hard cider tax rate under section 5041(b)(6) of the IRC (6.2 cents, 5.6 cents, and 3.3 cents, respectively).
  - **Foreign Manufacturer Election:** In the case of wine produced outside of the United States and imported, the Act provides for foreign wine producers to assign the tax credits described in the previous bullet to importers who elect to receive them.
- **Adjustment of Alcohol Content for Certain Still Wines:** The Act authorizes application of the wine tax rate of $1.07 per wine gallon under section 5041(b)(1) to still wines containing not more than 16% alcohol by volume.

- **Mead and Low Alcohol by Volume Wine**
  - **General:** The Act provides that certain "meads" and "low alcohol by volume wines" are deemed still wines subject to the wine tax rate of $1.07 per wine gallon under section 5041(b)(1) of the IRC.
  - **Definition of Mead:** For purposes of this provision, the term "mead" means a wine containing not more than 0.64 gram of carbon dioxide per hundred milliliters of wine, which is derived solely from honey and water, which contains no fruit product or fruit flavoring, and which contains less than 8.5% alcohol by volume.
  - **Definition of Low Alcohol by Volume Wine:** For purposes of this provision, the term "low alcohol by volume wine" means a wine containing not more than 0.64 gram of carbon dioxide per hundred milliliters of wine, which is derived primarily from grapes or from grape juice concentrate and water, which contains no fruit product or fruit flavoring other than grape, and which contains less than 8.5% alcohol by volume.

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Distilled Spirits

- **Reduced Distilled Spirits Tax Rates**
  - **General:** The Act provides for reduced tax rates on distilled spirits distilled or processed and removed during the calendar year or imported by the importer into the United States during the calendar year. These rates are equal to $2.70 per proof gallon on the first 100,000 proof gallons removed or imported, and $13.34 per proof gallon on the next 22.13 million proof gallons removed or imported. The tax rate for distilled spirits not subject to the reduced rates is $13.50 per proof gallon.
  - **Foreign Manufacturer Election:** In the case of distilled spirits produced outside the United States and imported, the Act provides for foreign distilled spirits manufacturers to assign the reduced tax rates to importers who elect to receive them.
  - **Amendment of Section 7652(f)(2):** The Act amends section 7652(f)(2) of the IRC to provide that the reduced rates of tax for distilled spirits are not taken into account when determining the amounts covered into the treasuries of Puerto Rico and the U.S. Virgin Islands.
- **Transfer in Bond of Non-Bulk Distilled Spirits:** The Act authorizes the transfer in bond of distilled spirits between distilled spirits plants irrespective of whether the distilled spirits are transferred in bulk or non-bulk containers.

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Controlled Group and Single Taxpayer Rules

- **Controlled Group:** The Act provides that the quantities to which the credits and reduced rates apply shall be applied to the controlled group. The Act also provides that an importer electing to receive an assignment of a credit or reduced tax rate from a foreign manufacturer shall be deemed a member of the controlled group of the foreign manufacturer.
- **Single Taxpayer:** The Act provides that two or more entities (whether or not under common control) that produce products marketed under a similar brand, license, franchise, or other arrangement shall be treated as a single taxpayer for purposes of the credits and reduced rates.

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Public Guidance

TTB issues formal public guidance in the form of rulings, procedures, delegation orders, industry circulars, and other publications issued to help the regulated industries understand TTB regulations, policies, and other requirements. See the related guidance below.

Industry Circulars

Industry Circular 2018-1A, Alternate Procedure for a Wine Producer to Tax Determine and Tax Pay Wine of Its Production That Is Stored Untaxpaid at a Bonded Wine Cellar

Industry Circular 2018-4, Calculating Effective Tax Rates for Distilled Spirits Products Containing Eligible Wine and Eligible Flavors, and Obtaining Approval of Standard Effective Tax Rates for Imported Distilled Spirits Products

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Procedures

2018-1 Transfer of Beer Between Breweries Not of the Same Ownership

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General Tax Reform Questions and Answers

TR-G1: Can I continue to file my taxes using the Excise Tax Return form, TTB Form 5000.24 or TTB Form 5000.24sm, either on paper or through pay.gov, or is a new form required for the new reduced tax rates on beer and distilled spirits and the new tax credits for wine?

Taxpayers continue to file taxes using TTB Form 5000.24 or TTB Form 5000.24sm, either on paper or through pay.gov. No new tax return forms are required to pay taxes under the new tax provisions.

Last reviewed/updated 01/12/2018

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TR-G2: I am a brewery, winery, or distilled spirits plant in the United States. Am I eligible for the reduced tax rates or tax credits on the products I remove in calendar years 2018 or 2019, even if I produced the products prior to calendar year 2018?

The reduced tax rates or tax credits became effective January 1, 2018, and they apply to products removed in calendar years 2018 or 2019 regardless of when the products were produced. (See the Act for the specific quantities of products eligible for the reduced tax rates or tax credits and any other limitations.)

Last reviewed/updated 01/12/2018

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TR-G3: If I pay my taxes due in 2018 to TTB based on tax rates in effect in 2017, and it results in an overpayment, can I be eligible for a refund or credit of the amount I overpaid?

If you pay your taxes to TTB using the wrong tax rate and such payment results in an overpayment, you may seek a refund or credit using existing TTB procedures.

Last reviewed/updated 01/12/2018

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TR-G4: How can I take the new reduced excise tax rates or tax credits on imported products?

U.S. Customs and Border Protection (CBP) is responsible for the collection of tax on imported alcohol products. Consequently, CBP has issued guidance on implementation of the Craft Beverage Modernization and Tax Reform Act of 2017 (as contained in Public Law 115-97) with respect to qualifying imports of beer, wine, and distilled spirits.

Last reviewed/updated 06/27/2018

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TR-G5: Since Federal excise tax rates are lower in calendar year 2018, for purposes of determining my eligibility to file quarterly or annual returns in 2018, can I recalculate my 2017 Federal excise tax liability based on the new lower rates?

To be eligible for quarterly or annual filing, an existing proprietor must reasonably expect that it will not exceed the applicable liability limits for excise taxes imposed on distilled spirits, wines and beer for the calendar year, and must not have exceeded those liability limits in the preceding calendar year. The liability in the preceding calendar year is the taxpayer's actual liability under the rates applicable during that time. For example, if a brewer was liable in the preceding calendar year for more than $50,000 in excise taxes imposed on beer, based on the tax rates applicable during that year, then the brewer is required by law to file returns semimonthly in the current calendar year. See 26 U.S.C. 5061(d)(4).

New proprietors commencing operations in 2018 may file quarterly or annually in 2018 if they reasonably expect, using the temporarily lower effective tax rates, that they will not exceed the applicable liability limits for quarterly or annual filing.

For more information regarding your eligibility to file quarterly or annually or whether you are required to obtain a bond, you may contact TTB's National Revenue Center. Click here for contact information.

Last reviewed/updated 02/05/2018

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TR-G6: If I receive imported or domestic beer, wine, or distilled spirits in bond, am I eligible to take the reduced tax rate or new tax credit?

Importers and producers of wine, beer, and distilled spirits may be eligible for reduced tax rates or tax credits on the products they import or produce, respectively, depending on a number of variables. The guidance below contains information about your ability to take advantage of the reduced tax rates or new tax credits. Eligibility for the reduced tax rates or new tax credits may be limited by application of the relevant single taxpayer or controlled group rules.

Imported products. Domestic wineries, breweries, and distilled spirits plants that receive imported beer, wine, or distilled spirits withdrawn without payment of tax from customs custody may only take advantage of reduced tax rates or credits if they perform a production activity on the beer, wine, or distilled spirits (or process spirits, in the case of a distilled spirits processor) and, as a result, would be considered the producer (or the distiller or processor for distilled spirits).

Domestic Beer. A brewer who receives beer in bond, but who does not brew or produce the beer, is not eligible for the reduced tax rates on that beer when the brewer removes it. Beer eligible for the $16 reduced tax rates must be brewed by the brewer and removed by that brewer. The brewer must remove the beer during the time the statute is applicable. See 26 U.S.C. 5051(a)(1)(C)(i). Domestically produced beer eligible for the $3.50 reduced rate must be brewed or produced by the brewer and removed by that brewer or producer. The brewer or producer must remove the beer during the time the statute is applicable. See 26 U.S.C. 5051(a)(2)(A).

Domestic Wine. A wine premises that receives wine in bond, but does not produce the wine, is not eligible for the new tax credits on that wine when the wine premises removes it. Wine eligible for the new tax credits must be produced by the producer and removed by that producer. The producer must remove the wine during the time the statute is applicable. The transfer provisions under 26 U.S.C. 5041(c)(6) are dependent upon eligibility for the small domestic producer credit under 26 U.S.C. 5041(c)(1). Because the applicability of that credit is suspended, producers may not take advantage of the transfer provisions under section 5041(c)(6). For more detailed information about the impact of the Tax Cuts and Jobs Act of 2017 on non-producing wine premises (such as bonded wine cellars), please see the FAQ TR-W7.

Domestic Distilled Spirits. A distilled spirits plant that receives distilled spirits in bond, but that does not distill or process those spirits is not eligible for the reduced tax rates on those spirits. Distilled spirits eligible for the reduced tax rates must be distilled or processed by the distilled spirits plant and removed on determination of tax by that distiller or processor. The distiller or processor must remove the distilled spirits during the time the statute is applicable. See 26 U.S.C. 5001(c)(1).

Last reviewed/updated 03/02/2018

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TR-G7: How should the reduced tax rates and credits be shown on the tax return, TTB Form 5000.24?

For beer and distilled spirits, the Act provides for reduced rates of tax for certain products removed during calendar years 2018 and 2019. Those rates should be used to calculate the tax due. The total tax due for distilled spirits should be shown on line 9 and the total tax due for beer should be shown on line 11.

For wine, the Act provides tax credits for certain products removed during the calendar years 2018 and 2019. The calculated tax due prior to accounting for the credit should be shown on line 10 and the credit should be calculated in Schedule B, with the resulting decreasing adjustment incorporated into line 20.

Last reviewed/updated 03/13/2018

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Beer Tax Reform Questions and Answers

TR-B1: The Act says I may be eligible for a reduced rate of tax on beer that I "produce." For purposes of the reduced rate of tax, what activity counts as "produced"? May I pay the reduced rate on beer that I've received in bond in containers (for example, bottles) and subsequently remove subject to tax? May I pay the reduced rate on beer that I've received in bond and bottled?

For purposes of taking the reduced rate of tax allowed by the Act, beer is considered to have been "produced" if it is lawfully brewed or produced at a qualified brewery premises, including beer brewed by fermentation or produced by the addition of water or other liquids during any stage of production. The entire volume of beer to which water or other liquids had been added will be considered "produced" for purposes of applying the reduced tax rates. TTB expects these production activities to be undertaken in good faith in the ordinary course of production, and not solely for the purpose of obtaining a tax credit. Blending or combining two beers does not count as production for purposes of the reduced tax rate. Beer received in bond in containers and subsequently removed subject to tax, without any production activity occurring, is not eligible for a reduced tax rate. Beer received in bond and merely bottled is also not eligible for a reduced tax rate. The eligibility for the reduced rate is also subject to controlled group and single taxpayer rules in section 5051(a)(5), which may further limit the beer subject to the reduced rate upon removal by the brewer.

Last reviewed/updated 03/02/2018

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Wine Tax Reform Questions and Answers

TR-W1: Is hard cider eligible for a tax credit separate from the credit for other wines? That is, can a producer take the new tax credit on 750,000 wine gallons of hard cider and the credit on an additional 750,000 wine gallons of wine in one of the other 5 tax classes of wine?

The Act allows a credit against the excise taxes imposed on the first 750,000 wine gallons of wine produced by the producer and removed during the calendar year for consumption or sale. The credit applies to the first 750,000 wine gallons of wine removed during the calendar year, regardless of the class or classes of wine that make up the 750,000 gallons. As an example, if a winery produces wine that falls within the tax class for hard cider and also produces wine that falls within the tax class for still wine containing not more than 16 percent alcohol by volume and, in a calendar year first removes, subject to tax, 500,000 gallons of the wine classified as hard cider, and then removes, subject to tax, 400,000 gallons of the still wine, a credit is allowed on the tax applicable to the first 750,000 wine gallons of wine removed, which in this case would be the tax on the 500,000 gallons of wine classified as hard cider and the tax for the 250,000 gallons of the wine classified as still wine containing not more than 16 percent alcohol by volume. In this example, no credit would apply to the remaining 150,000 gallons of still wine removed.

See the Act for information on how to calculate the tax credit on the first 750,000 wine gallons removed in a calendar year. See 27 CFR part 24, subpart P, and TTB IC 2017-2 for information pertaining to eligibility for the hard cider tax class.

Last reviewed/updated 01/12/2018

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TR-W2: The Act deems certain "mead" and "low alcohol wine" to be eligible for the tax rate applicable to "still wines containing not more than 16 percent alcohol by volume." Are these meads and low alcohol wines eligible for a tax credit separate from the tax credit applied to wines in other tax classes?

The Act allows a credit against the excise taxes imposed by the IRC on the first 750,000 wine gallons of wine produced by the producer and removed during the calendar year for consumption or sale. The credit applies to the first 750,000 wine gallons of such wine, regardless of the class or classes of wine that make up the 750,000 gallons. For more information see question TR-W1 above.

Last reviewed/updated 01/12/2018

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TR-W3: The Act has raised the maximum alcohol by volume content for the lowest still wine tax rate from 14 percent alcohol by volume to 16 percent alcohol by volume. Do the alcohol content labeling tolerance rules set forth in 27 CFR 4.36 still apply?

These tolerances remain unchanged. The recent tax law revisions, which amend a number of alcohol excise tax provisions in the Internal Revenue Code (IRC), do not affect TTB's part 4 regulations, which are based on the Federal Alcohol Administration Act (not the IRC). TTB regulations at 27 CFR 4.36(b)(1) are set forth under the authority of the FAA Act and provide for an alcohol tolerance of 1 percent alcohol by volume for wines containing more than 14 percent alcohol by volume, and 1.5 percent alcohol by volume for wines containing 14 percent or less.

Last reviewed/updated 01/12/2018

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TR-W4: I produce and remove both still wine and hard cider. For the first 30,000 wine gallons of wine I remove, the Act allows me to claim a credit of $1.00 per gallon for still wine and a credit of 6.2 cents per gallon for hard cider. Are the credits based on which type of wine I removed sequentially during the calendar year? Or, if I remove both types during a return period, may I choose to claim the higher still wine credit first, regardless of the order of removal?

Based on the amended statutory language, you must claim the credit applicable to the first wine gallons of wine removed. Under the IRC, as amended by the Act, there is either a $1.00 or a 6.2-cent credit on the "first 30,000 wine gallons of wine . . . which are produced by the producer and removed during the calendar year." The $1.00 credit applies unless the wine is taxed at the wine tax rate applicable to hard cider. If the wine tax rate applicable to hard cider applies, then the credit is 6.2 cents. For example, if you remove 40,000 wine gallons of wine during the return period, you must determine which types of wine were among the first 30,000 wine gallons removed. Within the first 30,000 wine gallons removed, the applicable credit is 6.2 cents per wine gallon if the wine is hard cider and $1.00 for all other wine. The taxpaid removal from bond record required by 27 CFR 24.310 should assist in making this determination.

Last reviewed/updated 02/01/2018

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TR-W5: Will there be a new version of TTB Form 5120.17, Report of Wine Premises Operations, with the new alcohol content cutoff? Instead of reporting gallons of wine over/under 14 percent alcohol by volume, will we instead report the volume that is over/under 16 percent alcohol by volume starting with the January 2018 submission?

TTB has issued new versions of TTB Form 5120.17, Report of Wine Premises Operations, which provides for reporting wine gallons at the new alcohol content cutoff of 16 percent alcohol by volume. These versions carry a "temporary" designation, since the changes to the still wine tax class currently apply only to wine removed during calendar years 2018 and 2019. The temporary versions are now available on TTB.gov and in Pay.gov.

TTB F 5120.17 Temp - Report of Wine Premises Operations
TTB F 5120.17sm Temp - Report of Wine Premises Operations Smart Form

Use the old version of the form (available here) if you need to file an original or amended report of winery activity that occurred in calendar years 2017 or earlier.

