

1 **HOUSE OF REPRESENTATIVES - FLOOR VERSION**

2 STATE OF OKLAHOMA

3 1st Session of the 55th Legislature (2015)

4 COMMITTEE SUBSTITUTE
5 FOR
6 HOUSE BILL NO. 1967

By: O'Donnell

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8 COMMITTEE SUBSTITUTE

9 An Act relating to low-point beer; amending 37 O.S.
10 2011, Sections 163.18B and 163.18E, which relate to
11 duties of manufacturer and termination of agreement
12 with wholesaler; defining terms; requiring certain
13 agreements to have certain provisions for certain
14 brand extensions; allowing retention of certain
15 rights to distribute; requiring certain assignments
16 in certain situations; providing for compensation to
17 certain sellers under certain condition; prohibiting
18 acceptance of payments for agreements relating to
19 territorial rights; establishing calculation of such
20 compensation; modifying beer production limit for
21 certain manufacturer exemption; modifying and
22 clarifying references; prohibiting the withholding of
23 certain written approval; modifying allowed instances
24 when certain agreement terminations are permitted;
 and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 37 O.S. 2011, Section 163.18B, is
amended to read as follows:

Section 163.18B A. For purposes of this section:

1 1. "Brand" means any word, name, group of letters, symbol, or
2 combination thereof, that is adopted and used by a licensed
3 manufacturer to identify a specific beer or low-point beer product,
4 and to distinguish that product from another beer or low-point beer
5 product;

6 2. "Brand extension" means any brand that:

7 a. incorporates all or a substantial part of the unique
8 features of a preexisting brand of the same licensed
9 manufacturer, and

10 b. relies to a significant extent on the goodwill
11 associated with that preexisting brand; and

12 3. "Beer" as used in this section means beer as defined in
13 paragraph 5 or 15 of Section 506 of this title, which has not
14 previously been sold in a licensed wholesaler's exclusive territory.

15 B. Every manufacturer of low-point beer licensed by the
16 Oklahoma Tax Commission authorizing the licensee to sell its low-
17 point beer in this state shall:

18 1. Enter into an agreement with a licensed wholesaler to sell
19 the designated brands of the licensed manufacturer which designates
20 the sales territory of that licensed wholesaler and the designated
21 brands to be sold by the licensed wholesaler. All such agreements
22 shall specifically authorize the sale of the designated brands by a
23 licensed wholesaler within that sales territory. All such
24 agreements shall further provide that the licensed manufacturer who

1 assigns a brand extension of a low-point beer must assign the low-
2 point beer brand extension to the licensed wholesaler to whom the
3 licensed manufacturer granted the exclusive sales territory to the
4 brand from which the brand extension resulted;

5 2. Sell its registered and approved designated brands only to a
6 licensed wholesaler with whom that licensed manufacturer has an
7 agreement designating the sales territory of the licensed wholesaler
8 and the designated brands to be sold by the licensed wholesaler;

9 3. Authorize only one licensed wholesaler for each designated
10 sales territory. Such licensed wholesaler shall be the only
11 licensed wholesaler for the designated brands of the authorizing
12 licensed manufacturer within that designated sales territory; and

13 4. Designate who is responsible for the distribution of its
14 designated brands.

15 C. Any and all licensed wholesalers possessing the rights to
16 distribute a low-point beer brand in a specific territory prior to
17 the introduction of that low-point beer's correlating beer brand in
18 that specific territory shall retain the right to distribute the
19 low-point beer.

20 D. Should a change in law in this state concerning the
21 distribution and sale of low-point beer or the distribution and sale
22 of beer materially impair the distribution rights of a licensed low-
23 point beer wholesaler or result in a material reduction in sales or
24 the elimination of a low-point beer in such licensed wholesaler's

1 specific territory, a manufacturer of beer shall assign the
2 exclusive right to distribute a beer brand to the low-point
3 distributor who has been assigned the exclusive distribution rights
4 to the beer brand's correlating low-point beer. If said beer brand
5 was being sold by a nonresident seller licensed under Section 524 of
6 this title at the time of impairment, reduction in sales, or
7 elimination of the low-point beer, the licensed wholesaler must
8 compensate the nonresident seller for the loss of the beer brand.
9 Compensation for the purposes of this provision shall be the fair
10 market value of the existing nonresident seller's business with
11 respect to such beer within that specific territory. Fair market
12 value shall be determined as set forth in paragraphs 3 and 4 of
13 subsection D of Section 163.18E of this title.

