Craft Beer, Distillery and Liquor Law: The Ultimate Guide

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Craft Beer, Distillery and Liquor Law: The Ultimate Guide

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Presenters

MARTHA ENGEL is an intellectual property attorney with Winthrop & Weinstine PA, who advises inventors, entrepreneurs, start-ups, and companies of all sizes on protecting their intellectual property assets. She helps clients guard their competitive advantage and add value to their business by obtaining, maintaining, and enforcing intellectual property rights. Ms. Engel counsels clients on all matters related to intellectual property, including clearing trademarks, drafting and prosecuting patent applications, obtaining trademark registrations, conducting due diligence reviews regarding intellectual property in corporate transactions, enforcing trademark rights, and assisting with patent litigation. She has drafted and prosecuted patent applications on a variety of technologies, including mechanical and manufacturing devices, materials, medical devices, porting goods, packaging, electronics, and software. Ms. Engel has experience working with foreign associates to prosecute applications both in the U.S. and abroad. She also has experience preparing patent infringement options. Ms. Engel has extensive experience assisting craft breweries, wineries, and distilleries regarding the protecting and enforcement of their trademark rights. She is a member of the Minnesota Intellectual Property Lawyers Association, as well as the Minnesota State and Hennepin County bar associations. Ms. Engel earned her B.S. degree from Marquette University and her J.D. degree from William Mitchell College of Law.

ADAM P. GISLASON is an attorney with Lommen Abdo, P.A. Since the advent of the iPod, he has represented businesses, artists, creatives, and entrepreneurs in various transactional matters and complex litigation across the country. Licensed in Minnesota and California, Mr. Gislason's practice has significant reach, focusing on reviewing, drafting, and enforcing contracts of all shapes and sizes, protecting and exploiting clients' entertainment assets and intellectual property, business formation, commercial litigation, information technology, and all aspects of entertainment law. He was listed as a Minnesota Super Lawyer by his peers in 2015. Mr. Gislason is an active member of the Minnesota State Bar Association, where he has held several leadership positions, including the current chair of the Arts & Entertainment Section. He also is a member of the Solo & Small Firm Section. Mr. Gislason frequently speaks on hot topic legal issues in the creative, intellectual property, and information technology realms. He earned his B.A. degree, cum laude, from Concordia College; and his J.D. degree, cum laude, from the University of Minnesota Law School.

JEFFREY C. O'BRIEN is a shareholder with the law firm of Lommen Abdo, P.A., practicing in the areas of business and real estate law. His clients include real estate agents, developers and investors; community banks; title companies; restaurant operators; manufacturing companies; franchised businesses; retired professional athletes; financial advisors; and insurance agents. Mr. O'Brien has significant experience with the formation of new businesses. He is the chair of Lommen Abdo, P.A.'s food and beverage law practice. He represents multiple craft breweries and distilleries, helping them with financing issues, real estate matters, the launch of their businesses, intellectual property protection, operational issues and all of their other legal needs. Mr. O'Brien has several other niche practice areas, including his work with individuals financing a business venture and/or acquiring real estate through the use of self-directed retirement accounts. He is certified as a real property law specialist by the Minnesota State Bar Association. A frequent lecturer and writer, Mr. O'Brien has presented and written articles on a variety of topics, such as asset protection planning, entity conversions, real estate law and real estate lending and loan

documentation, and other general business matters. He has been listed as a Minnesota Super Lawyer every year since 2013. Mr. O'Brien is a member of the Minnesota Craft Brewers Guild, Master Brewers Association of America (St. Paul/Minneapolis Chapter), Hennepin County Bar Association, Minnesota State Bar Association (Real Property Law Section), State Bar of Wisconsin, and the American Bar Association (Real Property Probate and Trust Law Section). He earned his B.S. degree, cum laude, from the University of St. Thomas; and his J.D. degree, cum laude, from William Mitchell College of Law.

RYAN SCHILDKRAUT is a business transactions attorney with Winthrop & Weinstine PA, who advises companies of all sizes on a wide range of business matters, including entity formation, fundraising, corporate finance, mergers and acquisitions, licensing, real estate, and tax. He quickly focuses on the meaningful issues in the transaction and efficiently leads the parties through the structuring, negotiation, documentation, and successful closing or completion of each deal. Mr. Schildkraut regularly counsels start-up companies and entrepreneurs on selecting the appropriate type of entity for their businesses, drafting organizational documents (including shareholder agreements, LLC agreements, and member control agreements), raising money from investors, hiring employees and independent contractors, negotiating commercial leases, and developing customized business contracts. He co-authored the MNvest legislation, which legalized securities crowdfunding in Minnesota. Mr. Schildkraut helped organize a group of politicians, business leaders, and other supporters in a grassroots campaign to educate Minnesotans on crowdfunding, and MNvest was signed into law on June 15, 2015. He represents start-up and mid-sized craft breweries on a variety of matters, including raising money from investors; awarding incentive equity to employees; securing debt and equipment financing; obtaining required permits and navigating through complex licensing regulations; negotiating brewery leases, beer distribution agreements, and beer ingredient procurement contracts; selling distribution rights; obtaining trademarks; and protecting other key intellectual property assets. In 2014 and 2015, he was named a Rising Star by Minnesota *Super Lawyers*. Mr. Schildkraut earned his B.B.A. degree, summa cum laude, from the University of Notre Dame; and his J.D. degree, cum laude, from the University of Minnesota Law School.

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Ryan Schildkraut

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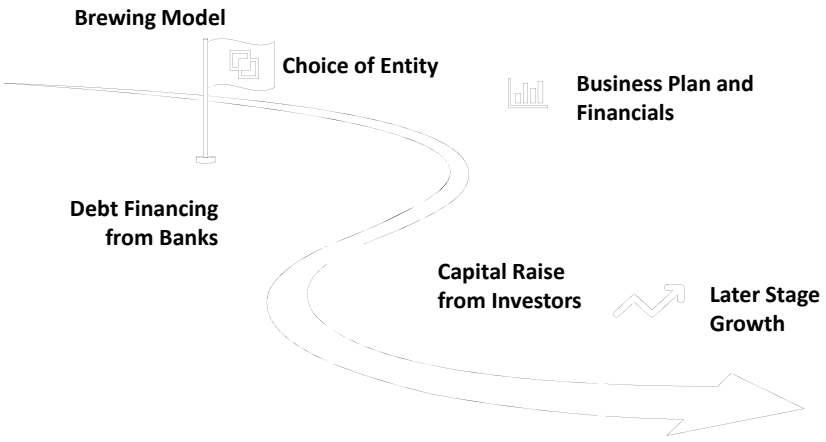
Roadmap



BREWING MODELS

Brewing Models

A. Production Brewery

B. Brewpub

C. Alternate Proprietorship

D. Contract Brewing

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Production Brewery

- Definition: A brewery that brews its own beer onsite and packages its beer for sale largely off premise. May have a tasting room.
- In most states, production breweries can serve beer on-site at a tap room.
  - HOWEVER, the brewery can ONLY serve its own beer.
- Whether production brewery can sell beer for off-site consumption (and the types of packaging that can be sold for off-site consumption) varies from state to state

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Brewpub

- 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.
- Most brewpubs must adhere to laws which limit the total ratio of beer sales to food sales.
- In some states, brewpubs cannot distribute their beer outside of the brewpub.
- In some states, brewpubs CAN sell liquor, wine, and beer from other breweries.

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Alternating Proprietorship (AP)

- 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."

- Some Pros of an AP:
  - 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.

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.

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.

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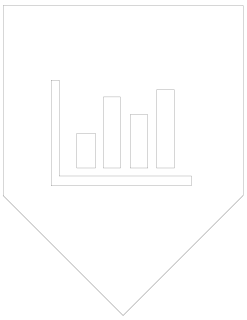
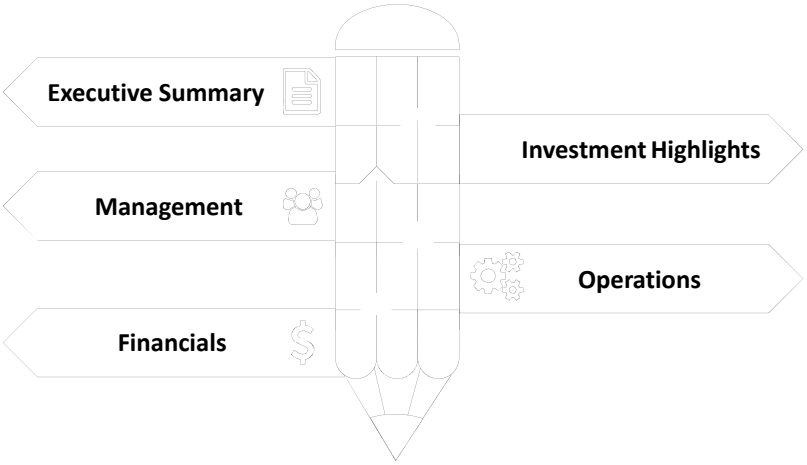


BUSINESS PLAN AND FINANCIALS

Business Plan Essentials



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Executive Summary

The "elevator pitch" for your business

- One page document addressing the following:
  - Simple explanation of your business
  - Problem your business will solve
  - Your business's "secret sauce"
  - Proof of market
  - Management team
  - Developmental phase
  - Summary financial data
- The Goal: Get the reader to page 2

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Investment Highlights

What makes your business special

Examples:

- Strong regional brand
- Leader in highest growth craft beer category
- Brand anchored by strong flagship product
- Ability to ramp production with existing footprint
- Attractive financial profile

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Management

Critical component for any funding source

- Items to highlight:
  - Prior business experience?
  - Prior brewing experience?
  - Prior restaurant experience?
  - Diversification of skill set?
  - Outside sources of income?
  - Particular expertise of value?
  - Board of advisors?
  - Service providers?

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Operations

Describe the workings of your business

- Items to highlight:
  - History
  - Product mix
    - Any “secret sauce”
    - Rationale behind mix
  - Sales and distribution
    - Brewpub vs. distribution model
    - Pricing strategy
  - Production
    - Contract vs. in-house
    - Capacity

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Financials

The very basics of financial information to include

- 3-5 year financial projections related to your business plan including the following:
  - Sales (hockey stick? in line with industry?)
  - Cost of Goods (GAAP vs. tax books)
  - Selling Expenses (hiring sales team?)
  - General & Admin Expenses (paying yourself?)
- Bonus points for balance sheet and cash flow statement
- Sources and uses of funds
  - Indicate how exactly their investment will be used
- Address how investor will get a return
  - Annual dividends? Sale of distribution rights? Strategic acquisition?
  - If not addressed then signals lack of value for someone’s capital

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Financials

There is no mission without margin!

Common Costs	Typically missing
Ingredients	Rent
Bottles	Labor
Labels	Depreciation
	Supplies
	Etc.

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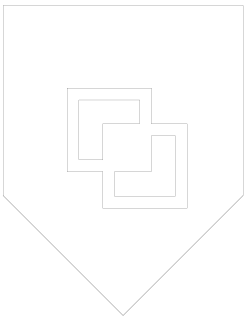

CHOICE OF ENTITY

Comparison of Entity Types

Entity	Advantage	Disadvantage
None	Easy	LIABILITY
LLC	Flexible	SE Tax
S-Corp	Tax Advantages	Owner Limitations
C-Corp	No Owner Limitations	Double Taxation

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Entity Formation Documents

Special Brewery/Distillery Provisions

- Provisions that require all proposed management to pass the appropriate TTB background check process.
- Provisions that require all proposed management to pass applicable local requirements to obtain and hold a liquor license.
- Check for other state or city requirements.

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Corporate Governance

- Board of directors?
  - Composition
    - Investor-elected directors
    - Independent directors
  - Consider list of "major decisions" requiring supermajority approval:
    - Examples:
      - relocating the Company's main brewing facility or opening additional brewing facilities
      - borrowing funds from lenders in excess of $X
      - selling substantially all of the Company's assets
      - Appointing a distributor for the Company's products
      - issuing new equity securities in the Company
      - increasing founder salaries beyond pre-approved ranges
- Limited voting rights for investors?
  - Consider similar list of "major decisions" requiring investor approval

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DEBT FINANCING FROM BANKS

Four Keys For Selecting the Right Bank

Flexibility

Ability to offer multiple financing options including lines of credit, term loans, SBA 504 and 7(a) loans, real estate loans, and construction loans

Industry Knowledge

Understands the brewing industry and the local craft beer market

Firepower

Ability to financing your funding needs over the long haul and grow with your business

Relationship

Your relationship manager has decision making authority so that you don't have to deal with multiple level of bureaucracy

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How To Impress a Commercial Banker

- Prior year business and individual tax returns
  - Other sources of income are critical
- Business plan
- 3-year financial model – if includes balance sheet you are pre-qualified!
  - REALISTIC EXPECTATIONS OF NET PROFIT
- 1-year cash flow model
  - Show how the money will be used
    - Where are the financial "pain points" during the year?
    - Can you meet repayment terms?

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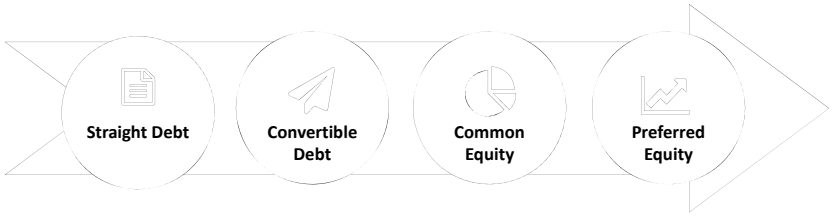
SBA 7 (a) Loan

- SBA 7 (a) loan can be good option for startup brewery that does not have operating history to attract traditional bank financing

- 4 Keys to Securing SBA Loan Commitment
  - Team (founders and service providers)
  - Plan (narrative, Year 1 projections broken out month to month)
  - Collateral (business assets and personal guarantees)
  - Equity (cash contribution of at least 25-30% of total project at time of closing; landlord improvements can count in certain circumstances)

CAPITAL RAISE FROM INVESTORS

Raising Money from Investors: What Are You Selling?



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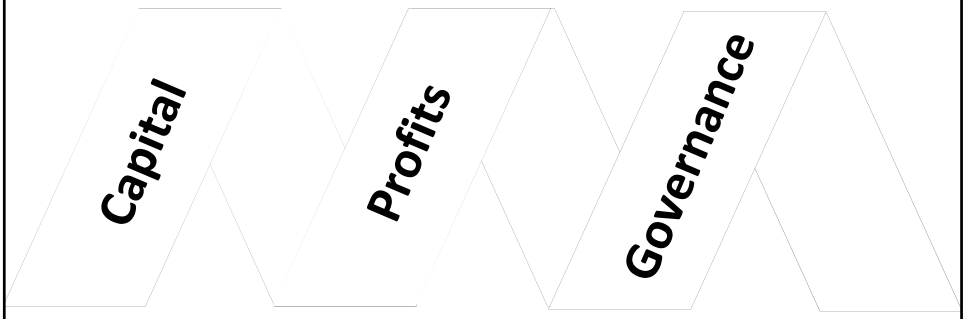
Three Pillars of LLC Ownership



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Real World Examples

Scenario	$ from Investors	Financial Rights	Governance Rights	Founders' Salaries
Brewery A	- $565k in equity - $200k in unsecured debt	- 44% of distributions	- No board representation - Limited approval rights over certain "major decisions"	- Tied to industry averages, as published by the BA
Brewery B	- $650k in equity	- 8% preferred return - 60% of distributions until repaid - 30% after repayment	- Investors elect 3 reps to 7-person board (founders elect 3 reps, 1 is independent)	- $54k each, 5% annual increases
Brewery C	- $1M in equity	- 100% of distributions until repaid - 40% of distributions after repayment	- Investors elect 1 rep to 3-person board	- $80k each, 15% annual increases up to $150k

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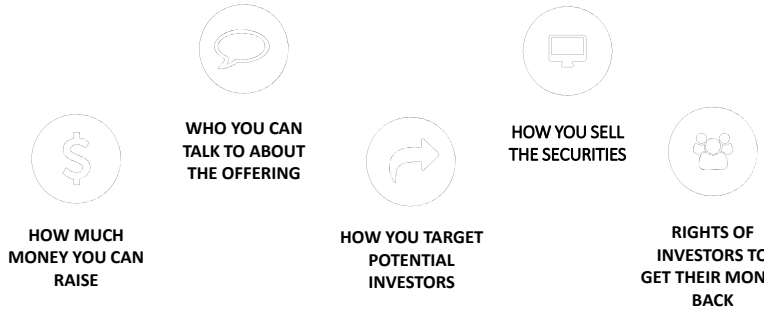
How Do You Find Investors?