Last reviewed/updated 02/01/2018

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TR-W6: May I label a wine containing 15 percent alcohol by volume as "table wine," now that the Act has raised the maximum alcohol by volume content for the lowest still wine tax rate from 14 percent alcohol by volume to 16 percent alcohol by volume?

No, a table wine may not contain more than 14 percent alcohol by volume. TTB's part 4 wine labeling regulations concerning the standards of identity for table wines, which are based on the Federal Alcohol Administration Act, are not affected by recent revisions to the alcohol excise tax provisions in the Internal Revenue Code. The term "table wine" is defined in TTB's part 4 regulations as a wine having an alcohol content not in excess of 14 percent by volume. See 27 CFR 4.21(a)(2), 4.21(d)(2), 4.21(e)(3), and 4.21(f)(2).

Last reviewed/updated 02/05/2018

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TR-W7: I am a Bonded Wine Cellar (BWC) and I do not produce my own wine. How does the new law affect my ability to take a tax credit on wine that I hold for other wineries that produced the wine?

The new law that went into effect January 1, 2018, set forth new tax credits for wine (referred to as the "Special Rule") and suspended, through the end of calendar year 2019, the previous tax credit for wine. The statutory provisions that allowed for a transfer of tax credits are also suspended, as they apply specifically only to the tax credit that has now been suspended by the new law. There is no provision in the new law that provides for a transfer of the new tax credits that apply to wine removed in 2018 and 2019. (See the addition of the "Special Rule" at 26 U.S.C. 5041(c)(8), stating that the tax credit provisions of 26 U.S.C 5041(c)(1) and (c)(2) do not apply after December 31, 2017 and before January 1, 2020, and the provisions of section 5041(c)(6) providing for the transfer of the credit by any person eligible for the credit under section 5041(c)(1).)

As a result, for calendar years 2018 and 2019, any wine that is removed from a wine premises that did not produce the wine is not eligible for the new tax credits. See FAQ TR-G6 for additional guidance on credits and reduced rates for products transferred in bond. See FAQ TR-W8 for what activities are considered "production" for purposes of the new tax credit.

While the Special Rule is in effect (that is, calendar years 2018 and 2019), a winery can only apply the new tax credits to wine produced by the winery. During this time, if wine is being held at premises that did not produce the wine, the producing wine premises can bring the wine back to its premises and remove the wine taxpaid from its premises in order to apply the new tax credits to the wine. Otherwise, a BWC or other wine premises that removes wine that it did not produce must tax pay the wine at the applicable tax rate, without application of credits that would otherwise be available to the producing wine premises under the Special Rule.

The Act was signed into law on December 22, 2017, and its provisions became effective within 10 days, on January 1, 2018. TTB recognizes that the exceptional circumstances of the short period between passage of the new law and its effective date limited the ability of businesses to adjust to the provisions in the new law, and that the transfer of wine from a BWC back to the producing winery may be expensive and burdensome, particularly for small wine producers. Based on these unique circumstances, TTB is authorizing an alternate procedure, applicable for a limited period of time, by which the wine producer may tax determine and tax pay the wine without physically returning the wine to its premises. See Industry Circular 2018-1A.

Last reviewed/updated 03/02/2018

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TR-W8: The Act says I may take a credit on wine I "produce" and remove. For purposes of taking the new tax credit, what activity counts as "produced"? May I take the new tax credit on wine that I've sweetened or blended? May I take the credit on wine that I've received in bond?

For the purpose of taking the credit allowed by the Act, the activities considered to be "production" that are set forth at 27 CFR 24.278(e) will apply. These are the activities that were used prior to the Act to determine whether a person's production of wine was within the production limit for the currently-suspended small domestic producer credit at 26 U.S.C. 5041(c)(1). In addition to the entire volume of wine produced by fermentation, a winery may count as production wine that has undergone the following activities, if undertaken in good faith in the ordinary course of production, and not solely for the purpose of obtaining a tax credit:

- *Sweetening* – Sweetening material is added after fermentation for the purpose of sweetening the wine.
- *Addition of wine spirits* – Certain brandy or wine spirits authorized to be used in wine production are added.
- *Amelioration* – Water, sugar, or a combination of both is added to wine to adjust the wine's acid content.
- *Production of formula wine* – Formula wine includes wine that may contain added flavoring or wine treating materials.

The entire volume of wine that has undergone one of these production activities would be considered "produced" for purposes of applying the new tax credit. Blending that does not involve one of the operations listed above is not considered production. The eligibility for the new tax credit is also subject to controlled group and single taxpayer rules similar to those in section 5051(a)(5), which may further limit the wine eligible for the new tax credit. See 26 U.S.C. 5041(b)(4).

In addition, the production of sparkling wine and carbonated wine are also considered "production" for the purpose of taking the credit allowed by the Act. Please see FAQ TR-W11 below.

Last reviewed/updated 05/21/2018

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TR-W9: If I blend wine that I produced with wine produced by another winery and then remove the blended wine product subject to tax, is it eligible for the tax credit?

As discussed in TR-W8, a winery may claim the new tax credits only on wine it produces (either by fermentation, sweetening, addition of wine spirits, amelioration, or production of formula wine) and removes from its own bonded premises for consumption or sale. If a winery bottles and removes a wine that is a blend of wine of its own production with wine produced by another winery, it may claim the new tax credit only on the portion of wine it produced and not on the portion produced by the other winery. For example, if you create a blended wine in which 85% of the wine was produced by you, with the remaining 15% comprising wine that you did not produce, you may claim the credit only on the 85% of the blend which you produced. The 15% which you did not produce must be taxpaid at the full rate. You should record the volume and source of the wine used in the blend in the bulk still wine record (see 27 CFR 24.301) to ensure you pay the correct amount of tax.

Last reviewed/updated 03/13/2018

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TR-W10: TTB issued an Alternate Procedure for wine producers who have untaxpaid wine stored at a Bonded Wine Cellar. Can wine producers who have untaxpaid wine stored at a Bonded Winery also take advantage of the Alternate Procedure?

Yes, a wine producer that has untaxpaid wine stored at a bonded winery may also take advantage of the Alternate Procedure at Industry Circular 2018-1A. If such a bonded winery does take advantage of the Alternate Procedure, the bonded winery at which the wine is stored must follow the instructions for the Bonded Wine Cellar set forth in the Industry Circular.

Last reviewed/updated 05/21/2018

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TR-W11: I produce sparkling wine from bulk still wine that I purchase and receive in bond at my winery premises. Am I considered the producer of the sparkling wine if I remove it from my bonded premises? Is the answer the same if I produced carbonated wine rather than sparkling wine?

Yes. TTB considers both sparkling wine and artificially carbonated wines created by a winery through secondary fermentation in a closed container or through injection of carbon dioxide to be "produced" for the purposes of applying the new tax credit. Prior to the Act, TTB included the production of champagne and other sparkling wines when determining whether a person's production of wine was within the production limit for the currently-suspended small domestic producer credit at 26 U.S.C. 5041(c)(1), even though sparkling wine was not eligible for that credit. See 27 CFR 24.278(e). Considering all methods of producing effervescent wine to be "production" activity is consistent with that regulatory interpretation. Accordingly, a winery that creates a sparkling wine or carbonated wine from a purchased still wine may claim the credit on the sparkling or carbonated wine when it removes the wine taxpaid from its bonded premises.

Last reviewed/updated 05/21/2018

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TR-W12: I operate a bonded winery and produce wine, which I transfer to a bonded wine cellar (BWC) for storage. Before I removed any wine that I produced taxpaid from my winery in 2018, the BWC removed and taxpaid 10,000 gallons of wine produced by me. The BWC paid the full tax rate and did not take any tax credits when it removed my wine. Must I count the 10,000 gallons removed by the BWC as part of the first 30,000 gallons for which I may claim the $1 credit per gallon?

No, only wine that you both produce and remove from your premises for consumption or sale is counted toward the gallonage limits to which the tax credits apply. Therefore, you do not count the 10,000 gallons removed by the BWC as part of your first 30,000 gallons of wine eligible for the $1 credit.

Last reviewed/updated 05/21/2018

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TR-W13: If I remove from my bonded premises wine that I did not produce (which is therefore not eligible for any credit), do those removals reduce my eligibility for the tax credits? For example, if the first 30,000 gallons of wine I remove taxpaid from my bonded premises in 2018 is wine that I purchased and did not produce, does that mean that the next 30,000 gallons of wine I remove taxpaid in 2018 is not eligible for the $1 credit even if I produced those next 30,000 gallons of wine?

No, you do not count any wine that you did not produce toward the gallonage limits to which the tax credits apply. The Act states that the $1 credit applies to the first 30,000 gallons of wine which are "produced by the producer and removed during the calendar year[,]" so those 30,000 gallons do not include wine you did not produce. You may claim the $1 credit for the first 30,000 gallons you produced and removed taxpaid in 2018, even if you already removed 30,000 gallons of purchased wine that year that you did not produce.

Last reviewed/updated 05/21/2018

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TR-W14: Our company has bonded wineries at three different locations. We currently file separate excise tax returns for each of the wineries. Does the Act change how many Federal excise tax returns we are supposed to file for return periods in 2018 and 2019?

No, the Act did not change how many Federal excise tax returns you must file, so you must still file a separate excise tax return for each bonded winery. However, you must combine the production and taxpaid removal totals for your three bonded wineries for the purpose of determining your eligibility for the tax credits in 26 U.S.C. 5041(c)(8).

Last reviewed/updated 05/21/2018

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TR-W15: I produce wine at my bonded winery and then transfer that wine in bond to a different bonded winery for bottling. The other winery doesn't do anything to the wine except bottle it. Once bottled, the wine is transferred in bond back to my bonded premises. When I remove the wine for consumption or sale, may I take any credits on it?

Yes, the wine that was transferred in bond for bottling and then transferred in bond back to you is eligible for the tax credits because you both produced it and will remove it from your premises for consumption or sale. This assumes the wine is among the first 750,000 gallons of your wine that you removed for consumption or sale from your premises during either 2018 or 2019, since this is the maximum number of gallons per year to which the credits apply in either 2018 or 2019.

Last reviewed/updated 05/21/2018

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Distilled Spirits Tax Reform Questions and Answers

TR-D1: I am a distilled spirits plant (DSP) who has an approved Application for Transfer of Spirits and/or Denatured Spirits in Bond (TTB Form 5100.16), which allows me to receive transfers of distilled spirits in bond from another DSP. This was approved prior to the change in law that now allows transfers in bond of non-bulk distilled spirits. Do I need to file an additional application to receive transfers in bond of bottled distilled spirits?

No, if you have an approved TTB Form 5100.16, you do not have to file an additional application to receive transfers of bottled distilled spirits in bond. Your approved TTB Form 5100.16 specifies a limitation on the number of proof gallons transferred, but does not distinguish between bulk and non-bulk distilled spirits.

Last reviewed/updated 01/12/2018

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TR-D2: Can industry members elect when to take the credits allowable under 26 U.S.C. 5010, and how do the reduced rates of tax on distilled spirits affect the credits allowable under section 5010?

An industry member cannot elect when to take the credits allowable under section 5010, and the reduced rates of tax on distilled spirits may affect the credits allowable under section 5010. The IRC provides for certain credits against the tax imposed on distilled spirits containing wine and flavors. The credits are determined at the same time the tax is determined on the distilled spirits containing the wine or flavors, and the credits are allowable at the time the tax is payable as if the credit constituted a reduction in the rate of tax. See 26 U.S.C. 5010(a), (b)(1)(A), and (b)(1)(B).

Under section 5010(b)(1)(A), taxes against which the credits are allowable are the taxes due on the distilled spirits product containing the wine or flavors that is removed from the bonded premises of a distilled spirits plant (DSP), imported into the United States, or otherwise brought into the United States. Therefore, the credits associated with the distilled spirits product containing the wine or flavors are allowable only against taxes due for the distilled spirits product containing that wine or those flavors. In addition, by equating allowance of the credits with a reduction in the rate of tax, section 5010(b)(1)(B) provides that credits associated with that distilled spirits product are allowable only to the extent they do not exceed the taxes due for that product. For example, if a DSP proprietor removes a distilled spirits product that is subject to a tax rate of $2.70 per proof gallon under 26 U.S.C. 5001(c)(1)(A) and the product contains wine and flavors for which the total credits allowable under section 5010 are $3.00 per proof gallon, the total allowable credits for that product would be limited to $2.70 per proof gallon and the DSP proprietor would be required to take the credits at the time the taxes are paid for the product.

Last reviewed/updated 02/01/2018

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TR-D3: I am a distilled spirits plant (DSP) proprietor and I would like to begin receiving transfers in bond of non-bulk distilled spirits as allowed under the Act. What requirements and other information should I be aware of related to such transfers?

You may receive transfers in bond of non-bulk distilled spirits during calendar years 2018 and 2019 if you comply with applicable requirements pertaining to such transfers. Below is a non-exhaustive list of some requirements and other information you should be aware of if you are interested in receiving transfers in bond of non-bulk distilled spirits:

- You must receive approval from TTB using TTB Form 5100.16 for each DSP from which you will receive such transfers. When filling out Box 6a of the form, you should use a tax rate of $13.50 for calculating the quantity of distilled spirits authorized to be transferred, as required by the form.
- DSPs who transfer distilled spirits (consignors) and DSPs who receive such transfers (consignees) must keep records required by the regulations, including the transfer records required by 27 CFR 19.620 and 19.621. The transfer records must contain all of the information required by these regulations, including the serial numbers of cases transferred and, if applicable, information about calculating the credits for the use of eligible wines and eligible flavors. Additionally, the consignor should send,

and the consignee should keep on file, any applicable documentation to substantiate label claims.

- When receiving bottled and other non-bulk distilled spirits as transfers in bond, DSPs must generally enter the distilled spirits into the processing account. If the distilled spirits will be dumped for redistillation, the distilled spirits may be entered into the production account.
- The bottler must apply for the Certificate of Label Approval (COLA) for the distilled spirits and should provide a copy of the COLA to the recipient of the bottled spirits transferred in bond. If the labels contain all information required under the regulations, no additional coding or other marking is required to be added to labels on bottles transferred in bond.

Last reviewed/updated 02/01/2018

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TR-D4: Do the credits allowable under 26 U.S.C. 5010 apply to distilled spirits subject to the reduced tax rates of $2.70 and $13.34 per proof gallon?

Yes. However, as discussed in FAQ TR-D2, the credits associated with the product containing the wine or flavors are allowable only to the extent they do not exceed the taxes due for that product.

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TR-D5: I am a distilled spirits plant (DSP) in the United States who makes a distilled spirits product containing a flavor that is eligible for the flavors content credit under 26 U.S.C. 5010. The flavor is present in the finished product at a proportion of 2.5 percent of the product on a proof gallon basis. What is the effective tax rate for this product expressed to the nearest cent when taking into account the flavors content credit under section 5010?

Depending on the circumstances, the effective tax rate for the product is $13.16, $13.00, or $2.36.

Section 5001 of the IRC (26 U.S.C. 5001) provides for tax rates of $13.50, $13.34, and $2.70 per proof gallon of distilled spirits depending on the circumstances. Under section 5010(a)(2), there is allowed on each proof gallon of flavors content of distilled spirits a credit against the tax imposed by section 5001 equal to $13.50. Under section 5010(c)(2)(B)(iii), the term "flavors content" does not include alcohol derived from flavors to the extent such alcohol exceeds 2.5 percent of the finished product on a proof gallon basis.

Under section 5010, the flavors content credit for a distilled spirits product containing 2.5 percent eligible flavor on a proof gallon basis is equal to $0.34 per proof gallon, which is equal to 2.5 percent of $13.50 per proof gallon. Subtracting this credit rate from the tax rates of $13.50, $13.34, and $2.70 per proof gallon yields effective tax rates of $13.16, $13.00, and $2.36, respectively.

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TR-D6: I am a distilled spirits plant (DSP) in the United States who makes a distilled spirits product containing a wine that is eligible for the wine content credit under 26 U.S.C. 5010. I understand that the Act provides for new wine tax credits under 26 U.S.C. 5041(c)(8) during 2018 and 2019 for certain wines. As a DSP, do I need to take into account the new wine tax credits under section 5041(c)(8) when determining the wine content credit under section 5010 for my distilled spirits product?

