

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-3764/P1dn  
ARG:cjs:jf

October 17, 2005

ATTN: Brian Pleva

Please review the attached draft carefully to ensure that it is consistent with your intent. To accomplish the purposes of the draft, I have had to make certain assumptions and interpretations with respect to the drafting instructions, which may not be consistent with your expectations.

Many of the major drafting decisions have already been discussed by e-mail or telephone. However, I would like to address some additional issues.

The drafting instructions provided refer in item (1) (e) to "the retail premise or location from which the fermented malt beverages will be sold at retail." I am uncertain what was intended by this language. Under the definition of "premises" in s. 125.02 (14m), any retail sales made by a licensee or permittee are made from the "premises," so reference to a "location" other than the premises if a retail license has been issued would be unnecessary. However, I thought this additional language might have been intended to cover the few exceptions where retail beer sales may be made without a license or permit, in particular on a campus or under an exception identified in s. 125.06 or, as I interpret the provision, under s. 125.31 (1) (b) (I believe that sales made at the state fair park can be made without any license or permit, while sales made on county fairgrounds are made under one temporary Class "B" license issued to the fair association that licenses the entire fairgrounds for all vendors.). Accordingly, I have defined "retailer" in created s. 125.34 (1) (e) of this draft to include those exceptions where such retail sales can be made without a license or permit, and I have defined "retail premises" to include the location from which such sales are made. Please advise if this is not consistent with your intent.

Also with respect to the definition of "retailer," this definition does not include sales made under authority of s. 125.06 (5) because the delivery could not be made to the place of sale as the sale must be while the railroad car or aircraft is "in transit." (A Class "B" license can be issued for sales in a railroad car not in transit.) I also note that I did not use this broader definition of "retailer" in created s. 125.34 (3) (b); instead, the duties under that paragraph run only to a person holding a retail license or permit. In s. 125.34 (4) (a), this definition of "retailer" is used, although I wondered from the instructions if you wanted s. 125.34 (4) (a) to identify any alcohol beverages retailer (including intoxicating liquor retailers as well). (I believe it would be unnecessary to

refer to intoxicating liquor retailers in this draft. See the second to last paragraph of this drafter’s note.)

With respect to created s. 125.34 (4), which is based upon drafting instruction items (1) (b) to (d), is s. 125.34 (4) (b) necessary? It seems that a violation of s. 125.34 (4) (b) would always be a violation of s. 125.34 (4) (a) as well, and while a wholesaler should know its own distribution territory, there may be uncertainty as to what rights have been granted in another territory. If you want s. 125.34 (4) (b) retained in the bill, perhaps the “exception” provision now appearing in s. 125.34 (4) (a) would fit better in s. 125.34 (4) (b). Also, the brewer’s ability to “give consent” under created s. 125.34 (4) (a) seems to be an exception from the prohibition on the brewer under created s. 125.34 (3) (a) granting distribution rights to more than one wholesaler in a territory, and therefor I have added an exception in created s. 125.34 (3) (a).

Item (1) (e) of the drafting instructions, appearing in the draft as created s. 125.34 (5), contains the phrase “unless otherwise permitted pursuant to s. 125.31.” I cannot decipher what part of s. 125.31 is believed to be pertinent here. I have interpreted the intent to be allowing a brewer with retail licenses for brewery premises to transfer product between these retail premises, and have drafted created s. 125.34 (5) accordingly. Please advise if this is not consistent with your intent and, if so, please advise as to what part of s. 125.31 you believe is pertinent here. (See also discussion of brewer ownership interests below.)

Regarding item (2) (d) of the drafting instructions, as discussed by e-mail, this item would apply to shipments into the state to a brewer’s wholesale premises, and I don’t see anything in the draft that is inconsistent with a brewer doing so. I therefore wonder about the need for such an “exception” to part (1) of the instructions. I have addressed this issue in the attached draft by adding the language “including a brewer that holds an out-of-state shipper’s permit” to created s. 125.34 (6) (a) in the attached draft.