14 E. No manufacturer shall accept payment in exchange for an
15 agreement setting forth territorial rights. Nothing in this section
16 shall interfere with the rights of a manufacturer to enter into
17 contractual agreements with a wholesaler, and accept payment from a
18 wholesaler arising from such agreements, that could be construed as
19 governing ordinary business transactions, including, but not limited
20 to, agreements concerning allowances, rebates, discounts, refunds,
21 services, capacity, product orders, litigation settlements,
22 advertising funds, promotional funds, or sports marketing funds.

23 SECTION 2. AMENDATORY 37 O.S. 2011, Section 163.18E, is
24 amended to read as follows:

1 Section 163.18E A. Nothing in this section shall apply to a
2 manufacturer that produces less than ~~three hundred thousand~~
3 ~~(300,000) gallons~~ ten thousand (10,000) barrels of low-point beer
4 per calendar year.

5 B. 1. Except as provided in subsections C, D and ~~E~~ of this
6 section, no manufacturer shall terminate an agreement with any
7 wholesaler unless all of the following occur:

- 8 a. the manufacturer establishes good cause for such
9 termination,
- 10 b. the wholesaler receives written notification by
11 certified mail, return receipt requested, from the
12 manufacturer of the alleged noncompliance and is
13 afforded no less than sixty (60) days in which to cure
14 such noncompliance,
- 15 c. the wholesaler fails to cure such noncompliance within
16 the allotted cure period, and
- 17 d. the manufacturer provides written notice by certified
18 mail, return receipt requested, to the wholesaler of
19 such continued noncompliance. The notification shall
20 contain a statement of the intention of the
21 manufacturer to terminate or not renew the agreement,
22 the reasons for termination or nonrenewal and the date
23 the termination or nonrenewal shall take effect.

1 2. If a wholesaler cures an alleged noncompliance within the
2 cure period provided in subparagraph b of paragraph 1 of this
3 subsection, any notice of termination from a manufacturer to a
4 wholesaler shall be null and void.

5 C. A manufacturer may immediately terminate an agreement with a
6 wholesaler, effective upon furnishing written notification to the
7 wholesaler by certified mail, return receipt requested, for any of
8 the following reasons:

9 1. The wholesaler's failure to pay any account when due and
10 upon written demand by the manufacturer for such payment, in
11 accordance with agreed payment terms;

12 2. The assignment or attempted assignment by the wholesaler for
13 the benefit of creditors, the institution of proceedings in
14 bankruptcy by or against the wholesaler, the dissolution or
15 liquidation of the wholesaler or the insolvency of the wholesaler;

16 3. The revocation or suspension of, or the failure to renew for
17 a period of more than fourteen (14) days, a wholesaler's state,
18 local or federal license or permit to sell low-point beer in this
19 state;

20 4. Failure of a wholesaler to sell his or her ownership
21 interest in the distribution rights to the manufacturer's low-point
22 beer within one hundred twenty (120) days after such a wholesaler
23 has been convicted of a felony that, in the manufacturer's sole
24

1 judgment, adversely affects the goodwill of the wholesaler or
2 manufacturer;

3 5. A wholesaler has been convicted of, found guilty of or pled
4 guilty or nolo contendere to, a charge of violating a law or
5 regulation of the United States or of this state if it materially
6 and adversely affects the ability of the wholesaler or manufacturer
7 to continue to sell its low-point beer in this state;

8 6. Any attempted transfer of ownership of the wholesaler, stock
9 of the wholesaler or stock of any parent corporation of the
10 wholesaler, or any change in the beneficial ownership or control of
11 any entity, without obtaining the prior written approval of the
12 manufacturer, which approval shall not be unreasonably withheld,
13 except as may otherwise be permitted pursuant to a written agreement
14 between the parties;