No. The wine content credit under section 5010(a)(1) is based on the rate of tax which would be imposed on the wine under 26 U.S.C. 5041(b) but for its removal to the bonded premises of a DSP. Since this wine content credit is based on the rate of tax which would be imposed on the wine under section 5041(b), the new wine tax credits under section 5041(c)(8) are not taken into account when determining the wine content credit for distilled spirits under section 5010(a)(1).

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Nonbeverage Products (MNBP) Tax Reform Questions and Answers

TR-O1: How do the new reduced tax rates on certain distilled spirits affect the amount of drawback that manufacturers of nonbeverage products (MNBPs) may claim?

The IRC provides for drawback of tax on each proof gallon at a rate of $1 less than the rate at which the distilled spirits tax has been paid or determined. See 26 U.S.C. 5114. The Act amends 26 U.S.C. 5001 to authorize reduced rates of excise tax on certain distilled spirits for 2018 and 2019. If the spirits used by an MNBP were taxed at a reduced rate, then the drawback rate will be $1 less than that rate. For example, if the spirits were taxed at a reduced rate of $2.70 per proof gallon, then the drawback rate would be $1.70 per proof gallon. The TTB regulations at 27 CFR 17.162 and 17.163 require MNBPs to maintain records of the effective tax rate paid on the spirits used to manufacture nonbeverage products. For this purpose, the effective tax rate includes the tax rate imposed by section 5001 (see 27 CFR 17.11), so these records must show the tax rate paid (including, as applicable, the reduced tax rate paid) on the spirits used.

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TR-O2: What information should manufacturers of nonbeverage products (MNBPs) submit with drawback claims to document the tax rate paid on the distilled spirits used?

In cases where the drawback rate claimed for any product exceeds $1.70 per proof gallon, the MNBP must include a statement in Part IV of TTB Form 5154.2 describing the specific tax rate or rates paid on the spirits used to manufacture the product; if the MNBP provides supporting data for claims using another suitable format in accordance with 27 CFR 17.147(a), the MNBP must include this same statement in an appropriate location. Unless specifically requested by the National Revenue Center after the claim is submitted, the MNBP does not need to submit invoices from a distilled spirits plant to support its drawback claim. TTB may require additional supporting data when needed to determine the correctness of drawback claims, including information that shows that the spirits used were taxpaid or tax-determined at the applicable effective tax rate. See 27 CFR 17.147(a) (TTB can require additional supporting data to determine correctness of claim) and 27 CFR 17.146(b) (claim must show that the spirits on which drawback is claimed were taxpaid at the applicable effective tax rate). Drawback is allowed only to the extent that the claimant can establish, by evidence satisfactory to the appropriate TTB officer (in this case, officers at the National Revenue Center), the actual quantity of taxpaid or tax-determined spirits used in the manufacture of the product and the effective tax rate applicable to those spirits. See 27 CFR 17.141. TTB can deny claims if MNBPs do not provide information necessary to establish the appropriate drawback rate.

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CONTACT US

Please send us your questions about Craft Beverage Modernization and Tax Reform using the Regulations and Rulings Division contact form. TTB is developing responses to questions for future updates to this page.

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Negotiating/Drafting Brewery and Distillery Contracts

Submitted by Jeff C. O'Brien

Negotiating/Drafting Brewery and Distillery Contracts

Jeffrey C. O'Brien

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ATTORNEYS AT LAW

Topics To Be Covered:

- Distribution Agreements
- Contract Production Agreements
- Agreements With Suppliers
- Licensing Agreements
- Alternating Proprietorships
- Equipment, Retail, Production, and Distribution Space Leases
- Sample Agreements

Distribution Agreements

Distribution Agreements

- Laws vary from state to state
- Creation
- Termination
- Scope of Agreement
- Small Brewer Exemptions

Contract Brewing/Licensing

- Definition: a brewery that hires another brewery to produce its beer. The licensor generally handles marketing and brand development of the beer, while leaving the brewing and packaging to the licensee brewery.
- Pros of Contract Brewing:
  - Can help alleviate producer brewery supply issues to meet demands.
  - Producer breweries avoid costs since they do not need to own a brewing facility

Alternating Proprietorship

- Definition: An arrangement in which two or more people take turns using the physical premises of a brewery. Generally, the proprietor of an existing brewery, the "host brewery", agrees to rent space and equipment to a new "tenant brewer."
- Pros of an Alternating Proprietorship:
  - Tenant brewers can develop a brand before they are ready to invest in their own premises and equipment.
  - Tenant brewer may be eligible for a lower tax rate on beer.
  - Host breweries can offset their investment by renting out their excess capacity.

Alt Prop vs. Contract Brewing

	ALT PROP	CONTRACT BREWING
Title Ownership	Tenant brewer holds title to its beer, including the ingredients and raw materials it uses to produce its beer, during all stages of production.	Contract brewer holds title to the beer, including the ingredients and raw materials used to brew the beer, during all stages of production.
Record Keeping	Tenant brewer and host brewer each retain their own records for production and removal of beer and each provides reports to the TTB.	Contract brewer retains all records of production and removal of beer and provides reports to the TTB.
Taxes	Tenant brewer and host brewer are individually responsible for paying their own taxes on their own beer removed from the brewery.	Contract brewer is solely responsible for paying taxes on beer removed from the brewery.
Brewer Licensure	Tenant brewer and host brewer must each qualify as a brewer and have separate licenses.	Only the contract brewer must qualify as a brewer, so the producer brewer does not need a license.
Ease of Paperwork	Requires significant paperwork for both parties.	Simple agreement; Brand is added to the contract brewer's Notice.

Negotiating Brewery and Distillery Contracts

Submitted by Jeffrey C. O'Brien

I. Brewing Models

A. Production Brewery

1. **Definition:** A brewery that brews its own beer onsite and packages its beer for sale largely off-premise. May have a tasting room.
2. **Examples of Large Production Breweries:** Lagunitas, Bell's, Stone.

B. Brewpub

1. **Definition:** A brewery whose beer is brewed primarily on the same site from which it is sold to the public, such as a pub or restaurant. If the amount of beer that a brewpub distributes off-site exceeds 75%, it may also be described as a craft or microbrewery. Most brewpubs must adhere to laws which limit the total ratio of beer sales to food sales. A brewpub cannot be considered a bar or beer garden which offers a limited amount of food or limits the restaurant's hours of operation. It must operate as a public restaurant which happens to offer a wide selection of micro-brewed beers.
2. **Pros of a Brewpub**
   - **a.** Brewpubs create marketing to new customers who may not be willing to go to a brewery just to taste beer, but who may be willing to try a new restaurant closer to home.
   - **b.** Brewpubs may be located in a more accessible location to attract more people because the brewery is not actually manufacturing beer onsite.
   - **c.** Brewpubs can easily develop their own identity by designing the brewpub to reflect their branding and style.
3. **Examples of National/Regional Brewpubs:** Rock Bottom Brewery, Gordon Biersch, etc.

C. Alternating Proprietorship (AP)

1. Definition: An arrangement in which two or more people take turns using the physical premises of a brewery. Generally, the proprietor of an existing brewery, the "host brewery," agrees to rent space and equipment to a new "tenant brewer." Under this arrangement, tenant brewers are solely responsible for brewing their beer, maintaining all of the brewing records, labeling the beer using their own name and address, and paying tax on the beer upon their removal of the beer from the brewery.

2. Pros of an Alternating Proprietorship

a. Tenant brewers can develop a brand before they are ready to invest in their own premises and equipment.

b. Tenant brewers can begin placing their product in the stream of commerce to better preserve intellectual property rights.

c. Host breweries can offset their investment by renting out their excess capacity.

d. Host breweries often serve as a buffer to allow for easy transition into a highly-regulated industry.

e. Host breweries take on much of the physical pressure, burden and liability

of the brewing operation.

f. Tenant brewer may be eligible for a lower tax rate on beer. Where a brewer produces less than 2,000,000 barrels of beer during a calendar year, there is a reduced tax rate of $7 per barrel on the first 60,000 barrels on beer produced that is also consumed or sold in that same year.

3. Examples of Alternating Proprietorships: 21st Amendment Brewery in CA (Tenant Brewer) within Cold Spring Brewery in MN (Host Brewer), Avery Brewing in CO (Tenant Brewer) within New Belgium Brewing in CO (Host Brewer).

D. Contract Brewing

1. **Definition:** A business that hires another brewery to produce its beer. It can also be a brewery that hires another brewery to produce additional beer. The contract brewing company handles marketing, sales and distribution of its beer, while generally leaving the brewing and packaging to its producer brewery. The producer brewery provides the recipes for the beer to the contract brewer.

2. **Pros of Contract Brewing**

    a. Producer breweries that cannot supply enough beer to meet demands can contract with a larger brewery to help alleviate their supply issues.

    b. Producer breweries do not need to own a brewing facility, so they can avoid the costs associated with a physical brewery.

    c. Producer breweries do not need a separate license.

3. **Example of Contract Brewing:** Gluek Brewing Company in MN (Producer Brewery) within Hard Energy Company in CA (Contract Brewery)

Comparison of Alternating Proprietorship and Contract Brewing Models

Differences	Alternating Proprietorship	Contract Brewing
Title Ownership	Tenant brewer holds title to its beer, including the ingredients and raw materials it uses to produce its beer, during all stages of production.	Contract brewer holds title to the beer, including the ingredients and raw materials used to brew the beer, during all stages of production.
Record Keeping	Tenant brewer and host brewer each retain their own records for production and removal of beer and each provides reports to the Alcohol and Tobacco Tax and Trade Bureau (TTB).	Contract brewer retains all records of production and removal of beer and provides reports to the TTB.
Taxes	Tenant brewer and host brewer are individually responsible for paying their own taxes on their own beer removed from the brewery.	Contract brewer is solely responsible for paying taxes on beer removed from the brewery.
Brewer Licensure	Tenant brewer and host brewer must each qualify as a brewer and have separate licenses.	Only the contract brewer must qualify as a brewer, so the producer brewer does not need a license.
Ease of Paperwork	Requires significant paperwork for both parties.	Simple agreement; Brand is added to the contract brewer's Notice.

II. Negotiating Brewery and Distillery Contracts

A. Distribution Agreements

State Distribution Laws

i. Distribution laws vary between states. See Appendix 1 for a summary of each state's law.

Franchise Laws

A majority of the states have enacted full-fledged beer franchise laws. Although it is not hard to detect a whiff of protectionism in these enactments, their stated purpose is to correct the perceived imbalance in bargaining power between brewers (who are presumed to be big and rich) and wholesalers (who are presumed to be small and local). Temperance concerns are also cited. A full-fledged beer franchise law will usually:

- Define franchise agreements to include informal, oral arrangements, making any shipment to a wholesaler the start of a franchise relationship.
- Prohibit coercive brewer practices, most often including actions in which a brewer (a) requires the wholesaler to engage in illegal acts, (b) forces acceptance of unordered beer, or (c) withholds shipments in order to impose terms on the wholesaler.
- Require "good cause" or "just cause" before a brewer can terminate a wholesaler.

    - The burden is generally on the brewer to demonstrate cause for termination.
    - "Good cause" is usually defined to include a significant breach of a "reasonable" and "material" term in the parties' agreement.
- Dictate that a brewer give prior written notice (60 or 90 days is common) to a wholesaler before termination is effective, with the notice detailing the alleged deficiencies that justify termination.
- Grant wholesalers an opportunity to cure the deficiencies alleged in a termination notice, with termination ineffective if a wholesaler cures the defect(s) or presents a plan to cure the defect(s).
    - "Notice-and-cure" requirements usually are waived under certain circumstances. These most often include a wholesaler's (a) insolvency, (b) conviction or guilty plea to a serious crime, or (c) loss of a license to do business. Many franchise laws also permit expedited termination where a wholesaler (d) has acted fraudulently or (e) has defaulted on a payment under the agreement despite a written demand for payment.
- Require wholesalers to provide brewers with notice of any proposed change in ownership of the wholesaler, giving the brewer an opportunity to object. The brewer's approval of an ownership change cannot be "unreasonably" withheld.

    - Brewers usually have little or no right to block a transfer to a previously designated family successor.
- Create remedies for unfair termination, generally granting wholesalers the right to receive "reasonable compensation" following termination.
    - Most beer franchise laws grant wholesalers the right to seek an injunction that, if granted, would quickly halt termination proceedings pending the resolution of wrongful termination claims. The forum for such relief can be either a state court or the state's alcohol control authorities.
    - Although arbitration of the entire dispute is not required, and sometimes prohibited, disputes over what constitutes "reasonable compensation" often must be arbitrated at the request of a party.
    - Even if the franchise law prohibits arbitration, an arbitration clause in the parties' written agreement is likely enforceable under the Federal Arbitration Act if the parties reside in different jurisdictions.
- Declare any waiver of franchise law protections void and unenforceable.
- Set a date that the law becomes effective. Some franchise agreements may predate franchise acts' effective dates, likely making the franchise law inapplicable to that agreement.

In addition to the extremely common provisions described above, other terms may:

- Require beer franchise agreements to be in writing.
- Mandate that sales territories be exclusive.
    - Wholesalers may face substantial penalties for making deliveries outside their designated territory, and such conduct may permit expedited termination by the brewer.
    - Territorial designations may need to be filed with state liquor control authorities.
- Restrict a brewer's ability to dictate prices, with restrictions that often go beyond the strictures of antitrust law. Common provisions prohibit brewer price fixing, require brewers to file and adhere to periodic price schedules, and ban price discrimination between wholesalers within the state.
- Provide that the prevailing party in a termination dispute will be compensated for its attorneys fees.
- Bind succeeding brand owners to existing franchise agreements, although some permit not-for-cause termination after a change in brand ownership, as long as compensation is paid.
- Impose a good faith obligation on both parties. Under modern contract law, this good faith obligation is already implied in all contractual relations.

- Impose specific obligations on wholesalers, occasionally specified to include a duty to properly rotate stock, maintain tap lines, and comply with other reasonable quality control instructions.

Most states have enacted at least a few laws that regulate brewer-wholesaler relations. In some, beer wholesalers are covered by a franchise law protecting all alcohol beverage wholesalers. In a few states, beer wholesalers are protected by franchise laws that apply to a variety of franchise relationships, from beer to burgers. Still others partially regulate beer franchise relationships through their alcohol control laws by, for example, requiring exclusive territories as a condition for licensing. Finally, a few states and the District of Columbia have, to date, left brewer-wholesaler relations essentially unregulated, thereby allowing the franchise relationship to be governed exclusively by the terms of the parties' agreement, to be enforced under general contract law principles.

Appendix 1 sets forth a state-by-state summary of beer distribution laws.

Self-Distribution

Many states permit breweries below a certain production threshold to distribute their product directly to retailers without the use of a distributor. While self-distribution can be a viable means around the complex and onerous franchise laws, the time and capital required to operate an effective distribution system is significant and tends to detract

from other operations. Further, breweries that grow beyond the production thresholds are forced into the franchise system as they lose their rights of self-distribution.

Appendix 2 sets forth a state-by-state summary of these self-distribution laws.

Small Brewer Exemptions

In response to the continued consolidation of beer wholesalers in the U.S. and the imbalance in negotiations between larger wholesalers and small craft brewers, several states have created exemptions within their distribution laws for "small brewers" relative to the onerous termination provisions:

- Arkansas: Small brewers within the state are fully exempt from any remedies under the state's franchise act. Ark. Code Ann. §§ 3-5-1102(12)(B); 3-5-1403(13). An Arkansas statute defines a small brewery as a "licensed facility that manufactures fewer than thirty thousand (30,000) barrels of beer and malt beverages per year for sale or consumption." Ark. Code Ann. § 3-5-1403(13).
- Colorado: None of the state's franchise protections are enforceable against small manufacturers. Colo. Rev. Stat. § 12-47-406.3(8). Specifically, the applicable statute exempts manufacturers that produce "less than three hundred thousand [300,000] gallons of malt beverages per calendar year." *Id.*
- Illinois: The state's franchise provisions allow small brewers whose annual volume of beer products supplied represents 10 percent or less of the wholesaler's entire

business to terminate upon payment of reasonable compensation to the wholesaler. 815 Ill. Comp. Stat. 720/7.