- Other than donation-based crowdfunding, almost every means by which a business raises capital will involve securities laws.
- Securities laws regulate:



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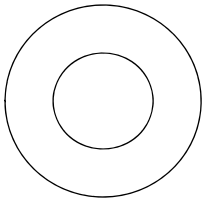
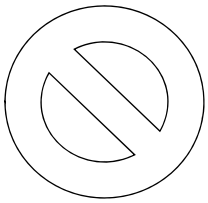
Securities Registrations vs. Exemptions

- As a general rule, in order to comply with Federal securities laws, a company offering or selling a security must either:



Register the offer or sale with the SEC

OR



Identify a specific exemption that allows the offer or sale to be conducted without registration.

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Federal Securities Registration

- In most circumstances, Federal securities registration is time consuming and expensive.
- Most small businesses are not able to easily comply with Federal registration requirements.

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Blue Sky Laws

- In addition to complying with Federal securities laws, an issuer offering or selling securities must also adhere to **blue sky laws** in each state where the securities are being offered or sold, all of which vary from each other.

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Private Placement Offerings

- Historically, most breweries have relied on the **PRIVATE PLACEMENT** federal securities law exemption.
- In order to keep the offering "private," companies have historically been required to comply with onerous requirements:

Friends and Family Only

No social media announcements

No TV, radio, newspaper, etc.

No prospective investor "events"

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Traditional Private Placement Safe Harbors

	Rule 504	Rule 506 [now Rule 506(b)]
How much money can I raise?	Up to $1M	Unlimited
Can I advertise the sale of my securities?	No, unless coupled with a state exemption or registration that allows advertising.	No.
To whom can I sell securities?	Anyone However, counterpart state exemptions or registrations may impose additional restrictions on number of non-accredited investors.	Unlimited number of accredited investors Up to 35 non-accredited investors if you believe they are "sophisticated"
Do I have to comply with the 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
Do I have to verify that any accredited investors are truly accredited?	No, accredited investors can "self-certify."	No, accredited investors can "self-certify."

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Congress Responds – JOBS Act

- As part of the JOBS Act of 2012, Congress directed the SEC to develop new rules that would make it easier for companies to raise capital from investors.

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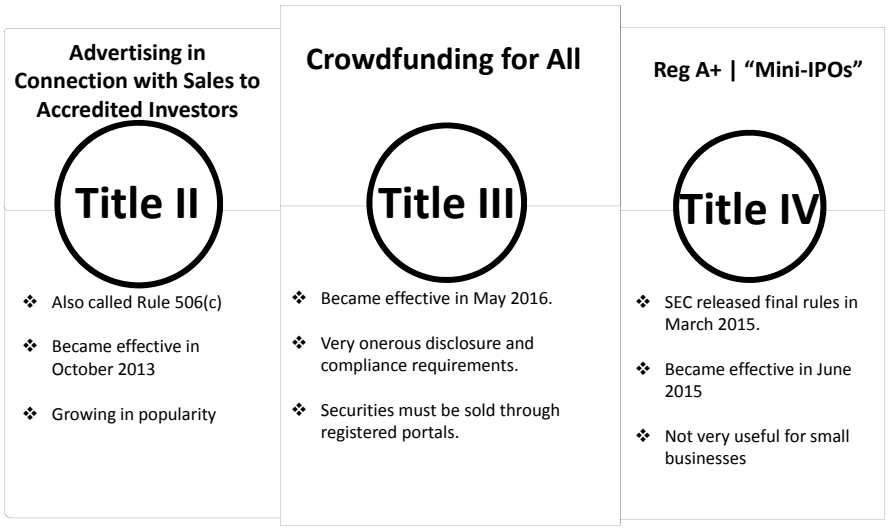
JOBS Act: Key Components



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Title II and Rule 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.	**Yes.**
To whom can I sell securities?	Anyone However, counterpart state exemptions or registrations may impose additional restrictions on number of non-accredited investors.	Unlimited number of accredited investors Up to 35 non-accredited investors if you believe they are "sophisticated"	**Unlimited number of accredited investors**
Do I have to comply with the 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.**

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Title III and Reg CF

- Companies may 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
  - $100k max across all CF offerings in any 12 month period.
- Financial statement requirements based on offering size:
  - < $100k → Internally prepared, certified statements
  - $100k - $500k → CPA reviewed statements
  - $500k - $1M → CPA audited financials (or CPA reviewed statements if the company is a first time user)
- Disclosure document must be filed with the SEC
- Annual SEC reporting obligations
- Offerings must be made through registered portals.
  - Registered as B-D; or
  - Registered as portal operator with SEC and member of FINRA
  - Regulatory compliance burden has largely been transferred to the crowdfunding portals

Title IV and Reg A+ | The "Mini-IPO"

- Became effective in June 2015
- Companies able to raise up to $50M from general public
- Pros:
  - General solicitation allowed; non-accredited investors can participate
  - State preemption (under Tier 2)
- Cons:
  - Raises under $20M (Tier 1) subject to state review
  - Likely cost prohibitive for startups and earlier stage companies (filing offering circular, financial audit, and ongoing reporting under Tier 2)
  - Tier 2 offerings could take up to 6 months to receive SEC approval

Conclusion: This will likely only be attractive to regional breweries wanting to involve customer base with national expansion plans

Quick Comparison of Fundraising Models

Method	$ Limit	Advertising?	Non-Accredited Investors?
Rule 504	$1M (SEC has proposed an increase to $5M)	⊗	⌄
Rule 506(b)	Unlimited	⊗	⊗
Rule 506(c)	Unlimited	⌄	⊗
Federal Crowdfunding (Reg CF)	$1M	⌄	⌄

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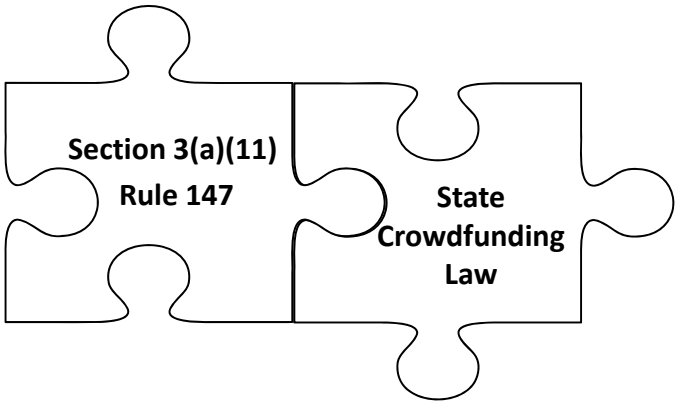
Intrastate Crowdfunding



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Intrastate Crowdfunding

- In addition to the new Federal laws, over the past few years individual states have adopted their own crowdfunding laws.
- These state crowdfunding laws only permit **intrastate** offerings.
- Common Framework:

  - Company can raise up to $1M with no audit or $2M with audit
  - Investment cap for state residents (b/n $5-10k)
  - Funds held in escrow for duration of raise
  - Periodic reporting (quarterly or yearly)

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State Crowdfunding Laws (April 2016)

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Challenges with Most Intrastate Crowdfunding Models

- Current Rule 147 has potentially onerous requirements, such as:

80% Tests	Use of Internet Advertising
• **80%** of the issuer's consolidated **gross revenues** must be derived from the state in which the offering is conducted. • **80%** of the issuer's consolidated **assets** must be located within the state in which the offering is conducted. • **80%** of the issuer's **net proceeds** must be intended to be used, and actually used, in connection with the operation of a business within the state in which the offering is conducted.	• **Advertising cannot result in offers to non-residents.** • **Companies must use reasonable measures to make sure that advertisements do not reach out-of-state residents.**

- **HOWEVER, in October 2015, the SEC released proposed changes to Rule 147 that would relax these requirements.**

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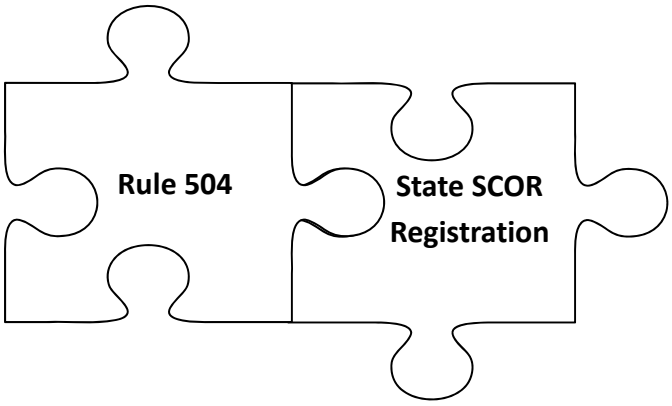
SCOR Offering



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Typical SCOR Offering Requirements

- Offering < $1M
- Must file Form U-7
  - Requires audited or reviewed financial statements
- Nothing prohibits issuer from selling securities online (i.e., operating its own "crowdfunding portal")
- Cannot use third party portal who is not a registered B-D Coordinated review if issuer wants to sell securities in multiple states

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Other Practical Considerations

- Put Rights
- Call Rights
- Preferred Distributions
- Preferential/Accelerated Distributions
- Informational Rights
- Minority Rights regarding Oppressive Conduct

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PPM

- Typical outline:
  - ✓ Intro / Disclaimer
  - ✓ Summary of Terms
  - ✓ Risk Factors
  - ✓ Business Plan
  - ✓ Subscription Agreement
  - ✓ Operating Agreement

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Social/Rewards Crowdfunding

- Social or Rewards Crowdfunding refers to the online funding of a campaign or project whereby contributors receive gifts, perks, or other rewards in exchange for their contribution.
  - Not a sale of securities.
  - Made popular by services such as Kickstarter, which has raised over $2.3 billion since 2009.
- **Example**: Bauhaus Brew Labs (Minneapolis, MN)
  - 369 backers pledged $42,772 in less than 24 hours.

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Other Funding Sources

- State or Local Grants
- Tax Increment Financing
- Municipal loans

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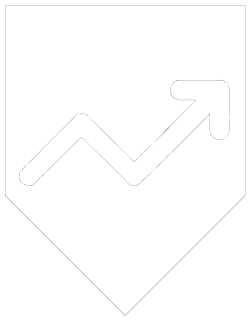

LATER STAGE GROWTH

Later Stage Growth

Craft beer is a "hot" investment

- Follow-on private offerings
- Private equity
- Family offices
- Strategic investors
- Mezzanine financing
- Sale of distribution rights

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Levels of Value

Strategic investors generally pay higher valuation multiples

Price per Share	Discount	Investor Type	Notes
$10.00			
	-30%	Strategic Controlling Interest	Value of strategic synergies
$7.00			
	-25%	Financial Controlling Interest	Value of control
$5.25			
		Financial Non-Controlling	Value to purely financial investor

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Recent M&A Activity Rationale

Target	Acquirer	Acquisition Rationale
		▪ Leading marquee brand provides Constellation foothold in fast growing craft beer segment ▪ Opens door for additional bolt-on craft acquisitions ▪ Constellation able to leverage expansive U.S. distribution network currently serving Grupo Modelo portfolio ▪ Platform to service international markets that have a growing appetite for U.S. craft beer offerings
		▪ Recently established Enjoy Beer, LCC, is a private equity backed acquisition vehicle and craft beer consortium ▪ Led by industry veteran Richard Doyle (Harpoon Brewing), Enjoy Beer intends to become a publicly traded company with multiple craft brands under its control ▪ Abita Brewing Company is a top-25 regional brewery which found growth slowing due to capacity constraints
		▪ Lagunitas on pace to produce more than 800,000 barrels in 2015, led by eponymous IPA ▪ Partnership with leading craft brewer gives Heineken much-needed relevance in U.S. market ▪ Growth plans include leveraging Heineken's robust international distribution network with particular focus on Mexico and Europe

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Intellectual Property and Advertising for Breweries & Distilleries

Martha Engel
Winthrop & Weinstine

Types of Intellectual Property

- Copyrights
  - 17 U.S.C. § 101, *et seq.*
- Patents
  - 35 U.S.C. § 101, *et seq.*
- Trademarks
  - 15 U.S.C. § 101, *et seq.*
- Trade Secrets
  - 18 U.S.C. § ___ and state statutes

Copyrights

- Original works of authorship fixed in a tangible medium of expression
  - Advertisement
  - Website content
  - Recipes (only in their written form)
  - Artistic works displayed in taproom / tasting room
  - Performances
  - Music played over sound system

Copyright Ownership

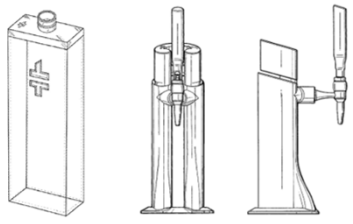
- Ownership vests in the individual author(s) of the work
- Ownership can vest in the company if:
  - Employer/employee relationship
  - For independent contractors or commissioned works, contract language must clearly state that the work was a “work made for hire”
  - Otherwise assigned from author(s) to company

Copyright Infringement

- Plaintiff must prove ownership of a copyrighted work and that Defendant misappropriated the work by copying it, either by proof of:
  - Direct copying
  - Inference based on Defendant's access to the copyrighted work and the substantial similarity to the copyrighted work
- Injunction, monetary damages

Patents

- "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent." – 35 U.S.C. 101
- To be eligible for patent protection, the invention must be novel and non-obvious. 35 U.S.C. 102, 103
- Types of patents:
  - Utility (process, widget)
  - Design (bottle)
  - Plant (hops, grain)



Patent Process

- Must be filed by a registered patent attorney or *pro se* by the inventor(s)
- Can be expensive and time-intensive
- Requirements:
  - Claims
  - Drawings
  - Specification
  - Oath/declaration

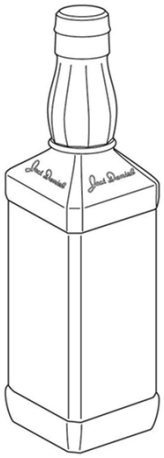
Patent Infringement

- Utility patents:
  - "[W]hoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent." – 35 U.S.C. 271
  - Defendant must practice each element of the claim (or an equivalent)
- Design patent: if an ordinary observer would think that the accused design is substantially the same as the patented design when they are compared
- Injunction, monetary damages

Trademarks

- Trademark – JACK DANIEL'S

JACK DANIEL'S



- Trade Dress
- Product Configuration

Trademark Rights

- Based upon use of the mark in commerce
  - Unregistered (common law) rights
    - Only where consumers have encountered the mark
  - State trademark registration
    - Statewide rights
  - Federal trademark registration
    - Nationwide rights
    - If an intent-to-use based federal trademark application is filed prior to use, priority of rights in the mark goes back to the filing date of the application

Trademark Infringement

- Likelihood of consumer confusion
  - Strength of Plaintiff's mark
  - Similarity of the marks
  - Similarity of the goods or services
  - Similarity of trade channels
  - Number and nature of similar marks on similar goods or services
  - Length of time and conditions under which there has been concurrent use without consumer confusion
  - Actual confusion
  - Other factors

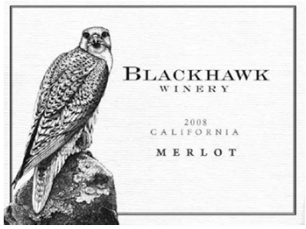
The Problem With Alcohol

- Courts and the USPTO generally consider beer, wine, and distilled spirits to all be related when analyzing marks for a likelihood of consumer confusion
  - Liquor stores traditionally sell all three
  - Consumers considered to be unsophisticated purchasers
  - Increasing collaboration between breweries, wineries, and distilleries
    - Barrel-aged beers

The Problem With Alcohol

- BLACKHAWK wine and BLACK HAWK STOUT
  - TTAB found the marks confusingly similar and refused registration in light of prior registration of BLACK HAWK STOUT for beer.

  In re Sonoma Estate Vinters, LLC (TTAB 2015)



The Problem With Alcohol

- RUBENS wine and REUBEN'S BREWS beer
  - TTAB found the marks were not confusingly similar based on the overall commercial impression of the marks given the use of BREWS and other graphical elements in applicant's mark.

  In re Reubens Brews LLC (TTAB 2015)

Rubens

reuben's
BREWS

The Problem With Alcohol

- Alcohol can also be considered to be related to other food and beverage items.
  - *Allagash Brewing Company v. Pelletier*, 2015 TTAB LEXIS 383 (TTAB 2015)

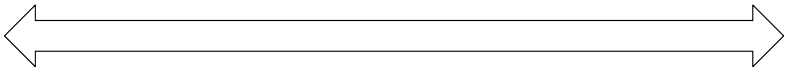
    Brewery opposed Maine individual's application for ALLAGASH WILD for jams and jellies

    TTAB found that Allagash Brewing's marks were strong and that the goods were related, finding that "craft beer is commonly associated with food."