As discussed by e-mail, various provisions of the instructions have been modified to recognize the restriction under current law that an out-of-state shipper may only sell to an in-state wholesaler. Also, the attached draft omits in several places references to out-of-state shippers that were included in the drafting instructions on the basis that out-of-state shippers’ premises are never located in this state. See, for example, item (2) (c) of the drafting instructions.

Item (1) (f) of the drafting instructions leads to complications in the draft. In simplified form, this provision requires a brewer to sell only to a wholesaler, which may be the brewer itself. Under current law, brewers may also sell at retail, so the issue of retail sales must be dealt with as an exception to the statement that brewers may sell only to wholesalers. Current law is rather unclear in some respects as to ownership restrictions on brewers. As I interpret current law, a brewer can hold a wholesaler’s license *or* retail licenses (Class “A” and Class “B” with limitations) but generally cannot hold *both* a wholesaler’s license and a retail license except for a brewer that holds a wholesaler’s license and a Class “B” license. See ss. 125.29 (4) and 125.31 (1) and (3). In my view, the statutes are ambiguous as to whether a brewer can hold a wholesaler’s license and Class “A” licenses all of which were issued before May 5, 1994; I am unaware of whether the absence of a cross-reference to s. 125.28 (2) in s. 125.31 (3) is

the result of a drafting oversight or was done intentionally. (As discussed in my drafter's note to LRB-3112/P1, s. 125.31 (3) contains more glaring errors than the mere omission of a cross-reference.) In addition, I believe the statutes are ambiguous as to whether a brewer that is a wholesaler can hold one or two Class "B" licenses under s. 125.31 (1) (a) 2. Compare s. 125.29 (4) with s. 125.31 (1) (a) 2. Nonetheless, while the breadth of the exceptions to brewer ownership restrictions may be unclear, I believe the general principle is clear that a brewer is typically not allowed to maintain ownership interests whereby it could distribute to itself as the wholesaler and then distribute to itself as the retailer. However, it is possible that, under s. 125.31 (1) (a) 2., a brewer could distribute to itself as the wholesaler and then distribute to itself as the retailer for a location on brewery premises or off brewery premises. (It is also possible that a *wholesaler* that is not a brewer and that holds licenses issued before May 5, 1994 could distribute to itself.) As discussed by e-mail, I have struggled in trying to decipher the intent with respect to brewers that are also wholesalers and retailers and in trying to assess how part (1) and part (2) of the drafting instructions were intended to interact with each other. A brewer may operate Class "A" and Class "B" premises on and off the brewery premises, and I have tried to determine how the bill is intended to affect distribution by a brewer where the brewer may have retail interests. I have interpreted the drafting instructions to create an exception to the requirements of the bill for a brewer that is also a wholesaler and holds a retail Class "B" license only when the Class "B" licensed premises are on the brewery premises. If the Class "B" licensed premises are off the brewery premises as allowed under s. 125.31 (1) (a) 2., or the retail sale is made off the brewery premises under circumstances where no retail license is required, the brewer must sell to itself as a wholesaler, unload the product on its wholesale premises, have a written agreement with itself (which would probably be legally void, as there would not be two parties to form an agreement) identifying an exclusive sales territory, and otherwise satisfy the requirements under the bill. Is this consistent with your intent? In addition, if the brewer does not hold a wholesaler's license and holds a Class "A" license on the brewery premises, the brewer may distribute directly to the Class "A" licensed premises on the brewery premises and is also not subject to the requirements under the bill. Is this consistent with your intent? Finally, the bill does not include any provision clarifying distribution requirements in the limited circumstances where a wholesaler can distribute to its own retail premises. Is this consistent with your intent?

The attached draft treats s. 125.31 (1) (a) 2. but does not treat s. 125.31 (1) (a) 3. or 4. because, under subd. 3., beer must be purchased from an independent wholesaler and, under subd. 4., the brewer's products cannot be sold on the retail premises.

