



# Wholesaler/Distributor Trade Practice Review

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Division of Liquor Control

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# Introduction

## Legislative Request

H.924 introduced into the House, and through a Proposal of Amendment by the Senate, ultimately resulted in a bill that included reporting requirements for the Commissioner of Liquor Control to submit a report regarding Unlawful Alcohol Trade Practice Violations. H.924 was ultimately vetoed by the Governor, and this reporting requirement was not included in the appropriations bill completed pursuant to special session. Following the session, the Commissioner of the newly merged Department of Liquor and Lottery determined that, even without the legislative requirement, it was prudent and practical to take the initiative in conducting a study to address the original bills intent. For reference, the reporting requirement called for:

On or before January 15, 2019, the Commissioner of Liquor Control shall submit a written report to the House Committee on General, Housing, and Military Affairs and the Senate Committee on Economic Development, Housing and General Affairs regarding the occurrence in Vermont of unfair trade practices at wholesale, including unlawful financial interests in retail licensees, price discrimination between retail licensees, and inducement of retail licensees to purchase or sell certain brands of alcoholic beverages to the exclusion of others. In particular, the report shall include:

(1) a description of the State and federal laws and regulations restricting:

(A) certain types of financial interests between wholesale and retail licensees;

(B) price discrimination between retail licensees by wholesale dealers and packagers; and

(C) the giving of free alcoholic beverages, monetary payments, or any other thing of value in order to induce or persuade a retail licensee to purchase or contract to purchase a certain brand or kind of alcoholic beverage to the exclusion of others, or to refrain from purchasing or contracting to purchase a certain brand or kind of alcoholic beverage;

(2) a description of the Department of Liquor Control's efforts to enforce the laws and regulations related to unlawful financial interests in retail licensees, price discrimination between retail licensees, and inducement of retail licensees to purchase or sell certain brands of alcoholic beverages to the exclusion of others, including:

(A) the number of complaints received by the Department

(B) the number of investigations performed by the Department;

(C) the number of alleged violations prosecuted by the Department; and

(D) the result of any prosecutions carried out by the Department; and

(3) any suggestions for legislative action to strengthen or improve the enforcement of Vermont's laws restricting unlawful financial interests in retail licensees, price discrimination between retail licensees, and inducement of retail licensees to purchase or sell certain brands of alcoholic beverages to the exclusion of others.

This report will address the concerns and questions as spelled out above, as well as detail the results and initiatives that the Department of Liquor and Lottery has instituted following the 2018 Legislative Session.

### Trade Practice History

Prior to addressing the current state of Trade Practice issues both nationally and within the State of Vermont, it is crucial to understand the US post prohibition era and the issues leading to the federal unfair trade practice provisions of the Federal Alcohol Administration Act of 1935 (FAA Act). Understanding this history is essential for understanding the statutory elements of and contextual definitions of concepts such as exclusive outlet, tied-house, commercial bribery, and consignment sales.

Consumer protection was the paramount concern and core purpose of the provisions within the FAA Act. Simply stated, as the nation emerged from prohibition, it was clear that protections were needed to balance the integrity of the production, distribution, and sales of alcoholic beverages while ensuring that consumers received what they wanted while maintaining temperance or preventing abusive consumption. Also, the FAA Act outlined the roles and responsibilities of how both the Federal government and State governments concurrently regulated the alcoholic beverage industry.

As evident by the passage of the 18th Amendment, the states were not effective in achieving this goal. Likely the most compelling argument for prohibition stemmed from a study commissioned by John Rockefeller. That study endeavored to identify the best practices to ensure that the beverage alcohol industry was adequately regulated. As reported by the Authors of that study, Raymond Fosdick and Albert Scott, they noted:

*“The ‘tied house’ system had all of the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the community. All he wanted was increased sales. He saw none of the abuses, and as a non-resident he was beyond local social influence. The ‘tied house’ system also involved a multiplicity of outlets, because each manufacturer had to have a sales agency in a given locality. ... large excess of sales outlets. Whether or not this is of concern to the public in the case of gasoline, in relation to the liquor problem it is a matter of crucial importance because of its effects in stimulating competition in the retail sale of alcoholic beverages”<sup>1</sup>.*

Furthermore, upon the ratification of the 21<sup>st</sup> Amendment, President Roosevelt noted in the December 1933 Presidential Proclamation on the Repeal of Prohibition, “I ask especially that no State shall by law or otherwise authorize the return of the saloon in its old form or in some modern guise.” All of this focuses the context for passage of the FAA Act and the specific provision that identified and prohibited specific trade practices deemed a detriment to public safety as well as a well-regulated and even playing field for the beverage alcohol marketplace.

Following the ratification and in some ways through the FAA Act, the United States has employed a system for the distribution and retail sale of alcohol that has helped guarantee access to beverage alcohol to the public and minimize its dangers and social costs. One of the best ways this is accomplished is via a “three-tier” system. This paradigm sets up three separate, distinct, and independent actors across the beverage alcohol industry. The first “tier” is the manufacturer. This “tier” includes producers of spirits, malt, and vinous beverages. After the manufacturer “tier”, follows the Distributor. Manufacturers sell their products only to state-licensed distributors, who are the exclusive source for the last “tier”; State-licensed retail outlets, including off-premise stores as well as bars and restaurants. Generally, beverage alcohol follows this system to prohibit or greatly restrict the sale of beverage alcohol directly from producers to consumers.