Selecting a Trademark

- Consider strength of mark

Aspirin	*Palms Free*	*Citibank*	*Apple*
Elevator	*Your Cloud*	*Blu-Ray*	*Xerox*
Flip Phone	*Caliburger*	*Greyhound*	*Pepsi*
Thermos	*Restore Lift*	*Trek*	*Kodak*
Generic	**Descriptive**	**Suggestive**	**Arbitrary or Fanciful**



More descriptive,
Less protection

More distinctive,
More protection

Selecting a Trademark

- At minimum, conduct a trademark search in USPTO records and on internet for similar marks
- Geographic names are often subject to a descriptiveness (or misdescriptiveness) refusal by the USPTO depending on how used
  - Be wary of using marks or symbols that may be owned by others. *Alamo Beer Company LLC v. Old 300 Brewing LLC*, Case No. 5:14-cv-285 (W.D. Texas).

Federal Trademark Filing Process

- Application can be use-based or an intent-to-use application
- Application is examined within 3-6 months of filing date
  - Formalities
  - Likelihood of confusion under Section 2(d)
  - Descriptiveness under Section 2(e)
  - May need disclaimer of descriptive terms such as "Brewing"
- Once approved, application is published for opposition by third parties
- If use not shown at filing, Applicant will have three years from allowance date to show use
- Registration certificate will issue once all requirements are met

Principal Register v. Supplemental Register

- If rejected under 2(e) as being descriptive and use has been made, Applicant has option of amending to the Supplemental Register to obtain a registration
  - After 5 years of continuous use, brewery or distillery can then show acquired distinctiveness and overcome the descriptiveness refusal in a new filing
- Under either Register, the Registrant may use the ® symbol
  - Supplemental Register does not carry the same presumptions of validity and ownership as the Principal Register in an enforcement proceeding

Trademark Enforcement

- Staying vigilant with respect to third party uses keeps trademark rights as broad as possible.
- Formal proceeding options:
  - Opposition (TTAB) for trademark applications
  - Cancellation (TTAB) for trademark registrations
  - Infringement lawsuit (applicable federal court)

Note: *B&B Hardware* SCOTUS decision held that when elements & facts considered by TTAB are materially the same as those before court, preclusion should apply

Resolving Trademark Disputes

- Beyond ceasing use of the infringing mark altogether, parties can consider options involving:
  - Territory limitations
  - Timeframe limitations (seasonal v. flagship)
  - Types of beer sold under the mark
  - Product packaging changes
  - Cross-promotional opportunities or other collaborations
  - Transaction to assign the trademark to the other party

Trade Secrets

- Any valuable commercial information that is not generally known and that provides an advantage to a business over competitors who do not have that information
  - Recipes or formulas
  - Processes
  - Know-how
  - Contacts and consumer information

Trade Secret Law

- Until recently, only cause of action was under state law
  - Most states have adopted the Uniform Trade Secrets Act (UTSA)
  - Exceptions are New York and Massachusetts
- On May 11, 2016, Obama signed into law the Defense of Trade Secrets Act (DTSA)
  - Provides a federal cause of action for trade secret misappropriation
  - Provides injunctive relief and opportunity for ex parte seizure under certain circumstances

Protecting Trade Secrets

- Key to protecting a trade secret is keeping it "secret"
  - Limit the number of employees with knowledge of the secret
  - Regularly identify and mark documents as "confidential" that contain trade secret material
  - Have an employee policy with respect to trade secrets and confidential information
  - Non-disclosure agreements with third parties, including contract brewers
  - Confidentiality agreements and non-compete agreements with employees

Alcohol Beverage Advertising

- "Advertisement" is essentially anything in writing that is disseminated to the public
  - Print ads, television ads, mailings, videos, webpages, social media
- Do not need TTB approval, but TTB does monitor
- Distillery: 27 C.F.R. 5.61-5.66
- Brewery: 27 C.F.R. 7.50-7.55

Mandatory Statements

- Name, city and state for brewery / distillery responsible for content
- Class of product
- For distilleries, alcohol content and percentage of neutral spirits (not required if advertisement covers full brand with multiple products)
- Statements must be
  - Conspicuous & readily legible
  - Clearly part of the advertisement
  - Readily apparent to the viewer

Prohibited Statements

- Statements that are false, untrue, or tend to create a misleading impression
- Statements that disparage a competitor's product
- Obscene or indecent statements or images
- Misleading statements about testing or product guarantees
- Use of terms like "bond," "pure" or "organic" (unless otherwise supported)
- Statements by breweries that create false or misleading impression that product contains distilled spirits
- Health-related statements that are untrue, misleading, or not substantiated by evidence

Social Media

- Social media pages are considered "advertisement" and must include mandatory statements
  - Should be placed where viewer would most logically expect to find information, such as the "profile" or "About" section

Liquor Law Issues

Jeffrey C. O'Brien

LOMMEN ABDO

LAW FIRM

lommen.com 800.752.4297 MN / WI / NY

Liquor Law Issues: Topics of Discussion

- Licensing – Federal
- Licensing – State
- Licensing - Local
- Labeling Requirements
- Formula Approvals

TTB - Overview

Brewers Notice/Distilled Spirits Plants License

State & Local Licensing Issues

- License requirements vary by state
- Local licenses: taproom, cocktail room (for distilleries) and growlers

Formula Approval

Labeling/COLAs

Craft Beer, Distillery and Liquor Law: Other Issues

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Distribution Agreements

Distribution Agreements

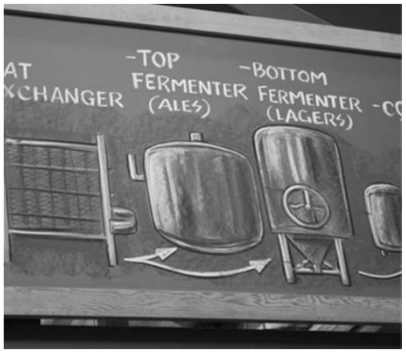
- Laws vary from state to state
- Creation
- Termination
- Scope of Agreement
- Small Brewer Exemptions

Employment Issues

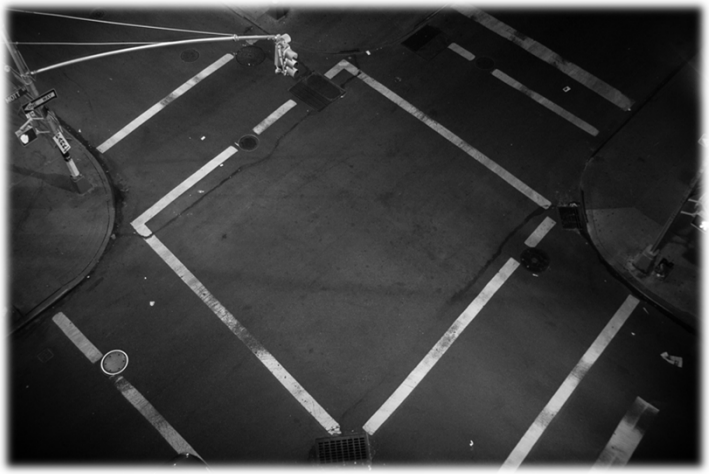
- Laws vary by state; general rule is “at will” employment
- Employment agreement for head brewer
- Trade secret issues
- Worker classification issues, especially regarding the use of volunteers

Real estate: lease vs. purchase

Insurance Issues



COMMON ETHICAL MISTAKES ATTORNEYS MAKE



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ETHICAL STANDARDS AND CIVIL LIABILITY

- **Lawyer Ethics: Not an Oxymoron**
- **Model Rules of Professional Conduct**
- **States' Rules of Professional Conduct or Professional Responsibility**

ETHICAL STANDARDS AND CIVIL LIABILITY

- **Majority courts: violation of ethical standards is evidence of attorney malpractice.**
- **Compliance with ethical standard may be defense to attorney malpractice.**

THE ROLE OF ATTORNEY AS ADVISOR

- **Rule 2.1: Advisor**
- **Who is the client?**

THE ROLE OF ATTORNEY AS ADVISOR

- **Advisor in Entity Formation**
- **Representation of Entity or Organization**
- **Representation of Individuals or Principals**

COMMON MISTAKES LAWYERS MAKE

- **Failure to identify the correct client**
- **Unintended representation**
- **Failure to recognize a conflict of interest**

AVOIDING CONFLICTS OF INTEREST

- **Again: Who is the client?**
- **What is a conflict of interest?**
- **Who determines whether a conflict exists?**

AVOIDING CONFLICTS OF INTEREST

- **Can the lawyer represent the client despite the conflict?**
- **What is concurrent representation and informed consent?**

COMMON MISTAKES LAWYERS MAKE

- **Failure to consider potential conflicts**
- **Failure to perform conflicts check**
- **Failure to obtain informed consent conflict waiver**

THE THREE C's:

- **#1: COMMUNICATION**
- **#2: COMPETENCY**
- **#3: CONFIDENTIALITY**

THE THREE C's: CONFIDENTIALITY

- **What is a lawyer's duty of confidentiality?**
- **What is the attorney-client privilege?**
- **When an entity is the client?**

COMMON MISTAKES LAWYERS MAKE

- **Failure to advise client to whom duty of confidentiality is owed.**
- **Waiver of confidentiality.**
- **Failure to adequately safeguard confidential information.**

ADEQUACY OF FEES AND CHARGES

- **What is a retainer agreement?**
- **What is a reasonable fee?**
- **Can a lawyers take an ownership stake in exchange for services?**
- **What transactions are prohibited?**

COMMON MISTAKES LAWYERS MAKE

- **Failure to get fee agreement in writing.**
- **Failure to assess whether transaction is prohibited.**
- **Failure to keep client's best interests in mind.**

WHAT WOULD YOU DO?

DIFFERENT ETHICAL SCENARIOS

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LAW FIRM

Brewing Models
And
Entity Selection, Formation and Finance
Specific to Breweries and Distilleries

Submitted by Ryan Schildkraut

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. Entity Selection, Formation and Finance Specific to Breweries and Distilleries

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.

(1) 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.

(2) 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.

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

(2) 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:

(1) "register" such sale with the Securities Exchange Commission (SEC) or

(2) 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:

(1) Offeree qualification (i.e., whether the investors are sophisticated);

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

(3) 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);

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

(5) 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*).

(1) 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:

(i) any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio; and

(ii) 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).

(2) 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:

(i) 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

(ii) 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.

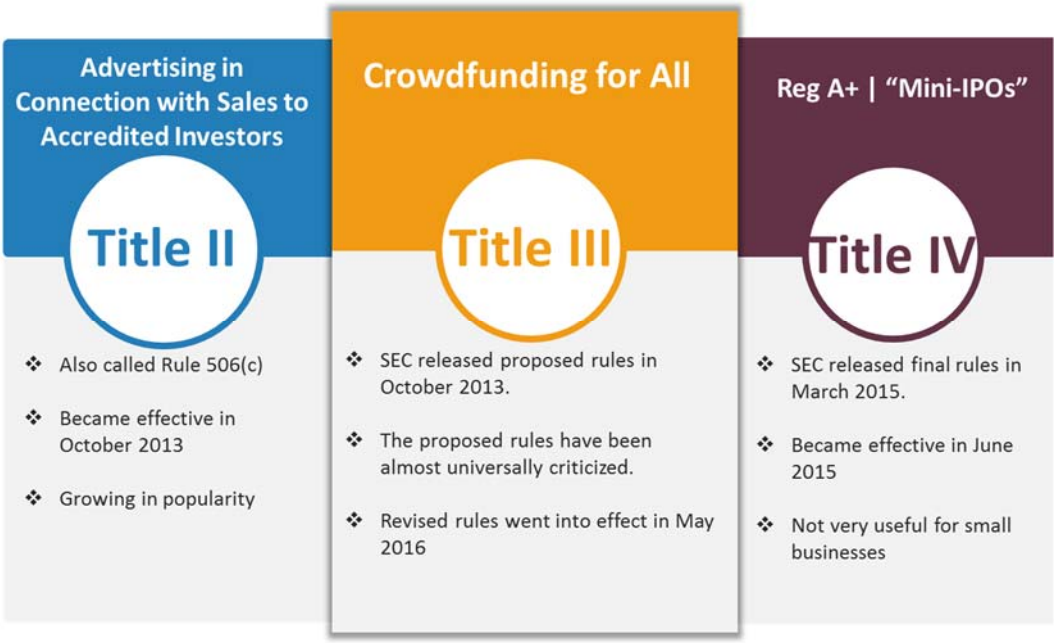
(1) State law counterpart - Limited Offering Exemption: Most states have a "limited offering" exemption that is often relied on by companies who are conducting Rule 504 offerings. Normally, sales by a company to no more than 35 non-accredited investors (and an

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.

(1) 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.

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:



   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 registrations may impose additional restrictions on number of non-accredited investors.	Unlimited number of accredited investors Up to 35 non-accredited investors if you believe they are "sophisticated"	Unlimited number of accredited investors
Do I have to comply with the 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 → 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).

(1) 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.

(2) 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:

(a) Detailed annual reports, using Form 1-K;

(b) Semiannual reports, using Form 1-SA, including unaudited interim financial statements and a management discussion; and

(c) Current event reports, using Form 1-U, reporting all fundamental changes.

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

	Title II - Rule 506(c)	Title III - Reg CF	Regulation A+ Tier 1	Regulation A+ Tier 2
Maximum Dollars Raised	No maximum	$1 million per 12 months, including affiliates	$20 million per 12 months	$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 a public company
Audited/Reviewed Financial Statements Required?	No	Depends on size of offering; most first time users will have to provide reviewed statements	No	Yes
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 mini-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.

(1) 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:

(i) 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

(ii) 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).

(2) 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

(1) 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:

(i) 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.

(1) 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.

(i) 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:

(a) 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

(b) providing a disclaimer and restrictive legend clarifying "that the offer is limited to residents of the relevant state under applicable law." (Question 141.04).

(ii) 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**
      (1) **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.
      (2) **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).
      (3) **Right to Information**: Members have the right to access information from the LLC that is material to the member's interest as a member.
      (4) **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**

(1) **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.

(2) **Rights to Information**: Shareholders are entitled to inspect books and certain records of the corporation.

(3) **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.

   (1) 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.

   (2) 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.

(3) **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 predetermined 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.

Intellectual Property Considerations For Breweries and Distilleries

Submitted by Martha Angel

INTELLECTUAL PROPERTY CONSIDERATIONS FOR BREWERIES AND DISTILLERIES

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Intellectual property generally falls into 4 main categories:

1. Copyrights –any original work of authorship or other creative work;
2. Patents – any new and useful invention, visual characteristics of an original article of manufacture, or any distinct and new variety of plant;
3. Trademarks – any word, symbol or design that identifies and distinguishes the source of a good or service from those of others;
4. Trade Secrets – any information that derives its economic value from not being generally known and is the subject of reasonable efforts to maintain its secrecy

Copyrights

Copyright-eligible works are any "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. 102(a). Importantly, the work must be (1) original and (2) fixed in a tangible medium. Copyright-eligible works fall into several categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. *Id.* Copyright protection includes protection for compilations and derivative works, but only to the extent that new material is included. 17 U.S.C. 103. Breweries and distilleries should pay attention to copyrights in advertisement, website content, artistic works displayed or performed in their taproom or tasting room, or music displayed over a sound system in a taproom or tasting room. Recipes are protectable under copyright law only to the extent that they are written down (fixed in a tangible medium) and copied.

Copyright protection extends from the moment of creation. However, a copyright must be registered with the U.S. Copyright Office in order for a copyright owner to sue for infringement and to be eligible to recover certain remedies. *See* 17 U.S.C. 412. If registration occurs within 5 years of publication, it is considered *prima facie* evidence of ownership and validity.

Copyrights are generally owned by the author or creator of the work. Where two or more authors have contributed to the work, the work may be jointly owned by the authors. Each owner has an equal right to register the copyright, enforce it, and commercially exploit it unless otherwise agreed. If the work is a commissioned work or a work made for hire, special rules apply. If an employee creates the work

on behalf of the employer within the scope of his or her employment, ownership of the copyright vests in the employer. 17 U.S.C. 101. If a work is specially commissioned (e.g. photographs of the tap room, advertising material, packaging artwork, etc.), the ownership only will vest in the brewery or distillery "if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." *Id.* If breweries or distilleries are utilizing a third party to develop creative works, they should ensure that any contract or purchase order specifically states that the work product "shall be considered a work made for hire" in order for ownership to vest in the brewery or distillery.

With some exceptions based on publication dates, the term of a copyright is 95 years from first publication or 120 years from creation, if a work made for hire or anonymous works. With some exceptions, the term of a copyright is otherwise the duration of the author's life plus 70 years.

