

WI - TLW_WBDA_WWSI_ Drafting Instructions Cross Tier and Alcohol Beverage Office

THREE-TIER, CROSS-TIER RESTRICTIONS

In late 2015, a disagreement developed among industry, municipalities and the Department of Revenue (“DOR”) on the application of the cross-tier restrictions within Wisconsin’s alcohol beverage law.

- Retailers, alcohol beverage wholesalers and other industry members have consistently argued that state law is clear in establishing a single three-tier structure: producers who sell to wholesalers who sell to retailers. Any cross-tier ownership interests within this three-tier structure are prohibited without a specific statutory exception.
- In contrast, some wineries and municipalities have recently advocated for interpreting state law to allow for two separate and parallel three-tier structures: one for fermented malt beverages and one for intoxicating liquor.

In March 2017, the Department of Justice issued an informal advisory opinion to DOR endorsing two separate and parallel three-tier systems. This “six-tier” interpretation of state law upends longstanding industry practice and will allow cross-tier ownership interests to pervade the industry. To reiterate the legislature’s support for a three-tier structure and its related cross-tier interest restrictions, legislation should be enacted consistent with the proposed language below. This proposal would not modify existing statutory exceptions which allow for certain existing specified cross-tier interests and business practices.

Proposed statutory language for three-tier clarification:

SECTION 1. AMEND WIS. STAT. § 125.01

Sec. 125.01 is amended to read:

125.01 Legislative intent. This chapter shall be construed as an enactment of the legislature’s support for the 3-tier system for alcohol beverages production, distribution, and sale that, through uniform statewide regulation, provides this state regulatory authority over the production, storage, distribution, transportation, sale, and consumption of alcohol beverages by and to its citizens, for the benefit of the public health and welfare and this state’s economic stability. Without the 3-tier system, the effective statewide regulation and collection of state taxes on alcohol beverages sales would be seriously jeopardized. It is further the intent of the legislature that without a specific statutory exception, all sales of alcohol beverages shall occur through the 3-tier system, from manufacturers to wholesalers holding a permit to retailers to consumers. As an enactment of the legislature’s support for the 3-tier system, this chapter shall prohibit permittees or licensees of the different levels of the 3-tier system from holding an ownership interest in a tier other than their own, unless there is a specific statutory exception permitting cross-tier ownership. This prohibition on cross-tier ownership shall be construed to apply to all manufacturers, wholesalers and retailers of alcohol beverages regardless of subchapter and type of alcohol beverage product sold. Face-to-face retail sales at licensed premises directly advance the state’s interest in preventing alcohol sales to underage or intoxicated persons and the state’s interest in efficient and effective collection of tax.

NOTES: The added language reiterates that chapter 125's interest restrictions apply across and between subchapters II (fermented malt beverages) and III (intoxicating liquor), therefore making clear that there is a single three-tier system of production, distribution and retail sale of alcohol beverages.

SECTION 2. CREATE WIS. STAT. § 125.24

Sec. 125.24 is created to read:

125.24 Construction of three-tier. The provisions of this subchapter which prohibit permittees or licensees of the different levels of the 3-tier system from holding an ownership interest in a tier other than their own shall be construed to apply to all manufacturers, rectifiers, brewers, brewpubs, out-of-state permittees, wholesalers and retailers of alcohol beverages, regardless of subchapter and type of alcohol beverage product sold. Unless there is a specific statutory exception permitting it, cross-tier ownership interests are strictly prohibited.

NOTES: This new section, at the beginning of subchapter II, reiterates that chapter 125's interest restrictions apply across and between subchapters II (fermented malt beverages) and III (intoxicating liquor), therefore making clear that there is a single three-tier system of production, distribution, and retail sale of alcohol beverages.

SECTION 3. CREATE WIS. STAT. § 125.50

Sec. 125.50 is created to read:

125.50 Construction of three-tier. The provisions of this subchapter which prohibit permittees or licensees of the different levels of the 3-tier system from holding an ownership interest in a tier other than their own shall be construed to apply to all manufacturers, rectifiers, brewers, brewpubs, out-of-state permittees, wholesalers and retailers of alcohol beverages, regardless of subchapter and type of alcohol beverage product sold. Unless there is a specific statutory exception permitting it, cross-tier ownership interests are strictly prohibited.

NOTES: This new section, at the beginning of subchapter III, reiterates that chapter 125's interest restrictions apply across and between subchapters II (fermented malt beverages) and III (intoxicating liquor), therefore making clear that there is a single three-tier system of production, distribution, and retail sale of alcohol beverages.

OFFICE OF ALCOHOL BEVERAGES ENFORCEMENT

Wisconsin's alcohol beverage regulatory structure is referred to as a "license" jurisdiction. The majority of jurisdictions in the United States – 33 states and the District of Columbia – regulate the alcohol beverage industry under a license model.¹ This approach allows private business to conduct wholesale and retail sales of distilled spirits, wine, and beer – subject to industry oversight to promote health, welfare, safety, and competition.