Via this three-tier system, the states can ensure and promote the effective regulation of consumption and can be responsive to local concerns. Given their unique position as the middle tier and therefore positioned between consumers and producers, distributors have significant responsibilities and advantages. For instance, Distributors possess the informational and economic ability to make sure that products are allocated and metered to the retail outlets with the greatest demand, while negotiating a stable, and generally low price. In the realm of responsibility, it is incumbent upon the Distributor tier to serve as the separation between the manufacturer and the retail outlet (or public) to alleviate the problems of profit-based allocation of product, and de-incentivizing irresponsible sale or service based wholly on profit generation. The goal of the three-tier system is a marketplace reflecting the products that the consumers want and not a marketplace controlled by the alcohol industry through unfettered trade practices to dictate to the consumer what he or she should want and causing abusive consumption via overstimulation of sales. Since its inception following Prohibition, the three-tier system is well understood to be an exercise of state power conferred by the Twenty-First Amendment.

<sup>1</sup> Fosdick, S. (2011). *Toward Liquor Control*. Cork: BookBaby.

On the Federal level, Regulation of the Alcoholic Beverage Industry is currently handled by the Tax and Trade Bureau (TTB) which is an investigative and regulatory arm of the United States Treasury Department. Within the State of Vermont, this same function is carried out on a state level by the Vermont Department of Liquor and Lottery, Division of Liquor Control.

## Definitions of specific terms

In the context of trade practice and the three-tier system there are four specific trade practices as identified by Federal Regulation, found specifically in [27 C.F.R Chapter I, Subchapter A](#). There are additionally specific terms used within the federal regulations that differ somewhat in nomenclature from recognized definitions found within Vermont Statute. [27 U.S. Code § 205](#) and 27 C.F.R Chapter I, Subchapter A, identify prohibited trade practices as Tied-House, Exclusive Outlets, Commercial Bribery, and Consignment Sales. Within these violations, there are two common elements of the offenses known as Inducement and Exclusion.

### *Industry Members*

Per 27 C.F.R, the actors within the first two tiers of the aforementioned three-tier system are referred to as Industry Members. This would include Manufacturers or Rectifiers as well as Wholesale dealers and Packagers as defined by Vermont Law, [Title 7 VSA § 2](#).

### *Inducement and Exclusion.*

Per 27 C.F.R most of the identified trade practice violations require two elements to occur between the tiers. The first, inducement, is most easily explained as something given by one tier that persuades or influences another tier to do something for the providing tier. Examples of inducements can include goods, property, financial obligation or interests and the like. Secondly, exclusion, while difficult to succinctly define and for that matter prove, has some precedence identified in [Fedway Associates, Inc. v. ATF, 976 F.2d 1416, 1424 \(DC Cir. 1992\)](#). In this case, exclusion was identified through some agreement or otherwise where the industry member, requires the retailer to purchase the industry member's products *to the exclusion*, in whole or in part, of products sold or offered for sale by other persons in interstate or foreign commerce. In this case, future Supreme Court Justice Ruth Bader Ginsburg wrote that exclusion requires “something more” than a retailer simply purchasing less than of a competitor’s product.

### *Tied House*

Per 27 U.S. Code § 205(b), “It is unlawful for an industry member to induce, directly or indirectly, a retailer to purchase alcohol beverages from the industry member to the exclusion of alcoholic beverage offered for sale by other persons”.

### *Exclusive Outlet*

Per 27 U.S. Code § 205(a), “It is unlawful for an industry member to directly or indirectly require a retailer, by agreement or otherwise, to purchase alcohol from that industry member to the exclusion of alcohol sold or offered for sale in interstate or foreign commerce by others”.

### *Commercial Bribery*

Per 27 U.S. Code § 205(c), “It is unlawful for an industry member to induce any trade buyer to purchase alcohol from the industry member to the exclusion of those sold by others by commercial bribery or offering or giving any bonus, premium, or compensation to employees, officers, or representatives of the trade buyer”.

### *Consignment Sale*

Per 27 U.S. Code § 205(d), “It is unlawful to sell, offer to sell, or contract to sell alcohol beverage to a trade buyer on consignment, under conditional sale, or with the privilege of return”.

## State and Federal Laws, Regulations, and Liquor and Lottery Board Guidance

### Shared Financial Interests (Tied-House & Exclusive Outlet); State Law, Regulation, and Board Guidance

While very little Vermont Title 7 law pertains to Tied-House or Exclusive Outlets as a matter of criminal conduct, there does exist a set of regulations that pertain specifically to Wholesale Dealers that has significant impact on the operation of a tied-house, as well as some regulations on the matter that pertains to retail outlets. Both law and regulation will be discussed in the following section.

Title 7 VSA § 702 prohibits a licensed manufacturer from inducing or coercing any wholesale dealer to accept delivery of any alcoholic beverage, any form of advertisement, or any other

commodity, that was not ordered by the wholesale dealer, nor can a manufacturer induce or coerce any wholesale dealer to do any illegal act by threatening to cancel or terminate the wholesale dealer's franchise. In addition, effective after January 1, 2019 it will be unlawful for a manufacturer to require a wholesale dealer to agree to any condition, stipulation, or provision limiting the wholesale dealer's rights to sell the product of another manufacturer or certificate of approval holder.