- Nevada: The state's good cause franchise protection against terminations is not enforceable against small suppliers in-state and out-of-state. Nev. Rev. Stat. § 597.160(2). Specifically, the statute exempts suppliers that sell "less than 2,000 barrels of malt beverages . . . in this state in any calendar year." *Id.*
- New Jersey: A brewer from within or without the state who succeeds another brewer is exempt from a rebuttable presumption that favors an injunction preventing termination of the preexisting wholesaler when the affected brands represent a small portion (*i.e.*, less than 20 percent) of the terminated wholesaler's gross sales, the terminated wholesaler receives compensation, and the brewer assigns the brands to a wholesaler that already distributes its other brands. N.J. Rev. Stat. § 33:1-93.15(4)(d)(1).
- New York: A small brewer whose annual volume is less than 300,000 barrels produced in the state or outside of the state and who represents only a small amount (*i.e.*, no more than three percent) of a wholesaler's total annual sales volume, measured in case equivalent sales of twenty-four-twelve ounce units, may terminate a wholesaler upon payment of compensation for only the distribution rights lost or diminished by the termination. N.Y. Alco. Bev. Cont. Law § 55-c(4)(c)(i). The statute defines "annual volume" as "the aggregate

number of barrels of beer" brewed by or on behalf of the brewer under trademarks owned by the brewery, or the aggregate number of barrels of beer brewed by or on behalf of any person controlled by or under common control with the brewer, "during the measuring period, on a worldwide basis." N.Y. Alco. Bev. Cont. Law § 55-c(4)(c)(iv).

- North Carolina: A small brewer may terminate a wholesaler upon payment of compensation for the distribution rights with five days' written notice without establishing good cause. N.C. Gen. Stat. § 18B-1305(a1). North Carolina's alcohol beverage statutes define a small brewer as "a brewery that sells, to consumers at the brewery, to wholesalers, to retailers, and to exporters, fewer than 25,000 barrels . . . of malt beverages produced by it per year." N.C. Gen. Stat. § 18B-1104(8).
- Pennsylvania: Although not a small brewer carve-out, the state's franchise provisions exempt in-state manufacturers whose principal place of business is in the state, "unless they name or constitute [or have named or constituted] a distributor or importing distributor as a primary or original supplier of their products." 47 Pa. Cons. Stat. § 431(d)(5). **Warning**: this provision likely violates the Commerce Clause of the U.S. Constitution.
- Rhode Island: Although not a small brewer carve-out, the state's franchise laws exempt Rhode Island-licensed manufacturers. R.I. Gen. Laws § 3-13-1(5).

Warning: this provision likely violates the Commerce Clause of the U.S. Constitution.

- Washington: Small brewers holding certificates of approval are excluded from the state's franchise protections. Wash. Rev. Code § 19.126.020(10). Specifically Washington's franchise law excludes from the definition of "supplier" "any brewer or manufacturer of malt liquor producing less than two hundred thousand [200,000] barrels of malt liquor annually." *Id.*

Distillery Distribution Issues

ii. Regarding distilleries, most states do not have statutory distribution provisions similar to breweries. In Minnesota, for example, a distillery can have a distribution agreement for a term certain and is not subject to the franchise-type termination provisions described hereinabove. However, distilleries typically have little to no rights of self-distribution

B. Contract Production Agreements

- Definition: a brewery that hires another brewery to produce its beer. The licensor generally handles marketing and brand development of the beer, while leaving the brewing and packaging to the licensee brewery.

- Pros of Contract Brewing:
  - Can help alleviate producer brewery supply issues to meet demands.
  - Producer breweries avoid costs since they do not need to own a brewing facility

Most states provide that employees are "at will" employees; that is, they can leave their employment whenever they wish, for any reason or no reason. If a business owner has a

key employee that is integral to its success, that employee should have a written employment agreement that provides for a fixed term of employment. A covenant not to compete can be included to deter a key employee from leaving to work for a competitor. Absent this type of agreement, the key employee can leave at any time.

A written employment agreement is imperative for your head brewer who knows a brewery's formulas could do the most damage to the business working for the competition. Hence, a master brewer employment agreement should include a covenant not to compete and provisions that clearly state that the beer formulas are "trade secrets" and thus the property of the brewery.

Covenants not to compete must be narrowly tailored to balance the interests of employer and employee. The employer must show (i) the covenant not to compete was supported by consideration when it was signed (if the consideration for the covenant is the continued employment of the employee, then the covenant must be signed prior to the start of employment to be valid); (ii) the covenant protects a legitimate business interest of the employer; and (iii) the covenant is reasonable in duration and geographic scope to protect the employer without being unduly burdensome on the former employee's right to earn a living.

Use of "Volunteers"

Many breweries take advantage of the abundance of people interested in helping their business grow by allowing them to volunteer at the brewery. Depending upon the nature of the duties they are performing, classifying an individual who ought to be treated – and compensated – as an employee as a "volunteer" can lead to significant penalties under Minnesota and federal law. In the past few years as both state and federal government have tried to get more revenue, they have focused on going after employers for misclassification of workers, whether they be independent contractors, interns or the use of volunteers.

Minnesota Law:

There is a presumption anyone performing work for a "for-profit" enterprise is an employee. In Minnesota, the nature of the employment relationship is determined by using worker classification tests, similar to the manner in which employee status is determined under both workers' compensation and unemployment insurance laws. Compensation of Minnesota employees is determined under Minn. Stat. § 181.722, Subd. 3, and the federal Fair Labor Standard Act. Correctly assessing a worker as an employee, student/intern, independent contractor, or volunteer is critical.

Minnesota Statute Section 177.23 governs the use of volunteers. Minn. Stat. §177.23, Subd. 5 states that "Employ" means "to permit to work", and Subd. 6 states that an "Employee" means any individual employed by an employer, subject to certain enumerated exceptions. There is an exception for "any individual who renders service gratuitously for a nonprofit organization", but there is no exception for an individual who renders service gratuitously for a for-profit organization.

Federal Law:

The Fair Labor Standards Act (FLSA) defines employment very broadly, i.e., "to suffer or permit to work." However, the Supreme Court has made it clear that the FLSA was not intended "to stamp all persons as employees who without any express or implied compensation agreement might work for their own advantage on the premises of another." In administering the FLSA, the Department of Labor follows this judicial guidance in the case of individuals serving as unpaid volunteers in various community services. Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious or humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of the religious, charitable or similar non-profit organizations that receive their service. Members of civic organizations may help out in a sheltered workshop; men's or women's organizations may send members or students into hospitals or nursing homes to provide certain personal services for the sick or elderly; parents may assist in a school library or cafeteria

as a public duty to maintain effective services for their children or they may volunteer to drive a school bus to carry a football team or school band on a trip. Similarly, an individual may volunteer to perform such tasks as driving vehicles or folding bandages for the Red Cross, working with disabled children or disadvantaged youth, helping in youth programs as camp counselors, scoutmasters, den mothers, providing child care assistance for needy working mothers, soliciting contributions or participating in benefit programs for such organizations and volunteering other services needed to carry out their charitable, educational, or religious programs.

Under the FLSA, employees may not volunteer services to for-profit private sector employers. On the other hand, in the vast majority of circumstances, individuals can volunteer services to public sector employers. When Congress amended the FLSA in 1985, it made clear that people are allowed to volunteer their services to public agencies and their community with but one exception - public sector employers may not allow their employees to volunteer, without compensation, additional time to do the same work for which they are employed. There is no prohibition on anyone employed in the private sector from volunteering in any capacity or line of work in the public sector.

Student/Interns:

Until recently, student/interns have not received the same close scrutiny as other groups of workers. Student/interns are <u>not</u> considered employees under both state and federal

law, if their use in the workplace generally passes six tests offered by the Department of Labor. The tests are:

1. The training experience is similar to what is provided at school;
2. The training experience is for the benefit of the student/interns;
3. The student/interns do not displace regular employees;
4. The employer providing the training receives no immediate advantage from the activities of the trainees;
5. Student/interns are not necessarily entitled to a job at the conclusion of the training; and
6. The employer and the student/interns understand the work is unpaid training.

Whether an employment relationship exists is not always clear. Instead, whether an intern or trainee is entitled to such things minimum wage and overtime compensation will often depend upon whether the individual is receiving training without displacing other employees or providing any real benefit to the employer. (Note: a reasonable stipend may be permitted)

Independent Contractor:

Independent contractors are hired to perform special services of a limited scope and duration, and they typically perform the same services for a variety of businesses. The standards in Minnesota to be considered in determining whether or not an individual is

an employee or an independent contractor depend upon the purpose for which such classification is to be considered but typically include factors such as:

1. The right to control the means and the manner of performance;
2. The mode of payment;
3. The furnishing of materials or tools;
4. The control of the premises where the work is done; and
5. The right of the employer to discharge the individual.

Generally, the more control, or right of control, an employer has over the individual performing the work, the work site, and the nature, quality, and manner in which work is performed, the more likely the relationship is an employer-employee relationship vs. an independent contractor arrangement.

B. Agreements with Suppliers

C. Licensing Agreements

D. Alternating Proprietorships

Definition: An arrangement in which two or more people take turns using the physical premises of a brewery. Generally, the proprietor of an existing brewery, the "host brewery", agrees to rent space and equipment to a new "tenant brewer."

Pros of an Alternating Proprietorship:

i. Tenant brewers can develop a brand before they are ready to invest in their own premises and equipment.

ii. Tenant brewer may be eligible for a lower tax rate on beer.

iii. Host breweries can offset their investment by renting out their excess capacity.

	Alt Prop	Contract Brewing
Title Ownership	Tenant brewer holds title to its beer, including the ingredients and raw materials it uses to produce its beer, during all stages of production.	Contract brewer holds title to the beer, including the ingredients and raw materials used to brew the beer, during all stages of production.
Record Keeping	Tenant brewer and host brewer each retain their own records for production and removal of beer and each provides reports to the TTB.	Contract brewer retains all records of production and removal of beer and provides reports to the TTB.
Taxes	Tenant brewer and host brewer are individually responsible for paying their own taxes on their own beer removed from the brewery.	Contract brewer is solely responsible for paying taxes on beer removed from the brewery.
Brewer Licensure	Tenant brewer and host brewer must each qualify as a brewer and have separate licenses.	Only the contract brewer must qualify as a brewer, so the producer brewer does not need a license.
Ease of Paperwork	Requires significant paperwork for both parties.	Simple agreement; Brand is added to the contract brewer's Notice.

E. Equipment, Retail, Production and Distribution Space Leases

i. Distribution Space Leases

i. As the old cliché goes, in real estate it's all about "location, location, location", and this is especially true for a brewery or distillery business. If you're looking to be the neighborhood hangout complete with a taproom (for breweries) or cocktail room (for distilleries), you'll need to find a suitable space close to home. Should you have larger ambitions, you may seek a more strategic location amenable to later expansion. Whatever the case may be, you'll need to have a space secured in order to complete the licensing process.

ii. A new brewery or distillery owner will most likely lease a building at the start, and negotiating a suitable lease is a crucial step in the process.

iii. Commercial lease agreements typically come in one of two varieties: "triple net" and "gross."

iv. In a triple net, the tenant pays rent to the landlord, as well as a pro rated share of taxes, insurance and maintenance expenses. In the typical triple net lease, the tenant pays a fixed amount of base rent each month as well as an "additional rent" payment which constitutes 1/12 of an estimated amount for taxes, insurance and maintenance expenses (also called CAM or common area maintenance expenses). At the end of the lease year, the estimated amounts are compared to actual expenses incurred and adjusted depending upon whether the tenant paid too much or too little through its monthly payments.

v. In a "gross" lease, the landlord agrees to pay all expenses which are normally associated with ownership. The tenant pays a fixed amount each month, and nothing more.

F. <u>Additional Contracts and Agreements</u>

Breweries and distilleries, like most businesses, face a myriad of insurance requirements. In addition to the surety bond required to obtain their license, breweries and distillers will need several types of coverages including:

- General liability insurance;
- Workers compensation; and
- Dram shop (if the business is serving alcohol for on-premise consumption).

With respect to general liability coverage, given the growth in breweries and distilleries and the increase in trademark and other intellectual property related disputes, it is imperative to carry coverage for these issues.

Many insurance companies now have special “craft brewery programs” which provide breweries with a package tailored to the needs of the industry.

Appendix 1

Summary of State Beer Franchise/Distribution Laws

State	Summary of Law	Statutory Citation
Alabama	• Written agreement required. • Exclusive territories. • State approval required before a brand is transferred. • Termination upon 60 days' notice, with wholesaler allowed to submit a plan for cure within 30 days and to cure defects within 120 days. • Immediate termination where wholesaler becomes insolvent, loses license for more than 61 days, or is convicted of a felony. • Termination on 15 days' notice for fraudulent conduct, sales outside territory, failure to pay after a written demand for payment, or a transfer of the business without brewer's permission. • Termination must be made in good faith and for good cause. • Good cause includes failure to comply with agreement provision that are reasonable and of material significance.	Ala. Code §§ 28-8-1 to 28-9-11
Alaska	• No beer franchise law	n/a
Arizona	• Exclusive territories are permitted, but not required. • Termination must be made in good faith and for good cause. • Good cause includes a failure to comply with a term in the franchise agreement, unless that term is unconscionable or requires an illegal act.	Ariz. Rev. Stat. §§ 44-1565 to 44-1567
Arkansas	• Exclusive territories, filed with the State. • Termination requires 30 days' notice with opportunity to cure. • No termination without good cause and good faith. • Good cause includes a wholesaler's insolvency, repeated violations of law, or failure to maintain a reasonable sales volume. • Immediate termination permitted for a number of reasons, including insolvency, license loss for more than 31 days, and sales outside of the wholesaler's territory. • Small brewery (less than 30,000 barrels a year) is not a supplier and exempted from the above provisions.	Ark. Code Ann. §§ 3-5-1101 to 3-5-1111 and § 3-5-1416.

California	• Territorial appointments must be in a written agreement, filed with the State. • Regardless of the parties' agreement, supplier may not terminate a wholesaler solely for wholesaler's "failure to meet a sales goal or quota that is not commercially reasonable under prevailing market conditions." • Some brewer-wholesaler relationships, particularly those involving large brewers, might be covered under California's general Franchise Relations Act. • A manufacturer that unreasonably withholds consent to transfer can be liable for damages. • Recent unpublished Attorney General letter suggested that manufacturer approval rights over wholesaler personnel decisions and business plans, impositions of changes to wholesaler standards or agreements, control over other manufacturers' brands, and control of wholesaler ownership changes are unlawful under the California Alcoholic Beverage Control Act. • In Crown Imp., LLC v. Classic Distrib. & Beverage Grp., Inc., to be published Cal. App. 3d (2014), the court found that even if you interpret the letter to disallow for a manufacture to unreasonably withhold consent to a sale of the distributorship, the law specifically allows for this and a specific statue controls.	Cal. Bus. & Prof. Code §§ 25000.2 to 25000.9
Colorado	• Exclusive territories in a written contract, filed with the State. • Franchise protections applicable to manufacturers producing at least 300,000 gallons of malt beverages annually. • Termination upon 60 days' notice, with wholesaler opportunity to cure during that period. • Grounds for immediate termination include failure to pay after written demand, insolvency, license loss for more than 14 days, fraud, and sales outside of the wholesaler's territory. • Not-for-cause termination permitted upon 90 days' written notice, with copies to all other wholesalers in all other states with the same agreement.	Colo. Rev. Stat. §§ 12-47-405 to 12-47-406.3
Connecticut	• Franchise protections apply following product distribution for more than six months. • Termination in writing, setting forth reasons and giving the wholesaler an opportunity to challenge. • Prior to termination, a brewer may appoint a replacement wholesaler, provided that the appointment is not effective until six months after the wholesaler receives notice of termination. • Termination for "just and sufficient cause," to be determined in a hearing before the Liquor Control Commission.	Conn. Gen. Stat. § 30-17

