

Beer Distributors of Massachusetts, Inc.

William A. Kelley, Jr.
President

February 25, 2020

Jean M. Lorizio, Chairman
Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3
Chelsea, MA 02150-2358

RE: *Clarification of "Thing of Substantial Value" Within the Meaning of
204 C.M.R. 2.08, The Inducement Regulation.*

Dear Chairman Lorizio:

The Beer Distributors of Massachusetts support a diverse and thriving beer industry through which the Commonwealth's economy has significantly benefited. Today's flourishing beer industry in the commonwealth includes Beer Distributors working to ensure consumers are enjoying a wide variety of beer brands through a safe, transparent and accountable system.

The Beer Distributors directly employ thousands of people, and contribute millions of dollars to the federal, state and local tax base and economy. The Beer Distributors' members are small business owners, civic leaders, parents and philanthropists who are active in their communities. The Beer Distributors and their employees play a vital role in working to keep safe the communities where they live and work by promoting responsible consumption in addition to other educational programs.

The Beer Distributors are grateful for this opportunity to participate in these Listening Sessions convened by the ABCC as it considers clarifying the meaning of the term

“thing of substantial value” as used in 204 C.M.R. 2.08, the ABCC’s “Inducement Regulation.”¹ The Beer Distributors support the ABCC’s action to provide this clarity in the language of the Inducement Regulation and offers the enclosed principles and comments for the ABCC to consider promulgating as part of the Inducement regulation.

*BACKGROUND for MASSACHUSETTS-BASED
REGULATION of BEER.*

The beer segment of the beverage alcohol industry in Massachusetts requires clarity in trade practice regulations from the ABCC, the state regulator of this industry, more than the wine segment or the hard liquor segment of the beverage alcohol industry in Massachusetts. This requirement for clear, Massachusetts-based regulation of beer flows from the federal laws enacted by the United States Congress that grants primacy to state laws regulating beer.² Specific provisions of the United States Code contain Congress’ clear statement that, when it comes to beer, the federal trade practice statutes enacted by Congress apply “only to the extent that the law of such State imposes similar requirements with respect to similar transactions between a retailer or trade buyer in such State and a brewer, importer, or wholesaler of malt beverages in such State, as the case may be.”³ No similar

¹ 204 C.M.R. 2.08 was recently amended to include an express prohibition on accepting and receiving any inducement that is prohibited by this regulation. Hence, 204 C.M.R. 2.08 currently provides *in toto*:
2.08: Inducements

(1) No licensee shall directly or indirectly give or permit to be given money or any other thing of substantial value in any effort to induce any person to persuade or influence any other person to purchase, or contract for the purchase of any particular brand or kind of alcoholic beverages, or to persuade or influence any person to refrain from purchasing, or contracting for the purchase of any particular brand or kind of alcoholic beverages.

(2) No licensee shall directly or indirectly receive or otherwise accept an inducement prohibited under 204 CMR 2.08(1).

² For example, a brewery is not required to obtain any permit from the federal government to conduct its beer business. In contrast, a beer distributor must obtain from the federal government both a wholesaler’s permit and also an importer’s permit to conduct the beer distributor’s business.

³ 27 U.S.C. 205(f).

provision exists for either the wine segment or the hard liquor segment of the beverages alcohol industry; each is subject to the federal trade practice laws, without the need for any similar Massachusetts law.⁴ The existing federal trade practice laws that apply to the wine segment and to the hard liquor segment do not provide clarity to the beer industry and do not support state-based regulation required to be performed by the ABCC and its employees. If the ABCC were to merely adopt these federal laws, the ABCC would be abdicating its regulatory authority to the federal administration, and the ABCC's employees would face the obligation to become experts on federal law from all sources, i.e., the Congress, the various agencies of the federal government, including the sub-regulatory rulings and interpretations issued by each federal agency, and the court decisions that pass on the legality of such laws, rulings and interpretations. This would not promote clarity and an orderly market here in Massachusetts; instead, it would create for the ABCC a self-imposed mandate that is unfunded. To date, the ABCC has successfully opposed policy proposals that would require its personnel to become experts in other government's laws and policies, such as driver's licenses issued outside Massachusetts. In this area of trade practice regulation of the beverage alcohol industry in Massachusetts, the ABCC should similarly resist the urge or formal proposals to opt into the federal laws and abandon its broad authority under the Massachusetts Liquor Control Act, whose foundation is set deep within the core powers of the states under 21st Amendment to the United States Constitution. Accordingly, the ABCC can, and should, establish clear parameters of the trade practices that are allowed and those that are prohibited in the beverage alcohol industry in