For the alleged copyright owner to prevail in a copyright infringement dispute, the Plaintiff must prove ownership of a copyrighted work and that the Defendant misappropriated the work by proof of either direct copying or an inference of copying based on Defendant's access to the copyrighted work and the substantial similarity to the copyrighted work.

Patents

The patent system seeks to promote innovation by granting to an inventor a limited monopoly in its invention in exchange for public disclosure of the invention. There are three types of patents: utility patents, design patents, and plant patents. Patents are an exclusionary right. They permit the owner to exclude others from making, using, or selling the invention for the term of the patent. A patent does not mean the owner has the right to fully perform the invention, just to exclude others from doing so. Patent applications must be filed by an attorney or patent agent registered with the United States Patent & Trademark Office, or *pro se* by the applicant.

Ownership of a claimed invention described in a patent application is initially in the name of the inventor or inventors. Joint inventors each own a full 100% right in the claimed invention. Ownership of a claimed invention may transfer to an employer if an employee agreement

Utility patents are directed to the invention of any new and useful process, machine, manufacture, or composition of matter, or a new or useful improvement thereof. A utility patent application must include a title, a specification describing the patent, and at least one claim. Similar to real property rights, the claim describes the metes and bounds of the patented invention. The claimed invention shall be granted a patent if it is novel and not obvious. The claimed invention is novel if it was not already patented, described in a printed publication, or in public use, or on sale, or otherwise available to the public before the effective filing date, with some

exceptions for the inventor's own disclosures. The claimed invention will not be granted a patent if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious to one of ordinary skill in the art to which the claimed invention pertained. For applications filed on or after June 8, 1995, any issued patent has a term of 20 years after the earliest filing date for the application. For any patents resulting from applications filed before June 8, 1995, the patent has a term of 20 years from the date of grant of the patent. Infringement of a utility patent occurs when the defendant practices each element or its equivalent.

Design patents are directed to the ornamental design of a functional item, such as a bottle design, other packaging design, or a flight design for a beer or distilled spirit. A design patent application must include drawings of the design (typically several views of the design), a description of the drawings, and a single claim. Design patents are also examined for novelty and non-obviousness. The term of a design patent is 14 years from the date of grant. Infringement of a design patent occurs if an ordinary observer would think that the accused design is the same as the patented design when they are compared.

Plant patents are directed to newly discovered and asexually reproduced plants including cultivated sports, mutants, hybrids, and newly found seedlings, other than a tuber propagated plant or a plant found in an uncultivated state, may obtain a patent therefore. 35 U.S.C. 161. The application requires a drawing, a description of the plant, and at least one claim. Like utility patents, plant patents are examined for novelty and non-obviousness. The term of a plant patent is 20 years from the filing date of the application. The most relevant application for plant patents for brewers are hop plant patents. Many hops are covered by plant patents., and brewers or hop farmers should be aware of the patent implications of re-planting patented hop seeds. In *Bowman v. Monsanto*, 569 U.S. ___, **1**33 S.Ct. 1761 (2013), the Supreme Court considered whether the doctrine of patent exhaustion applied to a farmer who purchases seed covered by a patent and then plants a harvested and saved seed from that crop. The Supreme Court ruled that despite the farmer initially purchasing the seed, the farmer replanting seed to harvest a second crop constituted making a copy of the patented invention and thus was an unauthorized making of the patented invention.

Trademarks

One of the most important assets of a brewery or distillery is its house brand and its product names.

A trademark is any word, phrase, symbol, design or other device that identifies or distinguishes the goods of one party from those of others. When applied to services, this often called a "service mark." "Trade dress" covers the visual appearance of a

product or its packaging that identify or distinguish the source of a product to consumers.

Rights in a trademark generally begin based on use of the mark in commerce, but filing an intent-to-use application with the U.S. Trademark Office can provide priority of right in a trademark back to the filing date of the application if use is perfected within three years of the allowance date of the application. Further, prior users ("senior users") of a trademark may have rights that precede a junior user's rights in a mark that may limit the junior user's rights.

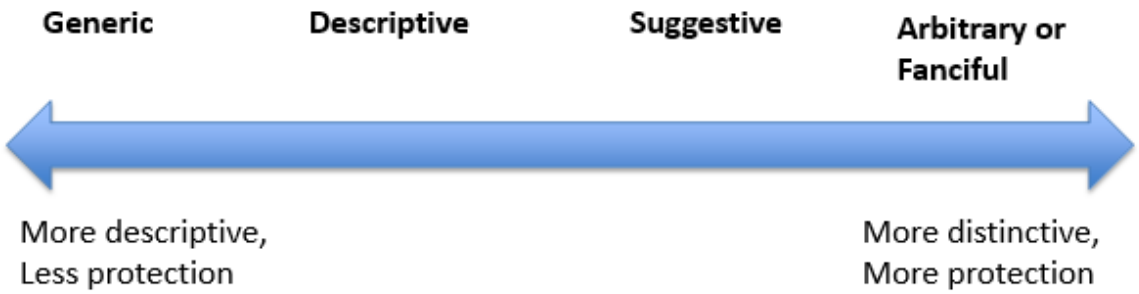
These rights can come in three forms: unregistered rights (often called "common law" trademark rights); a state trademark registration; or a federal trademark registration. Unregistered, common law rights extend only to the geographic area where consumers have encountered the mark. These rights are not believed to extend to use of a mark by homebrewers who aren't selling the product or operating under a TTB license by virtue of their use alone. State trademark registrations cover the entire area of the state, but do not extend beyond its borders and could not be used to enforce trademarks outside of the state. Federal trademark registrations provide nationwide rights to a mark and provide the ability to enforce rights in a mark, even in areas where the owner has not used the mark. Unlike a state filing, which typically requires use at the time of filing, an applicant can file a federal application based on an "intent to use" the mark. Breweries and distilleries should consider filing a federal trademark application while in the planning stages of their brewery or distillery (as well as obtaining domain names as soon as possible).

Infringement of these rights occurs when another party uses a mark with which such use is likely to cause confusion, or to cause mistake, or to deceive. 15 U.S.C. 1114. The likelihood of confusion standard varies by circuit, but typically considers:

- the strength of Plaintiff's mark;
- the similarity of the marks;
- the similarity of the goods or services;
- the similarity of trade channels;
- the number and nature of similar marks on similar goods or services;
- length of time and conditions under which there has been concurrent use without consumer confusion;
- actual confusion;
- other factors pertinent to a determination of whether consumers are likely to be confused by the two marks being used in commerce.

When selecting a mark, a search should be conducted both on the USPTO's search system TESS, the TTB's website, and also on the internet to determine availability. When conducting a search, one should consider alternative spellings that may sound the same as the proposed mark and also marks in use by others in the food and beverage industry. Breweries and distilleries should also consider the strength of a mark. The strength of a mark is considered based on where it falls on the "spectrum

of distinctiveness" and how many third parties use the mark on related goods or services. Arbitrary or fanciful marks are inherently more distinctive and provide more protection than those marks that are merely descriptive or generic.



1. Generic marks are those that the relevant consuming public understands primarily as the common name for a good or service. Examples include Beer, Vodka, Aspirin, Elevator, Flip Phone, Thermos.
2. Descriptive marks include those that describe an ingredient, quality, characteristic, function, feature, purpose, or use of the goods or services. Examples include Hoppy IPA, Brooklyn Brewery, Palms Free, Your Cloud and Oat Nut Bran Cereal. Even descriptive marks may acquire distinctiveness in the market by having been used continuously for five years or having gained significant recognition by the relevant consuming public that consumers identify that mark with a particular source.
3. Suggestive marks are marks that require imagination, thought, or perception to determine the nature of the goods or services. Examples include Chicken of the Sea, Citibank, Trek, Greyhound, Lupulin Brewing.
4. Arbitrary and fanciful marks are known words used in an unexpected or uncommon manner (e.g. Apple for computers, Tin Whiskers for beer) and those marks that are invented for the sole purpose of functioning as a trademark (e.g. Pepsi, Xerox).

When applying for federal trademark protection, applicants can file based on an intent to use the mark or based on actual use of the mark. Importantly, applicants must have actual use of the mark in interstate commerce in order to obtain a trademark registration. The application is examined by a USPTO examining attorney within about three to six months from the filing date of the application for conformance with formalities and to determine whether there is any reason that the mark should not be registered based on any requirements of 15 U.S.C. 1052. Reasons for not registering the mark include that the mark consists or comprises:

- Immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute;
- Importantly for distilleries, a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after 1996;
- Flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof;
- Name, portrait, or signature identifying a particular living individual except by his written consent, or the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow;
- Resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive;
- When used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them;
- When used on or in connection with the goods of the applicant is primarily geographically descriptive of them, except as indications of regional origin may be registrable;
- When used on or in connection with the goods of the applicant is primarily geographically deceptively misdescriptive of them;
- Primarily merely a surname;
- Generally in the case of trade dress registration or product configurations, any matter that, as a whole, is functional.

If the application fails to conform with particular formalities, or the examining attorney determines that registration must be refused based on one of the foregoing, the examining attorney will issue an office action. Applicants have six months from the date of the issuance of the office action to reply.

Trademark registrations for alcoholic beverages can be difficult to obtain because of case law, and the Trademark Office's interpretation of that case law, that suggests that beer is sufficiently related to wine and distilled spirits and vice versa. In rejecting marks on beer as being likely to be confused with similar marks registered for wine or distilled spirits, the Trademark Office generally relies on some of the following cases:

- *In re Chatam Int'l Inc.,* 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (holding GASPAR'S ALE for beer and ale likely to be confused with JOSE GASPAR GOLD for tequila);
- *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003) (holding RED BULL for tequila likely to be confused with RED BULL for malt liquor);

- *In re Salierbrau Franz Sailer*, 23 USPQ2d 1719 (TTAB 1992) (holding CHRISTOPHER COLUMBUS for beer likely to be confused with CRISTOBAL COLON & design for sweet wine);
- *Somerset Distilling, Inc. v. Speymalt Whiskey Distribs. Ltd.,* 14 USPQ2d 1539 (TTAB 1989) (holding JAS. GORDON and design for scotch whiskey likely to be confused with GORDON'S for distilled gin and vodka);
- *Schieffelin & Co. v. Molson Cos.*, 9 USPQ2d 2069 (TTAB 1989) (holding BRAS D'OR for brandy likely to be confused with BRADOR for beer);
- *Bureau Nat'l Interprofessionnel Du Cognac v. Int'l Better Drinks Corp*., 6 USPQ2d 1610 (TTAB 1988) (holding trademark COLAGNAC for cola flavored liqueur likely to be confused with certification mark COGNAC for brandy).

Typically, the Trademark Office's position is that alcoholic beverages are all related because they are available within the same channels of trade (e.g. liquor stores) to the same consumers, that the conditions in which consumers encounter the marks are generally the same, and that these consumers are generally unsophisticated purchasers.

If an application is rejected as being merely descriptive, the Applicant has the option of claiming acquired distinctiveness of the mark by virtue of the Applicant using the mark continuously over a period of five years or by providing evidence of acquired distinctiveness (sales information, advertising expenditures, statements from customers). If the Applicant cannot show this, the Applicant may also amend the application from the Principal Register to the Supplemental Register, which still allows the applicant to use the ® symbol but does not carry the same presumptions of validity and ownership in an enforcement proceeding. However, in order to amend the application to the Supplemental Register, use of the mark in interstate commerce must have occurred and the Applicant must have either filed the application as a use-based application or otherwise shown use by filing an allegation of use with the Trademark Office. In five years, the Applicant can then re-apply for registration on the Principal Register when it has had sufficient use to claim acquired distinctiveness.

Once an application is approved, the application will be published for opposition by third parties. Third parties may oppose registration of an application based on their own prior rights in a similar mark and generally oppose registrations at least on the basis of a likelihood of confusion with their own mark or being merely descriptive such that registration of the mark would weaken the third party's ability to use the same term.

If the application was filed as an intent to use, applicants will need to show use before a registration certificate will be issued. Applicants have three years from the allowance date in order to show use of the mark.

Trademark protection requires staying vigilant with respect to third party uses in order to keep rights as broad as possible. Formal proceedings include opposing

pending trademark applications, petitioning to cancel trademark registrations, and infringement lawsuits. Trademark disputes among breweries and distilleries are often resolved through negotiating settlement agreements. Terms of these agreements may include agreeing to cease use all together, territory limitations, duration of use limitations, types of goods sold under the mark, product packaging requirements, cross-promotion or other collaborations, or assignment or licensing of a trademark to another party.

Trade Secrets

Trade secrets can be one way for a brewery or distillery to protect confidential recipes, formulas, processes, customer information, and other important business information.

A "trade secret" is any information that derives independent economic value from not being generally known or readily ascertainable by other persons and is the subject of reasonable efforts to maintain its secrecy.

The second part of a "trade secret" definition is particularly important – breweries and distilleries must make reasonable efforts to maintain the information as a secret. In order to maintain information as a trade secret, breweries and distilleries should be counseled about employment agreements, employment handbooks, proper marking of materials as "confidential," and other steps to maintain this business information as a secret. Examples of such steps include:

- Limiting the number of people with direct knowledge of the recipe or process steps to those who must know and reminding them that the brewery or distillery considers this information to be a trade secret
- Having employees sign properly drafted confidentiality agreements and non-compete agreements in accordance with local laws
- If using a contract brewery, making sure that the contract brewery signs a non-disclosure agreement.
- Marking any documents that contain trade secret information as confidential
- Making sure confidential trade secret information is not posted on unsecured sites or databases that are not password protected

When hiring a brewer or distiller, clear expectations should be set about who owns the proprietary recipes or formulas that may be used during the course of the employment. To ensure that those recipes can continue to be used by the brewery even if it later parts ways with the brewer – particularly with respect to flagship products – companies should consider having the brewer assign the rights in those trade secrets to the brewery. Non-compete agreements are often disfavored in many states and are not as effective as an employment agreement that outlines ownership of trade secrets. Non-compete agreements are often held to be

unenforceable, but limiting the duration of the agreement (often to one year or less) and the geographic reach of the agreement can help with enforcement of these types of agreements.

Misappropriation of trade secrets has traditionally been governed under individual states' trade secret laws. The trade secret laws in most states conform to the Uniform Trade Secrets Act, with the exceptions of Massachusetts' and New York's laws. Until May 11, 2016, causes of action pertaining to misappropriation of trade secrets had to be brought in state court under state law. On May 11, 2016, the Defend Trade Secrets Act became effective. The Defend Trade Secrets Act (DTSA), 18 U.S.C. 1836, provides the first federal private cause of action for misappropriation of trade secrets. It is intended to co-exist with state trade secret laws and does not preempt state trade secret laws, but it provides some remedies and whistleblower protections otherwise unavailable under the Uniform Trade Secrets Act. Generally the statute of limitations for bringing a cause of action under state law or the DTSA is three years from when the misappropriation was discovered or reasonably should have been discovered. Remedies include injunctive relief, actual damages, damages for unjust enrichment, or a reasonable royalty.

Misappropriation of trade secrets by improper means generally includes theft, bribery, misrepresentation, breach or inducement of a breach of duty to maintain a secret. It does not include independent invention, reverse engineering, discovery on one's own, observation of the item in public use or on public display, or obtaining from published materials. For instance, someone purchasing a beer can independently try to replicate the beer through experimentation, essentially reverse engineering the beer, and this is not a trade secret violation. Once a trade secret has been publicly disclosed, it cannot return to its former state as a trade secret.

Under the DTSA, additional whistleblower protections have been implemented. These protections extend to employees, which also include contractors and consultants. Employers must provide employees with notice of these immunity protections offered by the DTSA for disclosing a trade secret in reporting a legal violation. This notice can include simply a cross-reference to an employee handbook that describes the notice. Any employment agreement entered into, or modified, after May 11, 2016 that does not inform employees of these protections will forfeit certain rights of the employer.

Liquor Law Issues

Submitted by Jeffrey C. O'Brien

A. Licensing, Labeling and Regulatory Compliance

Licensing and regulation of the liquor industry occurs at the federal, state and local levels.

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.

B. 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.

C. State and Federal, TTB Registration Requirements

TTB

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.

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.)

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.

State Licensing Issues

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.

D. Top Permitting/Licensing Issues

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.

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.

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.

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).

E. Formula Approvals

Beer Formulas

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.

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.

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.

Spirits formulas

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.

F. Labeling

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.

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

A copy of Form 5100.3 is included at Appendix 4.

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

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.

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.

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.

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—*

(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.

(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.

LABELING REQUIREMENTS

§7.20 General.

(a) *Application.* This subpart shall apply to malt beverages sold or shipped or delivered for shipment, or otherwise introduced into or received in any State from any place outside thereof, only to the extent that the law of such State imposes similar requirements with respect to the labeling of malt beverages not sold or shipped or delivered for shipment or otherwise introduced into or received in such State from any place outside thereof.

