ENGROSSED SENATE
BILL NO. 690 By: Jolley of the Senate

and

Echols of the House

An Act relating to intoxicating liquors; defining terms; prohibiting certain termination of distribution agreement with nonresident brewer; providing conditions for termination of agreement; requiring notice for certain terminations; providing certain cure period; stating reasons for immediate termination; providing procedure for beer brand transfer to successor; allowing successor to terminate agreement upon certain conditions; requiring good faith distribution until certain time; providing procedure to failure to reach agreement with successor; authorizing arbitration; stating arbitration procedure; providing for determination of fair market value; setting time requirements for arbitration; providing for right to be waived for failure to participate; establishing procedure to nonpayment of settlement or arbitration award; construing change in laws or constitution of this state on agreements; requiring certain notice of termination; permitting dispute resolution for certain actions; construing good faith settlements; restricting required compliance or waiver of rights; prohibiting inducements for agreements; including modifications to agreements; amending 37 O.S. 2011, Section 524, as amended by Section 2, Chapter 382, O.S.L. 2013 (37 O.S. Supp. 2014, Section 524), which relates to nonresident seller license; providing for certain brewer and nonresident sellers to have written distribution agreement; making certain agreements subject to inspection by ABLE Commission; making gender neutral; providing for codification; providing an effective date; and declaring an emergency.

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

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 525A of Title 37, unless there is created a duplication in numbering, reads as follows:

A. For purposes of this act:

1. "Brewer" means any person who produces beer inside or out of this state;

2. "Beer" means the definition in paragraph 5 of Section 506 of Title 37 of the Oklahoma Statutes;

3. "Nonresident seller" means any person licensed pursuant to Section 524 of Title 37 of the Oklahoma Statutes;

4. "Existing nonresident seller" means a nonresident seller who distributes a particular brand of beer;

a. at the time a successor brewer acquires rights to manufacture or import the particular brand of beer, or

b. at the time a brewer terminates a distribution agreement with the nonresident seller;

5. "Fair market value" means the value that would be determined in a transaction by a willing buyer and a willing seller entered into without duress or threat and includes all elements of value, including goodwill and going-concern value;

6. "Good cause" means:

a. failure by the nonresident seller to comply with the material and reasonable provisions of a written agreement or understanding with the brewer, or

b. failure by the nonresident seller to comply with the duty of good faith;

7. "Good faith" means the duty of each party to any franchise and all officers, employees or agents thereof to act with honesty in fact and within reasonable standards of fair dealing in the trade;

8. "Successor brewer" means a supplier, brewer or an importer that acquires rights to a beer brand from a predecessor brewer; and

9. "Successor nonresident seller" means one or more nonresident sellers or "Wholesalers", as defined by paragraph 4 of Section 163.2 of Title 37 of the Oklahoma Statutes, appointed or designated by a brewer or successor brewer to replace the existing nonresident seller, for all or part of the existing nonresident seller's territory, in the distribution of the existing beer brand or brands.

B. 1. Except as provided in subsections C and D of this section, no brewer shall terminate a distribution sales agreement with any nonresident seller unless all of the following occur:

a. the brewer establishes good cause for such termination,

b. the nonresident seller receives written notification by certified mail, return receipt requested, from the brewer of an alleged noncompliance with the

distribution sales agreement and is afforded no less than sixty (60)days in which to cure such noncompliance,

c. the nonresident seller fails to cure such noncompliance within the allotted cure period, and

d. the brewer provides written notice by certified mail, return receipt requested, to the nonresident seller of such continued noncompliance. The notification shall contain a statement of the intention of the brewer to terminate or not renew the distribution sales agreement, the reasons for termination or nonrenewal, and the date the termination or nonrenewal shall take effect.

2. If a nonresident seller cures an alleged noncompliance with a distribution sales agreement within the cure period provided in subparagraph b of paragraph 1 of this subsection, any notice of termination from a brewer to a nonresident seller shall be null and void.