Title 7 VSA § 271(d)(1) does create a small carve-out of the three-tier system and, in a way, permits a tied-house between a licensed Manufacturer and a retail outlet, so long as the retail outlet is located on the "Manufacturer's premises". The Liquor and Lottery board in a recent decision has taken an interpretation of "Manufacturer's premises" to encompass any space that a licensed manufacturer owns and/or operates regardless of their ability to manufacture at that space.

In the realm of regulation, [Wholesale Dealers and Certificate of Approval Holders and Vermont Manufacturers Regulations](#), commonly referred to as Wholesaler Regulations, deals often with issues surrounding tied-house and exclusive outlet. Examples include Wholesaler Regulations 1 and 2, which prohibits liquor representatives, employees of a wholesale dealer, holders of a certificate of approval or manufacturer's license from being employed directly or indirectly on a paid or voluntary basis by a first-class licensee as well as prohibiting employees of wholesale dealers from being employed as representatives of distilleries. In addition, Wholesale Regulation 15 explicitly prohibits any manufacturer, certificate of approval holder, or wholesale dealer from inducing any licensee to purchase any alcoholic beverage by giving or offering to such purchaser anything of value. A small but notable exception to Wholesale Regulation 15 is brand-identified items which are primarily valuable to the retailer for advertising purposes only, but only after obtaining prior Liquor and Lottery Board approval.

A recently modified and reaffirmed document known as Guidance Bulletin No 1 provides for some further exceptions to inducements and sets permissible limits on industry practices including promotions. A more in-depth discussion of this document will follow explaining the efforts made by the Department of Liquor and Lottery to address identified issues, with this bulletin being one issue identified.

### Shared Financial Interests (Tied-House & Exclusive Outlet); Federal Law

Tied-house and Exclusive outlet are covered under Federal Law by [27 U.S.C §205](#) (Unfair competition and unlawful practices). Under this section of Federal Law, subsection (a) explicitly prohibits exclusive outlets while subsection (b) explicitly prohibits tied-house arrangements.

## Wholesaler and manufacturer price discrimination between retailers; State Law, Regulation, and Board Guidance

While very little Title 7 law pertains to equitable price setting by the Wholesale and Manufacturer tier, there does exist a set of regulations that pertains specifically to Wholesale Dealers that has significant impact on this paradigm.

In respect to Title 7, It should be noted that due to a recent legislative change to VSA § 702, effective January 1, 2019 If a manufacturer or certificate of approval holder believes in good faith that it does not have a sufficient amount of a product available for immediate sale to satisfy the demand of a wholesale dealer and its other customers, it shall allocate the available product between the wholesale dealer and its other customers in a fair and equitable manner. In addition. Lastly, section § 702 prohibits a manufacturer from failing or refusing to deliver promptly to a wholesale dealer after the receipt of its order any malt beverages or vinous beverages when the product is publicly advertised for immediate sale.

In the realm of regulation, Wholesaler Regulation 12 requires that all wholesale dealers post their malt beverage prices to first and second-class licensees with the Department of Liquor and Lottery. Prices will be posted as to each brand and size container. In the event of any proposed price change, the wholesale dealer must notify and post that price change with the Department of Liquor and Lottery.

Of note, Wholesale Regulation 12 requires that each first and second-class licensee in the wholesale dealer's territory must receive at least one opportunity to buy at the changed price. When a wholesale dealer runs out of product, they shall be allowed to offer rain checks to all licensees who were not able to purchase the product at the posted price for a period not to exceed fourteen days. Furthermore, Wholesale Regulation 12 states that no price posting involving quantity discounts will be made.

## Wholesaler and manufacturer price discrimination between retailers; Federal Law

Neither 27 U.S.C nor 27 C.F.R deal directly with price discrimination between industry members and retail outlets.

## Providing things of value to induce business at the exclusion of others; State Law, Regulation, and Board Guidance

Wholesale Regulation 15 explicitly prohibits any manufacturer, certificate of approval holder, or wholesale dealer from inducing any licensee to purchase any alcoholic beverage by giving or offering to such purchaser anything of value. A small but notable exception to Wholesale Regulation 15 is brand-identified items which are primarily valuable to the retailer for advertising purposes only, but only after obtaining prior Liquor and Lottery Board approval.

Also, Wholesale Regulation 9 sets up rules for the furnishing of things of value from a wholesaler or manufacturer to a retail outlet. Specifically, Wholesale Regulation 9 provides that tapping accessories, such as standards, faucets, rods, vents, taps, hoses, washer, couplings, vent tongues, shanks, pressure gauges, and check valves may be sold to a retailer, if the tapping accessories are sold at a price not less than the cost to the certificate of approval holder, manufacturer, or wholesale dealer who initially purchased those items. Invoices on all such sales must be maintained on the licensed premises for a period of two years. However, in an existing system, servicing and cleaning of all draught equipment from the barrel to the glass, and replacing of rods, taps, hoses and washers is approved. As mentioned previously, Guidance Bulletin No 1 provides for some further exceptions to inducements and sets permissible limits on industry practices including promotions.