Delaware	• Territorial arrangements filed with the State. • Where parties have an exclusive arrangement, brewer must obtain ABCC consent before appointing a second distributor. • Termination upon 60 days' notice, with wholesaler opportunity to cure during the notice period. • Good cause is required to terminate a wholesaler without paying "reasonable compensation," which includes the laid-in cost of inventory and goodwill. • Good cause includes, among others, a wholesaler's refusal to comply with a material provision of the franchise that is essential, fair, and reasonable; failure to meet reasonable and fair performance standards; insolvency; and license loss for more than 30 consecutive business days. • Not-for-cause termination is allowed, provided the brewer receives the permission of the Commission to pay "reasonable compensation" and the termination does not violate the terms of the franchise agreement.	Del. Code Ann. tit. 6, §§ 2551 to 2556; 4 Del. Code Regs. § 46
District of Columbia	• No beer franchise law	n/a
Florida	• Exclusive sales territories, in writing, and filed with the State. • Termination upon 90 days' notice, with wholesaler permitted to cure defects within the notice period. • Termination without good cause is forbidden. • Good cause includes a violation of a reasonable and material contract term. • Termination upon 15 days' notice is allowed in certain instances such as insolvency, license loss for more than 60 days, fraud, and sales outside of the wholesaler's territory.	Fla. Stat. §§ 563.021 to 563.022
Georgia	• Exclusive sales territories, filed with the State. • Termination notice containing specific reasons for termination must be filed with the State, giving the State and wholesaler 30 days to object and request a hearing. Georgia Department of Revenue decides whether to allow a termination. • Justifications for termination include a wholesaler's financial instability, repeated violations of law, or failure to maintain sales volume that is reasonably consistent with other wholesalers of the brand.	Ga. Code Ann. §§ 3-5-29 to 3-5-34; Ga. Comp. R. & Regs. 560-2-5.10
Hawaii	• No beer franchise law	n/a
Idaho	• Territorial agreements must be filed with the State. • Termination upon 90 days' notice, with 30 days to submit a plan of corrective action and an additional 90 days to cure defects. • Termination without notice-and-cure permitted upon the wholesaler's bankruptcy, conviction of a felony, loss of license for more than 30 days, sales outside of the wholesaler's territory, transfer without consent, failure to pay within five business days of written demand for	Idaho Code Ann. §§ 23-1003; 23-1101 to 23-1113

	payment, or fraud.	
Illinois	• Written contract required. • Exclusive territories permitted. • Termination upon 90 days' notice, with opportunity for the wholesaler to cure within notice period. • Immediate termination permitted for wholesaler's insolvency, default on payments, conviction of a serious crime; attempt to transfer business without approval, permit revocation or suspension, or fraud in dealing with the brewer. • Termination must be for good cause, following good faith efforts to resolve disagreements. • Good cause includes failure to comply with essential and reasonable requirements of the franchise agreement that are consistent with the law. • A brewer may not discriminate among wholesalers when enforcing agreements with wholesalers. • Small suppliers whose annual volume of beer products supplied represents 10% or less of wholesaler's entire business have a mechanism to terminate upon payment of reasonable compensation to the wholesaler. • Compensation, if not agreed upon, subject to a potentially lengthy arbitration or litigation process. Pending bill (as of April 2014) seeks to amend to permit termination in 6 months while process proceeds.	815 Ill. Comp. Stat. 720/1 to 720/10
Indiana	• Exclusive territories permitted, not required. • Prohibits unfair terminations by suppliers or wholesalers, described as those without due regard for "the equities of the other party." • Currently pending legislation (as of April 2014) would allow a "small brewer" of less than 30,000 barrels to terminate the agreement without cause with notice and payment of a multiple of gross profit. Number is based on the timing of the termination.	Ind. Code §§ 7.1-5-5-9
Iowa	• Written agreement with exclusive territories required. • Termination upon 90 days' notice, with the wholesaler given 30 days to submit a plan to correct deficiencies within 90 days. • Immediate termination permitted upon a wholesaler's failure to pay when due after written demand, insolvency, dissolution, conviction of a crime that would adversely affect its ability to sell beer, an attempted transfer without approval, fraudulent conduct in dealing with the brewer, license loss for more than 31 days, or sales outside the territory. • Termination must be in good faith and supported by good cause. • Good cause exists if the wholesaler failed to comply with reasonable and materially significant requirements of the agreement that are legal and do not discriminate as compared with the requirements imposed on or enforced against similarly-situated wholesalers. • Good faith means honesty in fact and the observance of reasonable standards of fair dealing in	Iowa Code §§ 123A.1 to 123A.12

	the trade, as interpreted under Iowa's Uniform Commercial Code.	
Kansas	• Agreements must be in writing. • Exclusive territories, filed with the State. • Termination must be for reasonable cause. • Must file written termination notice with the agency at least 30 days before the effective termination date.	Kan. Stat. Ann. § 41-410
Kentucky	• Written contract, designating exclusive territories, filed with the State. • Good cause and good faith required for termination • Termination upon written notice and reasonable opportunity (60 to 120 days) to cure. • Grounds for termination include insolvency, felony conviction, fraud, license loss for more than 31 days, sales outside of the wholesaler's territory, and ownership change without consent.	Ky. Rev. Stat. Ann. §§ 244.585; 244.602 to 244.606
Louisiana	• Written agreement required. • Exclusive territories. • Termination upon 30 days' notice, with termination ineffective if the wholesaler produces a plan for corrective action within the notice period that will cure the defect within 90 days. • Immediate termination permitted for numerous contingencies, including a wholesaler's insolvency, loss of license, conviction of a serious crime, or fraudulent conduct towards the brewer. • Termination for good cause only. • Good cause includes wholesaler's failure to comply with a reasonable and material term of the agreement.	La. Rev. Stat. Ann. §§ 26:801 to 812
Maine	• Exclusive territories, filed with the State. • Termination requires at least 90 days' notice, plus a reasonable time to cure. • Immediate termination permitted upon wholesaler's bankruptcy, loss of license, or conviction of a serious crime. • Termination must be for good cause. • Good cause does not include a change in wholesaler ownership, but includes a wholesaler's loss of license, insolvency, or failure to substantially comply with reasonable and material terms of the agreement.	Me. Rev. Stat. Ann. tit. 28-A, §§ 1451 to 1465
Maryland	• Exclusive territories. • Termination upon 180 days' notice, with 180 days for the wholesaler to cure any deficiency. • No notice required to terminate for a wholesaler's insolvency. • Termination must be for good cause. • Good cause always includes a wholesaler's loss of license.	Md. Code Ann., art. 2B, §§ 17-101 to 17-107

Massachusetts	• No refusals to sell after six months of regular sales. • Termination upon 120 days' notice to wholesaler and the State. • Termination may be suspended upon wholesaler's request, pending a hearing before the Alcoholic Beverage Control Commission. • Pending bill (as of April 2014) would allow for a quicker hearing by the Commission. • Termination only for good cause. • Good cause limited to wholesaler's disparagement of the brewer's product, unfair preference of a competing brand, failure to exercise best efforts, encouragement of improper practices, or failure to comply with contract terms.	Mass. Gen. Laws. ch. 138, § 25E
Michigan	• Written agreement with exclusive territories. • Termination upon written notice, with the wholesaler having 30 days in which to submit a plan to cure deficiencies within 90 days. • Termination upon 15 days' notice is permitted upon a wholesaler's fraud in dealing with the brewer, sales outside its territory, or sales of goods known to be ineligible for sale. • Immediate termination is permitted upon a wholesaler's insolvency, loss of license for more than 60 days, or conviction of a felony. • Termination by the brewer must be in good faith and for good cause. • Good cause is established by a wholesaler's failure to comply with reasonable and material contract terms.	Mich. Comp. Laws §§ 436.1401; 436.1403
Minnesota	• Exclusive territories. • Termination requires 90 days' notice, during which time the wholesaler may cure deficiencies. • Termination upon 15 days' notice permitted upon the wholesaler's insolvency, loss of license, or violation of a significant law. • Termination must be for good cause. • Good cause does not include a change in brewery ownership, but includes a wholesaler's loss of license, bankruptcy, or failure to substantially comply with reasonable and material terms of the franchise agreement.	Minn. Stat. §§ 325B.01 to 325B.17
Mississippi	• Written contract and exclusive territories required. • Termination upon 30 days' notice, with the wholesaler given 30 days to submit a plan to cure deficiencies within 90 days. • Immediate termination is permitted for a variety of contingencies, including a wholesaler's fraudulent conduct towards the brewer, insolvency, loss of license, or failure to make payments according to established credit terms. • Termination must be in good faith, for good cause. • Good cause exists when the wholesaler fails to comply with reasonable and material provisions of the agreement, the deficiency arose within the past two years, and the wholesaler failed to cure.	Miss. Code Ann. §§ 67-7-1 to 67-7-23

Missouri	• Written agreement required. • Exclusive territories presumed unless otherwise provided for by written agreement. • Community of Interest must exist for there to be a franchisor-franchisee relationship per Missouri Beverage co., Inc. v. Shelton Bros., Inc. 669 F3d 873 (2012). The court found no relationship because wholesaler's sales of importer's products never exceed 1.16% of wholesaler's annual sales, its name was not used in marketing, and it made no sizable investments particular to the importer. • Termination upon 90 days' notice. • Immediate termination upon criminal misconduct, fraud, abandonment, insolvency, or issuing an NSF check. • Termination requires good cause. • Good cause includes failure to comply substantially with essential and reasonable terms of the parties' contract, bad faith, or wholesaler's loss of license for more than 31 days.	Mo. Rev. Stat. §§ 311.181 to 311.182; 407.400 to 407.420
Montana	• Written contract, filed with the State. • Agreement must include a list of mandatory terms, and designate exclusive territories. • Termination upon 60 days' notice, with the wholesaler given a reasonable time to cure deficiencies. • Mandatory term in every contract includes a procedure for the regular review and correction of wholesaler deficiencies. • Termination must be for just cause or in accordance with brewer's contract terms, as applied equally to all wholesalers within the State.	Mont. Code Ann. §§ 16-3-217 to 16-3-226
Nebraska	• Written agreement required. • Exclusive territories, filed with the State. • Termination upon 30 days' notice, with the wholesaler given a reasonable opportunity to cure deficiencies within 90 days. • Termination upon 15 days' notice permitted in certain circumstances, including a wholesaler's fraudulent conduct towards the brewer, sales outside its territory, failure to pay according to the agreement's terms and after written demand, and intentional cessation of brand business for more than 31 days. • Immediate termination permitted upon the wholesaler's insolvency, loss of license, conviction of a felony, or an agreement to terminate. • Termination must be in good faith and for good cause. • Good cause includes a wholesaler's failure to comply with reasonable and material provisions of the contract. • Good faith means factual honesty and the "observance of reasonable commercial standards of fair dealing in the trade," as interpreted by the Uniform Commercial Code. • Wholesaler is obligated to maintain clean taps, adhere to the brewer's freshness program, and comply with other reasonable written quality control standards.	Neb. Rev. Stat. §§ 53-201 to 53-223

Nevada	• Exclusive territories presumed, but non-exclusive franchise permitted if specified in writing. • Termination upon 90 days' notice, with 60 days to cure deficiencies. • Termination upon written notice after wholesaler's loss of license for more than 31 days, insolvency, conviction of a felony, fraud toward the brewer, sale of beer to an unlicensed retailer, failure to pay according to agreement and seven days after demand for payment, attempt to transfer without notifying the brewer, or discontinuance of the brewer's brand. • Termination must be for good cause. • Good cause means either the wholesaler's failure to substantially comply with essential and reasonable requirements of the agreement or the wholesaler's bad faith acts in carrying out the agreement. • Brewers selling less than 2,500 bbls. within the State in a calendar year are exempt from the good cause termination requirement.	Nev. Rev. Stat. §§ 597.120 to 597.180
New Hampshire	• Written agreement. • Exclusive territories. • Termination upon 90 days' notice, with wholesaler given a reasonable time to cure deficiencies. • Immediate termination permitted upon the wholesaler's insolvency, loss of license, conviction of a serious crime, willful breach of a material provision of the franchise agreement; attempt to transfer business without notice to the brewer, fraud, or failure to pay account upon demand. • Termination only for good cause. • Good cause generally includes a wholesaler's loss of license, insolvency, or failure to substantially comply with the brewer's reasonable and material requirements.	N.H. Rev. Stat. Ann. §§ 180:1 to 180:12
New Jersey	• Exclusive territories required unless dualing prior to March 1, 2006. • Written agreements required. • Termination upon written notice and 120 days to cure • Immediate termination upon insolvency, felony conviction, fraud, license loss for more than 31 days, intentional sales outside of the wholesaler's territory, or transfer of business without consent. • Good cause required for termination. • Good cause means a wholesaler's failure to substantially comply with a reasonable term of the non-discriminatory franchise agreement.	N.J. Rev. Stat. §§ 33:1-93.12 to 33:1-93.20
New Mexico	• Exclusive territories permitted, and must be filed with the State. • Termination must be in good faith, for good cause. • Good faith means factual honesty and observance of reasonable commercial standards under the circumstances. • Good cause includes a wholesaler's failure to substantially comply with essential and reasonable contract provisions, or bad faith actions. • Good cause does not include wholesaler consolidation.	N.M. Stat. §§ 60-8A-1; 60-8A-2; 60-8A-7 to 60-8A-11

New York	• Written agreements required. • Termination for cause upon written notice, with wholesaler given 15 days (or more by court order) to submit a plan to cure deficiencies within 75 days. • Time for corrective action may be limited by a wholesaler's prior failure to satisfactorily cure deficiencies, or if the brewer's product makes up less than either 1,000 cases or 1/2 of 1% of wholesaler's total purchases. • Wholesaler can demand that brewer supply it with a written plan for curing deficiencies. • Immediate termination permitted upon a wholesaler's insolvency, conviction of a felony, loss of license for more than 31 days, fraudulent conduct towards the brewer, failure to pay monies due under the agreement, acts constituting grounds for termination under the agreement, or under a written agreement to terminate. • Upon 15 days' notice, a brewer may terminate a multiple brand wholesaler within 120 days of a competing brewer's loan to or acquisition of an interest in that wholesaler. • Termination only for good cause. • Good cause includes the brewer's implementation of a national or regional consolidation policy (upon 90 days' notice) that is reasonable, nondiscriminatory, essential, and disclosed in writing, or the wholesaler's failure to comply with a material term of the franchise agreement. • Termination based upon consolidation requires payment of to wholesaler of "fair market value" of wholesaler's lost business. • Small brewers (annual volume less than 300,000 barrels and sales to wholesaler 3% or less of wholesaler's annual business) may terminate an agreement without good cause upon payment of fair compensation to the wholesaler.	N.Y. Alco. Bev. Cont. Law § 55-c
North Carolina	• Exclusive territories, filed with the State. • Termination upon 90 days' notice, with wholesaler given 45 days to cure. • Immediate termination permitted upon the wholesaler's insolvency, loss of license for more than 30 days, conviction of a serious felony, fraudulent conduct in dealing with the brewer, failure to pay for delivered beer, or transfer of the business without notice to the brewer. • Termination requires good cause. • Good cause means a wholesaler's failure to comply with contract terms that are reasonable, material, and not unconscionable or discriminatory. • Good cause does not include a change in either brewery ownership or the right to distribute the brand, sale or transfer of brand rights to a successor supplier, a wholesaler's failure to meet performance standards if imposed unilaterally by the supplier, a wholesaler's establishment of a franchise agreement with another supplier, or a supplier's desire to consolidate franchises. • Small brewery (fewer than 25,000 barrels) exception allows for termination absent good cause following the fifth business day after confirmed receipt of written notice and payment of fair market value.	N.C. Gen. Stat. §§ 18B-1300 to 18B-1308

North Dakota	• Written contract with exclusive territories required. • Termination upon 90 days' notice, with the wholesaler having 90 days to rectify deficiencies. • Immediate termination permitted upon the wholesaler's insolvency, loss of license, or significant violation of the law. • Termination must be for good cause. • Good cause does not include a change in brand ownership, but does include the wholesaler's loss of license, insolvency, or failure to comply with reasonable and material obligations of the agreement.	N.D. Cent. Code §§ 5-04-1 to 5-04-18
Ohio	• Agreement must be in writing. • Exclusive territories. • Termination upon 60 days' notice. • Termination without notice permitted upon wholesaler's insolvency or loss of license for more than 30 days. • Termination must be in good faith and for just cause. • Good faith requires fair and equitable business dealings. • Just cause cannot include the failure to perform an illegal act, the restructuring of a brewer's business, or the transfer of a brand. • A wholesaler must act in good faith, properly represent the brewer, adequately serve the public, and protect the brewer's reputation and trade name.	Ohio Rev. Code Ann. §§ 1333.82 to 1333.87
Oklahoma	• Franchise law applies to "low point beer" (not more than 3.2% ABW). • Franchise protections do not apply to suppliers producing fewer than 300,000 gallons of low point beer per calendar year. • Written agreement, designating exclusive territories. • Good cause required for termination. • Must provide written notice of termination and 60 days to cure defects. • Immediate termination upon written notice permitted if wholesaler engages in unapproved sales outside its designated territory, fails to pay upon written demand, insolvency, loss of license for more than 14 days, felony conviction, violation of a serious law, business transfer without approval, fraud, or ceases to do business for five business days.	Okla. Stat. tit. 37, §§ 163.2; 163.18A to 163.18H (for "low point beer")
Oregon	• Agreement must be in writing and filed with the State. • Exclusive territories required. • Termination upon 90 days' notice, with the wholesaler given 30 days to submit a plan that will correct any deficiency within 60 days. • Immediate termination upon written notice permitted upon the wholesaler's insolvency, loss of license for more than 31 days, conviction of a felony, fraudulent conduct towards the brewer, substantial misrepresentations to the brewer, or for certain unapproved assignments of rights under the agreement. • Termination requires good cause, with the brewer acting in good faith. • Good cause exists where the wholesaler fails to comply with a reasonable and material term of the agreement.	Or. Rev. Stat. §§ 474.005 to 474.115