C. A brewer may immediately terminate a distribution sales agreement with a nonresident seller, effective upon furnishing written notification to the nonresident seller by certified mail, return receipt requested, for any of the following reasons:

1. The assignment or attempted assignment by the nonresident seller for the benefit of creditors, the institution of proceedings

in bankruptcy by or against the nonresident seller, the dissolution or liquidation of the nonresident seller or the insolvency of the nonresident seller;

2. The revocation or suspension of, or the failure to renew for a period of more than fourteen (14) days, a nonresident seller's state, local or federal license or permit to sell beer in this state;

3. Failure of a nonresident seller to sell his or her ownership interest in the distribution rights to the brewer's beer within one hundred twenty (120) days after such nonresident seller has been convicted of a felony that, in the brewer's sole judgment, adversely affects the goodwill of the nonresident seller or brewer;

4. A nonresident seller has been convicted of, found guilty of or pled guilty or nolo contendere to, a charge of violating a law or regulation of the United States or of this state if it materially and adversely affects the ability of the nonresident seller or brewer to continue to sell its beer in this state;

5. Any attempted transfer of ownership of the nonresident seller, stock of the nonresident seller or stock of any parent corporation of the nonresident seller, or any change in the beneficial ownership or control of any entity, without obtaining the prior written approval of the brewer, which approval shall not be unreasonably withheld, except as may otherwise be permitted pursuant to a written distribution sales agreement between the parties;

6. Fraudulent conduct in the nonresident seller's dealings with the brewer or its beer, including the intentional sale of beer outside the brewer's established quality standards; or

7. The nonresident seller ceases to conduct business for five (5) consecutive business days, unless conducting the business is prevented or rendered impractical due to events beyond the nonresident seller's reasonable control as a result of an act of God, an insured casualty, war or a condition of national, state or local emergency.

D. If a particular brand of beer is transferred by purchase or otherwise from a brewer to a successor brewer, the following shall occur:

1. The successor brewer shall become obligated to all of the terms and conditions of the distribution sales agreement in effect on the date of succession. The provisions of this subsection shall apply regardless of the character or form of the succession. A successor brewer has the right to contractually require its nonresident seller to comply with operational standards of performance if the standards are uniformly established for all of the successor brewer's nonresident sellers. A successor brewer may, upon written notice, terminate its distribution sales agreement, in whole or in part, with a nonresident seller of the brewer it succeeded; provided, the successor nonresident seller first pays to the existing nonresident seller the fair market value of the

existing nonresident seller's business with respect to the terminated brand or brands;

2. If the successor brewer decides to terminate its distribution sales agreement with the existing nonresident seller for purposes of transfer, the successor brewer shall notify the existing nonresident seller in writing of the successor brewer's intent not to appoint the existing nonresident seller. The successor brewer shall mail the notice of termination by certified mail, return receipt requested, to the existing nonresident seller. The successor brewer shall include in the notice the names, addresses, and telephone numbers of the successor nonresident seller or nonresident sellers;

3. The successor nonresident seller shall negotiate with the existing nonresident seller to determine the fair market value of the existing nonresident seller's right to distribute the beer. The successor nonresident seller and the existing nonresident seller shall negotiate the fair market value in good faith. The existing nonresident seller shall continue to distribute the beer in good faith until payment of the compensation agreed to under this paragraph, or awarded under paragraph 4 of this subsection, is received; and

4. a. If the successor nonresident seller and the existing nonresident seller fail to reach a written agreement on the fair market value within thirty (30) days after

the existing nonresident seller receives the notice required pursuant to paragraph 2 of this subsection, the successor nonresident seller or the existing nonresident seller shall send a written notice to the other party requesting arbitration pursuant to Sections 1851 et seq. of Title 12 of the Oklahoma Statutes. Arbitration shall be held for the purpose of determining the fair market value of the existing nonresident seller's right to distribute the beer.