(b) *Marking, branding, and labeling.* No person engaged in business as a brewer, wholesaler, or importer of malt beverages, directly or indirectly, or through an affiliate, shall sell or ship, or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce, or receive therein, or remove from Customs custody any malt beverages in containers unless the malt beverages are packaged, and the packages are marked, branded, and labeled in conformity with this subpart.

(c) *Alteration of labels.* (1) It shall be unlawful for any person to alter, mutilate, destroy, obliterate, or remove any mark, brand, or label upon malt beverages held for sale in interstate or foreign commerce or after shipment therein, except as authorized by Federal law. The appropriate TTB officer may, upon written application, permit additional labeling or relabeling of malt beverages in containers if, in his judgment, the facts show that the additional labeling or relabeling is for the purpose of compliance with the requirements of this subpart or of State law.

(2) 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.

§7.21 Misbranding.

Malt beverages in containers shall be deemed to be misbranded:

(a) If the container fails to bear on it a brand label (or a brand label and other permitted labels) containing the mandatory label information as required by §§7.20 through 7.29 and conforming to the general requirements specified in this part.

(b) If the container, cap, or any label on the container, or any carton, case, or other covering of the container used for sale at retail, or any written, printed, graphic, or other matter accompanying the container to the consumer buyer contains any statement, design, device, or graphic, pictorial, or emblematic representation that is prohibited by §§7.20 through 7.29.

(c) If the container has blown, branded, or burned therein the name or other distinguishing mark of any person engaged in business as a brewer, wholesaler, bottler, or importer, of malt beverages, or of any other person, except the person whose name is required to appear on the brand label.

§7.22 Mandatory label information.

There shall be stated:

(a) On the brand label:

(1) Brand name, in accordance with §7.23.

(2) Class, in accordance with §7.24.

(3) Name and address (except when branded or burned in the container) in accordance with §7.25, except as provided in paragraph (b) of this section.

(4) Net contents (except when blown, branded, or burned, in the container) in accordance with §7.27.

(5) Alcohol content in accordance with §7.71, for malt beverages that contain any alcohol derived from added flavors or other added nonbeverage ingredients (other than hops extract) containing alcohol.

(b) On the brand label or on a separate label (back or front):

(1) In the case of imported malt beverages, name and address of importer in accordance with §7.25.

(2) In the case of malt beverages bottled or packed for the holder of a permit or a retailer, the name and address of the bottler or packer, in accordance with §7.25.

(3) Alcoholic content, when required by State law, in accordance with §7.71.

(4) A statement that the product contains FD&C Yellow No. 5, where that coloring material is used in a product bottled on or after October 6, 1984.

(5) A statement that the product contains the color additive cochineal extract or the color additive carmine, prominently and conspicuously, using the respective common or usual name ("cochineal extract" or "carmine"), where either of the coloring materials is used in a product

that is removed on or after April 16, 2013. (For example: “Contains Cochineal Extract” or “Contains Carmine” or, if applicable, “Contains Cochineal Extract and Carmine”). The statement that the product contains the color additive cochineal extract or the color additive carmine may appear on a strip label or a neck label in lieu of appearing on the brand label or back label.

(6) *Declaration of sulfites.* The statement “Contains sulfites” or “Contains (a) sulfiting agent(s)” or a statement identifying the specific sulfiting agent where sulfur dioxide or a sulfiting agent is detected at a level of 10 or more parts per million, measured as total sulfur dioxide. The sulfite declaration may appear on a strip label or neck label in lieu of appearing on the front or back label. The provisions of this paragraph shall apply to:

(i) Any certificate of label approval issued on or after January 9, 1987;

(ii) Any malt beverage bottled on or after July 9, 1987, regardless of the date of issuance of the certificate of label approval; and,

(iii) Any malt beverage removed on or after January 9, 1988.

(7) Declaration of aspartame. The following statement, in capital letters, separate and apart from all other information, when the product contains aspartame in accordance with Food and Drug Administration (FDA) regulations:

“PHENYLKETONURICS: CONTAINS PHENYLALANINE.”

§7.22a Voluntary disclosure of major food allergens.

(a) *Definitions.* For purposes of this section the following terms have the meanings indicated.

(1) *Major food allergen. Major food allergen* means any of the following:

(i) Milk, egg, fish (for example, bass, flounder, or cod), Crustacean shellfish (for example, crab, lobster, or shrimp), tree nuts (for example, almonds, pecans, or walnuts), wheat, peanuts, and soybeans; or

(ii) A food ingredient that contains protein derived from a food specified in paragraph (a)(1)(i) of this section, except:

(A) Any highly refined oil derived from a food specified in paragraph (a)(1)(i) of this section and any ingredient derived from such highly refined oil; or

(B) A food ingredient that is exempt from major food allergen labeling requirements pursuant to a petition for exemption approved by the Food and Drug Administration (FDA) under 21 U.S.C. 343(w)(6) or pursuant to a notice submitted to FDA under 21 U.S.C. 343(w)(7), provided that the food ingredient meets the terms or conditions, if any, specified for that exemption.

(2) *Name of the food source from which each major food allergen is derived. Name of the food source from which each major food allergen is derived* means the name of the food as listed in paragraph (a)(1)(i) of this section, except that:

(i) In the case of a tree nut, it means the name of the specific type of nut (for example, almonds, pecans, or walnuts); and

(ii) In the case of Crustacean shellfish, it means the name of the species of Crustacean shellfish (for example, crab, lobster, or shrimp); and

(iii) The names “egg” and “peanuts”, as well as the names of the different types of tree nuts, may be expressed in either the singular or plural form, and the name “soy”, “soybean”, or “soya” may be used instead of “soybeans”.

(b) *Voluntary labeling standards.* Major food allergens (defined in paragraph (a)(1) of this section) used in the production of a malt beverage product may, on a voluntary basis, be declared on any label affixed to the container. However, if any one major food allergen is voluntarily declared, all major food allergens used in production of the malt beverage product, including major food allergens used as fining or processing agents, must be declared, except when covered by a petition for exemption approved by the appropriate TTB officer under §7.22b. The major food allergens declaration must consist of the word "Contains" followed by a colon and the name of the food source from which each major food allergen is derived (for example, "Contains: egg").

(c) *Cross reference.* For mandatory labeling requirements applicable to malt beverage products containing FD&C Yellow No. 5, sulfites, and aspartame, see §§7.22(b)(4), (b)(6), and (b)(7).

§7.22b Petitions for exemption from major food allergen labeling.

(a) *Submission of petition.* Any person may petition the appropriate TTB officer to exempt a particular product or class of products from the labeling requirements of §7.22a. The burden is on the petitioner to provide scientific evidence (including the analytical method used to produce the evidence) that demonstrates that the finished product or class of products, as derived by the method specified in the petition, either:

(1) Does not cause an allergic response that poses a risk to human health; or

(2) Does not contain allergenic protein derived from one of the foods identified in §7.22(a)(1)(i), even though a major food allergen was used in production.

(b) *Decision on petition.* TTB will approve or deny a petition for exemption submitted under paragraph (a) of this section in writing within 180 days of receipt of the petition. If TTB does not provide a written response to the petitioner within that 180-day period, the petition will be deemed denied, unless an extension of time for decision is mutually agreed upon by the appropriate TTB officer and the petitioner. TTB may confer with the Food and Drug Administration (FDA) on petitions for exemption, as appropriate and as FDA resources permit. TTB may require the submission of product samples and other additional information in support of a petition; however, unless required by TTB, the submission of samples or additional information by the petitioner after submission of the petition will be treated as the withdrawal of the initial petition and the submission of a new petition. An approval or denial under this section will constitute a final agency action.

(c) *Resubmission of a petition.* After a petition for exemption is denied under this section, the petitioner may resubmit the petition along with supporting materials for reconsideration at any time. TTB will treat this submission as a new petition.

(d) *Availability of information*—(1) *General.* TTB will promptly post to its public Web site, *http://www.ttb.gov,* all petitions received under this section as well as TTB's responses to those petitions. Any information submitted in support of the petition that is not posted to the TTB Web site will be available to the public pursuant to 5 U.S.C. 552, except where a request for confidential treatment is granted under paragraph (d)(2) of this section.

(2) *Requests for confidential treatment of business information.* A person who provides trade secrets or other commercial or financial information in connection with a petition for exemption under this section may request that TTB give confidential treatment to that information. A failure

to request confidential treatment at the time the information in question is submitted to TTB will constitute a waiver of confidential treatment. A request for confidential treatment of information under this section must conform to the following standards:

(i) The request must be in writing;

(ii) The request must clearly identify the information to be kept confidential;

(iii) The request must relate to information that constitutes trade secrets or other confidential commercial or financial information regarding the business transactions of an interested person, the disclosure of which would cause substantial harm to the competitive position of that person;

(iv) The request must set forth the reasons why the information should not be disclosed, including the reasons the disclosure of the information would prejudice the competitive position of the interested person; and

(v) The request must be supported by a signed statement by the interested person, or by an authorized officer or employee of that person, certifying that the information in question is a trade secret or other confidential commercial or financial information and that the information is not already in the public domain.

§7.23 Brand names.

(a) *General.* The product shall bear a brand name, except that if not sold under a brand name, then the name of the person required to appear on the brand label shall be deemed a brand name for the purpose of this part.

(b) *Misleading brand names.* No label shall contain any brand name, which, standing alone, or in association with other printed or graphic matter, creates any impression or inference as to the

age, origin, identity, or other characteristics of the product unless the appropriate TTB officer finds that such brand name, either when qualified by the word "brand" or when not so qualified, conveys no erroneous impressions as to the age, origin, identity, or other characteristics of the product.

(c) *Trade name of foreign origin.* This section shall not operate to prohibit the use by any person of any trade name or brand of foreign origin not effectively registered in the United States Patent Office on August 29, 1935, which has been used by such person or his predecessors in the United States for a period of at least 5 years immediately preceding August 29, 1935: *Provided,* That if such trade name or brand is used, the designation of the product shall be qualified by the name of the locality in the United States in which produced, and such qualification shall be in script, type, or printing as conspicuous as the trade name or brand.

§7.24 Class and type.

(a) The class of the malt beverage shall be stated and, if desired, the type thereof may be stated. Statements of class and type shall conform to the designation of the product as known to the trade. If the product is not known to the trade under a particular designation, a distinctive or fanciful name, together with an adequate and truthful statement of the composition of the product, shall be stated, and such statement shall be deemed to be a statement of class and type for the purposes of this part.

(b) Malt beverages which have been concentrated by the removal of water therefrom and reconstituted by the addition of water and carbon dioxide shall for the purpose of this part be labeled in the same manner as malt beverages which have not been concentrated and reconstituted, except that there shall appear in direct conjunction with, and as a part of, the class

designation the statement “PRODUCED FROM ____ CONCENTRATE” (the blank to be filled in with the appropriate class designation). All parts of the class designation shall appear in lettering of substantially the same size and kind.

(c) No product shall be designated as “half and half” unless it is in fact composed of equal parts of two classes of malt beverages the names of which are conspicuously stated in conjunction with the designation “half and half”.

(d) Products containing less than one-half of 1 percent (.5%) of alcohol by volume shall bear the class designation “malt beverage,” or “cereal beverage,” or “near beer.” If the designation “near beer” is used, both words must appear in the same size and style of type, in the same color of ink, and on the same background. No product containing less than one-half of 1 percent of alcohol by volume shall bear the class designations “beer”, “lager beer”, “lager”, “ale”, “porter”, or “stout”, or any other class or type designation commonly applied to malt beverages containing one-half of 1 percent or more of alcohol by volume.

(e) No product other than a malt beverage fermented at comparatively high temperature, possessing the characteristics generally attributed to “ale,” “porter,” or “stout” and produced without the use of coloring or flavoring materials (other than those recognized in standard brewing practices) shall bear any of these class designations.

(f) Geographical names for distinctive types of malt beverages (other than names found under paragraph (g) of this section to have become generic) shall not be applied to malt beverages produced in any place other than the particular region indicated by the name unless (1) in direct conjunction with the name there appears the word “type” or the word “American”, or some other statement indicating the true place of production in lettering substantially as conspicuous as such

name, and (2) the malt beverages to which the name is applied conform to the type so designated. The following are examples of distinctive types of beer with geographical names that have not become generic; Dortmund, Dortmunder, Vienna, Wien, Wiener, Bavarian, Munich, Munchner, Salvator, Kulmbacher, Wurtzburger, Pilsen (Pilsener and Pilsner): *Provided,* That notwithstanding the foregoing provisions of this section, beer which is produced in the United States may be designated as "Pilsen," "Pilsener," or "Pilsner" without further modification, if it conforms to such type.

(g) Only such geographical names for distinctive types of malt beverages as the appropriate TTB officer finds have by usage and common knowledge lost their geographical significance to such an extent that they have become generic shall be deemed to have become generic, e.g., India Pale Ale.

(h) Except as provided in §7.23(b), geographical names that are not names for distinctive types of malt beverages shall not be applied to malt beverages produced in any place other than the particular place or region indicated in the name.

§7.25 Name and address.

(a) *Domestic malt beverages.* (1) On labels of containers of domestic malt beverages there shall be stated the name of the bottler or packer and the place where bottled or packed. The bottler's or packer's principal place of business may be shown in lieu of the actual place where bottled or packed if the address shown is a location where bottling or packing operation takes place. The appropriate TTB officer may disapprove the listing of a principal place of business if its use would create a false or misleading impression as to the geographic origin of the beer.

(2) If malt beverages are bottled or packed for a person other than the actual bottler or packer there may be stated in addition to the name and address of the bottler or packer (but not in lieu of), the name and address of such other person immediately preceded by the words "bottled for," "distributed by," or other similar appropriate phrase.

(b) *Imported malt beverages.* On labels of containers of imported malt beverages, there shall be stated the words "imported by," or a singular appropriate phrase, and immediately thereafter the name of the permittee who is the importer, or exclusive agent, or sole distributor, or other person responsible for the importation, together with the principal place of business in the United States of such person. In addition there may, but need not, be stated unless required by State or foreign law or regulation the name and principal place of business of the foreign manufacturer, bottler, packer, or shipper.

(c) *Post-office address.* The "place" stated shall be the post-office address, except that the street address may be omitted. No additional places or addresses shall be stated for the same person, unless (1) such person is actively engaged in the conduct of an additional bona fide and actual malt beverage business at such additional place or address, and (2) the label also contains, in direct conjunction therewith, appropriate descriptive material indicating the function occurring at such additional place or address in connection with the particular malt beverage.

§7.26 Alcoholic content [suspended as of April 19, 1993; see §7.71].

(a) The alcoholic content and the percentage and quantity of the original extract shall not be stated unless required by State law. When alcoholic content is required to be stated, but the manner of statement is not specified in the State law, it shall be stated in percentage of alcohol

by weight or by volume, and not by proof or by maximums or minimums. Otherwise the manner of statement shall be as specified in the State law.

(b) The terms "low alcohol" or "reduced alcohol" may be used only on malt beverage products containing less than 2.5 percent alcohol by volume.

(c) The term "non-alcoholic" may be used on malt beverage products, provided the statement "contains less than 0.5 percent (or .5%) alcohol by volume" appears in direct conjunction with it, in readily legible printing and on a completely contrasting background.

(d) The term "alcohol-free" may be used only on malt beverage products containing no alcohol.

§7.27 Net contents.

(a) Net contents shall be stated as follows:

(1) If less than 1 pint, in fluid ounces, or fractions of a pint.

(2) If 1 pint, 1 quart, or 1 gallon, the net contents shall be so stated.

(3) If more than 1 pint, but less than 1 quart, the net contents shall be stated in fractions of a quart, or in pints and fluid ounces.

(4) If more than 1 quart, but less than 1 gallon, the net contents shall be stated in fractions of a gallon, or in quarts, pints, and fluid ounces.

(5) If more than 1 gallon, the net contents shall be stated in gallons and fractions thereof.

(b) All fractions shall be expressed in their lowest denominations.

(c) The net contents need not be stated on any label if the net contents are displayed by having the same blown, branded, or burned in the container in letters or figures in such manner as to be plainly legible under ordinary circumstances and such statement is not obscured in any manner in whole or in part.

§7.28 General requirements.

(a) *Contrasting background.* All labels shall be so designed that all statements required by this subpart are readily legible under ordinary conditions, and all the statements are on a contrasting background.

(b) *Size of type*—(1) *Containers of more than one-half pint.* Except for statements of alcoholic content, all mandatory information required on labels by this part shall be in script, type, or printing not smaller than 2 millimeters. If contained among other descriptive or explanatory information, the script, type, or printing of all mandatory information shall be of a size substantially more conspicuous than that of the descriptive or explanatory information.