Most license states have administrative commissions, agencies or divisions dedicated to oversight of the alcohol beverages industry. These entities have staff familiar with the industry, and they play a more significant role in education – for market participants, government actors with jurisdiction over the industry, law enforcement, and the general public. States without dedicated agencies typically have dedicated alcohol divisions or units structured within other larger, government departments. Wisconsin currently has neither. Instead, state-level alcohol beverages regulation is administered by Department of Revenue ("DOR") staff who have responsibilities spread across multiple industry areas.

Through legislation, Wisconsin should establish a new, industry-dedicated, Office of Alcohol Beverages Enforcement, headed by a Director who is appointed by the governor. The Office would continue to be located in and affiliated with DOR, though it would exercise its regulatory jurisdiction independently. It could be funded through existing alcohol beverage permit and administrative fees.

Structure

The basic framework can be summarized simply:

- Create an Office of Alcohol Beverages Enforcement dedicated exclusively to alcohol beverages regulation, enforcement and education. The office and its staff would be located within DOR and affiliated with DOR for budgetary and administrative purposes.
- The office would be headed by a Director who would be appointed by the governor, subject to senate confirmation, for a 6-year term. The Director's 6-year term appointment would be fixed, but he or she may be re-appointed for subsequent terms, with each re-appointment subject to senate confirmation.
- The Director would be a full-time, salaried employee, appointed outside the classified service. The Director would have the authority to appoint and supervise staff necessary to carry out permitting, audit, education, and enforcement duties. These staff would be appointed within the classified service. Staff would include a legal counsel and dedicated field agents who would report to the Director.

¹ The alternative structure is "control" jurisdiction. "Control" states provide government agencies with state monopoly rights to conduct the wholesale distribution of liquor (and, in some jurisdictions, wine and beer). Some control states also engage in package store retail sales.

- The Director and alcohol beverage regulatory staff would be subject to conflict of interest statutes and specifically prohibited from working or holding financial interests in the alcohol beverage industry.
- The office would be independent from a regulatory and enforcement standpoint – neither the director nor office staff would report to, or be under the supervision of, the DOR Secretary.

Authority

The new office's statutory authority will derive from existing provisions in chapter 125. Proposed legislation would not expand the office's substantive regulatory jurisdiction beyond DOR's existing jurisdiction under chapter 125. The legislation would not interfere with a municipality's or district attorney's existing jurisdiction under chapter 125.

Budget

Initial office budgetary needs would be relatively small. Total staff would be approximately 15 full-time equivalent positions; and the initial office budget would be approximately \$2.0 million annually. (For comparison, DOA's Division of Gaming has a current annual budget of ~\$2.6 million and 22 full-time staff.)

According to the Legislative Fiscal Bureau, alcohol-related permit and administrative fees totaled approximately \$2.16 million for fiscal year 2015; and Wisconsin state liquor, wine, and beer taxes generated \$58.97 million in 2016 fiscal year revenue.

Proposed statutory language for Office of Alcohol Beverages Enforcement:

SECTION 1. CREATE WIS. STAT. § 15.433(2)

Sec. 15.433(2) is created to read:

15.435(2) OFFICE OF ALCOHOL BEVERAGES ENFORCEMENT. (a) There is created an office of alcohol beverages enforcement which is attached to the department of revenue under s. 15.03. The office shall be under the direction and supervision of a director who shall be nominated by the governor, and with the advice and consent of the senate appointed, for a 6-year term expiring on March 1 of the odd-numbered years. The director shall be appointed outside the classified service.

(b) There is created in the office of alcohol beverages enforcement a legal counsel who shall be appointed by the director within the classified service. The director may also appoint field agents within the classified service.

(c) The director and any employee of the office may not have a financial interest in the alcohol beverages industry or any business subject to the jurisdiction of chapter 125.

NOTES: This subsection creates a new office dedicated to state alcohol beverages regulation and enforcement and “administratively attaches” the office to DOR under Wis. Stat. § 15.03. Attachment under § 15.03 allows for budgeting and program coordination and the sharing of related business management functions, to minimize administrative expenses.

This subsection also specifies that the office is headed by a director, to be appointed by the governor with senate confirmation, for 6-year terms. Upon completion of a 6-year term, a director may be reappointed to subsequent terms, with each nomination subject to senate confirmation. The director serves outside the classified service. Office staff, appointed by the director, serves within the classified service. All employees of the office are prohibited from holding financial interests in the alcohol beverages industry. The office would function independently from a regulatory and enforcement standpoint, and neither the director nor the staff would report to the DOR Secretary.