The attached draft repeals s. 125.33 (11), which requires an agreement between a wholesaler and a brewer, brewer's agent, or out-of-state shipper under specified circumstances. Because of the considerable overlap between this provision and created s. 125.34 (3) (a) in the attached draft, I believe that s. 125.33 (11) should be repealed (along with s. 125.12 (2) (ag) 7.). Is this consistent with your intent?

The revised instructions provided on October 12 omitted some items that I had drafted based upon the original instructions. Based upon these revised instructions, I have pulled from the draft the following: A definition of "brand extension," which read as

follows: “Brand extension’ means any brand that incorporates all or a substantial part of the unique features of a preexisting brand of the same brewer or out-of-state shipper and that significantly benefits from the goodwill associated with that preexisting brand.” (I have retained in the draft the definition of “brand,” which was also omitted from the revised instructions, because this definition is necessary to the draft. The definition of brand in the attached draft varies slightly from the definition of brand in s. 125.33 (10) (a) 1.) The following language was removed from the end of created s. 125.34 (3) (a): “If a brewer or out-of-state shipper sells more than one brand of fermented malt beverages, the agreement under this paragraph may provide for distribution rights to the wholesaler of all or less than all of the brewer’s or out-of-state shipper’s brands as long as the provisions of this paragraph are satisfied for each brand for which distribution rights are granted. After the effective date of this paragraph .... [revisor inserts date], a brewer or out-of-state shipper may enter into an agreement under this paragraph with respect to a brand extension only if the agreement grants distribution rights for the brand extension to the wholesaler that is granted distribution rights for the preexisting brand in the same designated sales territory.”

The attached draft does not include the severability provision in the drafting instructions. Section 990.001 (11) provides a global severability provision applicable to all statutes, so inserting another severability provision is unnecessary and contrary to our drafting practices.

As discussed, the draft includes initial applicability and effective date provisions so that existing wholesalers have six months to come into compliance with the various requirements of the bill, including the requirements of separate premises and written distribution agreements with exclusive territories.

This draft does not attempt to correct the problem with s. 125.31 (3) that is discussed in the drafter’s note to LRB-3112/P1 and corrected in the text of LRB-3112/P1.

I am uncertain how ownership interest restrictions under current law are interpreted with respect to out-of-state shippers. Section 125.30 does not contain any specific ownership interest restrictions on out-of-state shippers. However, out-of-state shippers wear two hats; while they are out-of-state shippers for permit purposes under s. 125.30, they also are typically either brewers or wholesalers operating in another state. If an out-of-state shipper may not hold a retail license, then the text of created s. 125.34 (6) (b) in the attached draft should be modified.

I note that this bill mandates written agreements creating exclusive wholesale sales territories. The impact of these provisions in the bill will intertwine with current s. 125.33 (10), relating to termination protections for such distribution rights.

I also note that the attached draft does not affect a brewer’s ability to wholesale wine under ss. 125.54 and 125.69 (1) (c).

Finally, in interpreting the provisions of the attached draft, I note a few pertinent provisions of current law. Current law prohibits a person from selling beer at wholesale unless the person has a wholesaler’s license, see s. 125.04 (1), and prohibits retailers

from purchasing beer from any person other than licensed wholesalers. See s. 125.33 (9). The term “sell” is defined in a way that covers both direct and indirect sales, see s. 125.02 (20), and “person” is defined to include natural persons and business entities. See s. 125.02 (14). Current law also requires brewers, wholesalers, and retailers to have separate licenses or permits for each location from which sales or deliveries are made, see s. 125.04 (9), and prohibits a person from possessing on retail or wholesale premises alcohol beverages not authorized for sale on the premises. See s. 125.32 (6).

Please let me know if you would like any changes made to the attached draft or if you have any questions. If the attached draft meets with your approval, let me know and I will convert it to an introducible “/1” draft.

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