⁴ The public policy behind this clear choice by Congress is contained in the legislative history of the Federal Alcohol Administration Act. A detailed discussion of this legislative history is deferred from being included in this document but can be provided upon request.

Massachusetts. To that end, the Beer Distributors propose that the ABCC enact the following principles of trade practice regulation.

2020 TRADE PRACTICES POLICIES PROPOSED To THE ABCC

POLICIES. Five (5) policies are proposed to achieve the goal of providing clarity to the Massachusetts marketplace through the ABCC's trade practices law promulgated at 204 C.M.R. 2.08:

- I. no supplier and no distributor/wholesaler should "buy" business,
- II. no supplier and no distributor/wholesaler should apply or threaten "undue influence" (a term to be defined) to a retailer,
- III. a supplier or a distributor/wholesaler may remove out of code beer from a retailer; a supplier or a distributor/wholesaler may remove and re-locate and re-position close to code beer from one retailer to another, and,
- IV. the penalties for violating the clarified Inducement Regulation must be appropriate & proportionate to the offense.
 - a. Such penalties must be imposed according to a progressive discipline policy specified in the regulation,
 - 1) penalties should start with appropriate fines that are proportionate to the offense and proportionate with the money and value of the things involved.

PRINCIPLES & PROPOSALS. The following specific principles advance one or more of these five (5) policies.

PROHIBITED PRACTICES. The following activities are reasonably considered to “buy” business and ought to be activities that are specifically prohibited for a supplier or a distributor to do:

- a. GIFTS being given to a retailer⁵
- b. MONEY being given to a retailer
- c. TIE IN SALES (Must buy product “X” if want to buy product “Y”)
- d. FREE EQUIPMENT being given to a retailer
 - 1) Special price being given to a retailer for equipment
 - 2) Below FMV sales/lease being given to a retailer for equipment
- e. Providing by sale or lease or any other transaction fixtures and other heavy equipment such as a counter, back bar, stool, chair, table, sink, refrigerator or cooling box, awning, border, fencing, a structure that is not temporary, and any similar article.
- f. A brewery or other supplier FORCING SHIPMENTS without an advance purchase order from a distributor
- g. Fraudulent claims by a retailer for BREAKAGE that occurs after delivery or is not claimed by the retailer within a reasonable time after delivery.
- h. SALES CONTESTS and OTHER INCENTIVES being given to a retailer or retailer’s employees to sell a brewery’s, supplier’s or distributor’s products.
- i. A distributor buying tickets to any entertainment event, whether a music performance, a sports event or other type of event, and giving those tickets to a retailer or the employees of a retailer.

⁵ Expressions of sympathy or congratulations for a life-event to an individual are not “gifts” within this principle.

AUTHORIZED PRACTICES. The following activities, provided as an illustration and not a limitation, are reasonably considered not to “buy” business or apply or threaten “undue influence” (a defined term) to a retailer and ought to be specifically authorized:

- a. Giving POINT OF SALE ADVERTISING MATERIAL that is not personalized for the retailer that include as an illustration and not a limitation, brand signs, umbrellas, neon signs, price cards, pricing products sold by the distributor/brewery to retailer, g sales analysis and market data based on data received from or given to a retailer
- b. Giving BRANDED PROMOTIONAL ITEMS NOT RETAINED OR SOLD BY RETAILER including as an illustration and not as a limitation:
 - i. trays, lighters, blotters, postcards, pencils, coasters, menus, menu cards, napkins, clocks, mugs, glassware branded with the name or brand of the producer or importer, bottles or can openers, corkscrews, printed recipes, shirts, hats, visors, branded umbrellas that are not personalized for a Retailer, a neon sign that is not personalized for a Retailer, any illuminated sign that is not personalized for a Retailer and other similar items.
- c. Giving ADVERTISING DIRECTED TO CONSUMERS NOT RETAINED OR SOLD BY RETAILER:
 - ii. Display Enhancements including (for illustration & not limitation) table tents, coasters, banners, window signs, case cards, case tucks, cooler wraps, napkins, stickers, over-cooler signs, lights, clocks, dartboards, chalkboards, menus, menu boards, umbrellas that are not

personalized for the Retailer, glassware branded with the name or brand of the producer or importer, tap handles, openers, cork screws, pencils, pens, neon signs, mirrors, inside signs that are not illuminated signs personalized for the Retailer, tap handles, bar mats, portable display racks, and portable ice bins.

- iii. Consumer Novelties Not Retained or Sold by Retailer including (for illustration & not limitation) shirts, tee shirts, caps, visors, bottle openers, glassware branded with the name or brand of the producer or importer, key chains, koozies, and coolers.
- d. Sponsoring Contests and Sweepstakes with Consumers. Prizes may include free tickets to events at an Entertainment Facility that exhibits music, sports or other types of live entertainment
- e. Listing Retailer(s) on Brewery/Distributor Website & Retailer listing Brewery/Distributor on Website; such listings may include an informational program or other computerized or digital tool by which a particular product may be located by consumers as available at identified retailers
- f. Brewery/Distributor & Retailer jointly sponsoring tourism promotion
- g. Tasting services to educate consumer, pouring, participation & Bottle signing, including trade shows and other activities that provide reasonable training to a retailer and its employees on the benefits and qualities of a brewery's or distributor's products

- h. Sports Teams & Entertainment Facility Operators accepting advertising or intellectual property licensing deals from Brewery/Distributor.
- i. Temporary Retailer who is a non-profit entity that carries a tax-exempt designation⁶ and who holds a so-called “1-Day License”⁷ accepting free services from Brewery/Distributor

For Further Consideration. Other types of activities, such as merchandising (that is employees of the distributor, wholesaler, or supplier who sells directly to a retailer, providing services with the retailer’s permission by building floor displays, reviewing the product displayed and stock level of products on shelves, in the refrigerated door displays, and in the refrigerated stock room), might be considered a “thing of substantial value” if the services are excessive and, thus, unreasonable. While no specific proposal on this activity is made, the Beer Distributors are always available for a discussion of this matter.

Furnishing entertainment to retailers in various forms, for example, giving tickets to an event that is sponsored by a supplier or distributor, hosted rounds of golf, or hosted dinners for business, might also be considered to be “a thing of value” if the entertainment being furnished becomes excessive and, thus, unreasonable. While no specific proposal on this activity is made, the Beer Distributors are always available for a discussion of this matter.

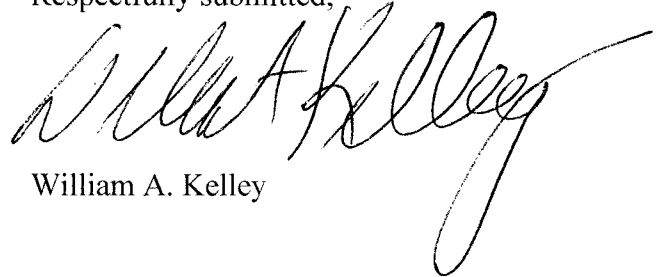
The members of the Beer Distributors and I look forward to working with the ABCC to establish clarity on what is prohibited and what is allowed under 204 C.M.R. 2.08. We are

⁶ A 501(c)(3) designation by the Internal Revenue Service.

⁷ A so-called “1-Day License” means a special license issued pursuant to section 14 of chapter 138 of the General Laws.

available to provide any additional information that you may find helpful. This initiative of the ABCC to provide this clarity in trade practice regulation is welcome and very much appreciated.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William A. Kelley". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

William A. Kelley