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## Comments to the ABCC Listening Session

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William Kiritsy; President / General Manager

Good Morning,

Thank you for this opportunity to be heard at this listening session for Section 15 Licensees. My name is Bill Kiritsy, operator of an independent section 15 license in Worcester Massachusetts, we have a 5600 square foot facility and we employ 12 people. To be clear, I am not an attorney nor do we have the resources to hire an attorney to assist in this important endeavor, we do provide 2.08 Inducement Amendments and also provide examples for review to use for discussion and justification for our Amendments.

We purchased our store 8 and half years ago, without any experience in this industry. But because we would be selling the three sins of human nature one of which is an impactful control substance, we carefully reviewed the regulations and laws that for the most part have been in place and in practice for over 70 years and we determined that if we and all licensees followed the regulations to the best of our abilities, there would be a fair playing field and we should also be able to maintain a fair living for our family and our employees. However, in the last 5 years the plain meaning language in the laws and regulations have been ignored without any fear of enforcement by many in this industry and has had a direct impact on our operation.

In our layman's view, Section 204 CMR 2.08 was significantly improved last fall by adding the words "direct and indirect" to paragraph 1 and adding all of paragraph 2. In our opinion, the plain language of Section 204 should not need further clarification or definition. Moreover, there are cases like Craft Beer Guild versus ABCC that provide clear precedent and guidelines to all industry members. In fact, many Section 18 wholesalers changed their methods of operation after that specific case.

However, further improvement to provide irrefutable clarity for all industry members may be necessary, for at the street level where we reside, when dealing with industry members both section 15 and section 18, either from ignorance or convenience, what definitively constitutes inducement and substantial value remains remarkably murky.

I believe we all can agree that Craft Beer Guild was in clear violation of 2.08 by providing cash payments of between \$1000 to \$1500 per tap in order to induce section 12 licenses to tap their products over other Section 18 wholesalers. Moreover, most if not all would agree that \$1000 cash or credit reimbursement to secure exclusive beer keg taps represents a significantly value.

Unfortunately, there are practices by industry members occurring in place site today that would also constitute inducements directly and indirectly with things of substantial value.

For example, if a Section 18 wholesale industry member provided at no cost to a section 15 licensee that has two locations, Automatic Wine Tasting equipment for each location, in an effort to ensure the wholesalers name brand wines are preferred over other distributors and that

equipment cost the wholesaler in excess of \$10,000 each, most if not all would consider this an inducement and the equipment cost of \$10,000 each a substantial value.

Another example would be, if a Section 18 wholesaler provided a unique, unpublished "paid" summer internship to the child of a preferred Section 15 Licensee that controls a large Consolidated Buying Group in order to redirect special credits only available to that buying group and that value exceeded \$5,000, most if not all would consider this bad act as an inducement and that \$ 5,000 would also constitute a thing of substantial value.

But where it can get murky and complex is if Section 18 Wholesalers provide a thing of substantial value to an off premise retailer, with let us just say 6 separate licenses and that value exceeds over \$50,000 annually for each location, and that thing was only provided to certain large chains and/or large Consolidated Buying Groups but not all Section 15 licenses, most if not all would agree that \$50,000 would represent a substantial value that 6 times that or \$324,480 <sup>(note 1)</sup> would also be substantial.

To define this specifically, there is a Section 15 Licensee, lets call it ABC Liquor chain, and they currently have 6 locations in this state, and its primary business model is pushing 70% of their total gross sales with their own private label alcohol products purchased from a "sole source" distributor. ABC Liquor personnel will receive and stock the private label product. But the remaining 30% of their Total sales are all name brand products, from Section 18 wholesalers that only distribute those products. And the only way those name brand products find their way from the delivery trucks to the shelves is by the name brand distributors providing day to day operational stocking labor at no charge to ABC Liquor Chain. Should the name brand distributor be unable to appear during their regular scheduled shift to stock ABC Liquors shelves, then ABC Liquor sales staff will use the empty name brand shelves to persuade their customers to purchase one of ABC private label products, even though there are several cases in storage in the stock room or in stocking areas on top of the shelving display units. Moreover, even if the name brand distributor did not have a delivery, the name brand distributor is expected to appear for their regular shift to re-stock shelves otherwise they remain empty. In other words, they perform the operational day to day responsibility for ABC Liquors to maintain products on the shelves that otherwise is not available to my store.

