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Bill Analysis

Legislative Service Commission

S.B. 259

126th General Assembly
(As Introduced)

Sens. Niehaus, Fingerhut

BILL SUMMARY

- Creates the Wholesale Wine Distribution Study Committee to study and make recommendations regarding the best means of improving wholesale distribution of wine in Ohio.
- Amends the Alcoholic Beverages Franchise Law to exempt wine purchases from certain prohibitions regarding beer and wine distribution and sale and to make changes regarding the cancellation, failure to renew, or renewal of manufacturers' wine franchise agreements with distributors.
- Amends the Liquor Control Law to eliminate the Liquor Control Commission's authority to set minimum mark-ups and to fix minimum prices on wholesale wine sales, to remove wine from the coverage of the credit extension prohibition and to allow wine distributors and wine retailers a maximum of 30 days of credit when purchasing wine, and to prohibit volume and quantity discounting to assist wholesale or retail sellers of beer or intoxicating liquor.

CONTENT AND OPERATION

STUDY OF WHOLESALE WINE DISTRIBUTION IN OHIO

Wholesale Wine Distribution Study Committee

(Section 4)

Creation and duties

The bill creates the Wholesale Wine Distribution Study Committee to study the best means of improving wholesale distribution of wine in Ohio. To do this, the Committee must examine how other states regulate the wholesale distribution

of wine and must take into consideration the perspectives of manufacturers, wholesalers, retailers, and consumers of wine in Ohio.

The Committee must submit its findings and recommendations to the Speaker of the House of Representatives and the President of the Senate not later than 210 days after the effective date of the bill. Once the report is submitted, the Committee ceases to exist.

Membership

The Committee must consist of the following members, to be appointed no later than 30 days after the bill takes effect:

- Two members of the House of Representatives appointed by the Speaker of the House of Representatives;
- Two members of the Senate appointed by the President of the Senate;
- One representative from the Division of Liquor Control in the Department of Commerce appointed by the Superintendent of the Division;
- One representative from the Department of Taxation appointed by the Tax Commissioner;
- Two representatives of the wine wholesale industry, one each appointed by the Speaker and President;
- Two representatives of the wine retail industry, one each appointed by the Speaker and President;
- Two representatives of the wine supplier industry, one each appointed by the Speaker and President;
- One representative of wine consumer interests appointed by the Governor.

Vacancies in the membership of the Committee must be filled in the same manner provided for original appointments. The members must select a chairperson. Members are to serve without compensation or reimbursement.

CHANGES TO LIQUOR LAWS RELATING TO WINE

The bill makes a number of changes regarding Ohio law governing wine distribution and sales. The first group of changes is made to Ohio's Alcoholic Beverages Franchise Law; the next group of changes is to Ohio's Liquor Control Law. These changes are to become operative one year after the effective date of the bill (Section 3).

Alcoholic Beverages Franchise Law

Background

(R.C. 1333.85(C); 1333.83 and 1333.86 [not in bill])

The Alcoholic Beverages Franchise Law requires every manufacturer of "alcoholic beverages" (beer and wine) to contract with or offer in good faith to its distributors a written franchise providing for and specifying the rights and duties of both parties in effecting the sale of specified products or brands of the manufacturer.¹ During the effective period of the franchise, a distributor must

¹The following definitions of terms referred to in the analysis are applicable to the Alcoholic Beverages Franchise Law (R.C. 1333.84; 1333.82 and 4301.01 [not in bill]):

"Beer" includes all beverages brewed or fermented using malt products and containing at least 0.5% but not more than 12% of alcohol by volume.

"Wine" includes all liquid beverages containing at least 0.5% but not more than 20% of alcohol by volume, which are made from the fermented juices of grapes, fruits, or other agricultural products.

"Distributor" means a person who sells or distributes beer and wine to retail permit holders in Ohio, but does not include the government of Ohio or its political subdivisions.

"Manufacturer" means a person, whether located in Ohio or elsewhere, who manufactures or supplies beer and wine to distributors in Ohio.

"Franchise" means a contract or any other legal device used to establish a contractual relationship between a manufacturer and distributor.

"Good faith" means the duty of any party to a franchise, and all officers, employees, or agents of any party to a franchise, to act in a fair and equitable manner toward each other so as to guarantee each party freedom from coercion or intimidation; except that recommendation, endorsement, exposition, persuasion, urging, or argument does not constitute lack of good faith or coercion.

"Brand" as applied to wine, means a wine different from any other wine in respect to type, brand, trade name, or container size.

maintain adequate facilities and personnel so that the manufacturer's products or brands are at all times properly represented in the distributor's sales area, the manufacturer's reputation and trade name are protected, and the general public receives adequate servicing of the manufacturer's products or brands. And, the distributor must at all times act in good faith.

If a manufacturer or distributor cancels or fails to renew a franchise, the distributor must sell to the manufacturer, and the manufacturer must purchase from the distributor, all of the distributor's inventory of the manufacturer's products and sales aids at the laid-in cost to the distributor, including freight and cartage, provided that, upon payment, the distributor must transfer to the manufacturer good title to all property free of liens and encumbrances.