SECTION 2. CREATE WIS. STAT. § 20.566(9)

Sec. 20.566(9) is created to read:

20.566(9) OFFICE OF ALCOHOL BEVERAGES ENFORCEMENT. The amounts in the schedule for alcohol beverages regulation and enforcement under chapter 125 and general program operations of the office of alcohol beverages enforcement. All moneys and fees received by the office of alcohol beverages enforcement under chapter 125 shall be credited to this appropriation.

NOTES: This subsection creates a new chapter 20 appropriation in DOR to fund the Office of Alcohol Beverages Enforcement. Total alcohol-related permit and administrative fees for fiscal year 2015 equal ~\$2.16 annually. (Updated figures for fiscal year 2016 have not yet been released by DOR.)

SECTION 3. CREATE WIS. STAT. § 125.02(11h)

Sec. 125.02(11h) is created to read:

125.02(11h) “Office” means the office of alcohol beverages enforcement.

NOTES: This addition is definitional. It defines “office” as referred throughout chapter 125 as the office of alcohol beverages enforcement. Note too that numerous references to the “department” or the “secretary of revenue” in current law chapter 125 will need to be changed to “office.” This draft does not include that list of terminology changes, which would be drafted as non-statutory language in the actual legislation.

SECTION 4. CREATE WIS. STAT. § 125.025

Sec. 125.025 is created to read:

125.025 Power and duties of the office. (1) JURISDICTION. The office has jurisdiction to exercise all powers and duties conferred to it by this chapter by supervising and regulating the production, storage, distribution, transportation, sale, and consumption of alcohol beverages consistent with the provisions of this chapter.

(2) DUTIES. The office shall:

- (a) Protect public health and welfare and the state's economic stability by investigating and deterring violations of this chapter.
- (b) Promote legal and responsible alcohol beverage consumption.
- (c) Ensure robust and fair competition within the 3-tier system of alcohol beverages production, distribution, and sales.
- (d) Ensure consistent, predictable, and timely enforcement of this chapter.
- (e) Ensure a consistent, predictable, and timely licensing and permitting process.
- (f) Communicate to the public and the alcohol beverages industry the requirements of this chapter clearly and consistently.

(3) INSPECT BOOKS. The office may, by order or subpoena, require persons engaged in the alcohol beverages business and subject to the provisions of this chapter to provide information, records, accounts, or other documents the office finds necessary to accomplish the purposes of this chapter.

(4) FEES. The office may by rule establish reasonable fees for tasks and services performed by the office in carrying out the provisions of this chapter.

(5) COMPLAINTS. The office shall maintain a system to promptly and efficiently act on complaints filed with the office.

(6) OFFICE INITIATIVE. In any matter within its jurisdiction under this chapter, the office may initiate, investigate, and order a hearing at its discretion upon such notice as it deems proper.

(7) MARKET REGULATION. The office shall develop a process for making policy decisions regarding market practices regulation and for communicating those decisions to the alcohol beverages industry.

NOTES: This section establishes the core of the office's duties and jurisdiction. It makes clear that the office's jurisdiction is limited to chapter 125 and does not extend to other substantive areas of law, such as fair dealership law or tax collection, as examples.

SECTION 5. CREATE WIS. STAT. § 125.11(3)

Sec. 125.11(3) is created to read:

125.11(3) CIVIL ACTIONS AND SETTLEMENT SCHEDULE. In civil actions for violations under this chapter, the office shall settle violations within the penalty guidelines set forth in this subsection. If multiple violations are involved, violations may not be aggregated in a single enforcement proceeding or investigation. Instead, a repeat violation determination shall be based on whether an earlier enforcement proceeding or investigation occurred and any violations arising out of those proceedings.