The Department of Treasury TTB Ruling Number 2016-1 determined that a Shelf Plan and Shelf Schematics in an of itself does not constitute a means of inducement in that the actual planagram itself did not represent a thing of value and therefore when considering language of what represents a substantial value, a shelf plan from a distributor is primarily a sales and marketing tool. I argue, although 27 CFR 6.99 *(a) which states Industry members may, at a retail establishment, stock, rotate and affix the price to distilled spirits, wine, or malt beverages which they sell, provided products of other industry members are not altered or disturbed. The rearranging or resetting of all or part of a store or liquor department is not hereby authorized.* That this exception was to address the overreach of distributors resetting or rearranging a store and also moving and changing other distributors products. The intent was to allow the distributors, as a sales and marketing function, to make sure that their own products were presented properly on the retailers shelves and that at no time was the intent to have the wholesaler serve as the operational arm of retailers....And at no time was there an expectation that they only provide stocking labor for certain larger chains. Because we are dealing with a control substances it is impossible to believe that the intent was to reduce the distribution of alcohol beverages to that of a Frito Lay merchandiser!!!

Moreover, there was a sincere concern at the time of TTB 2016-1 that the independence of the retailer would be at risk by allowing the 6.99 ( a) exception. That is where Title 27 CFR 6.153 Criteria for determining retailer independence comes in and establishes the guideline to control overreach by the Section 18 Industry Member. Title 27 CFR 6.153 paragraph E and F specifically address this concern. Title 27 CFR 6.153 ( e ) states *The Criteria for determining a retailers independence is at risk if the practice involves the industry member in the day to day operations of the retailer. For example the industry member controls the retailers decisions on which brand of products to purchase, the pricing of products, or the manner in which the products will be displayed on the retailers premises.*

*Title 27 6.153 (f) states the Criteria for determining a retailers independence is at risk is if the practice is discriminatory in that it is not offered to all retailers in the local market on the same terms.*

It is clear that ABC Liquors enjoys a substantial value of \$300,000 of inducement labor that is provided by the name brand distributor that my store and many other section 15 licenses do not enjoy. And because the name brand distributors are not going to bare the cost of the inducement labor they provide ABC Liquors they past that cost on by raising the prices of all the name brand products they sell. In essence, I am paying for the free inducement labor ABC liquors is receiving.

### **Conclusions and Amendment Recommendations.**

Therefore, in order to provide further clarity to 204 CMR 2.08 in order to address the above examples, we believe adding paragraphs from 27 CFR 6.153 ( e) and ( f) as shown below will significantly improve 204 CMR 2.08

#### **2.08 Inducement Amendment**

(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). This emergency regulation will be in effect until December 22, 2019.

***(3) No licensee shall directly or indirectly place at risk the independence of the retailer including if the practice involves the industry member in the day to day operations of the retailer. For example: if the industry member provides human resource labor as a day to day operation for the retailer, the retailers independence shall be at risk and constitutes an inducement.***

***(4) No Licensee shall directly or indirectly place at risk the independence of the retailer if the practice is discriminatory in that it is not offered to all retailers in the local market on the same terms.***

***(5) Substantial Value is defined as a value not to exceed \$500.00.***

Thank you,

William Kiritsy; Olympic Wine & Liquors 345 Grafton Street Worcester Ma

Note (1)

The substantial labor is estimated labor provided by the Section 18 Name Brand wholesaler(s) to ABC Liquors each of their 6 locations. This is based on the number of name brand wholesalers that service our store and information provided by the name brand wholesalers own personnel that service ABC Liquors (which is: Massachusetts Wine and Spirits dba Total Wines). Calculations are as follows:

- Inducement Labor Rate is estimated at \$13.00 per hour for the name brand merchandisers (note this does not include corporate tax, benefits etc.)
- Number of estimated hours allocated each week for each name brand wholesaler = 6 hours per week.
- Estimated number of name brand wholesalers servicing day to day inducement stocking labor at ABC Liquors = 10 (note, this could be as high as 17)
  - 8 hours per week x \$13.00 per hour = \$ 104.00 per week per distributor
  - 52 weeks x \$104.00 per week = \$ 5,408 per year per distributor
  - \$5,408 per year x 10 Distributors per store = \$ 54,080 annual value of inducement labor per store
  - \$54,080 annual value x 6 number of Total Wines locations = \$ 324,480.00
- Therefore Total Wines is conservatively receiving annually from all of the name brand distributors that service their stores \$324,480 annually.