## Providing things of value to induce business at the exclusion of others; Federal Law

27 U.S. Code § 205 and 27 C.F.R Chapter I, Subchapter A, identify the prohibited trade practice referred to as Tied-House. Within the definition of Tied-House, both federal law and federal regulation makes the practice of inducing any retailer through any means, including through the provision of things of value. In Federal Law, this practice and the items of value provided is known as inducement. If that inducement leads a retailer to exclude other products in the marketplace, and if such inducement is made in the course of interstate or foreign commerce, then a Federally prohibited trade practice has occurred. 27 U.S.C § 205 (3) further explains that inducements include the furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other thing of value, subject to such exceptions as the Secretary of the Treasury may impose. Simply stated, the furnishing, giving, renting, lending, or selling is considered an inducement and may be part in parcel to a federal crime.

## Department of Liquor and Lottery Enforcement History

In recent history, the Department of Liquor and Lottery has had little to no history of active investigations regarding any of the described trade practice violations. Largely, the Division of Liquor Control routinely fields inquiries and requests for clarification for industry members or their compliance representatives looking for clarification and guidance regarding all of the elements described above. Prior to the introduction of H.924, and within the last 5 years, there have been no initiated trade practice investigations by any Vermont Liquor Investigator.

## Efforts by Department of Liquor and Lottery to Address Identified Issues

Following the introduction of H.924 the Commissioner of the newly merged Department of Liquor and Lottery determined that it was prudent and practical to take the initiative in conducting a study to address the current state of trade practice issues in Vermont and how the Department addresses education and training of staff and industry members, the relevancy and applicability of regulation and policies pertaining to trade practice, and protocols to handle investigations of trade practice occurrences going forward.

### Training

On July 18th, 2018 two members of The Department of Liquor and Lottery's management staff, Director Martin Prevost and Director Skyler Genest attended a Trade Practice Seminar in Boston, Massachusetts. This seminar organized and provided by the TTB allowed the TTB to deliver an in-depth presentation geared towards alcohol beverage industry members and regulators alike. During the seminar, a thorough discussion of laws, regulations, and enforcement efforts to prohibit certain alcohol marketing practices deemed to cause unfair competition ensued. In addition to TTB staff, officials from state regulatory agencies also talked about trade practice enforcement from their state's perspective. Chief Investigator Ted Mahoney of the Massachusetts Alcoholic Beverages Control Commission presented on recent cases in the state of Massachusetts, including lessons learned and suggested protocols.

Following the TTB Seminar, Director Skyler Genest organized a Division wide training involving all Vermont Liquor Investigators where the elements of the information garnered from the TTB seminar was disseminated. In addition, Director Genest arranged for Investigator Vanessa L. Hamedl of the U.S. Department of the Treasury, TTB to attend to answer or advise on any specific questions about federal law that arose. The culmination of this training resulted in the institution of an investigative protocol that would be adhered to going forward anytime that Vermont Division of Liquor Control received information about possible violations of state and/or federal law pertaining to trade practice. That protocol will be discussed in a detail in a later portion of this report.

### Policy/Regulation/Practices Review

As early as April of 2018, Commissioner Delaney and Director Skyler Genest engaged in discussion and evaluation of the Division's handling of trade practice issues. By August Commissioner Delaney had requested Director Genest to conduct an intensive study to address the requirements of H.924. Director Genest began with a survey of existing Law, Policy, Regulation, and Practice regarding all aspects of trade practice. Much of what was collated is spelled out in the sections above. One area of particular interest was what was found to be included in a document dated May 15<sup>th</sup>, 2012. This document titled LIQUOR CONTROL BOARD GUIDANCE BULLETIN NO. 1 signed by then commissioner Michael J. Hogan spelled out a litany of exceptions to permissible "things of value" as adopted by the Liquor Control Board at a duly noticed meeting on May 11<sup>th</sup>, 2012. The entirety of this document will be included with this report. Of note, this document set parameters and limits for inducements between Wholesale dealers and retail accounts. An example of this permissible exception and limitation would be Section 3 of that document titled "Hospitality/Routine Business Entertainment". That section, for example, in subsection A allowed for an Industry Member to purchase meals and beverages for a Retailer, but only when the Industry Member is in the company of that Retailer and only in an amount not to exceed \$250.00 per person per event. Another example, found in subsection C of section 3 allowed for an Industry Member to cover the costs of a Retailer's greens fees, cart rental and other fees to attend golfing events, but only when the Industry Member is in the company of that Retailer and only in a total amount not to exceed \$250.00 per person per event.

In general, the existence of this document and its exceptions and limitations, was generally not widely known to both the Wholesale Industry and to the Division of Liquor Control Investigative Staff. In general, nearly all of the caveats allowed by Liquor Control Board Guidance Bulletin No

1 constitute an inducement and would be, if accompanied by any exclusion in the marketplace, a federal trade practice violation.

This document was provided to Commissioner Delaney who found it prudent and practical to revisit this document with the newly merged Liquor and Lottery Board for review. That review took place at a duly noticed meeting on October 31<sup>st</sup>, 2018. At that meeting, the Liquor and Lottery Board made several amendments to the Liquor Control Board Guidance Bulletin No 1. In particular, nearly all the dollar amount limitations of Section 3 were reduced. That updated Liquor Control Board Guidance Bulletin No 1 as approved by the Liquor and Lottery Board on October 31<sup>st</sup>, 2018 will be included with this report.