DESCRIPTION	1st Violation	2nd Violation	3rd + Violation
Conducting unlicensed, unpermitted or otherwise unauthorized alcohol beverage business in violation of Wis. Stat. § 125.04(1).	\$0 - \$1,000	\$1,000 - \$2,500	\$2,500 - \$10,000
Selling or dispensing alcohol beverages to underage person unaccompanied by parent, guardian or spouse, in violation of Wis. Stat. § 125.07(1)(a).	\$0 - \$500	\$500 - \$1,000 Suspend up to 3 days	\$1,000 - \$10,000 Suspend up to 30 days
Allowing underage person on licensed premises in violation of Wis. Stat. § 125.07(3)(a).	\$0 - \$100	\$100 - \$250	\$250 - \$500
Selling or dispensing alcohol beverages to intoxicated person in violation of Wis. Stat. § 125.07(2)(a).	\$0 - \$100	\$100 - \$250	\$250 - \$500
Impersonating an inspector, agent or other employee of DOR or DOJ in violation of Wis. Stat. § 125.105(1).	\$0 - \$1,000	\$1,000 - \$2,500	\$2,500 - \$10,000
Failing to comply with bona fide wholesaler requirement for fermented malt beverages wholesalers in violation of Wis. Stat. § 125.28(5).	\$0 - \$1,000 Forfeiture of profit Suspend up to 30 days	\$1,000 - \$2,500 Forfeiture of profit Suspend up to 60 days	\$2,500 - \$10,000 Forfeiture of profit Revocation
Failing to comply with out-of-state shippers' permits for fermented malt beverages under Wis. Stat. § 125.30.	Suspend up to 30 days	Suspend up to 60 days	Revocation
Evading provisions of law by giving away fermented malt beverages in violation of Wis. Stat. § 125.315(1).	\$0 - \$1,000	\$1,000 - \$2,500	\$2,500 - \$10,000
Violating credit term requirements of Wis. Stat. § 125.33(7)(a) (beer).	\$0 - \$100	\$100 - \$250	\$250 - \$1000
Failing to purchase fermented malt beverages from a wholesaler in violation of Wis. Stat. § 125.33(9).	\$0 - \$1,000	\$1,000 - \$2,500	\$2,500 - \$10,000

DESCRIPTION	1st Violation	2nd Violation	3rd + Violation
Failing to comply with bona fide wholesaler requirement for intoxicating liquor wholesalers in violation of Wis. Stat. § 125.54(7)(a).	\$0 - \$1,000 Forfeiture of profit Suspend up to 30 days	\$1,000 - \$2,500 Forfeiture of profit Suspend up to 60 days	\$2,500 - \$10,000 Forfeiture of profit Revocation
Failure of winery to use permitted wholesaler or cooperative wholesaler in violation of Wis. Stat. § 125.545(7)(a).	\$0 - \$1,000 Forfeiture of profit Suspend up to 30 days	\$1,000 - \$2,500 Forfeiture of profit Suspend up to 60 days	\$2,500 - \$10,000 Forfeiture of profit Revocation
Giving preferential or discriminatory treatment to a Wisconsin winery in violation of Wis. Stat. § 125.545(7)(b).	\$0 - \$1,000 Forfeiture of profit Suspend up to 30 days	\$1,000 - \$2,500 Forfeiture of profit Suspend up to 60 days	\$2,500 - \$10,000 Forfeiture of profit Revocation
Failing to comply with permit to solicit wholesale sales for future delivery in violation of Wis. Stat. § 125.65.	\$100	\$100 - \$250	\$250 - \$500
Selling, or possessing with the intent to sell, intoxicating liquor without a license or permit, in violation of Wis. Stat. § 125.66(1).	\$0 - \$1,000	\$1,000 - \$2,500	\$2,500 - \$10,000
Evading provisions of law by giving away intoxicating liquor in violation of Wis. Stat. § 125.67.	\$0 - \$1,000	\$1,000 - \$2,500	\$2,500 - \$10,000
Failing to comply with the “original container” requirements for intoxicating liquor in violation of Wis. Stat. § 125.68(8).	\$150	\$150 - \$250	\$250 - \$500
Failing to comply with the “labels; contents; packaging” requirements for intoxicating liquor in violation of Wis. Stat. § 125.68(9).	\$500	\$500 - \$750	\$750 - \$1000
Transporting intoxicating liquor into Wisconsin without consigning it to a permitted wholesaler, or to a permitted manufacturer or rectifier, in violation of Wis. Stat. § 125.68(10).	\$100 per violation	\$100 per violation	\$100 per violation
Selling for intoxicating beverage purposes alcohol that is unfit for beverage purposes in violation of Wis. Stat. § 125.68(11).	\$0 - \$100	\$100 - \$250	\$250 - \$1000
Violating credit term requirements of Wis. Stat. § 125.69(4)(a) (liquor).	\$0 - \$100	\$100 - \$250	\$250 - \$1000
Failing to purchase fermented malt beverages from a wholesaler in violation of Wis. Stat. § 125.69(6)(a).	\$0 - \$1,000	\$1,000 - \$2,500	\$2,500 - \$10,000

NOTES:

The proposed schedule, above, is limited to civil penalties available under Wis. Stat. chapter 125. It is proposed as a “settlement schedule” – meaning office staff with specified delegated authority would be able to settle chapter 125 violations within the schedule’s proposed penalty guidelines.

If the defending party contested the imposition of any of the proposed penalties, it could proceed with contested case procedures under Wis. Stat. chapter 227, including the opportunity for an administrative hearing.

Additionally, the proposed schedule would not alter the existing authority of municipalities and state regulators to institute suspension and revocation proceedings under Wis. Stat. § 125.12.

The proposed schedule does not concern criminal penalties and imprisonment. Criminal enforcement would occur outside the scope of the proposed schedule and consistent with existing prosecutorial discretion practices.

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