(2) *Containers of one-half pint or less.* Except for statements of alcoholic content, all mandatory information required on labels by this part shall be in script, type, or printing not smaller than 1 millimeter. If contained among other descriptive or explanatory information, the script, type, or printing of all mandatory information shall be of a size substantially more conspicuous than that of the descriptive or explanatory information.

(3) *Alcoholic content statement.* All portions of the alcoholic content statement shall be of the same size and kind of lettering and of equally conspicuous color. Unless otherwise required by State law, the statement of alcoholic content shall be in script, type, or printing:

(i) Not smaller than 1 millimeter for containers of one-half pint or less, or smaller than 2 millimeters for containers larger than one-half pint; or

(ii) Not larger than 3 millimeters for containers of 40 fl. oz. or less, or larger than 4 millimeters for containers larger than 40 fl. oz.

(c) *English language.* All information, other than the brand name, required by this subpart to be stated on labels shall be in the English language. Additional statements in foreign languages may be made, if the statements do not conflict with, or are contradictory to, the requirements of this subpart. Labels on containers of malt beverages bottled or packed for consumption within Puerto Rico may, if desired, state the information required by this subpart solely in the Spanish language, in lieu of the English language, except that the net contents shall also be stated in the English language.

(d) *Labels firmly affixed.* All labels shall be affixed to containers of malt beverages in such manner that they cannot be removed without thorough application of water or other solvents.

(e) *Additional information.* Labels may contain information other than the mandatory label information required by this subpart if the information complies with the requirements of this subpart and does not conflict with, or in any manner qualify, statements required by this part.

§7.29 Prohibited practices.

(a) *Statements on labels.* Containers of malt beverages, or any labels on such containers, or any carton, case, or individual covering of such containers, used for sale at retail, or any written, printed, graphic, or other material accompanying such containers to the consumer, must not contain:

(1) Any statement that is false or untrue in any particular, or that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter, tends to create a misleading impression.

(2) Any statement that is disparaging of a competitor's products.

(3) Any statement, design, device, or representation which is obscene or indecent.

(4) Any statement, design, device, or representation of or relating to analyses, standards, or tests, irrespective of falsity, which the appropriate TTB officer finds to be likely to mislead the consumer.

(5) Any statement, design, device, or representation of or relating to any guarantee, irrespective of falsity, which the appropriate TTB officer finds to be likely to mislead the consumer. Money-back guarantees are not prohibited.

(6) A trade or brand name that is the name of any living individual of public prominence, or existing private or public organization, or is a name that is in simulation or is an abbreviation thereof, or any graphic, pictorial, or emblematic representation of any such individual or organization, if the use of such name or representation is likely falsely to lead the consumer to believe that the product has been endorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of, such individual or organization: *Provided,* That this paragraph shall not apply to the use of the name of any person engaged in business as a producer, importer, bottler, packer, wholesaler, retailer, or warehouseman, of malt beverages, nor to the use by any person of a trade or brand name that is the name of any living individual of public prominence, or existing private or public organization, provided such trade or brand name was used by him or his predecessors in interest prior to August 29, 1935.

(7) Any statement, design, device, or representation that tends to create a false or misleading impression that the malt beverage contains distilled spirits or is a distilled spirits product. This paragraph does not prohibit the following on malt beverage labels:

(i) A truthful and accurate statement of alcohol content, in conformity with §7.71;

(ii) The use of a brand name of a distilled spirits product as a malt beverage brand name, provided that the overall label does not present a misleading impression about the identity of the product; or

(iii) The use of a cocktail name as a brand name or fanciful name of a malt beverage, provided that the overall label does not present a misleading impression about the identity of the product.

(b) *Simulation of Government stamps.* No label shall be of such design as to resemble or simulate a stamp of the United States Government or of any State or foreign government. No label, other than stamps authorized or required by the United States Government or any State or foreign government, shall state or indicate that the malt beverage contained in the labeled container is brewed, made, bottled, packed, labeled, or sold under, or in accordance with, any municipal, State, Federal, or foreign government authorization, law, or regulation, unless such statement is required or specifically authorized by Federal, State, or municipal, law or regulation, or is required or specifically authorized by the laws or regulations of the foreign country in which such malt beverages were produced. If the municipal or State government permit number is stated upon a label, it shall not be accompanied by an additional statement relating thereto, unless required by State law.

(c) *Use of word "bonded", etc.* The words "bonded", "bottled in bond", "aged in bond", "bonded age", "bottled under customs supervision", or phrases containing these or synonymous terms

which imply governmental supervision over production, bottling, or packing, shall not be used on any label for malt beverages.

(d) *Flags, seals, coats of arms, crests, and other insignia.* Labels shall not contain, in the brand name or otherwise, any statement, design, device, or pictorial representation which the appropriate TTB officer finds relates to, or is capable of being construed as relating to, the armed forces of the United States, or the American flag, or any emblem, seal, insignia, or decoration associated with such flag or armed forces; nor shall any label contain any statement, design, device, or pictorial representation of or concerning any flag, seal, coat of arms, crest or other insignia, likely to mislead the consumer to believe that the product has been endorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of the government, organization, family, or individual with whom such flag, seal, coat of arms, crest, or insignia is associated.

(e) *Health-related statements*—(1) *Definitions.* When used in this paragraph (e), terms are defined as follows:

(i) *Health-related statement* means any statement related to health (other than the warning statement required by §16.21 of this chapter) and includes statements of a curative or therapeutic nature that, expressly or by implication, suggest a relationship between the consumption of alcohol, malt beverages, or any substance found within the malt beverage, and health benefits or effects on health. The term includes both specific health claims and general references to alleged health benefits or effects on health associated with the consumption of alcohol, malt beverages, or any substance found within the malt beverage, as well as health-related directional statements. The term also includes statements and claims that imply that a physical or psychological

sensation results from consuming the malt beverage, as well as statements and claims of nutritional value (e.g., statements of vitamin content). Statements concerning caloric, carbohydrate, protein, and fat content do not constitute nutritional claims about the product.

(ii) *Specific health claim* is a type of health-related statement that, expressly or by implication, characterizes the relationship of the malt beverage, alcohol, or any substance found within the malt beverage, to a disease or health-related condition. Implied specific health claims include statements, symbols, vignettes, or other forms of communication that suggest, within the context in which they are presented, that a relationship exists between malt beverages, alcohol, or any substance found within the malt beverage, and a disease or health-related condition.

(iii) *Health-related directional statement* is a type of health-related statement that directs or refers consumers to a third party or other source for information regarding the effects on health of malt beverage or alcohol consumption.

(2) *Rules for labeling*—(i) *Health-related statements.* In general, labels may not contain any health-related statement that is untrue in any particular or tends to create a misleading impression as to the effects on health of alcohol consumption. TTB will evaluate such statements on a case-by-case basis and may require as part of the health-related statement a disclaimer or some other qualifying statement to dispel any misleading impression conveyed by the health-related statement.

(ii) *Specific health claims.* (A) TTB will consult with the Food and Drug Administration (FDA), as needed, on the use of a specific health claim on a malt beverage label. If FDA determines that the use of such a labeling claim is a drug claim that is not in compliance with the requirements of

the Federal Food, Drug, and Cosmetic Act, TTB will not approve the use of that specific health claim on a malt beverage label.

(B) TTB will approve the use of a specific health claim on a malt beverage label only if the claim is truthful and adequately substantiated by scientific or medical evidence; sufficiently detailed and qualified with respect to the categories of individuals to whom the claim applies; adequately discloses the health risks associated with both moderate and heavier levels of alcohol consumption; and outlines the categories of individuals for whom any levels of alcohol consumption may cause health risks. This information must appear as part of the specific health claim.

(iii) *Health-related directional statements.* A statement that directs consumers to a third party or other source for information regarding the effects on health of malt beverage or alcohol consumption is presumed misleading unless it—

(A) Directs consumers in a neutral or other non-misleading manner to a third party or other source for balanced information regarding the effects on health of malt beverage or alcohol consumption; and

(B)(*1*) Includes as part of the health-related directional statement the following disclaimer: "This statement should not encourage you to drink or to increase your alcohol consumption for health reasons;" or

(*2*) Includes as part of the health-related directional statement some other qualifying statement that the appropriate TTB officer finds is sufficient to dispel any misleading impression conveyed by the health-related directional statement.

(f) *Use of words "strong," "full strength," and similar words.* Labels shall not contain the words "strong," "full strength," "extra strength," "high test," "high proof," "pre-war strength," "full oldtime alcoholic strength," or similar words or statements, likely to be considered as statements of alcoholic content, unless required by State law. This does not preclude use of the terms "low alcohol," "reduced alcohol," "non-alcoholic," and "alcohol-free," in accordance with §7.71 (d), (e), and (f), nor does it preclude labeling with the alcohol content in accordance with §7.71.

(g) *Use of numerals.* Labels shall not contain any statements, designs, or devices, whether in the form of numerals, letters, characters, figures, or otherwise, which are likely to be considered as statements of alcoholic content, unless required by State law, or as permitted by §7.71.

(h) *Coverings, cartons, or cases.* Individual coverings, cartons, cases, or other wrappers of containers of malt beverages, used for sale at retail, or any written, printed, graphic, or other matter accompanying the container shall not contain any statement or any graphic pictorial or emblematic representation, or other matter, which is prohibited from appearing on any label or container of malt beverages.

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.

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	-	-	-	

APPENDIX 3

COLAs Online

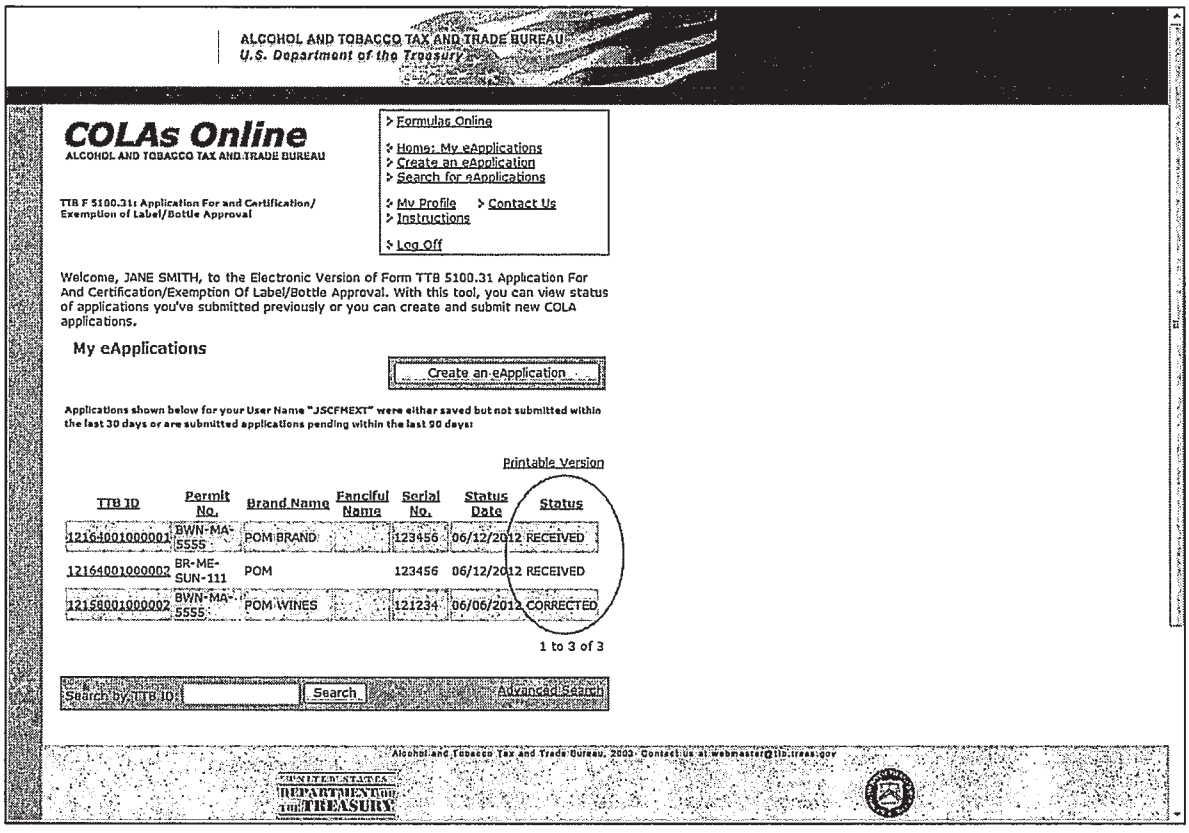
eApplication Statuses in COLAs Online

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)

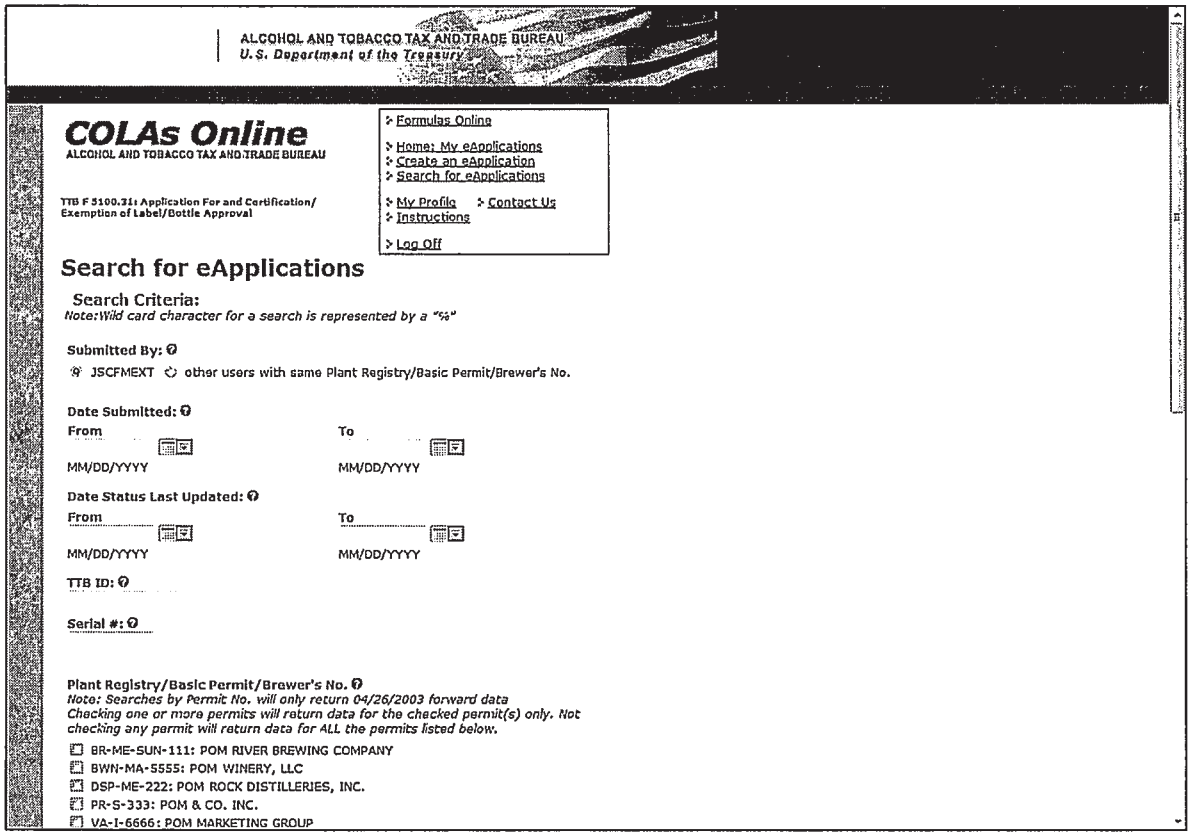
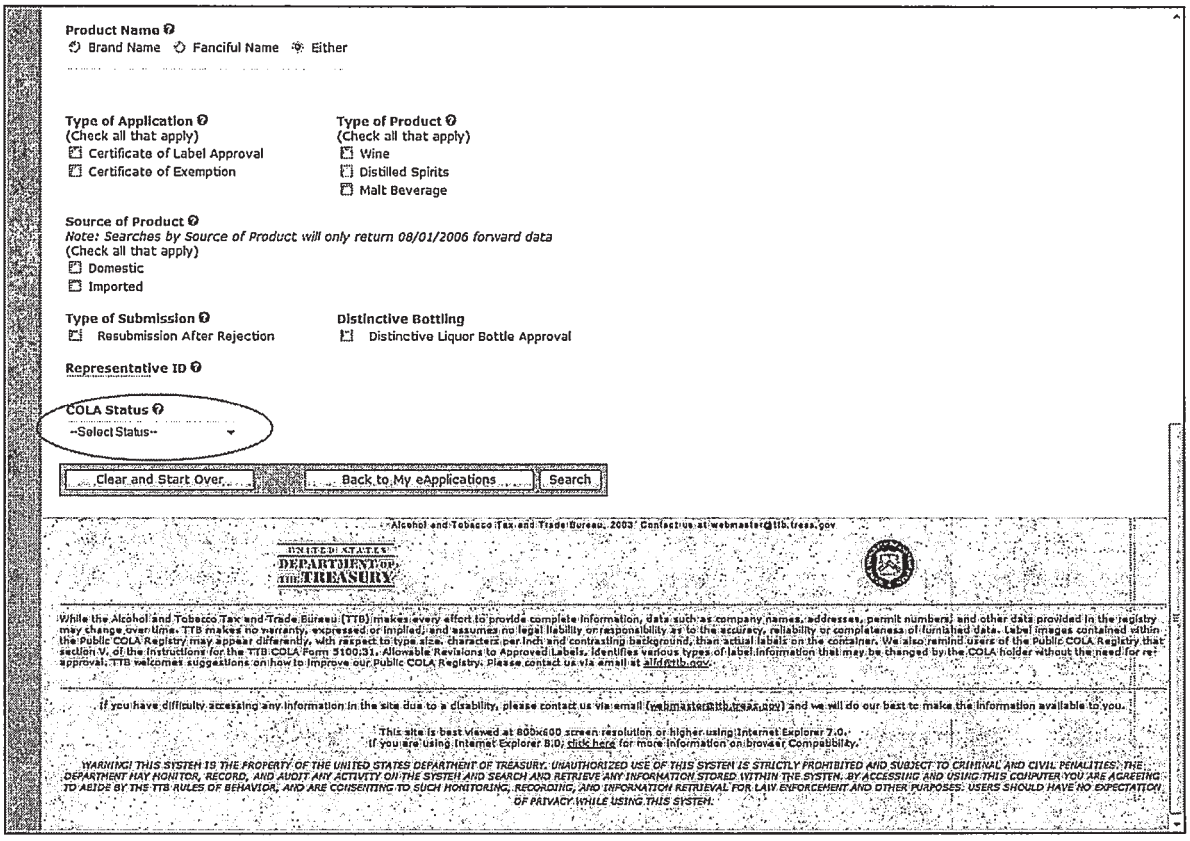


Figure 3: Search for eApplications (Bottom)



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.