Pennsylvania	• Pennsylvania brewers are exempt from the franchise law's provisions if they do not designate a distributor as a primary or original supplier and had not done so before 1980. • Written agreement, filed with the State. • Exclusive territories. • Termination upon 90 days' notice, with 90 days to cure any deficiencies. If a deficiency relates to inadequate equipment or warehousing, a wholesaler's positive action to comply with the required change satisfies the cure provision. • Immediate termination permitted upon a wholesaler's insolvency, fraudulent conduct towards the brewer, or loss of license for more than 30 days. • Termination must be for good cause.	47 Pa. Cons. Stat. §§ 4-431; 4-492; 40 Pa. Code § 9.96
Rhode Island	• Licensed Rhode Island brewers are not considered suppliers within the meaning of the franchise law, and are exempt from its requirements. • Written contract required. • Exclusive territories. • Termination upon 90 days' notice, with opportunity to cure within the time frame of the notice. • Immediate termination permitted in case of a wholesaler's insolvency, loss of license, or violation of a law significant to the business. • Termination must be for good cause. • Good cause means the failure to substantially comply with a reasonable requirement of the agreement.	R.I. Gen. Laws §§ 3-13-1 to 3-13-12
South Carolina	• Exclusive territories, in writing, filed with the State. • Termination upon 60 days' notice. • Termination by either party must be fair, and for just cause or provocation.	S.C. Code Ann. §§ 61-4-1100 to 61-4-1320
South Dakota	• Exclusive territories, in writing. • Termination upon written notice that gives wholesaler at least 30 days in which to submit a plan to correct deficiencies within 90 days. • Termination by written notice is permitted upon numerous contingencies, including a wholesaler's loss of license for more than 31 days, insolvency, conviction of a felony, or fraudulent conduct towards the brewer. • Termination must be for good cause, and in good faith. • Good faith imposes a duty on each party to act in a fair and equitable manner. • Good cause means a failure to substantially comply with terms that are reasonable, material, and are not unconscionable or discriminatory.	S.D. Codified Laws §§ 35-8A-1 to 35-8A-20

Tennessee	• Exclusive territories for each brand. • Termination upon 90 days' notice, with the wholesaler having 30 days to submit a plan to correct deficiencies within 90 days. • Termination upon 30 days' notice permitted upon a brewer's discontinuance of the brand in the State (which cannot be reintroduced for one year) or wholesaler's conviction for a significant felony. • Termination upon written notice is permitted upon a wholesaler's loss of license for more than 60 days, insolvency, fraud in dealing with the brewer, sales outside its designated territory, or failure to pay monies due under the agreement within five days of demand. • Termination must be in good faith, for good cause. • Good cause exists where the wholesaler failed to substantially comply with essential and reasonable requirements of the agreement, so long as those terms are not discriminatory.	Tenn. Code Ann. §§ 57-5-501 to 57-5-512; 57-6-104
Texas	• Written contract required. • Exclusive territories, filed with the State. • Termination upon 90 days' notice, with the wholesaler having 90 days to cure any deficiencies. • Immediate termination permitted upon a wholesaler's insolvency, conviction of a serious crime, loss of a license for 30 days or more, or failure to pay money when due, after demand. • Termination only for good cause. • Good cause means a failure to substantially comply with an essential, reasonable, and commercially acceptable term of the agreement.	Tex. Alco. Bev. Code Ann. §§ 102.51; 102.71 to 102.82
Utah	• Small brewers (manufacturers producing less than 6,000 barrels per year) exempted from franchise law. • Exclusive territories, filed with the State. • Written agreement required. • Termination upon 90 days' notice, with wholesaler given the opportunity to cure within 90-day period. • Immediate termination permitted for wholesaler's insolvency, conviction or a felony, loss of license for more than 30 days, or fraudulent conduct. • Good cause required for either brewer or wholesaler to terminate contract. • Good cause means the material failure to comply with terms that are essential, reasonable and lawful.	Utah Code Ann. §§ 32B-1-102; 32B-11-201; 32B-11-503; 32B-14-101 through 32B-14-402
Vermont	• Exclusive territories. • Termination upon 120 days' notice, with the wholesaler given 120 days to rectify any deficiency. • Immediate termination permitted upon a wholesaler's insolvency, or when the brewer shows that providing 120 days' notice would cause irreparable harm to the marketing of the brand. • Termination must be for good cause.	Vt. Stat. Ann. tit. 7, §§ 701 to 710

Virginia	• Exclusive territories (except where overlaps are caused by changes in brewer ownership), in writing and filed with the State. • Termination upon 90 days' notice and notice to the State, with a wholesaler given 60 days to provide the brewer with a plan for corrective action. • Immediate termination permitted in the case of a wholesaler's insolvency or loss of license. • Termination requires good cause. • Good cause is determined by the Virginia Department of Alcohol Beverage Control. • Good cause includes a wholesaler's loss of license, insolvency, or failure to substantially comply with reasonable and material requirements. Presumptively legitimate requirements include maintaining a brand's sales volume, providing services at a level comparable to that provided by other Virginia wholesalers, and requiring a brewer's reasonable consent to a transfer of the wholesaler's business. • Obligation of good faith is implied in every contract.	Va. Code Ann. §§ 4.1-500 to 4.1-517
Washington	• Franchise laws do not cover certain domestic suppliers producing fewer than 200,000 barrels of beer annually. • Written contract required. • Termination upon 60 days' notice, giving the wholesaler 60 days to cure any deficiency. • Immediate termination upon a wholesaler's insolvency, loss of license for more than 14 days, or fraud. • Wholesaler required to give a brewery 90 days' notice before termination.	Wash. Rev. Code §§ 19.126.010 to 19.126.901
West Virginia	• Written agreement, filed with the State. • Exclusive territories. • West Virginia must approve all new territorial appointments. • Distributor must be allowed to distribute new brands. • Termination upon 90 days' notice. • Termination must be for just cause.	W. Va. Code § 11-16-21
Wisconsin	• Parties must share a "community of interest" before "dealership" law applies. • Although the "dealership" provisions may not apply, Wisconsin law specifies the compensation due upon certain wholesaler terminations. • Written agreement required. • Exclusive territories required. • Termination upon 90 days' notice, with wholesaler given 60 days to rectify any deficiencies. • Termination upon 10 days' notice permitted where wholesaler is in default on payments under the agreement. • Immediate termination is permitted upon the wholesaler's insolvency. • Termination requires good cause. • Good cause includes the wholesaler's failure to substantially comply with essential and reasonable requirements of the agreement which are not discriminatory, or the wholesaler's bad faith acts.	Wis. Stat. §§ 125.33 to 125.34; 135.01 to 135.07

Wyoming	• Exclusive territorial agreements, filed with the State. • Termination upon 30 days' notice, during which time the wholesaler can cure with a plan to remedy deficiencies within 90 days. • Immediate termination permitted upon a wholesaler's insolvency, loss of license for 60 days or more, conviction of a felony, intentional sales outside the territory, or fraud. • Termination must be in good faith, and for good cause. • Good cause means wholesaler's insolvency, loss of license for more than 60 days, conviction of a felony, intentional sales outside its territory, or failure to comply with a reasonable and material provision of the franchise agreement. • Good faith requires honesty in fact and observance of reasonable commercial standards in the trade.	Wyo. Stat. Ann. §§ 12-9-101 to 12-9-119

Appendix 2

Summary of State Beer Self-Distribution Laws

State	License to Self Distribute	Statutory Citation
Alabama	No	Code of Ala. § 28-3A-6
Alaska	Yes	Alaska Stat. § 04.11.010
Arizona	Yes	A.R.S. § 4-205.08
Arkansas	Yes	A.C.A. § 3-5-1405
California	Yes	Cal Bus & Prof Code § 23357
Colorado	Yes	C.R.S. 12-47-402; C.R.S. 12-47-415
Connecticut	Yes	Conn. Gen. Stat. § 30-16
Delaware	No	4 Del. C. § 512C; Brewpubs at § 512B
District of Columbia	Yes	D.C. Code § 25-110
Florida	No	Fla. Stat. § 563.022
Georgia	No	O.C.G.A. § 3-5-32
Hawaii	Yes	HRS § 281-31
Idaho	Yes	Idaho Code § 23-1003
Illinois	Yes	235 ILCS 5/5-1; 235 ILCS 5/3-12

Indiana	Yes	Burns Ind. Code Ann. § 7.1-3-2-7
Iowa	Yes	Iowa Code § 123.124
Kansas	No	K.S.A. § 41-308b
Kentucky	No	KRS § 243.157
Louisiana	No	La. R.S. 26:273
Maine	Yes	28-A M.R.S. § 1355-A
Maryland	Yes	Md. Ann. Code art. 2B, § 2-208
Massachusetts	Yes	ALM GL ch. 138, § 19
Michigan	Yes	MCLS § 436.1401
Minnesota	Yes	Minn. Stat. § 340A.301
Mississippi	No	Miss. Code Ann. § 67-3-46
Missouri	No	§ 311.195 R.S.Mo.
Montana	Yes	Mont. Code Anno., § 16-3-214
Nebraska	No	R.R.S. Neb. § 53-169
Nevada	No	Nev. Rev. Stat. Ann. § 369.382
New Hampshire	Yes	RSA 178:12; RSA 178:12-a; RSA 178:13

New Jersey	Yes	N.J. Stat. § 33:1-10
New Mexico	Yes	N.M. Stat. Ann. § 60-6A-26.1
New York	Yes	NY CLS Al Bev § 51; NY CLS Al Bev § 52; NY CLS Al Bev § 64-c
North Carolina	Yes	N.C. Gen. Stat. § 18B-1104
North Dakota	Yes	N.D. Cent. Code, § 5-01-11; N.D. Cent. Code, § 5-01-14
Ohio	Yes	ORC Ann. 4303.02; ORC Ann. 4303.022; ORC Ann. 4301.24
Oklahoma	Yes	37 Okl. St. § 521
Oregon	Yes	ORS § 471.220; ORS § 471.200
Pennsylvania	Yes	47 P.S. § 4-431
Rhode Island	Yes	R.I. Gen. Laws § 3-6-1
South Carolina	No	S.C. Code Ann. § 61-4-940
South Dakota	No	S.D. Codified Laws § 35-8A-8
Tennessee	Yes	Tenn. Code Ann. § 57-5-101; Tenn. Code Ann. § 57-2-104
Texas	Yes	Tex. Alco. Bev. Code § 62.01; Tex. Alco. Bev. Code § 74.01 and 74.08
Utah	Yes	Utah Code Ann. § 32B-11-503

Vermont	Yes	7 V.S.A. § 230
Virginia	Yes	Va. Code Ann. § 4.1-208
Washington	Yes	Rev. Code Wash. (ARCW) § 66.24.244
West Virginia	Yes	W. Va. Code § 11-16-6; W. Va. Code § 60-4-3
Wisconsin	Yes	Wis. Stat. § 125.29; Wis. Stat. § 125.295
Wyoming	Yes	Wyo. Stat. § 12-2-201; Wyo. Stat. § 12-4-412; Wyo. Stat. § 12-5-401

Intellectual Property and Advertising

Submitted by Emeric J. Dwyer

Intellectual Property and Advertising

Emeric J. Dwyer

Topics To Be Covered:

- Critical Considerations When Choosing Names
- Trademark Clearance, Filing , and Protection – Top Mistakes Made by Attorneys
- Trade Dress and Design Patent
- Alcoholic Beverage Copyright Filing, Registration, and Protection
- Trade Secrets in Brewery and Distillery Law – How, Why, and What to Protect
- Brewery and Distillery Confidentiality/Non-Disclosure Agreements
- Review Tips: Non-Compete Agreements
- Top Brewery and Distillery Advertising Mistakes – Social Media and More

Intellectual Property and Advertising Issues

Submitted by Emeric J. Dwyer

A. Disputes Regarding Beer Names and Trademarks

1. Purposes of trademarks

    a. Indicate product source

    b. Distinguish products from each other and competitors

    c. Protect company's investment in its business and brand

    d. Protect consumer expectations of quality

2. U.S. Breweries continue to increase with a 16 percent growth from 2016 to 2017

    a. Saturation in the market leads to increased trademark infringement litigation and inter partes proceedings before the Trademark Trial and Appeal Board.

B. Issues with Protecting Trademarks and Characteristic Beer Bottle Trade Dress

1. Nearly any matter that distinguishes the source of one product from another can qualify as a trademark, including, words, designs, color, product configurations, packaging and containers, sales environments, scents, sounds and touch.

2. Trade dress generally refers to the overall appearance or image of a product, including features such as size, shape, color, texture, or graphics. *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 980 (11th Cir. 1983). When considered in the context of breweries, trade dress generally applies to beer bottles, tap handles or a taproom's layout or design.

3. Issues in obtaining trade dress protection include issues with functionality and distinctiveness.

    a. Functionality: A product or its attribute may not be protected as trade dress if it serves a functional purpose. The purpose underlying the non-functionality rule is to prevent producers from acquiring monopolies so as to ensure that functional characteristics are available to all competitors in the marketplace.

i. Functional means any attribute that makes the product more useful, or more easily used, or that contributes to the ease or economy of manufacture or distribution.

ii. Courts apply two tests in determining functionality: utilitarian functionality and aesthetic functionality. Under the traditional utilitarian functionality test, a product feature will be considered functional if it is essential to the use or purpose of the article or if it affects the cost or quality of the article. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 850 n.10 (1982). Under the aesthetic functionality test, a product feature will be considered functional if it is one, the exclusive use of which, would put competitors at a non-reputation related disadvantage. *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159, 165 (1995).

b. Distinctiveness: A product or its attribute's ability to identify a single source of goods or services, even if the source is unknown. Distinctiveness may be either inherent or acquired (known as secondary meaning).

i. Inherently distinctive trade dress is immediately capable of identifying a source of origin for a good or service. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992). Courts vary in the test applied in determining whether trade dress is inherently distinctive with some applying the same spectrum used for assessing traditional word marks (generic, descriptive, suggestive, arbitrary, fanciful), *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976), and others applying a four-factor test of whether the trade dress is common or basic, unique or unusual in a particular field, a mere refinement of a commonly adopted and well-known form of ornamentation for a particular class of goods or services viewed by the public as dress or ornamentation, and capable of creating a commercial impression distinct from any accompanying words, *Seabrook Foods, Inc. v. Bar-well Foods Ltd.*, 568 F.2d 1342 (C.C.P.A. 1977).

ii. Acquired distinctiveness is trade dress that has obtained distinctiveness through use or promotion over time. In determining whether dress has acquired distinctiveness, courts consider a variety of evidence, including, consumer testimony, surveys, exclusivity, manner and length of use, amount and manner of advertising, amount of sales, number of customers, establishment in the marketplace, and proof of intentional copying by an infringer.

C. Trademark Difficulties With PTO Considering Beer in Same Class as Wine and Spirits

1. In order to establish a likelihood of confusion, the goods or services at issue do not need to be identical or directly competitive, but instead merely "related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods or services] emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC*, 101 U.S.P.Q.2d 1713, 1722 (Fed. Cr. 2012).
   a. The nature and scope of a party's goods or services is determined based on the goods or services recited in the application or registration. The International Class identification "is wholly irrelevant" to a likelihood of confusion claim. *Jean Patou, Inc. v. Theon, Inc.*, 29 U.S.P.Q.2d 1771, 1774 (Fed. Cir. 1993).