b. Notice of intent to arbitrate shall be sent, as provided in this paragraph, not later than forty (40) days after the existing nonresident seller receives the notice required pursuant to paragraph 2 of this subsection or paragraph 1 of subsection F of this section. The arbitration proceeding shall conclude not later than sixty (60) days after the date the notice of intent to arbitrate is mailed to a party, unless this time is extended by mutual agreement of the parties and the arbitrator.

c. Any arbitration held pursuant to this subsection shall be conducted in a city within this state that:

(1) is closest to the existing nonresident seller, and

(2) has a population of more than twenty thousand (20,000) people.

d. Any arbitration held pursuant to this paragraph shall be conducted before one impartial arbitrator to be selected by the American Arbitration Association or its successor. The arbitration shall be conducted in accordance with the rules and procedures of Sections 1851 et seq. of Title 12 of the Oklahoma Statutes.

e. In determining the fair market value of the existing nonresident seller's right to distribute the beer, the arbitrator shall consider:

(1) the expected annual sales and earnings of the distribution sales agreement,

(2) the length of time the existing nonresident seller has held the distribution sales agreement, and

(3) other relevant elements of value, including goodwill and going concern-value.

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

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

h. The arbitrator in any arbitration held pursuant to this paragraph shall render a written decision not later than thirty (30) days after the conclusion of the arbitration, unless this time is extended by mutual agreement of the parties and the arbitrator. The decision of the arbitrator is final and binding on the parties. The arbitrator's award may be enforced by commencing a civil action in any court of competent jurisdiction. The decision of the arbitrator may be appealed as authorized in Sections 1851 et seq. of Title 12 of the Oklahoma Statutes.

i. An existing nonresident seller or successor nonresident seller who fails to participate in the arbitration hearings in any arbitration held pursuant to this paragraph waives all rights the existing nonresident seller or successor nonresident seller would have had in the arbitration and is considered to have consented to the determination of the arbitrator.

j. If the existing nonresident seller does not receive payment from the successor nonresident seller of the settlement or arbitration award required under paragraph 2 or 3 of this subsection within thirty (30) days after the date of the settlement or arbitration award:

(1) the existing nonresident seller shall remain the nonresident seller of the beer in the existing nonresident seller's territory to at least the same extent that the existing nonresident seller distributed the beer immediately before the successor brewer acquired rights to the beer, and

(2) the existing nonresident seller is not entitled to the settlement or arbitration award.

E. A change in the laws or constitution of this state shall not constitute "good cause" for purposes of this act, and if the right or authorization of a nonresident seller to distribute or represent a particular brand of beer is terminated as a result of a change in the laws or constitution of this state, the provisions of this act shall be applicable.

F. 1. If a brewer terminates a nonresident seller and appoints or designates a successor nonresident seller for a brand or brands, the brewer shall provide written notice within thirty (30) days of appointing or designating the successor nonresident seller to the

existing nonresident seller of the appointment or designation of a successor nonresident seller and shall provide the names, addresses, and telephone numbers of the successor nonresident seller or nonresident sellers. If an existing nonresident seller is aggrieved by a violation of any provision of subsections B or C of this section, the nonresident seller shall provide notice of intent to arbitrate to the successor nonresident seller. The existing nonresident seller and successor nonresident seller shall proceed with the process as directed in paragraphs 3 and 4 of subsection D of this section, including arbitration if necessary. Disputes arising under paragraphs 3 and 4 of subsection D of this section may be addressed in a court of competent jurisdiction in this state.

2. Any disputes arising under subsection B or C of this section may also be settled by such dispute resolution procedures as may be provided by a written distribution sales agreement between the parties.

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

H. Nothing in this section shall be construed to give an existing nonresident seller or a successor nonresident seller any right to compensation if a distribution sales agreement with the existing nonresident seller or successor nonresident seller is

terminated by a successor brewer pursuant to subsections B and C of this section.