### Webinar to Wholesale Tier

On October 11th, 2018, Director Skyler Genest hosted a webinar to explain Federal Trade Practice laws and surrounding issues. This webinar was widely distributed to members of the wholesale industry and later made available on the [Division of Liquor Control's website](#). To date, that webinar has been viewed by nearly 40 individuals. The hour-long webinar discussed each of the 4 federal trade practice violations and the applicable state law or regulation in Vermont that addressed them. Following that webinar, industry members were invited to participate in an anonymous survey gauging the effectiveness of the webinar and to garner input on the prevalence of trade practice violations occurring across the state.

### Survey Results Post Webinar

Following the October 11<sup>th</sup> webinar, an anonymous survey was provided to attendees from the Wholesale community. That survey asked the following questions on a 1-5 scale (Low- 1 - 2 - 3 - 4 - 5 – High):

1. Prior to this presentation, I would rate my understanding of Trade Practice Violations as:
2. After this presentation, my understanding of Trade Practice Violations is:
3. Prior to the Trade Practice Webinar, were you aware of Liquor Control Board Guidance Bulletin No. 1?
4. If you were aware of LCB Guidance Bulletin No. 1, how would you rate your opinion of the constraints to Inducements/Things of Value

That survey also asked the following questions on a 1-5 scale (1 = Never 2 = Almost Never 3 = Occasionally 4 = Frequently 5 = On a daily basis):

5. Based on what I have heard today, and seen in the past, I would say that TIED HOUSE violations occur in Vermont:

6. Based on what I have learned and seen in the past, I would say that EXCLUSIVE OUTLET violations occur in Vermont:
7. Based on what I have learned and seen in the past, I would say that COMMERCIAL BRIBERY violations occur in Vermont:
8. Based on what I have learned, and seen in the past, I would say that CONSIGNMENT SALE violations occur in Vermont:
9. In general, my overall view of Trade Practice Violations occurrence in Vermont is that it occurs:

That survey also asked the following questions on a 1-5 scale (1 = Completely Disagree 2 = Somewhat Disagree 3 = Neutral 4 = Somewhat Agree 5 = Completely Agree):

10. It is my opinion that Trade Practice issues are an important issue for DLC to address:

Of note, 100% respondents to Question 2 did not feel that the webinar made any impact in their understanding of Trade Practice violations. As mentioned previously, 100% of respondents to Question 3 had a low awareness of Liquor Control Board Guidance Bulletin No. 1. In contrast, respondents to question 4 rated their opinion of the constraints to inducements as spelled out by Liquor Control Board Guidance Bulletin No. 1 as moderate to high. For questions 5 – 7, none of the respondents believed that Tied House, Exclusive Outlet, or Commercial Bribery occurred at any regular interval the State. However, 100% of respondents to question 8 believed that Consignment Sales occurred frequently or on a daily basis. Similarly, 100% of respondents to question 10 somewhat or completely agreed that Trade Practice violations were an important issue for the Division of Liquor Control to address.

### Newly Established Policies/Protocols

Following the study into Trade Practice issues in Vermont, it has become the protocol of the Office of Compliance and Enforcement to accept all information and complaints regarding Trade Practice violations and to conduct a thorough investigation in to the matter. Depending on the case and the alleged activity, this can include the interviewing of witnesses, collection of evidence including invoices, sales receipts, and ledgers, the inspection of facilities and collection of sworn statements. Following a thorough investigation of Title 7 violations or violations of Regulations as imposed by the Liquor and Lottery board, a completed case file is to be forwarded to the U.S. Treasury office, TTB for consideration for Federal Trade Practice implications. Since the inception of this protocol, and following the education efforts of the wholesale tier, The Office of Compliance and Enforcement for the Division of Liquor Control is engaged in two such active investigations.

The Office of Compliance and Enforcement has re-evaluated our complaint intake procedures. During that evaluation, we determined it prudent to clarify verbiage on our state website indicating that our online complaint mechanism can be utilized anonymously to protect the identity of whistleblowers. OCE has established a protocol to investigate all allegations, either by a direct complainant or by an anonymous tip.

Lastly, given the new-found data post Wholesaler webinar, the Department completely retooled the manner in which Product Returns are processed. Given the self-reporting of the webinar survey, that Consignment Sales were a routine violation across the state, the OCE re-evaluated the manner in which Product Returns are “approved” and what was done with any information culled from that approval process. What was discovered, is that the approval process was completed manually by administrative staff in the Montpelier office. While masked as some form of approval, what was found is that the submitted approval request was handled less as a request for approval, and more a reporting mechanism. Additionally, through this process, it was discovered that significant administrative workhours were spend on this task, involving numerous email exchanges with each “request” and a filing system that was less than useful. In light of this information, the Department endeavored to streamline the process while making data available for analysis. Through contracted work with the Vermont Information Consortium (VIC) a module was added to the Liquor Control website. This module allowed for Wholesaler dealers to submit Product Return reports to the department, limiting the reason for the return to permissible consignment sale exceptions as outlined in Subpart D of 27 C.F.R Part 11. Those exceptions are limited to:

§ 11.32 Defective products.