2. The Trademark Trial and Appeal Board and courts have recognized that beer and wine and other alcoholic beverages are related. The Trademark Trial and Appeal Board and the courts' finding of relatedness is often supported by evidence demonstrating that the same entity offers both products at issue thereby establishing that consumers are accustomed to seeing the goods emanating from the same source.

3. Clearance searches need to be conducted in order to determine whether a trademark is available. There are generally two types of clearance searches that can be performed: (1) a preliminary search and (2) a comprehensive search. Because the Trademark Trial and Appeal Board and the courts are finding that beer is related to other alcoholic beverages, including wine, a proper trademark clearance search for a mark that is going to be used in connection with beer needs to include a search of marks used in connection with other alcoholic beverages, including wine.

a. A preliminary search is a quick knock out search of the USPTO's database to identify clear problems.

b. A comprehensive search looks at not only the USPTO's database, but also common law uses, such as websites and state databases.

4. Adopt strong marks at the outset. Stronger marks provide a wider range of exclusivity and are immediately protectable.

D. Intellectual Property Infringement: Difficulties in Protecting Breweries and Distilleries in a Competitive Market.

1. To maintain trademark rights, trademark owners need to be diligent in protecting their marks against infringement and misuse by third parties as failure to do so may diminish the value of the marks.

   a. Proper protection of a trademark owner's rights includes monitoring the marketplace for infringement or misuse of the mark and monitoring third-party applications. Trademark owners should develop, and follow, a trademark enforcement strategy prior to any potential infringement or misuse.

2. Formal action to enforce trademark rights include actions before the Trademark Trial and Appeal Board to oppose third party registrations and to cancel existing registrations. The Trademark Trial and Appeal Board can only address registration of the trademark; it cannot issue injunctions or monetary awards.

3. Formal action to enforce trademark rights also includes commencing litigation before the court. Claims may include trademark infringement and unfair competition. The court may award injunctive relief and monetary damages.

4. Before pursing formal action, the trademark owner may consider whether the infringement or misuse may be resolved informally. This could include contact between the business owners or a cease and desist letter issued by an attorney.

E. Challenges in Protecting and Copyrighting Brewing Recipes and Processes

1. Copyright protects original works of authorship. The works of authorship include literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound records and architectural works. 17 U.S.C. § 102(a).

    a. Copyright does not protect ideas, procedures, methods, systems, processes, concepts, principles or discoveries.

2. A recipe is a statement of the ingredients and procedure required for making a dish of food or beverage. Copyright does not protect recipes that are mere listings of ingredients. However, a recipe that creatively explains or depicts how or why to perform a particular activity may be copyrightable. If registration is afforded in this instance, the registration will not extend to the list of ingredients that appear in the recipe or the underlying process for making the recipe.

F. Brewery and Distillery Confidentiality/Non-Disclosure Agreements: Hidden Dangers that Make Them Unenforceable.

1. Breweries and distilleries that share, receive and exchange confidential information with and from customers, suppliers and other parties would benefit from and should implement the use of confidentiality and nondisclosure agreements to protect their confidential information and data. Effective protection of confidential information and data, however, includes not only having confidentiality and nondisclosure agreements in place, but also having comprehensive policies and procedures regarding confidential information and data.

2. Confidentiality/Non-Disclosure agreements generally include the following provisions:

    a. The parties to the agreement (business entities or individuals).

        i. If a Confidentiality/Non-Disclosure agreement is signed by someone who does not have the power to execute a binding agreement, it could potentially invalidate the agreement.

ii. If the Confidentiality/Non-Disclosure agreement is entered into by a business entity, it is important to ensure that the correct legal name of the business entity is used in order to bind the correct party.

b. The business purpose of the agreement.

i. Identifying a business purpose limits the disclosure or exchange of confidential information to the specified business purpose.

c. The definition of confidential information.

i. Confidential information should be defined broadly enough to cover all of the confidential information that may be disclosed and to identify the type of information that is confidential. However, confidential information should not be so broadly defined that it is unenforceable.

d. Identification of what is excluded from the definition of confidential information.

i. Generally information that is or becomes public other than through breach of the agreement, was already in the recipient's possession or was available to the recipient on a non-confidential basis prior to disclosure, is received from a third party not bound by the confidentiality agreement, or is independently developed by the recipient without use of the confidential information is excluded from the definition of confidential information.

e. Use and access restrictions.

i. Access to the confidential information may be restricted even within a business entity, such as, to those employees who have a "need to know."

f. Safekeeping and security requirements.

i. The Confidentiality/Non-Disclosure agreement may identify the manner in which the confidential information is stored, including, network security protections.

g. The term of the agreement and any survival provisions.

i. A Confidentiality/Non-Disclosure agreement may be perpetual or terminate on a specified date or event. If the agreement terminates on specified date or event, a set period can be defined during which the nondisclosure obligations remain in effect after expiration of the agreement.

h. Provisions relating to return or destruction of confidential information.

i. Intellectual property rights.

i. Confidentiality/Non-Disclosure agreements generally provide that the disclosing party retains the intellectual property rights in the confidential information being disclosed and disclaims any license to the recipient.

G. Advertising Breweries and Distilleries: Mandatory Statement Challenges.

1. The Alcohol and Tobacco Tax and Trade Bureau ("TTB") defines "advertisement" as any written or verbal statement, illustration, or depiction, which is in, or calculated to induce sales in, interstate or foreign commerce, or is disseminated by mail. 27 C.F.R. § 7.51.

a. The definition includes any written, printed, graphic, or other matter accompanying the container; markings on cases, billboards signs, or other outdoor display; and broadcasts made via radio, television, or in any other media. *Id.* Examples include ads in newspapers or magazines, trade booklets, menus, wine cards, leaflets, circulars, mailers, book inserts, catalogs, promotional materials, or sales pamphlets. *Id.*

2. Advertisements for malt beverages need to include the following information:

a. Name and address (city and State) of the permittee responsible for the advertisement; and

b. Class to which the product belongs, corresponding with the information shown on the approved label, *e.g.*, lager, ale, stout. 27 C.F.R. § 7.52.

3. The TTB also identifies what may not be included in advertisements for malt beverages. See 27 C.F.R. § 7.54 for a complete list of prohibited statements. From a trademark perspective, the most applicable prohibitions are:

a. No names that are misleading with respect to the characteristics of the product;

b. No statements that are disparaging of a competitor's product; and

c. No statements, designs, devices or representations that are obscene or indecent.

4. The TTB monitors the advertising of malt beverages through pre-clearance of advertising materials, referrals and/or complaints and internal selections for review.

a. The TTB offers business owners a voluntary, free of charge advertising pre-clearance service in which the TTB reviews an advertisement for compliance with applicable advertising regulations.

Walking the Ethical Line

Submitted by Emeric J. Dwyer

Walking the Ethical Line

Emeric J. Dwyer

Topics To Be Covered:

- Ethical Standards and Civil Liability
- The Role of the Attorney as Advisor in Entity Formation
- Avoiding Conflicts of Interest: Who is the Client?
- Confidentiality – Information Derived from and Earlier Representation
- Adequacy of Fees and Charges
- What Would You Do? Different Ethical Scenarios

Thank you!

- Sarah B. Bennett
- Jeff C. O'Brien
- Emeric J. Dwyer

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ATTORNEYS AT LAW

Walking the Ethical Line

Submitted by Sarah B. Bennett

A. Ethical Standards and Civil Liability

1. Business Law Ethical Issues

Ethical issues facing businesses generally fall into four categories: (i) health and safety; (ii) technology; (iii) transparency: and (iv) fair working conditions.

i. Health and Safety

The Department of Labor has taken steps to protect the health and safety of employees in the United States in the form of the Occupational Safety and Health Administration and The Fair Labor Standards Act. However, these agencies have limitations, leaving businesses with flexibility in the level of health and safety measures taken to protect their employees. This flexibility often presents ethical issues due to the high costs of health and safety safeguards. Management is presented with choosing between additional health and safety protections and expense control.

Although a business must comply with OSHA and the FLSA, in many situations, a business should go beyond the mandated health and safety requirements to protect their employees. For example, an office that requires employees to stand or sit all day, should take additional steps to ensure the health and safety of such employees, such as ergonomic chairs or cushioned flooring. A business that ignores these issues or cuts corners to save money is arguable engaging in unethical behaviors in the business environment.

Another health issue arises from the environmental impact of a business. Many believe that a business has a responsibility to protect the environment in which it operates and such beliefs have driven governmental regulations. However, some discretion is still given to the companies to determine the level of environmental impact it will have. Management is often conflicted because of the high costs associated with limiting a business's environmental impact. For example, waste management presents a tough issue for many companies, as less eco-friendly waste disposals cost less than the more eco-friendly options. Another example is eco-friendly supplies, which costs more than normal supplies that a business might ordinarily purchase.

However, there are some clear ethical lines, which if crossed, result in blatant ethical

violations, such as wrongful disposal of toxic waste and water pollution violations. Aside from these few exceptions, the ethical line for environmental impact may differ between companies, therefore, each company needs to determine what they feel is ethical for their industry and location.

ii. Technology

Technological advances have resulted in a slew of new ethical considerations for businesses. Although technology allows businesses to compete on a higher level, in some areas technology infringes on individual rights, creating an ethical issue. Privacy laws have been passed to help limit this infringement; however, many companies still struggle with this ethical dilemma.

The most common ethical violation regarding technology results from privacy issues. This area has been clearly identified as a pedestal for unethical business behavior. Through the use of technology companies have the ability to track Internet usage and consumer buying habits, as well as collect personal information about customers or potential customers. Some restrictions have been passed to limit the type of information that may be collected and stored; however, ultimately each company must determine what level of collection and retention they feel is ethical.

Another ethical violation concerning technology results from security issues. Companies have the ability to monitor employees and visitors, collecting information for which the company states is for security. This includes monitoring employees' activities as well as constant recording from security cameras. To be clear, there is a level of surveillance that is ethically acceptable and has been tolerated for the sake of security. However, companies need to determine what level of monitoring they find ethical, which is often based upon the level of monitoring for which a company can justify. However, it is difficult to justify extensive monitoring of non-employees, therefore, it has been generally accepted that the surveillance of non-employees should be limited to a lower level than that of employees to be considered ethically acceptable.

Lastly, businesses are faced with ethical issues arising from the monitoring of

communications. With today's technology, companies can easily monitor typical methods of digital communications such as e-mails or text messages. For example, one computer program can scan the text of millions of messages looking for specific designated words. Once those words are flagged, the program can identify the sender. Companies using this type of technology must consider the ethical issues that arise with this level of surveillance and it has become difficult for companies to justify this level of intrusion as ethical, without the knowledge or explicit agreement of employees. Therefore, to limit ethical violations, a company should only conduct a level of monitoring or surveillance for which the company can justify as necessary for the business.

iii. Transparency

Transparency has become imperative to maintaining an ethical image in society. With the number of business scandals, the public has become weary to trust companies, requiring businesses to transition into a more transparent and open operational structure. This change requires companies to maintain honesty and complete accurate and comprehensive financial reports. However, this has continuously been an area of numerous ethical violations, including violations for fraud, conflicts of interest, lying, insider trading, and bribery.

Typically, these types of violations occur due to managements errors in putting their own interests ahead of those of the company. For example, violations for conflicts of interest occur from choosing personal gains over the well-being of the organization. Bribery is another example, where such actions might result in an immediate gain for the individual or even the organization, but such behavior exposes the organization to legal recourse from the U.S. government. Another common example of an individual putting their own interests ahead of the company's is insider trading, which occurs when an officer, who has information that is not available to the public, uses such information as a basis for buying or selling stock.

iv. Fair Working Conditions

Although businesses are required by law to provide a certain degree of fair working conditions, gaps in legislation still provide large discretion to management. Unfortunately, this creates an area of ethical unrest as responsible employee treatment also typically comes with

increased costs. However, this is the price a company must pay to remain ethical in the eyes of society. Typical violations in this area include the use of child labor, sweatshops, violations of basic worker rights, ignoring health and safety of employees, discrimination, intimidation, and harassment.

However, some ethical violations are easier to spot then others. For example, management can generally ensure that children are not being employed in their facilities; however, it is harder to identify if a supplier abides by those same requirements. Although it is no longer the initial company engaging in the unethical behavior, continuing to use such a supplier after knowing of the violations is arguably unethical. This can be a difficult decision for management as suppliers who engage in unethical behaviors such as sweatshops and child labor often can provide products at lower cost.

Another hard to define area is the use of harassment or intimidating behavior. This is a difficult area because people view these behaviors differently. What one person may find intimidating, another may find entertaining. Therefore, ethical violations may be more common than a company anticipates. Violations may also occur without being identified as unethical. For example, a company that is dominated mainly by males, who then hires a female who is outcaste or "given a hard time" may likely arise to unethical behavior. To limit such ethical violations a company must establish clear company policies that outline what behaviors are prohibited and encourage an open work environment that promotes communication.

Therefore, a company must think comprehensively about its operations to ensure ethical compliance. Although it may appear a company is acting ethically, you must look to the third-party affiliates of the company to fully determine the ethics of a company as well as the internal operations.

2. Intellectual Property Ethical Issues

As discussed below, conflict checking is a huge issue for an IP attorney. The alcohol industry may seem large at first, but after time you will come across the same players over and over again through time. Conflict checking is especially important in trademark law, where you may file a trademark for one client that is similar to a mark registered or owned by another

client.

Confidentiality is a hugely important issue for patents, trademarks, and trade secrets alike. Often times, even before entering into an attorney-client relationship, a client must provide some highly sensitive information to the attorney. For patents, it is necessary for the client to provide a description of the invention or design in order the attorney to provide an estimate for the work to be performed. For trademarks, a client will often need to provide the desired mark to the attorney before engagement so the attorney can do a conflict check of the mark against other client marks.

Fee structuring is particularly relevant for intellectual property attorneys, who often opt to price work on a fixed fee rather than on an hourly basis.

3. Alcohol Law Ethical Issues

Some of the most important ethical issues relating to alcohol law include: (i) unauthorized practice of law; (ii) conflicts of interest; and (iii) disclosure and honesty in dealing with TTB.

i. Unauthorized Practice of Law

The alcohol industry is unique in that it is highly regulated at the federal, state, and local level. Clients need to comply with countless laws and regulations, and they often look to attorneys to help navigate these troubled waters. Clients that are planning to offer products in multiple states will need help drafting and negotiating agreements with wholesalers in different states, registering brands with the state, obtaining state licenses, and more. Also, attorneys in this niche industry often help clients throughout the country and world.

Each state has its own definition for what constitutes legal advice. The American Bar Association ("ABA") weighs in with their model rule 5.5(a), "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

North Carolina, N.C. Gen. Stat. § 84-2.1, defines "practice law" as "performing any legal service for any other person, firm, or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust

instruments, … or assisting by advice, counsel, or otherwise in any legal work." North Carolina does allow out-of-state attorneys to draft legal documents, so long as a North Carolina reviews and approves the documents. "Legal Documents" include any deed, mortgages, trust instrument, contract or any document filed in any court, quasi-judicial or administrative tribunal. It is not wholly clear from this language whether an application for a Brewery/ Distillery permit is considered a legal document.

One clue to help determine whether a task is considered practicing law: whether non-attorneys can and do perform the work in question. Regarding registrations and permitting at many state alcohol control boards, it appears that there are non-attorney businesses offering this type of assistance to breweries and distilleries. Accordingly, it seems that such assistance may not fall within the purview of "legal service" in some or many states.

Some attorneys avoid the unauthorized practice of law issue entirely by only handling federal issues (which an attorney barred in any state may do). ABA model rule 5.5(d)(2) provides that an out-of-state attorney may provide legal services in his/her home state to clients in another state, so long as those services are authorized by federal law. This is effective strategy for a great deal of trademark and patent work as well, which are largely federal issues. In order to traverse this path, it is necessary for attorneys to establish a wide network of attorneys to whom they can refer these clients for their out-of-state needs.

ii. Conflicts of Interest

Aside from the general conversation below relating to conflicts of interest, there are a few specific issues that come up relating to the alcohol industry. The ABA model rule 1.7(a) provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

For instance, one production model that is becoming more and more common in both the brewing and distilling industries is contract brewing. Under these arrangements, a host

brewery/distillery will agree to produce a certain amount of a product on behalf of the brand owner. A conflict arises where a host brewery refers a brand owner to their attorney to review their contract. In order to take on such a client, the attorney should first obtain the informed, written consent of both parties.