I. No brewer shall require any nonresident seller to waive compliance with any provision of this section.

J. No brewer shall charge or accept, and no nonresident seller shall pay or provide, any money, property, gratuity, discount, rebate, free goods, allowances, thing of value or other inducement from a nonresident seller in exchange for the brewer entering into a distribution sales agreement with a nonresident seller.

SECTION 2. AMENDATORY 37 O.S. 2011, Section 524, as amended by Section 2, Chapter 382, O.S.L. 2013 (37 O.S. Supp. 2014, Section 524), is amended to read as follows:

Section 524. A. A nonresident seller license shall be required of all out-of-state distillers, winemakers, brewers, importers, brokers, and others who sell alcoholic beverages to wholesalers and Class B wholesalers in Oklahoma regardless of whether such sales are consummated within or without the State of Oklahoma.

A nonresident seller license shall authorize the holder thereof to solicit and take orders for alcoholic beverages from the holders of licenses authorized to import the same into this state, and to ship or deliver, or cause to be shipped or delivered, alcoholic beverages into Oklahoma pursuant to such sales.

B. A brewer not licensed in this state selling beer to a nonresident seller shall have a written distribution sales agreement

with the nonresident seller. Such agreement shall be subject to inspection by the ABLE Commission.

C. The Alcoholic Beverage Laws Enforcement Commission may, subject to the provisions of the Oklahoma Alcoholic Beverage Control Act requiring notice and hearing in the case of sanctions against holders of licenses, suspend or revoke a nonresident seller license for any violation of the Oklahoma Alcoholic Beverage Control Act by the holder thereof.

~~C.~~ D. No licensee in this state authorized to import alcoholic beverages into this state shall purchase or receive any alcoholic beverages from without this state from any person not holding a valid and existing nonresident seller license. Every nonresident seller license shall expire on the June 30 following its issuance or renewal, and shall be eligible for subsequent renewal terms of one (1) year beginning on the July 1 following each expiration. License fees for a new or initial nonresident seller license applied for after July 1 may be prorated through the following June 30 on a quarterly basis.

~~D.~~ E. The holder of a nonresident seller license shall, promptly upon consignment of any alcoholic beverages to an importer in Oklahoma, forward to the ABLE Commission a true copy of the invoice, bill of lading, or other document as the ABLE Commission may by regulations prescribe, showing the details of such shipment.

~~E.~~ F. Any person, not otherwise a dealer in alcoholic beverages, coming into possession of any alcoholic beverages as security for or in payment of a debt, or as an insurer ~~(~~or its transferee or assignee~~)~~ for the salvage or liquidation of an insured casualty or damage or loss, or as an executor, administrator, trustee or other fiduciary, may sell the beverages in one lot or parcel to a duly licensed wholesaler at an agreed-upon price without regard to current posted prices. However, immediately after taking possession of the alcoholic beverages, the person shall register with the Director and furnish to him or her a detailed list of the alcoholic beverages and post with the Director a bond in such amount as the Director deems sufficient to protect the state from any taxes due on the alcoholic beverages. The person shall pay to the Director a registration fee of Ten Dollars ($10.00), which fee shall permit the sale of only the alcoholic beverages detailed in the registration request. A wholesaler receiving a lot or parcel of alcoholic beverages pursuant to this subsection may sell it in one lot or parcel or more than one lot or parcel to a licensed package store or mixed beverage licensee or more than one licensed package store or mixed beverage licensee at an agreed-upon price without regard to current posted prices; provided, the total of the lots sold by the wholesaler shall not exceed four (4) lots.

SECTION 3. This act shall become effective July 1, 2015.

SECTION 4. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

Passed the Senate the 10th day of March, 2015.

_____
Presiding Officer of the Senate

Passed the House of Representatives the ____ day of _____, 2015.

_____
Presiding Officer of the House of Representatives