§ 11.33 Error in products delivered.

§ 11.34 Products which may no longer be lawfully sold.

§ 11.35 Termination of business.

§ 11.36 Termination of franchise.

§ 11.37 Change in product.

§ 11.38 Discontinued products.

§ 11.39 Seasonal dealers.

Wholesalers are forced to select which exception they are agreeing is initiating the product return, and are required to attest that they are not purposely misrepresentation information and that doing so could subject the licensee to enforcement action. By virtue of the online submission process, a database is populated. This allows for detailed analytics to occur, leading to the easy detection of anomalies. For instance, total volume of product returns by distributor is possible. This will greatly increase the OCE's ability to police this activity.

### Suggested Legislative Action

At this time, the Department of Liquor and Lottery feels that an extensive study of all aspects of Trade Practice on both a state and federal level was conducted internally. This study led to changes in protocol, and an educational effort amongst the Wholesale Tier. Based on this outcome, the Department of Liquor and Lottery has no suggestions or proposals for legislative change that would impact the occurrence of Trade Practice violations across the state. OCE is committed to remaining vigilant for these occurrences and will investigate comprehensively when we receive information from any source that a violation may have occurred

# Appendix

## **LIQUOR CONTROL BOARD GUIDANCE BULLETIN NO. 1:**

### ***INTERPRETATION OF CURRENT "THINGS OF VALUE" REGULATIONS, INCLUDING WHOLESALE DEALER/CERTIFICATE OF APPROVAL HOLDER/VERMONT MANUFACTURER REGULATION NO. 15; GENERAL REGULATION NO. 19; AND ADVERTISING REGULATIONS NOS. 4 AND 5***

**1. Scope and Effect of Bulletin.** An Industry Member's offer and a Retailer's acceptance of a Thing of Value not expressly authorized or exempted by applicable State statute or regulation shall be prohibited and shall, at a minimum, constitute a violation of Wholesaler Dealer/Certificate of Approval Holder/Vermont Manufacturer Regulation No. 15 and/or a violation of General Regulation No. 19, and may result in the suspension or revocation of licenses issued by the Board or the imposition of administrative penalties up to \$2,500.00 per violation. Subject to any express authorization or exception provided in any applicable statute or regulation, the act of an Industry Member of furnishing, giving, renting, lending or selling any Thing of Value to a Retailer shall constitute a means to induce purchase of alcoholic beverages in violation of Wholesaler Dealer/Certificate of Approval Holder/Vermont Manufacturer Regulation No. 15.

**2. Definitions.** For the purposes of this Bulletin, the following definitions shall apply:

- A. Industry Member: Any wholesale dealer, a solicitors permit holder, certificate of approval holder, manufacturer or rectifier of malt, vinous or spirituous beverages or a spirits broker who represent a distillery or distributor of distilled spirits, and any employee, agent or affiliate thereof.
- B. Retailer: Any individual or entity holding a first class, third class, first and third class or second class liquor license, and any employee, agent or affiliate thereof.
- C. Board: Liquor Control Board.
- D. Thing of Value: any tangible or intangible item with monetary or material worth, including equipment, fixtures, signs, supplies, money, services, gifts, sponsorships, and advertising.

### **3. Hospitality/Routine Business Entertainment.**

- A. An Industry Member may purchase meals and beverages for a Retailer, but only when the Industry Member is in the company of that Retailer and only in an amount not to exceed \$250.00 per person per event.
- B. An Industry Member may purchase tickets for a Retailer to attend sporting events, concerts, plays or other entertainment events, but only when the Industry Member is in the company of that Retailer. Not to exceed \$250 per person per event.
- C. Industry Members may cover the costs of a Retailer's greens fees, cart rental and other fees to attend golfing events, but only when the Industry Member is in the company of that Retailer and only in a total amount not to exceed \$250.00 per person per event.

- D. On or before the 15<sup>th</sup> day of every July, October, January and April, Industry Members shall provide an electronic, itemized record of every Thing of Value described in subsections (A)-(C) above furnished, given, rented, lent or sold to any Retailer in the preceding three months, including at a minimum the following information: (i) the name of the Retailer; (ii) the date the Thing of Value was furnished, given, rented, lent or sold; (iii) a description of the Thing of Value; and (iv) the value of the Thing of Value. An Industry Member that fails to keep such records as required shall not be eligible to claim the exception provided in this Section.

**4. Advertising and Specialty Items.** In addition to those items listed in the Board's Advertising Regulations, Nos. 4 and 5, an Industry Member may furnish, give, rent, lend or sell the following specialty and advertising items to a Retailer without prior approval of the Board:

- A. Print branded promotional signs with or without the Retailer's name printed on the signs;
- B. Coasters;
- C. Outdoor table umbrellas;
- D. Sandwich boards/menu boards/chalk boards; and
- E. Wine buckets/wine list covers.