Another increasingly common arrangement is the alternating proprietorship ("AP"). In an AP, a host brewery/distillery will allow a tenant to operate a "virtual brewery/distillery" on their premises. A tenant brewery is required to obtain their own state and federal permits in order to operate. Conflicts (and potentially confidentiality issues) may arise where a tenant brewery asks you to assist with their permits, labels, formulas, and more. The solution here, again, is to make sure all parties provide their informed consent to the arrangement.

iii. Disclosure and Honesty in Dealing with TTB

Pursuant to ABA model rule 3.3, a lawyer shall not make a false statement of fact or law to a tribunal (extended to cover representation in a non-adjudicative proceeding before an administrative agency, under model rule 3.9), offer evidence that the lawyer knows to be false, and take remedial measures to correct and avoid criminal or fraudulent conduct by a client.

Further, for all/most TTB forms and submissions, TTB requires a declaration that the signing party authorize, "Under the penalties of perjury, I declare that I have submitted this claim, including supporting documents and statements, and to the best of my knowledge and belief, it is true, correct, and complete."

In light of the above, it will likely be an ethical violation for an attorney to make a submission to TTB, where the attorney knows that the content submitted is inaccurate. This would also apply the client has already signed declarations indicating that the content provided therewith is true.

This particular issue is becoming more and more relevant in this practice area with the increasing amount of legal disputes for false advertising. For instance, extra care should be taken to insure that a product with a label declaring the product is HAND MADE is actually made by hand. Also, extra care should be given to make sure products are MADE IN THE USA, produced by Contract Production Brewery X, and the like. While these are probably grey areas

from a legal perspective, they are certainly relevant for the companies being sued for false or misleading advertising under the Lanham Act.

4. Civil Liability

The Model Code of Professional Responsibility, created by the American Bar Association, sets forth ethical rules to guide lawyers in their behaviors and to provide a process of discipline for those who act improperly. Although language prefacing the ethical rules indicates that such rules are not to be used to impose civil liability upon violators, the majority of courts hold that evidence of an ethical violation is admissible evidence in a malpractice action. The rules were created to establish a minimum level of competency and any actions falling beneath that minimum are evidence that the required standard of care required was breached. Therefore, evidence of an ethical violation can be used to demonstrate that the attorney breached the standard of care owed to its client. However, an ethical violation by itself will not establish a cause of action, but rather, it may be used as "some evidence" of malpractice.

However, an attorney may also be sued for numerous other violations, other than just ethical violations. One common cause of action that is presented in legal malpractice claims is a claim for negligence. To be successful, the client must establish that the attorney took some type of action that a prudent attorney would not have taken, or that the attorney failed to take some type of action that a prudent attorney would have taken. Negligence can arise in various ways, such as giving incorrect advice, failing to file documents, or the creation of a conflict of interest.

Another claim that may be brought against an attorney is for breach of fiduciary duty. When an attorney enters into an attorney-client relationship, the attorney becomes a fiduciary of the client, owing the client a duty of utmost good faith. Such good faith requires the attorney to place the client's interest before his or her own interests, and prohibits the attorney from using his position to gain a profit at the expense of the client. In a business situation, a breach of fiduciary duty often arises if the attorney has a relationship or history with one of the parties to the transaction. Typically, when a corporation hires an attorney, an officer chooses an attorney that he or she knows or is familiar with. However, the attorney must remember that

its fiduciary relationship is with the company and not the individual. As such, the attorney must do what is best for the company, even if it is not in the best interest of the officer or person whom the attorney has a relationship with.

Another area that is increasingly becoming an area of concern is when attorneys invest in the business of the client. When this occurs, the attorney still keeps its fiduciary relationship with the client and therefore, must put the interest of the business first, even if it is to the detriment of the attorney's investment. For example, an attorney may need to advise its client to file bankruptcy, even knowing that he or she will lose the investment in the company. This inherently creates an ethical issue and opens the attorney up to malpractice claims.

5. Ethical Issues for CPA's

CPA licenses are issues and governed by individual state boards. The American Institute of Certified Public Accountants is member based organization which has a professional code of conduct.

B. The Role of the Attorney as Advisor in Entity Formation

1. Duties Owed to Investors

The duty an attorney owes to investors, if any, depends on the relationship created between the investor(s) and the attorney. The general rule is that an attorney owes a duty of care solely to an entity itself and not to its constituents; however, some courts have expanded this rule to include shareholders or members. See, e.g., Evans v. Blesi, 345 N.W.2s 775 (Minn. Ct. App. 1984).

The Model Rules of Professional Conduct dictate that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents" and "[i]n dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." Rules 1.13(a) & (f).

Failure to identify who the client is may result in unintended representation. A duty may rise to an investor if the attorney agrees to be an investor's lawyer, or under tort theory, if the

investor reasonably believes the attorney to be his or her attorney. This belief can arise from casual conversations where advice is given, regardless of the attorney's intentions.

In addition, if the attorney is trying to obtain investors for the entity, an attorney may have securities law obligations to the investors. However, regardless of the attorney's role in obtaining investors, if the entity is seeking investors, it is the attorney's duty to inform the entity of its security law obligations when speaking to investors.

2. Conflicts Between Organizers

The discussion of conflicts between organizers is founded on the identification of the client. The attorney must be clear in who he or she is representing. If prior to the formation of the entity, the attorney must identify whether one or more of the organizers is the client. If more than one organizer is being represented by the same attorney a potential conflict of interest exists. Therefore, the attorney must discuss the advantages and disadvantages of joint representation and obtain informed consent to the representation from the organizers. Once this is completed, the attorney must independently determine if he or she can effectively represent the clients. If the attorney represents more than one organizer, the attorney has a duty to each client and cannot play favorites. Also, there is no attorney-client privilege amongst the group, meaning that information told to the attorney by one organizer can be shared with the other organizer.

An attorney should also establish at the outset, whether he or she will represent the entity once it is formed. If the attorney will represent the entity, the attorney must obtain informed consent from the organizers and the entity agreeing to the representation despite the conflict of interest existing between the representation of both the organizers and the entity. However, if the attorney does not want to represent the entity, he or she should be clear in his or her intentions and the best way to do so is to send a non-representation letter to the entity.

3. Taking an Ownership Stake in Exchange for Services

Taking an ownership stake in a company in exchange for legal services can be very risky for an attorney. Some business transactions between attorney and client are prohibited by ethical rules; however, even if the transaction is not prohibited by the rules, it is often not

advisable to engage in such agreements due to its complexity. The Model Rules of Professional Conduct state that:

> "[a] lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction. Rule 1.8(a).

Therefore, under Rule 1.8 of the Model Rules of Professional Conduct an attorney may only enter into a business transaction with a client if the transaction is fair to the client, the terms are fully disclosed in a clear manner to the client, the client is advised and given an opportunity to seek independent legal counsel for the transaction, and the client gives informed written consent to the terms of the transaction and the lawyer's role in such transaction. If these elements are not met, an attorney is prohibited from taking an ownership stake in the company in exchange for services.

However, even if the transaction is permitted, it creates a significant ethical concern resulting from the potential conflict between the attorney's financial investment and the client's interest. In addition, the disclosure requirements set forth in Rule 1.8 of the Model Rules of Professional Conduct may be difficult to prove in the event of future litigation.

4. Ethics of Company Valuation

Goal is to choose an independent valuation authority who knows the specific industry. Specific qualities include:

- Integrity

- Objectivity
- Competence
- Confidentiality
- Professional Behavior

C. Conflicts of Interest

1. Conflict Checking

The Model Rules of Professional Conduct prohibit a lawyer from representing a client "if the representation involves a concurrent conflict of interest." The rules provide that a concurrent conflict of interest exists if: "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Rule 1.7(a). To avoid conflicts of interest attorneys should engage in a "conflicts check" prior to beginning representation of a client. A conflicts check generally involves reviewing a list of clients and cases to determine whether the attorney has represented parties in the past that have interests which are adverse to those of the potential client's.

To successfully conduct a conflicts check an attorney must have a system in place to conduct the check. To do so, an attorney should begin building a database from the day he or she begins to practice. The attorney should maintain records of all clients and engagements, including at a minimum: (1) the name, address, and contact information of the person; (2) the date of intake; (3) the nature of the representation; (4) who authorized the engagement; and (5) the name, address, and contact information of all involved parties. The database should be updated regularly to ensure all information is up-to-date.

A conflicts check should occur prior to forming an attorney-client relationship; therefore, prior to initial consultations, the attorney should conduct a conflicts check. In addition, whenever a new party is added, a new attorney is added, or new witnesses are added a conflicts check should be conducted. Failure to do so may result in a conflict of interest going unnoticed and result in further legal issues.

However, even if a concurrent conflict of interest does exist, a lawyer may still represent

a client. The Model Rules dictate that a lawyer may still represent a client, regardless of a conflict of interest, if:

> "(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing." Rule 1.7(b).

Therefore, an attorney may use the conflicts check to determine if a conflict exists and if a conflict is present, the attorney may still represent the client if the exceptions established in Rule 1.7(b) are met. In small communities or with attorney's changing job positions more often, conflicts checks have become imperative, as well as the Rule 1.7(b) exceptions, to ensuring proper representation.

2. When Does A-C Relationship Attach

Typically, an attorney-client relationship arises when "(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest a lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services . . . . " Restatement (Third) "The Law Governing Lawyers" § 14 (2000). Therefore, an attorney-client relationship may arise, without the attorney consenting to such relationship if the attorney fails to decline the representation.

Therefore, attorney-client relationships may form when an attorney believes he or she is simply giving casual legal advice. For example, an attorney who gives legal advice in a social setting, but does not make clear that representation has not begun, may have formed an attorney-client relationship. Another example, is when a lawyer provides advice and answers questions to a pro-se litigant. It is the lawyer's responsibility to be clear about whether any representation has begun and if the lawyer fails to do so, an attorney-client relationship may form.

Some attorneys rely on the false assumption that an attorney-client relationship fails to exist unless it is documented in writing. However, the relationship does not need to be documented in writing and may be created implicitly. Therefore, it is important for an attorney to protect itself against surprise relationships and accidental clients. To do so, an attorney may provide a letter declining representation. The letter expressly declines representation and makes clear that no representation has begun. Another safeguard is to expressly communicate to the person that representation has not begun and no attorney-client relationship has formed. However, this may still be difficult to prove in the future, therefore, it is best to put the communication in writing.

3. Duties Owed to Non-Clients

A lawyer owes a fiduciary duty to the client and typically, that duty is not extended to non-clients. However, the Model Rules of Professional Conduct speak to an attorney's duties owed to a non-client, specifically a non-client that is a party to a matter in which the attorney is involved as representation for the opposing party. The Model Rules state that:

> [i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client." Rule 4.3.

In addition, an attorney may owe a duty of care to non-clients, even if the attorney does not believe an attorney-client relationship formed, if the attorney knows, or should know, that non-clients will rely on the attorney's representations and such non-clients are not too secluded from the attorney to be entitled to protection. As discussed above in the section discussing when an attorney-client relationship attaches,

an attorney can limit the risk of owing a duty to non-clients by explicitly informing the person that representation has not begun and an attorney-client relationship has not formed. Absent such explicit statements, an attorney may owe a fiduciary duty to the person, even though the attorney views such person as a non-client.

4. Special Issues for Contract Drafting

When drafting a contracts, an attorney must ensure that no conflict of interest is present, or if a conflict exists, approval must be obtained from the parties. However, even if an attorney gains approval from the parties, an attorney must maintain impartiality throughout the contract drafting process. For example, an attorney representing a partnership may have a personal relationship with one of the partners and in drafting the partnership agreement, the attorney must make certain that the agreement is drafted in an impartial manner and that no underlying biases or assumptions based upon personal knowledge affect the contract drafting. The attorney cannot allow his or her personal knowledge of a partner to play into the contract drafting process.

Issues also arise during dual representation of parties entering into a contract. The situation becomes complex because an attorney owes his or her client a duty of loyalty, meaning the attorney must act with the client's best interests in mind; however, during dual representation, the attorney is faced with a challenge because often what is best for one party to a transaction, comes at the detriment of the other. Therefore, any contract provision that is one-sided or even biased towards a specific party, would be a breach of the attorney's duty of loyalty. Therefore, during dual representation of parties, the attorney must make certain that both parties are satisfied with the drafted contract, and biases should be eliminated to decrease the potential for client complaints.

5. Special Issues for CPA's

TTB audits are usually randomly selected. You may be selected for audit due to repeated submission errors of the BRO and Excise tax.

If you are selected for audit:

- Comply with all request and deadlines

- Provide auditor copies of all support
- Be transparent with the auditor
- Be respectful to the auditor
- Ask questions to clarify any misunderstandings

Representation of a CPA or Lawyer should not be necessary. TTB auditors are not out to "get" a brewery, they job is to ensure you are doing your job. If the result requires extra tax to be paid, ask for a payment plan not to hurt the cash flow of the brewery.

D. Confidentiality

1. Corporate Attorneys

Confidentiality is the foundation to a successful attorney-client relationship as it encourages clients to make full disclosures and allows attorneys to give fully-informed advice, among other things. As such, confidentiality is embedded into the attorney-client relationship through the attorney-client privilege, work product doctrine, and the ethics doctrine of confidentiality. The Model Rules of Professional Conduct provide clear rules that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted" as otherwise provided in the rules. Rule 1.6(a). Specific exceptions to the general rule of confidentiality are also explicitly established in the rules, providing that:

> [a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a

> controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; (6) to comply with other law or a court order; or (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client." Rule 1.6(b)(1–7).

However, it is important to recognize that an attorney hired for the entity, typically represents only the entity, unless agreed otherwise. In such a situation, the attorney-client privilege attaches only to the entity, not individual employees of the company. As such, any personal information given to the attorney from someone other than the entity, including an officer, director, or employee, is not protected under attorney-client confidentiality. For example, if an officer admitted to that he or she was involved in embezzlement of company funds to the entity's attorney, such information is not protected under confidentiality. Rather, the attorney is required to disclose such information to the management of the entity.

Due to the often complicated nature of the relationship, when representing an entity, an attorney needs to be careful not to unintentionally waive the attorney-client privilege. One common test regarding the attorney-client privilege in a corporate setting is the Upjohn test, which was established by the U.S. Supreme Court in 1981. The test provides that an attorney may gather facts from employees of the company, of any rank, and any employee may seek legal advice from counsel, so long as the communication: (1) was made to counsel at the direction of corporate superiors; (2) concerned matters that are within the scope of the employees' duties; (3) the information was not available from any upper-level management; and (4) the employees were made aware that they were being questioned by the attorney in order for the company to receive legal advice. Although the Upjohn test is a common test, some states still follow other tests. Therefore, it is important to understand the rules of the jurisdiction in which the attorney is operating in order to ensure attorney-client privilege is

protected.

2. For CPAs

From the Professional code of Conduct: A member in public practice shall not disclose any confidential client information without specific consent of the client.

E. Fees and Charges

1. Retainer Agreements

The purpose of a retainer agreement is to document the relationship between the parties. The Model Rules of Professional Conduct dictate that "[t]he scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation." Rule 1.5(b). As such, the agreement does not need to be in writing, nevertheless, to avoid confusion or later litigation, it is advisable to put such an agreement in writing.

However, there are certain arrangements that require the agreement be in writing, such as a contingent fee arrangement. The rules require that a contingent fee arrangement "be in writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated." Rule 1.5(c) In addition, the written agreement must "clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party." Id.

Although there is no set format for a retainer agreement, it is advisable to leave nothing to memory or chance, and the best way to do so is having clients sign a written retainer agreement. To reduce confusion or misunderstandings, the attorney-client relationship should begin with a written agreement including, but not limited to, the following elements:

- Client's identity;
- A description of the work covered by the fee or hourly rate (scope of the representation);
- The amount of the fee or hourly rate;
- Out-of-pocket costs (generally, the lawyer will want to represent that additional out-of-pocket costs may apply on top of the lawyer's hourly rate or fee);

- Agreement of the client to cooperate and be truthful;
- Either party's right to terminate services;
- Consequence of non-payment;
- No guarantee of particular results on behalf of the attorney; and
- Signature (of both the attorney and the client).

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