15 7. Fraudulent conduct in the wholesaler's dealings with the
16 manufacturer or its low-point beer, including the intentional sale
17 of low-point beer outside the manufacturer's established quality
18 standards;

19 8. The wholesaler ceases to conduct business for five (5)
20 consecutive business days, unless conducting the business is
21 prevented or rendered impractical due to events beyond the
22 wholesaler's reasonable control as a result of an act of God, an
23 insured casualty, war, or a condition of national, state or local
24 emergency; or

1 9. Any sale of low-point beer, directly or indirectly, to
2 customers located outside the territory assigned to the wholesaler
3 by the manufacturer unless expressly authorized by the manufacturer.

4 ~~D. The manufacturer shall have the right to terminate an~~
5 ~~agreement with a wholesaler at any time by giving the wholesaler at~~
6 ~~least ninety (90) days' written notice by certified mail, return~~
7 ~~receipt requested; provided, that the manufacturer shall give a~~
8 ~~similar notice to all other wholesalers in all other states who have~~
9 ~~entered into the same distribution agreement with the manufacturer.~~

10 ~~E.~~ If a particular brand of low-point beer is transferred by
11 purchase or otherwise from a manufacturer to a successor
12 manufacturer, the following shall occur:

13 1. The successor manufacturer shall become obligated to all of
14 the terms and conditions of the agreement in effect on the date of
15 succession. This subsection applies regardless of the character or
16 form of the succession. A successor manufacturer has the right to
17 contractually require its wholesaler to comply with operational
18 standards of performance, if the standards are uniformly established
19 for all of the successor manufacturer's wholesalers. A successor
20 manufacturer may, upon written notice, terminate its agreement, in
21 whole or in part, with a wholesaler of the manufacturer it
22 succeeded, for the purpose of transferring the distribution rights
23 in the wholesaler's territory to a new wholesaler, provided that the
24 successor wholesaler first pays to the existing wholesaler the fair

1 market value of the existing wholesaler's business with respect to
2 the terminated brand or brands;

3 2. If the successor manufacturer decides to terminate its
4 agreement with the existing wholesaler for purposes of transfer, the
5 successor manufacturer shall notify the existing wholesaler in
6 writing of the successor manufacturer's intent not to appoint the
7 existing wholesaler for all or part of the existing wholesaler's
8 territory for the low-point beer. The successor manufacturer shall
9 mail the notice of termination by certified mail, return receipt
10 requested, to the existing wholesaler. The successor manufacturer
11 shall include in the notice the names, addresses and telephone
12 numbers of the successor wholesaler or wholesalers;

13 3. a. The successor wholesaler shall negotiate with the
14 existing wholesaler to determine the fair market value
15 of the existing wholesaler's right to distribute the
16 low-point beer in the existing wholesaler's territory.

17 The successor wholesaler and the existing wholesaler
18 shall negotiate the fair market value in good faith.

19 b. The existing wholesaler shall continue to distribute
20 the low-point beer in good faith until payment of the
21 compensation agreed to under subparagraph a of this
22 paragraph, or awarded under paragraph 4 of this
23 subsection, is received; and

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- 1 4. a. If the successor wholesaler and the existing
2 wholesaler fail to reach a written agreement on the
3 fair market value within thirty (30) days after the
4 existing wholesaler receives the notice required
5 pursuant to paragraph 2 of this subsection, the
6 successor wholesaler or the existing wholesaler shall
7 send a written notice to the other party requesting
8 arbitration pursuant to the Uniform Arbitration Act,
9 Part 2 of Article 22 of Title 13, C.R.S. Arbitration
10 shall be held for the purpose of determining the fair
11 market value of the existing wholesaler's right to
12 distribute the low-point beer in the existing
13 wholesaler's territory.
- 14 b. Notice of intent to arbitrate shall be sent, as
15 provided in subparagraph a of this paragraph, not
16 later than forty (40) days after the existing
17 wholesaler receives the notice required pursuant to
18 paragraph 2 of this subsection. The arbitration
19 proceeding shall conclude not later than sixty (60)
20 days after the date the notice of intent to arbitrate
21 is mailed to a party, unless this time is extended by
22 mutual agreement of the parties and the arbitrator.
- 23 c. Any arbitration held pursuant to this subsection shall
24 be conducted in a city within this state that:

1 (1) is closest to the existing wholesaler, and
2 (2) has a population of more than twenty thousand
3 (20,000) people.