Except for the proposed changes noted below, these provisions of the Alcoholic Beverages Franchise Law, and all other provisions of that Law, will continue to apply to manufacturers and distributors of both beer and wine.

Exempting wine from certain prohibitions regarding beer and wine distribution and sale

(R.C. 1333.84)

Under the Alcoholic Beverages Franchise Law, no manufacturer or distributor engaged in the sale and distribution of beer and wine, or the subsidiary of any manufacturer, is permitted to do the following:

- (1) Fail to act in good faith or without just cause in acting or purporting to act under the terms of a franchise or in canceling or failing to renew a franchise.
- (2) Award an additional franchise for the sale of the same brand within the same sales area or territory.²
- (3) Require a distributor to submit profit and loss statements, balance sheets, or financial records as a requirement to retain its franchise.

²"Sales area or territory" means an exclusive geographic area or territory that is assigned to a particular manufacturer (A) or distributor (B) permit holder and that either has one or more political subdivisions as its boundaries or consists of an area of land with readily identifiable geographic boundaries. It does not include a particular retail location in an exclusive area or territory that is assigned to another A or B permit holder. (R.C. 1333.82 [not in bill]).

(4) Without reasonable cause, withhold delivery of beer and wine ordered by a distributor, or change or amend a distributor's quota of a manufacturer's product or brand.

(5) Coerce a distributor by any means to participate in or contribute to any local or national advertising fund controlled directly or indirectly by a manufacturer.

(6) Refuse to recognize the rights of surviving partners, shareholders, or heirs and fail to act in good faith in accordance with reasonable standards for fair dealing, with respect to the distributor's right to sell, assign, transfer, or otherwise dispose of the distributor's business, in all or in part. However, the law provides that the distributor has no right to sell, assign, or transfer the franchise without the prior consent of the manufacturer, and that the manufacturer cannot unreasonably withhold such consent.

Under the bill, the prohibitions described above only apply regarding the sale and distribution of beer; sale and distribution of wine is excluded from the law's coverage.

Cancellation or failure to renew wine franchises and alteration of wine sales areas and territories--notice and just cause

(R.C. 1333.85(A) and (B))

Under the Alcoholic Beverages Franchise Law, no manufacturer or distributor can cancel or fail to renew a franchise or substantially change a sales area or territory without the prior consent of the other party for other than just cause and without at least 60 days' written notice to the other party setting forth the reasons for the action. However, neither party is required to give to the other such notice if any of the following events occurs: (1) the filing of a bankruptcy petition or an assignment for the benefit of creditors by the other party, (2) the filing of an involuntary bankruptcy petition against either party that is not dismissed within 30 days, or (3) the cancellation, revocation, or suspension for more than 30 days of any permit required to be held by either party to authorize the handling of beer and wine. In addition, the occurrence of any of the events described in (1) to (3) above constitutes just cause for cancellation or failure to renew a franchise or substantially changing a sales area or territory without the prior consent of the other party.

Current law also provides that if any of the following events occur, they do **not** constitute just cause for cancellation of or failure to renew a franchise or substantially changing a sales area or territory without the prior consent of the other party: (1) the failure or refusal on the part of either party to engage in any

act or practice that would result in a violation of any federal or Ohio law or regulation, (2) the restructuring, other than in bankruptcy proceedings, of a manufacturer's business organization, (3) a unilateral alteration of the franchise by a manufacturer for a reason unrelated to any breach of the franchise or violation of the Alcoholic Beverages Franchise Law by the distributor, or (4) a manufacturer's sale, assignment, or other transfer of a product or brand to another manufacturer over which it exercises control.

The bill makes the provisions of current law described above regarding notice and just cause applicable only to beer franchises and beer sales areas and territories. Wine franchises and sales areas and territories are eliminated from the law's coverage and will likely be governed by general statutory and common law contract law.

Wine franchise termination, failure to renew, or renewal--successor manufacturer

(R.C. 1333.85(D))

Under the Alcoholic Beverages Franchise Law, if a successor manufacturer acquires all or substantially all of the stock or assets of another manufacturer through merger or acquisition or acquires or is the assignee of a particular product or brand from another manufacturer, the successor manufacturer, within 90 days of the merger, acquisition, purchase, or assignment date, may give written notice of termination, nonrenewal, or renewal of the franchise to a distributor of the acquired product or brand. Any notice of termination or nonrenewal of the franchise to a distributor must be received at the distributor's principal place of business within the 90-day period. If notice is not received within that time, a franchise relationship is established between the parties. If the successor manufacturer complies with the 90-day notice requirement, just cause or consent of the distributor is not needed for the termination or nonrenewal.