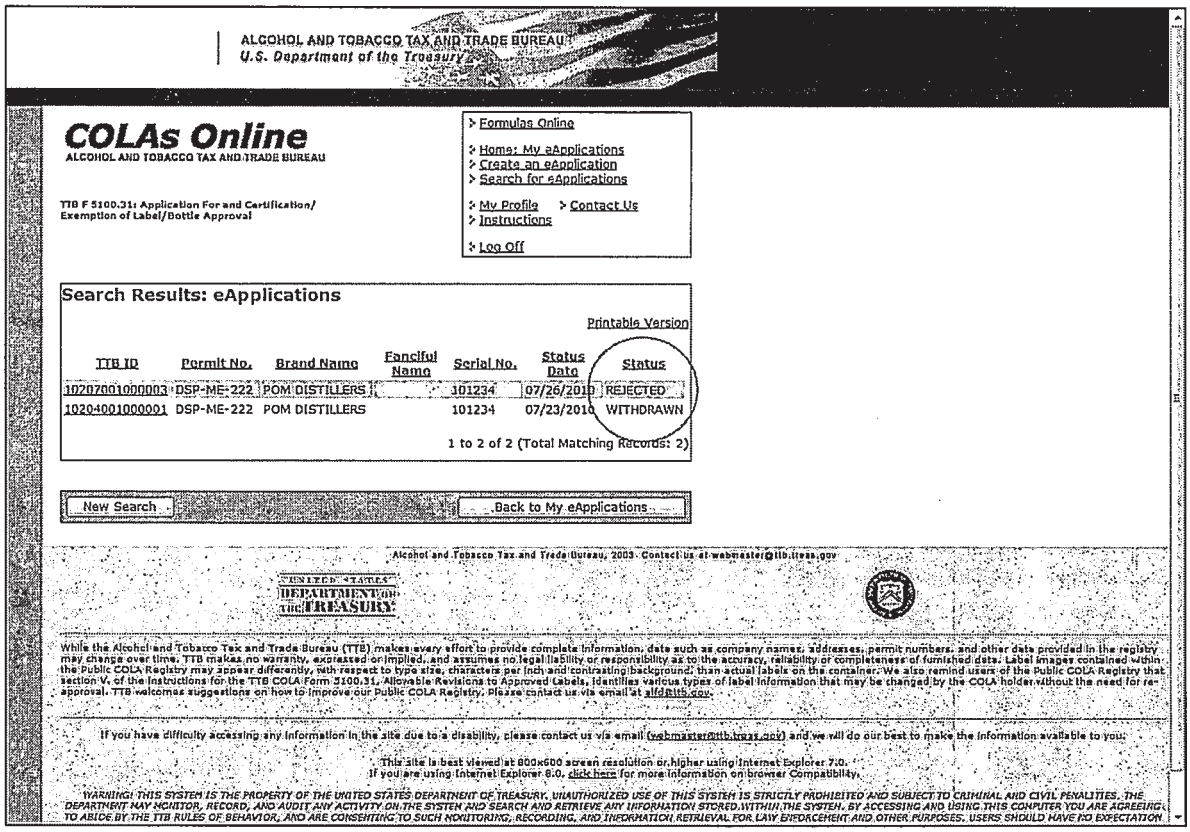
►**Note:** Search results are limited to a maximum of 500 items.

►**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.

Other Issues

Submitted by Jeffrey C. O'Brien

A. Distribution Agreements and the Three-Tier System

Origins

In 1933 the 21st Amendment to the United States Constitution repealed Prohibition and also gave states the authority to regulate the production, importation, distribution, sale and consumption of alcohol beverages within their own borders. A new regulatory system known as the Three-Tier System was created. This system was established to eliminate tied-house abuses. "Tied-houses" would no longer exist - instead beer would be sold through independent distributors.

While each state has its own set of laws governing the three-tier system, the separation of the three-tiers by inserting an independent distributor between the brewers and the retailers is a common thread. The three tiers (brewer, distributor, retailer) are also further separated by other laws and regulations prohibiting suppliers and distributors from having any financial interest or influence with retailers - for example, beer sales on credit are not allowed and consignment sales are banned.

State Distribution Laws

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

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, which again leads to unequal bargaining power in contractual negotiations.

B. Employment Issues

Dealing With Key Employees

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.

C. Real Estate (Lease vs. Purchase)

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.

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.

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

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.

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.

D. Insurance Matters

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

Common Ethical Mistakes Attorneys Make

Submitted by Adam P. Gislason

VI. Common Ethical Mistakes Attorneys Make

Submitted by Adam P. Gislason

Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.

- American Bar Association, Preamble of the Model Rules of Professional Conduct

A. ETHICAL STANDARDS AND CIVIL LIABILITY

Contrary to public opinion, Hollywood portrayals, and popular lawyer jokes, the practice of law is heavily regulated in the U.S., and the vast majority of attorneys consider their integrity and professional ethics to be of paramount importance. In the U.S., the practice of law is regulated by the governments of the individual states. For the most part, federal law does not govern legal ethics. In order to obtain a license to practice law in any state within that state, a lawyer must pledge to abide by the rules of professional conduct or code of ethics of that specific state. Thus, all lawyers who practice law in the U.S. are governed by at least one set of rules of professional conduct or code of ethics. Lawyers licensed to practice law in multiple states are subject to the rules and discipline of each state.

Many of these rules of conduct or professional code follow or are substantially similar to the American Bar Association's Model Rules of Professional Conduct, which set forth the standards of professional conduct and legal ethics

for lawyers practicing law in the U.S. As of 2015, 49 of the 50 states have adopted the Model Rules in whole or substantial part.

The "Scope and Preamble" to the Model Rules provide several general principles regarding "Lawyer Responsibility" including:

> [1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
>
> [2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.
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> * * *
>
> [4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

Following the Scope and Preamble, the Model Rules set forth a multitude of tenets, duties, and definitions that govern the "Client-Lawyer Relationship," including, e.g.,, the lawyer's duty of Competence (Rule 1.1), Diligence (Rule 1.3), Communications (Rule 1.4), Fees (Rule 1.5), Confidentiality (Rule 1.6) and Conflicts of Interest (Rule. 1.7, 1.8, and 1.9).

The rules or codes of ethics of the individual states are enforced by governing bodies established by the supreme courts of each individual state.

For example, in Minnesota, the Lawyers Professional Responsibility Board—which is comprised of 23 lawyers and non-lawyers appointed by the Minnesota Supreme Court for up to two 3-year terms—is responsible for the oversight and administration of the Minnesota lawyer discipline system. The Office of Lawyers Professional Responsibility (OLPR) is the agency established by the Minnesota Supreme Court to handle complaints against Minnesota lawyers for unprofessional conduct, including violations of the Rules of Professional Conduct. If the OLPR determines that a lawyer violated the Rules or acted unprofessionally, the OLPR has the authority to discipline the lawyer, including temporary suspension or permanent revocation of the lawyer's license to practice law.

For example, Minnesota Rule of Professional Conduct 1.3 provides that a lawyer must act with reasonable diligence and promptness in representing a client. A lawyer is subject to sanctions for failing to act in accordance with the diligence rule. *E.g. In re Discipline of Hartke*, 529 N.W.2d 678 (Minn. 1995). In *Hartke*, the Minnesota Supreme Court held that a lawyer's repeated and continued neglect of client matters warrants severe sanctions, absent mitigating circumstances. *Id*. at 683. In a disciplinary proceeding, a defendant lawyer's neglect of client matters involving patterns of procrastination, delay, lack of concern, and other dereliction resulting in financial loss to the clients, warranted an indefinite suspension from the practice of law. *See In re Levenstein*, 438 N.W.2d 665, 668 (Minn. 1989).

Failure to comply with the ethical standards in the Rules of Professional Conduct opens the door for imposition of liability. When considering whether a lawyer's behavior has risen to the level of professional misconduct, Minnesota courts consider the following factors:

(1) the nature of the offending lawyer's conduct;

(2) the cumulative weight of the disciplinary violation;

(3) the harm caused to the public because of the conduct; and

(4) any harm brought upon the legal profession because of the conduct.

See In re Olsen, 577 N.W.2d 218, 220-221 (Minn. 1998) (a lawyer's failure to cooperate with investigatory and disciplinary processes, misappropriation of client funds, and failure to maintain proper trust account books and records warranted disbarment); *see also In re Weiblen*, 439 N.W.2d 7, 12 (Minn. 1989) (where a pattern of misconduct, involving multiple offenses, existed, and the attorney refused to acknowledge violation of his ethical responsibility, suspension was necessary to protect the public and ensure the integrity of the judicial system itself).

Attorney discipline is different than legal malpractice. Legal malpractice occurs when an attorney mishandles a case or matter due to his or her negligence or with the intent to cause damage to his or her client. It is a tortious claim that must be adjudicated in a court of law or other legal proceeding (e.g., arbitration) against the lawyer. However, not every lawyer's mistake amounts to malpractice and it's not malpractice just because a lawyer

loses a case. To the contrary, legal malpractice concerns serious and significant lawyer errors that actually caused damage.

Although the Minnesota Rules and Model Rules expressly provide that the Rules are not to be used to impose civil liability, most courts have determined that violations of the Rules may be considered to be evidence in a malpractice action. In other words, if the claimant shows that the lawyer violated a professional rule of conduct, that violation can be used to further show that the lawyer was professionally negligent, and thus should be liable for whatever damage was caused by the lawyer.

B. THE ROLE OF ATTORNEY AS ADVISOR IN ENTITY FORMATION

> *In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.*

- "Advisor": Rule 2.1 of the Model Rules of Professional Conduct

The Model Rules define the role of the attorney as threefold: "A lawyer as a member of the legal professional, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice." When a lawyer is initially contacted to provide advice in connection with an emerging brewery or distillery business – for example, to establish or form an entity for that business – threshold questions arise: what will be the lawyer's role and who is the client?

1. Who is the Client?

As is the case with any business, when working with a brewery or distillery, it is crucial for the lawyer, the business, and the principals that the lawyer identify the client. For example, if the lawyer is retained to form an entity, such as a limited liability company (LLC) or corporation, the attorney must clearly identify who he or she represents: the entity, one or more of the principals, or some or all parties. Failure to do so at the outset is a common mistake lawyers make, which may have adverse consequences, not only for the lawyer, but more important, for the client(s) he or she represents.

When an entity is involved, there is a question of whether the lawyer represents the entity as a whole or one of the particular members. At first glance, rules of professional conduct appear to draw a bright line in entity representation. Rule 1.13(a) of the Model Rules, "Organization as Client" provides: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." This general principle is also made clear by the courts. *See, e.g., Manion v. Nagin*, 394 F.3d 1062, 1068 (8th Cir. 2005) (corporate employee does not generally enjoy an attorney-client relationship with corporate counsel); *see also Humphrey v. McLaren,* 402 N.W.2d 535, 540 (Minn. 1987) (in representing a corporation against one of its officers or employees, corporate counsel's "allegiance is to the organization").

The Comment to Minnesota Rule 1.13 clarifies the meaning of the words "duly authorized constituents." For corporations, this term refers to "officers, directors, employees, and shareholders." For non-corporate entities, the term encompasses those individuals holding "the position equivalent to officers, directors, employees, and shareholders." In the case of an LLC, the equivalent positions are those of the employees, members, managers, and governors. Because the lawyer must consider each of these subgroups, conflicts of interest issues may arise. This is further explored in Section C.

a. Organization as the Client

A limited liability company is a creature of statute. Under the statutory laws of Minnesota, an LLC is a legal entity that is separate and distinct from its partners. *See Opus Corp. v. International Business Machines Corp.,* 956 F. Supp. 1503, 1508 (D. Minn. 1996). Thus, when a lawyer or firm represents a business entity, the client is the entity alone, and not the members, managers, partners, etc. *Id*.

When members of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. The organization must make its own decisions concerning policy and operations, including those decisions entailing serious risk. However, there are certain situations where it may be appropriate for a lawyer to take action. If a lawyer for an organization learns that an officer, employee, or other person associated with the organization is engaged in action or intends to act in a

manner that is a violation of a legal obligation to the organization or a violation of law that can reasonably be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. Minn. R. Prof. Conduct 1.13(b). In determining how to proceed, the lawyer should give due consideration to:

(1) the seriousness of the violation and its consequences;

(2) the scope and nature of the lawyer's representation;

(3) the responsibility in the organization and all the apparent motivation of the person involved;

(4) the policies of the organization concerning such matters; and

(5) any other relevant considerations.

Id. Any measures taken by an attorney must be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization, or even persons within the organization. *Id.; see also Opus,* 956 F. Supp. at 1508.

In addition to informing individuals of the consequences of an adverse action or potential conflicts, measures taken to dissuade a member from acting in a manner which could substantially injure the organization may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to a higher authority in the organization, including, if warranted by the seriousness of the matter, referral

> to the highest authority that can act on behalf of the organization as determined by applicable law.

Minn. R. Prof. Conduct 1.13(b). The higher authority referred to could be the board of directors or a similar governing body. In addition, the stated policies of an organization may define circumstances and prescribe channels for review. If it does not, a lawyer should encourage the formulation of such a policy. At some point it may be useful or essential to obtain an independent legal opinion.

The comments to Rule 1.13 indicate that clear justification should exist for seeking review over the head of the member normally responsible for the organization. Care must be taken to assure that the individual understands that when there is such adversity of interest the lawyer for the organization cannot provide legal representation for the individual. In addition, discussion between the lawyer for the organization and the individual may not be privileged. Whether the lawyer should give a warning to the organization regarding an individual may turn on the facts of each case.

A government lawyer has greater authority than a private lawyer to question a client's conduct because public business is involved. *Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d 435, 443 (Minn. Ct App. 2005). Courts take very seriously the fact that attorneys working for such an entity have an ethical duty to assure that the laws are properly applied. *Id*. In the *Brainerd Daily Dispatch* case, a newspaper sued city council members under a state open-meeting law, when it was denied access to a meeting involving the city council members and the city's legal counsel. In the end, the Court concluded that the

respondents invoked the attorney-client privilege in good faith and not to thwart the purpose of the Minnesota Open Meeting Law. *Id*. at 444. Therefore, the meeting remained closed.

b. Representation of Individuals

In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer must explain the identity of the client when it appears that the organization's interests are adverse to those of the organization's. Minn. R. Prof. Conduct 1.13(d). Nonetheless, a lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the consent provisions of Rule 1.7. If the organization's consent to dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Issues arise when a number of individuals wish to form an entity and one of the individuals is the lawyer's original client. If the lawyer has been selected to draft the entity agreement for all the parties, it is important for the lawyer to clearly identify who is the client and for all parties to have an understanding of whether the lawyer represents the individual or the entity.