**5. Industry Members who Distribute Non-Alcoholic Beverages and Other Items.** Industry Members also distributing items containing no alcohol, including soda, energy drinks, candy, and food, are not subject to the prohibitions of Wholesaler Dealer/Certificate of Approval Holder/Vermont Manufacturer Regulation No. 15 when they are promoting only such items. Industry Members shall maintain a written, itemized record of every Thing of Value furnished, given, rented, lent or sold to any Retailer for the purpose of promoting such items, including at a minimum: (i) the name of the Retailer; (ii) the date the Thing of Value was furnished, given, rented, lent or sold; (iii) a description of the Thing of Value; (iv) the value of the Thing of Value; and (v) the item's) and specific promotion's) to which the Thing of Value related. Without a clear nexus to an item containing no alcohol, the act of an Industry Member of furnishing, giving, renting, lending or selling any Thing of Value to a Retailer with whom the Industry Member has an existing business relationship involving the sale of alcoholic beverages shall constitute a means to induce purchase of alcoholic beverages in violation of Wholesaler Dealer/Certificate of Approval Holder/Vermont Manufacturer Regulation No. 15. Industry Members shall keep the above-described records for inspection by a member of the Board, the Commissioner of Liquor Control, the Commissioner of Taxes and/or any of their assistants or Investigators for a period of no less than two (2) years. An Industry Member that fails to keep such records as required shall not be eligible to claim the exception provided in this Section.

**6. Draft Systems.** Industry Members shall report to the Board on or before the 15<sup>th</sup> day of every July, October, January and April on a separate invoice an itemized list of parts sold and the cost of labor to build, install and/or repair all malt, vinous or spirituous draft style dispensing systems

at Retailer establishments in the previous three months. The invoice shall include the fair market value paid by the Retailer for the cost of parts and labor.

**7. Gift Certificates.** Industry Members shall be allowed to purchase gift certificates from Retailers at their fair market value; however, a record will be maintained by the Industry Member including: (i) the type of gift certificate purchased; (ii) the value of that certificate; and (iii) the name of the individual to whom the certificate was given. Gift certificates shall not be given to Retailers. Industry Members shall keep these records for inspection by a member of the Board, the Commissioner of Liquor Control, the Commissioner of Taxes and/or any of their assistants or Investigators for a period of no less than two (2) years.

**8. New Retail Accounts.** Industry Members may visit with applicants for liquor licensure once the applicant has submitted their application to the locality in which they wish to operate. During such visits, the Industry Member may inform the applicant about the Industry Member's products and prices and may solicit orders from such applicants to be filled when the applicant has received their liquor license.

**9. Promotional beer and wine tastings on Retailer premises.** In accordance with 7 V.S.A. § 67(d)(1), each Industry Member shall provide at least five (5) days prior written notice to the Board identifying the names of the Retailers that will be visited on a particular day. If the same schedule is followed each week or month thereafter, the Industry Member may indicate that in their notice to the Board and shall not be required to file multiple forms with the Board. If a change in such regular schedule should occur, the Industry Member shall file a new written notice with the Board. Industry Members participating in promotional tastings shall have with them an invoice indicating the Retailers they have visited/will visit that day. The Industry Member shall ensure that such invoice provides a complete listing of products that have been/will be offered for sampling including: the brand, size and numbers of alcoholic beverages offered during the promotion. No alcoholic beverages, regardless of how much is left at the end of the sampling, shall be left on the premises of any Retailer.

**10. Incorporation of Federal Tied-House Exceptions.** The Board shall not consider an Industry Member's act of furnishing, giving, renting, lending or selling any Thing of Value to a Retailer as a means to induce purchase of alcoholic beverages in violation of Wholesaler Dealer/Certificate of Approval Holder/Vermont Manufacturer Regulation No. 15 to the extent such act is expressly authorized pursuant to 27 CFR §§ 6.81-6.102 as now in existence or hereafter amended, provided: (A) the Industry Member meets its applicable federal recordkeeping requirements; (B) the Industry Member's act is not otherwise prohibited by any other applicable State statute or regulation; and (C) the Industry Member complies with all restrictions and conditions imposed by any applicable State statute or regulation.

## **LIQUOR CONTROL BOARD GUIDANCE BULLETIN NO. 1:**

**Update Approved by the Liquor and Lottery Board 10/31/2018**

### ***INTERPRETATION "THINGS OF VALUE" REGULATIONS, INCLUDING WHOLESALE DEALER/CERTIFICATE OF APPROVAL HOLDER/VERMONT MANUFACTURER REGULATION NO. 15; GENERAL REGULATION NO. 19; AND ADVERTISING REGULATIONS NOS. 4 AND 5***

#### **1. Scope and Effect of Bulletin.**

An Industry Member's offer and a Retailer's acceptance of a Thing of Value not expressly authorized or exempted by applicable State statute or regulation shall be prohibited and shall, at a minimum, constitute a violation of Wholesaler Dealer/Certificate of Approval Holder/Vermont Manufacturer Regulation No. 15 and/or a violation of General Regulation No. 19, and may result in the suspension or revocation of licenses issued by the Board or the imposition of administrative penalties up to \$2,500.00 per violation. Subject to any express authorization or exception provided in any applicable statute or regulation, the act of an Industry Member of furnishing, giving, renting, lending or selling any Thing of Value to a Retailer shall constitute a means to induce purchase of alcoholic beverages in violation of Wholesaler Dealer/Certificate of Approval Holder/Vermont Manufacturer Regulation No. 15.