On termination or nonrenewal of a franchise, the distributor must sell and the successor manufacturer must repurchase the distributor's inventory of the terminated or nonrenewed product or brand at the laid-in cost to the distributor including freight and cartage, provided that upon payment the distributor must transfer to the manufacturer good title to all that property free of liens and encumbrances. The successor manufacturer also must compensate the distributor for the diminished value of the distributor's business that is directly related to the sale of the product or brand terminated or not renewed by the successor manufacturer. The value of the distributor's business that is directly related to the sale of the terminated or nonrenewed product or brand must include the appraised market value of the distributor's assets principally devoted to the sale of the product or brand and the goodwill associated with it.

The bill makes the provisions applicable only to successor manufacturers of beer; successor manufacturers of wine are excluded from the law's coverage and will likely be governed by general statutory and common law contract law.

Liquor Control Law

Cash sales to wholesale and retail permit holders

(R.C. 4301.24)

Under current law, manufacturers are prohibited from selling or offering to sell to any wholesale distributor or retail permit holder any beer, brewed beverages, or wine manufactured in the United States except for cash.³ An identical prohibition applies to wholesale distributors selling or offering to sell to any retail permit holder, and wholesale distributors or retail permit holders purchasing or receiving from any manufacturer or wholesale distributor. The law does allow, however, a licensee to credit to a purchaser the actual prices charged for packages or containers returned by the original purchaser on any sale or to refund to any purchaser the amount paid by that purchaser for containers or as a deposit on containers when title is retained by the vendor, if those containers or packages have been returned to the manufacturer or distributor. Additionally, current law does not prohibit a manufacturer from extending usual and customary credit for beer, brewed beverages, or wine manufactured in the United States and sold to customers who live or maintain places of business outside of Ohio when

³ *The following definitions of terms referred to in the analysis are applicable to the Liquor Control Law (R.C. 4301.01 [not in bill]):*

*"**Manufacturer**" means any person engaged in the business of manufacturing beer or intoxicating liquor.*

*"**Intoxicating liquor**" includes all liquids and compounds, other than beer, containing at least 0.5% alcohol by volume that are fit to use for beverage purposes, from whatever source and by whatever process produced, by whatever name called, and whether medicated, proprietary, or patented. "Intoxicating liquor" includes wine even if it contains less than 4% of alcohol by volume, mixed beverages even if they contain less than 4% of alcohol by volume, cider, alcohol, and all solids and confections that contain any alcohol.*

*"**Wholesale distributor**" means a person engaged in the business of selling to retail dealers for purposes of resale.*

*"**Wine**" includes all liquid beverages containing at least 0.5% but not more than 20% of alcohol by volume, which are made from the fermented juices of grapes, fruits, or other agricultural products.*

those beverages sold are actually transported and delivered to points outside of Ohio.

Also under current law, no beer or wine manufactured in the United States can be imported into the state unless the beer or wine has been paid for in cash, and no supplier registration for any such beer or wine manufactured in the United States can be issued by the Division of Liquor Control until the A-2 (manufacturer permit for the manufacture of wine and its retail sale by individual glass or in containers for consumption on or off the manufacturing premises), B-1 (distributor permit to distribute beer or sell it for home use), or B-5 (distributor permit to bottle or distribute wine or sell it for home use) permit holder establishes to the satisfaction of the Division that the beer or wine has been paid for in cash.

If items are sold or purchased on credit in violation of these provisions, no right of action exists to collect any claims for the credit extended.

The bill removes wine from the coverage of the credit extension prohibition and exceptions described above. Instead the bill provides, with respect to credit purchases of wine, that a manufacturer may extend credit on terms that require payment to be made by a wholesale distributor or retail permit holder no later than 30 days after the delivery of wine to the distributor or permit holder. A wholesale distributor may extend credit on terms that require payment to be made by a retail permit holder no later than 30 days after the delivery of wine to the permit holder.

Liquor Control Commission rules governing bottled wine mark-ups

(R.C. 4301.13)

Under current law, the Liquor Control Commission may adopt rules to regulate the manner of dealing in and distributing and selling bottled wine in Ohio. As part of that authority, the Commission may determine and fix the minimum mark-ups at wholesale or retail, or both, for bottled wine, and fix the minimum prices at which the various classes of bottled wine can be distributed and sold in Ohio at wholesale, retail, or both. The bill limits the Commission's authority to determining and fixing the minimum mark-ups and fixing the minimum prices at retail; bottled wine wholesale mark-up and minimum pricing authority is eliminated.

GENERAL LIQUOR CONTROL LAW CHANGE

Aid to wholesale and retail permit holders

(R.C. 4301.24; Section 3)

Under current law, manufacturers are prohibited from aiding or assisting the holder of any wholesale permit, by gift or loan of any money, property, or other valuable thing, or by giving premiums or rebates. The same limitation applies to manufacturers and wholesale distributors with respect to their dealings with holders of retail permits. Holders of wholesale and retail permits are generally prohibited from accepting aid or assistance. The bill adds to the list of specifically prohibited aid or assistance "volume or quantity discounts." This change would apply to beer and intoxicating liquors (which includes wine) and becomes operative one year after the bill's effective date.

HISTORY

ACTION	DATE
Introduced	01-24-06

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