4 d. Any arbitration held pursuant to this paragraph shall
5 be conducted before one impartial arbitrator to be
6 selected by the American Arbitration Association or
7 its successor. The arbitration shall be conducted in
8 accordance with the rules and procedures of the
9 Uniform Arbitration Act, Part 2 of Article 22 of Title
10 13, C.R.S.

11 e. An arbitrator's award in any arbitration held pursuant
12 to this paragraph shall be monetary only and shall not
13 enjoin or compel conduct. Any arbitration held
14 pursuant to this paragraph shall be in lieu of all
15 other remedies and procedures.

16 f. The cost of the arbitrator and any other direct costs
17 of an arbitration held pursuant to this paragraph
18 shall be equally divided by the parties engaged in the
19 arbitration. All other costs shall be paid by the
20 party incurring them.

21 g. The arbitrator in any arbitration held pursuant to
22 this paragraph shall render a written decision not
23 later than thirty (30) days after the conclusion of
24 the arbitration, unless this time is extended by

1 mutual agreement of the parties and the arbitrator.
2 The decision of the arbitrator is final and binding on
3 the parties. The arbitrator's award may be enforced
4 by commencing a civil action in any court of competent
5 jurisdiction. Under no circumstances may the parties
6 appeal the decision of the arbitrator.

7 h. An existing wholesaler or successor wholesaler who
8 fails to participate in the arbitration hearings in
9 any arbitration held pursuant to this paragraph waives
10 all rights the existing wholesaler or successor
11 wholesaler would have had in the arbitration and is
12 considered to have consented to the determination of
13 the arbitrator.

14 i. If the existing wholesaler does not receive payment
15 from the successor wholesaler of the settlement or
16 arbitration award required under paragraph 2 or 3 of
17 this subsection within thirty (30) days after the date
18 of the settlement or arbitration award:

19 (1) the existing wholesaler shall remain the
20 wholesaler of the low-point beer in the existing
21 wholesaler's territory to at least the same
22 extent that the existing wholesaler distributed
23 the low-point beer immediately before the
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1 successor manufacturer acquired rights to the
2 low-point beer, and

3 (2) the existing wholesaler is not entitled to the
4 settlement or arbitration award.

5 ~~F.~~ E. 1. Any wholesaler or manufacturer who is aggrieved by a
6 violation of any provision of ~~subsections~~ subsection B and ~~D~~ of this
7 section shall be entitled to recovery of damages caused by the
8 violation. Except for a dispute arising under subsection ~~E~~ D of
9 this section, damages shall be sought in a civil action in any court
10 of competent jurisdiction.

11 2. Any dispute arising under ~~subsections~~ subsection B and ~~D~~ of
12 this section may also be settled by such dispute resolution
13 procedures as may be provided by a written agreement between the
14 parties.

15 ~~G.~~ F. Nothing in this section shall be construed to limit or
16 prohibit good-faith settlements voluntarily entered into by the
17 parties.

18 ~~H.~~ G. Nothing in this section shall be construed to give an
19 existing wholesaler or a successor wholesaler any right to
20 compensation if an agreement with the existing wholesaler or
21 successor wholesaler is terminated by a successor manufacturer
22 pursuant to subsections ~~B~~ C and ~~D~~ of this section.

23 ~~I.~~ H. No manufacturer shall require any wholesaler to waive
24 compliance with any provision of this section.

1 ~~¶~~ I. This section shall apply to any agreement entered into,
2 and any renewals, extensions, amendments, or conduct constituting a
3 modification of an agreement, by a manufacturer on or after the
4 effective date of this act.

5 SECTION 3. This act shall become effective November 1, 2015.

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7 COMMITTEE REPORT BY: COMMITTEE ON ALCOHOL, TOBACCO, AND CONTROLLED
8 SUBSTANCES, dated 02/25/2015 - DO PASS, As Amended.

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