#### **2. Definitions.** For the purposes of this Bulletin, the following definitions shall apply:

- a. Industry Member: Any wholesale dealer, a solicitor permit holder, certificate of approval holder, manufacturer or rectifier of malt, vinous or spirituous beverages or a spirit's broker who represent a distillery or distributor of distilled spirits, and any employee, agent or affiliate thereof.
- b. Retailer: Any individual or entity holding a first class, third class, first and third class or second-class liquor license, and any employee, agent or affiliate thereof.
- c. Board: Liquor Control Board.
- d. Thing of Value: any tangible or intangible item with monetary or material worth, including equipment, fixtures, signs, supplies, money, services, gifts, sponsorships, and advertising.
- e. DLL employees: are any individuals employed by the Department of Liquor and Lottery.

### **3. Hospitality/Routine Business Entertainment.**

- a. An Industry Member may purchase meals and beverages for a Retailer, but only when the Industry Member is in the company of that Retailer and only in an amount not to exceed \$100.00 per person per event.
- b. An Industry Member may purchase tickets for a Retailer to attend sporting events, concerts, plays or other entertainment events, but only when the Industry Member is in the company of that Retailer. Not to exceed \$100.00 per person per event Industry Members may cover the costs of a Retailer's greens fees, cart rental and other fees to attend golfing events, but only when the Industry Member is in the company of that Retailer and only in a total amount not to exceed \$200.00 per person per event.
- c. On or before the 15<sup>th</sup> day of every July, October, January and April, Industry Members shall provide an electronic, itemized record of every Thing of Value described in subsections (A)-(C) above furnished, given, rented, lent or sold to any Retailer in the preceding three months, including at a minimum the following information: (i) the name of the Retailer; (ii) the date the Thing of Value was furnished, given, rented, lent or sold; (iii) a description of the Thing of Value; and (iv) the value of the Thing of Value. An Industry Member that fails to keep such records as required shall not be eligible to claim the exception provided in this Section.

### **4. Advertising and Specialty Items.**

In addition to those items listed in the Board's Advertising Regulations, Nos. 4 and 5, an Industry Member may furnish, give, rent, lend or sell the following specialty and advertising items to a Retailer without prior approval of the Board.

- a. Print branded promotional signs with or without the Retailer's name printed on the signs;
- b. Coasters
- c. Outdoor table umbrellas;
- d. Sandwich boards/menu boards/chalk boards; and
- e. Wine buckets/wine list covers.

### **5. Industry Members who Distribute Non-Alcoholic Beverages and Other Items.**

Industry Members also distributing items containing no alcohol, including soda, energy drinks, candy, and food, are not subject to the prohibitions of Wholesaler Dealer/Certificate of Approval Holder/Vermont Manufacturer Regulation No. 15 when they are promoting only such items. Industry Members shall maintain a written, itemized record of every Thing of Value furnished, given, rented, lent or sold to any Retailer for the purpose of promoting such items, including at a

minimum: (i) the name of the Retailer; (ii) the date the Thing of Value was furnished, given, rented, lent or sold; (iii) a description of the Thing of Value; (iv) the value of the Thing of Value; and (v) the item's any specific promotion's) to which the Thing of Value related. Without a clear nexus to an item containing no alcohol, the act of an Industry Member of furnishing, giving, renting, lending or selling any Thing of Value to a Retailer with whom the Industry Member has an existing business relationship involving the sale of alcoholic beverages shall constitute a means to induce purchase of alcoholic beverages in violation of Wholesaler Dealer/Certificate of Approval Holder/Vermont Manufacturer Regulation No. 15. Industry Members shall keep the above-described records for inspection by a member of the Board, the Commissioner of Liquor Control, the Commissioner of Taxes and/or any of their assistants or Investigators for a period of no less than two (2) years. An Industry Member that fails to keep such records as required shall not be eligible to claim the exception provided in this Section.

## **6. Draft Systems.**

Industry Members shall report to the Board on or before the 15<sup>th</sup> day of every July, October, January and April on a separate invoice an itemized list of parts sold and the cost of labor to build, install and/or repair all malt, vinous or spirituous draft style dispensing systems at Retailer establishments in the previous three months. The invoice shall include the fair market value paid by the Retailer for the cost of parts and labor.

## **7. New Retail Accounts.**

Industry Members may visit with applicants for liquor licensure once the applicant has submitted their application to the locality in which they wish to operate. During such visits, the Industry Member may inform the applicant about the Industry Member's products and prices and may solicit orders from such applicants to be filled when the applicant has received their liquor license.

## **8. Incorporation of Federal Tied-House Exceptions.**

The Board shall not consider an Industry Member's act of furnishing, giving, renting, lending or selling any Thing of Value to a Retailer as a means to induce purchase of alcoholic beverages in violation of Wholesaler Dealer/Certificate of Approval Holder/Vermont Manufacturer Regulation No. 15 to the extent such act is expressly authorized pursuant to 27 CFR §§ 6.81-6.102 as now in existence or hereafter amended, provided: (A) the Industry Member meets its applicable federal recordkeeping requirements; (B) the Industry Member's act is not

otherwise prohibited by any other applicable State statute or regulation; and (C) the Industry Member complies with all restrictions and conditions imposed by any applicable State statute or regulation.