In *Opus Corp. v. International Business Machines Corp.*, 956 F. Supp. 1503 (D. Minn. 1996) a law firm represented IBM in the formation of a partnership with another company. After the partnership was formed, the firm assumed the role

as the Partnership's counsel, as well as continuing to represent IBM in IBM's capacity as general partner and as an investor in the partnership. In this latter capacity, the firm represented IBM, on certain occasions, in a manner that was adverse to the interests of the other corporate partner. Difficult issues arose relating to attorney-client privilege during subsequent litigation between IBM and its corporate partner. These issues could have been avoided if the firm had been more observant about representing the partnership and one of its corporate partners.

A lawyer for an organization is not barred from accepting representation that is potentially adverse to the organization. However, attorneys have to be wary about providing advice to employees of the entities they represent. In *Manion v. Nagin*, an attorney agreed to represent an individual in creating a business. 394 F.3d 1062 (8th Cir. 2005). The individual later became a majority shareholder, and the attorney continued to represent the business. The attorney eventually provided the shareholder with advice about his personal interest in the company and its management structure. The Court indicated that this behavior was beyond the scope of the attorney's job as the company's attorney, and perhaps contrary to it. *Id*. at 1069.

If the attorney was truly working exclusively as the entity's lawyer, he should have responded to the shareholder's personal questions by clarifying the fact that he worked only for the company and he should have suggested that the individual seek outside counsel. *Id*. (citing Minn. R. Prof. Conduct 1.13(d),

which requires corporate counsel who is dealing with a shareholder or employee to "explain the identity of the client when it appears that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing"). The individual advice given by the attorney was sufficient to establish that an attorney-client relationship existed. *Id*. at 1069. However, the shareholder was unable to state a claim for relief, or else the attorney could have been held liable for malpractice, breach of contract, or some other legal claim.

c. Representation of Affiliates (Parents or Subsidiaries)

Issues also arise when an entity is an affiliate of another entity, such as a parent or subsidiary corporation. While not common for start-up breweries, it is important to have an understanding of the ethical considerations and legal implications as part of the overall business plan and portfolio.

A lawyer who represents an organization does not necessarily represent any affiliated organization, such as a parent or subsidiary. Minn. R. Prof. Conduct 1.13(a). Indeed, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated manner, unless:

(1) the circumstances are such that the affiliates should also be considered a client of the lawyer;

(2) there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates; or

(3) the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

In *Bieter Co. v. Blomquist*, 132 F.R.D. 220 (D. Minn. 1990), the court found that a law firm was not disqualified from representing a shopping center developer in its action for alleged interference with its relationship with a prospective tenant even though the firm represented a different joint venture in a similar matter. The defendants were constituents of the joint venture during contract negotiations with the tenant, so they requested that the firm be disqualified from representing the plaintiff. However, the court held that the constituents of the joint venture were not clients of the firm, only the joint venture was. *Id*. at 225. Therefore, disqualification was not necessary. *Id*.

Common Mistakes Summarized.

For reasons discussed above and in more detail in the next section, it is paramount for the lawyer to identify at the outset who the client is, specifically when an entity is involved. Failure to do so may result in unintended representation and expose the attorney to conflicting duties to multiple clients. This may require the lawyer to withdraw from representing <u>all</u> parties, which could be problematic legally and practically for all involved.

C. AVOIDING CONFLICTS OF INTEREST: WHO IS THE CLIENT?

The dreaded "conflict of interest." While it is a common phrase in the practice of law, it is also commonly misunderstood. Conflicts cannot only limit a lawyer's or law firm's ability to take on new clients, but also the prospective client's choice of counsel. And, if a conflict is not detected, determined or

handled properly, it can lead to more drastic consequences, including attorney discipline and professional malpractice.

1. Conflict of Interest: What Is It?

A conflict of interest can be a serious ethical concept and dilemma for attorneys seeking to retain and advise clients. A conflict of interest occurs when an individual lawyer or law firm represents multiple clients (i.e., two or more) whose goals or requests (i.e., interests) are at-odds with each other. This is also known as "concurrent representation." The most blatant conflict of interest or obvious form of concurrent representation exists when a lawyer or law firm represents both the plaintiff and defendant in a lawsuit or both parties to a contract. Most conflicts are not so obvious.

The ABA has created, and all states have adopted, ethical rules and guidelines to help lawyers identify and prevent conflicts. For example, Minnesota Rule of Professional Conduct 1.7 states that a lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

> (1) the lawyer reasonably believes that the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.

In addition, a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

Id. When representation of multiple clients in a single matter is undertaken, the consultation must include explanation of the implications of the common representation and the advantages and risks involved.

2. Conflicts Check: Who is the Client?

Before a lawyer and a potential client enter into an attorney-client relationship, the lawyer and his/her law firm must determine that the lawyer is not "conflicted" from representing the potential client. Typically, lawyers and law firms perform a "conflicts check," which generally involves reviewing the lawyer's and law firm's list of clients and matters to determine whether the lawyer and his/her firm represents (or represented) any party that has interests that are adverse to the potential client's interests. A conflicts check, however, is more than that and should involve a comprehensive system and database that is consistently conducted in a series of steps.

The first step in performing a conflicts check is to properly identify the potential client. As discussed in the preceding Section, if a lawyer is contacted by the organizer(s) of the business, the actual client may appropriately be the organization or entity, not the organizers or the directors, officers, or other constituents. The proper identity of the client must not only be determined by the lawyer at the outset, it must be adequately explained to the organizers. Model Rule 1.13(a) states "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."

This may be easier said than done. A lawyer does not talk to the entity, but deals with its authorized constituents (i.e., the principals, directors, officers). In addition, at the time formation is in progress, the organization or entity does not exist, and the lawyer must make its explanation specifically when the entity's interests are or may be adverse to the constituents' interests. In these situations, it is best for the lawyer to put this explanation in writing to avoid any dispute as to whether the explanation was ever provided.

Again, in performing a conflicts check, the lawyer is seeking to determine whether he or she is able to represent the potential client. If retention by the potential client would result in concurrent representation, then there is a conflict of interest that must be dealt with.

3. Conflicts Check: Identifying Sources of Conflict

The next step in guarding against conflicts of interest is to identify all potential sources of conflicts. Intake forms are useful to inquire about all parties related, including adverse parties and their counsel. Further steps are recommended to compare information on new matters with information on

matters other individual attorneys, and the firm as a whole, have handled for other clients. Lawyers should perform a new conflict screen whenever additional parties join during representation.

According to the Comment to Minnesota Rule 1.7, the relevant factors in determining whether there is a potential for adverse effect include:

(1) the duration and intimacy of the lawyer's relationship with the client or clients involved;

(2) the functions being performed by the lawyer;

(3) the likelihood that actual conflict will arise; and

(4) the likely prejudice to the client from the conflict if it does arise.

Even non-direct conflicts of interest should be recognized if a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities of interest. Substantial risk that a conflict could interfere with the lawyer's independent professional judgment is the basis for this determination.

4. Concurrent Representation

If a potential concurrent conflict of interest exists, a lawyer is not automatically disqualified from representing the potential client. Model Rule 1.7(b) provides:

> b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client 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.

In other words, a potential client has the option of consenting to the concurrent representation notwithstanding the conflict. Importantly, this consent must be confirmed in writing by each client. A writing by the attorney identifying the conflict does not replace the lawyer's responsibility to talk directly with the client and explain the risks and advantages to the representation in addition to the burden of the conflict on the client and available alternatives. *See, e.g.,*Minn. R. Prof. Conduct 1.0. A lawyer, however, cannot ask for consent if a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances. Such as situations where the clients are hostile it would then be unlikely that the lawyer could be impartial between the clients.

Common Mistakes Summarized.

Conflicts of interest are difficult dilemmas to identify and deal with. It is not uncommon for lawyers and law firms to overlook a conflict of interest prior to the formation of an attorney-client relationship. This failure commonly results from lawyers either misidentifying the appropriate client or failing to perform a systematic "conflicts check." It is also problematic when a lawyer fails to make clear to a business organization's constituents that the entity, not the constituents, is the client, and if this explanation is not provided in writing. Although concurrent representation does not automatically disqualify a lawyer

from concurrently representing the clients, lawyers mistakenly fail to provide informed, written consent to all clients whose interests are presently or potentially adverse.

D. CONFIDENTIALITY: INFORMATION DERIVED FROM AN EARLIER REPRESENTATION

1. Duty of Confidentiality and Attorney-Client Privilege

Confidentiality is at the heart of the attorney-client relationship. Again, properly identifying the client is crucial to determine the duty is owed. Failure to do so may not only create an attorney-client relationship where none would otherwise exist, but may result in the waiver of confidentiality of one or more clients.

Further, lawyers and clients often confuse the doctrine of the attorney-client privilege and a lawyer's duty of confidentiality. The attorney-client privilege is an evidentiary rule that protects private information and communications from being made public or from being used in court or dispute resolution proceedings. The duty of confidentiality is a duty a lawyer or law firm owes to its clients as a matter of professional ethics to protect private information gained through representation of a client. For example, Model Rule, 1.6 provides, except when permitted, under a lawyer shall not knowingly:

(1) Reveal a confidence or secret of a client;

(2) Use a confidence or secret of a client to the disadvantage of the client;

(3) Use a confidence or secret of a client for the advantage of the lawyer or a third person, unless the client consents after consultation.

Rule 1.6(b) indicates that a lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after consultation with them;

(2) Confidences or secrets when permitted under the Rules of Professional Conduct or required by law or court order;

(3) The intention of a client to commit a crime and the information necessary to prevent a crime;

(4) Confidences or secrets necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;

(5) Confidences or secrets necessary to establish or collect a fee or to defend the lawyers or employees or associates against an accusation of wrongful conduct;

(6) Secrets necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. *See* Minn. R. Prof. Conduct 8.3.

2. Issues Arising Solely from Possession of Confidential Information of Another Client

Unless a lawyer is able to earn a living representing one client for the duration of her/his career, a lawyer is likely to represent multiple clients, typically dozens of clients in many different matters. If the lawyer has developed a specialized practice, e.g., representing craft breweries or distilleries, she/he is likely to represent many different clients in one industry. Some of these clients may be competitors, which raises the following questions: 1) where a lawyer has acquired confidential information from one client that would be useful to another client, is the lawyer conflicted out from representing one or both clients;

and 2) can a lawyer use confidential information derived from one client for the benefit of the lawyer or for the benefit another client?

The answers to these questions depend upon the particular facts and the totality of circumstances, including the content of the confidential information and whether the clients are otherwise "adverse." As previously discussed, lawyers are prohibited from "concurrent representation" unless the clients are informed by the lawyer and consent in writing. However, the mere fact that a lawyer possesses confidential information from one client that would be useful to another client is not "concurrent representation" of adverse interests.

A critical factor is the materiality of the information in the second representation: the more material the information, the more likely the lawyer cannot avoid using it or likely that the lawyer's professional judgment as to the second representation will be affected by the lawyer's knowledge of the confidential information. The test for the materiality of specific information is whether the information would have been obtained in the ordinary course of business of the second matter. If yes, then the confidential information is only material if it would be important to the second representation to have the information sooner rather than later in the ordinary course.

Similarly, a lawyer may not disclose or use information gained from a client to the advantage of the lawyer in a professional or personal setting. A lawyer may be privy to information that could potentially have adverse effects on the client, or that could provide financial benefits for the lawyer. Such information

cannot be used or disclosed by the lawyer or those working with/for the lawyer. For example, an attorney was publicly reprimanded and suspended from practicing law for nine months after trading stock based on confidential information obtained through legal work being done by his law firm. *In re Petition for Disciplinary Action Against Marick*, 546 N.W.2d 299 (Minn. 1996).

There are limited occasions when an attorney can or must reveal confidential information gained from a client. In general, a lawyer has a duty to reveal information gained through a client that indicates future criminal activity or information pertaining to improper behavior by another lawyer. Additionally, a lawyer may reveal confidential information gained from a client upon court order or if the client consents after an informational consultation.

Common Mistakes Summarized.

Lawyers may at times fail to advise his/her client to whom duty of confidentiality is owed. This may result in the waiver of confidentiality, which could have drastic consequences in multiple forums. A lawyer's failure to safeguard confidential information may lead to severe discipline, including sanctions and disbarment, and professional liability, depending on the circumstances.

E. ADEQUACY OF FEES AND CHARGES

1. Permitted Fee Agreements

As discussed in previous sections, the legal issues facing emerging businesses, including craft breweries and distilleries, can vary in significance, scope and severity. A lawyer's fee and fee arrangements can similarly vary depending on the experience, skill, and specialization of the lawyer and the lawyer's practice. Typical fee arrangements include: 1) a retainer; 2) hourly rates; 3) flat or fixed fees; or 4) a contingency fee.

A retainer typically operates as an advance payment on a lawyer's hourly rate to secure that specific lawyer or law firm to handle a specific task, matter, or case. For example, the client may make an advance payment of $5,000 from which the lawyer will "bill against" when work is performed. It is, in effect, a down payment that will be applied to the total fee billed to the client. The lawyer typically puts the retainer amount into the lawyer's trust account from which the lawyer will deduct payment for services and expenses as they are incurred or accrue.

Although lawyers generally have wide discretion as to what types of fee arrangements to offer, rules of professional conduct do provide some basic limitations for clients' and consumers' protection. Under Model Rule 1.5, "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Model Rule 1.5(b) goes on to state that whatever the fee arrangement is, it must be communicated to the potential client within a reasonable time after commencing representation.

> "[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, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

While hourly rates, flat fees and retainer agreements are not required to be in writing, it is best practices to put the fee arrangement in writing to ensure that all parties understand the scope and terms of the attorney-client relationship.

Certain agreements, such as contingent fees, are required to be in writing. A contingent fee agreement is one where the lawyer doesn't take an upfront fee or bill on an hourly basis, but the lawyer receives a fixed percentage (typically 33% -- 40%) of any "recovery," which is the amount ultimately paid to the client, if the lawyer is successful. In other words, if the matter is successful or the client wins, the lawyer's contingent fee is paid out of the money award to the client. If the matter is not successful and the client loses, neither the client nor the attorney will get any money. Model Rule 1.5(c) provides in pertinent part:

> A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a 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. The 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. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

2. Taking an Ownership Stake in Exchange for Legal Services

Emerging companies and new businesses, such as a start-up craft brewery or distillery, may propose that the lawyer provide legal services on behalf of the startup entity in exchange for an ownership stake in the company.

This sort of fee arrangement contains some inherent risks, complexities, and ethical issues of which a lawyer must be keenly aware.

The Model Rules and state rules of professional conduct provide guidance. Under Minnesota Rule 1.8, 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 to the client in a manner which can be reasonably understood by the client;
>
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) the client consents thereto in writing.

Minn. R. Prof. Conduct 1.8. Rule 1.8 makes it clear that a lawyer should be wary of getting involved in business deals with their clients. If such a deal is made, proper means should be used to guarantee that there is no appearance or impropriety or unfairness. A writing from the lawyer to the client is required, along with a separate writing from the client which indicates whether or not the lawyer is looking out for the client's interest in the transaction, the nature of the conflicting interest, and that any reasonably foreseeable risks for the client have been discussed. The lawyer should employ all possible safeguards to ensure that the deal is recognized as one that is fair, reasonable, and in the interests of the client. If these elements are not met or the safeguards not put in place, the transaction between the lawyer and client is strictly prohibited.

Common Mistakes Summarized.

Although lawyers are only required to put contingency fee agreements in writing, it is bad practice for a lawyer not to get all fee arrangements in writing. Much like conflicts checks, lawyers must be diligent in assessing whether fee arrangement is prohibited as a result of an ethical dilemma. In considering these issues, including the amount or type of a reasonable fee, lawyers fail when they don't keep the client's best interests in mind over their own.

CONCLUSION

Legal ethics is not an oxymoron. Lawyers promise to abide by comprehensive codes of ethics and rules of professional conduct, which serve not only as guide to the ethical practice of law, but the basis for attorney discipline, and potentially legal malpractice, if seriously (and repeatedly) violated. Most lawyers are very concerned about their reputations and integrity, and strive to be ethical and professionally responsible. Nevertheless, lawyers often encounter serious ethical dilemmas in the course of their work and throughout their careers because legal issues, controversies, and disputes--as well as the parties involved in them—can be very complex. Identifying these dilemmas and common mistakes early and often is critical to the endeavor of not only a successful, ethical practice, but happy clients who deserve nothing less.

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