

2012 New York Code
ABC - Alcoholic Beverage Control
Article 4 - (50 - 57-A) SPECIAL PROVISIONS RELATING
TO BEER
55-C - Agreements between brewers and beer
wholesalers.

Universal Citation: [NY Alcoh Bev Ctrl L § 55-C \(2012\)](#)

§ 55-c. Agreements between brewers and beer wholesalers. 1. Purpose. It is hereby declared to be the policy of this state, that the sale and delivery of beer by brewers to beer wholesalers shall be pursuant to a written agreement. That further, the regulation of business relations between brewers and beer wholesalers is necessary and appropriate to the general economy and tax base of this state and in the public interest.

2. Definitions. As used in this section, the following words shall have the following meanings:

(a) "Agreement" means any contract, agreement, arrangement, course of dealing or commercial relationship between a brewer and a beer wholesaler pursuant to which a beer wholesaler is granted the right to purchase, offer for sale, resell, warehouse or physically deliver beer sold by a brewer.

(b) "Brewer" means any person or entity engaged primarily in business as a brewer, manufacturer of alcoholic beverages, importer, marketer, broker or agent of any of the foregoing who sells or offers to sell beer to a beer wholesaler in this state or any successor to a brewer.

(c) "Successor to a brewer" means any person or entity which acquires the business or beer brands of a brewer, without limitation, by way of the purchase, assignment, transfer, lease, or license or disposition of all or a portion of the assets, business or equity of a brewer in any transaction, including merger, corporate reorganization or consolidation or the formation of a partnership, joint venture or other joint

marketing alliance.

(d) "Beer wholesaler" and "wholesaler" means the holder of a wholesaler's license pursuant to section fifty-three of this article who purchases, offers to sell, resells, markets, promotes, warehouses or physically distributes beer sold by a brewer.

(e) "Good cause" means and shall be limited to:

(i) (A) The implementation by a brewer of a national or regional policy of consolidation which is reasonable, nondiscriminatory and essential. Such policy shall have been previously disclosed, in writing, in reasonable detail to the brewer's wholesalers, and shall result in a contemporaneous reduction in the number of a brewer's wholesalers not only for a brand in this state, but also for a brand in contiguous states or in a majority of the states in which the brewer sells the brand. All affected wholesalers and affected brewers shall be afforded ninety days prior notice of the implementation of such policy, and such notice shall be provided by the brewer implementing said policy. Further, an affected wholesaler who has actual knowledge of the intended implementation of such policy shall also notify each affected brewer. The term "affected brewers" means all other brewers with an agreement with an affected wholesaler who is a multiple brands wholesaler. The term "affected wholesalers" means wholesalers who may reasonably be expected to experience a loss or diminishment of a right to distribute a brand, in whole or in part, as a consequence of a proposed consolidation policy.

(B) An affected brewer receiving notice pursuant to this paragraph may, within one hundred twenty days after receiving such notice, terminate an agreement with a multiple brands wholesaler in the event: (1) the total case purchases computed in twenty-four twelve ounce equivalence units by the wholesaler of the products of the affected brewer amounted to two percent or less of the multiple brands wholesaler's total sales volume during the twelve month period preceding the notice; and (2) the affected brewer, prior to such termination, pays compensation to the multiple brands wholesaler.

(ii) There is a failure by the beer wholesaler to comply with a material term of an agreement required by subdivision three of this section between the brewer and beer wholesaler, provided that: (A) the

wholesaler was given written notice by the brewer of the failure to comply with the agreement as provided for in subdivision five of this section and in which the brewer states with particularity the basis for the brewer's determination of non-compliance, and upon the wholesaler's written request within ten days of receipt of the notice, the brewer has supplemented such notice by submitting to the wholesaler in writing the brewer's recommended plan of corrective action to cure the claimed defaults or deficiencies in a manner satisfactory to it; (B) the wholesaler was afforded a reasonable opportunity to assert good faith efforts to comply with the agreement by curing the claimed defaults or deficiencies specified in said notice within the time provided for in clause (C) of this subparagraph; and (C) the wholesaler was afforded fifteen days after receipt of such notice to submit a written plan of corrective action to comply with the agreement by curing the claimed non-compliance and seventy-five days to cure such non-compliance in accordance with the plan. Provided, however, that such period for cure may be increased or reduced to a commercially reasonable period by an order of a court in this state entered after a hearing at which the brewer has the burden to demonstrate that the claimed defaults or deficiencies can be substantially rectified in the period of time afforded the wholesaler or that, after receipt of notice of default or deficiency as provided for in subdivision five of this section, the wholesaler has intentionally engaged in an affirmative course of conduct in which the brewer's current marketing plans and other trade secrets are disclosed to a third party without the prior consent of the brewer or in which the wholesaler acts or threatens to act to significantly impair, harm or dilute the reputation or competitive position of the brewer or otherwise irreparably injure the brewer, its brands or trademarks. Provided, further however: (1) that such period for cure need not exceed forty-five days if within the twelve months immediately following a cure, the wholesaler intentionally engages in conduct which repeats the same specified default and deficiency which the brewer had deemed cured; and (2) that such period for cure need not exceed sixty days in the event that during the twelve month period preceding the notice, the total case purchases by the wholesaler of the affected products of the brewer account for less than one-half of one percent of

the wholesaler's aggregate case purchases from all sources or one thousand cases. For purposes of this subdivision, case purchases of affected products whether package or draught shall be computed in twenty-four twelve ounce equivalence units.

(f) "Good faith" means honesty in fact and the observance of reasonable commercial standards in the trade.

(g) "Material modification" of an agreement or to "materially modify" means and includes a substantial and significant change in the competitive circumstances under which the agreement was entered into and is performed which is caused by a brewer without fault on the part of the wholesaler.

(h) "Multiple brands wholesaler" means a wholesaler which pursuant to agreements with different brewers holds the rights to purchase, resell, warehouse or physically deliver two or more competing products in substantially the same geographic area or to the same customer class.

(i) "Fair market value of distribution rights" means the amount a willing seller, under no compulsion to sell, would be willing to accept and a willing buyer, under no compulsion to purchase, would be willing to pay for the distribution rights.

3. Written agreement required. Except as provided for in subdivision ten of this section, beer offered for sale in this state by a brewer to a beer wholesaler shall be sold and delivered pursuant to a written agreement which conforms to the provisions of this section and which sets forth all essential and material terms, requirements, standards of performance and conditions of the business relationship between a brewer and a beer wholesaler. Such agreement may be cancelled, terminated, materially modified or not renewed for good cause as defined in this section, provided the brewer has acted in good faith.

4. Termination for cause and opportunity to cure. (a) No brewer may cancel, fail to renew, or terminate an agreement unless the party intending such action has good cause for such cancellation, failure to renew, or termination and in any case in which prior notification is required under this section, the party intending to act has furnished said prior notification as provided for in subdivision five of this section and the wholesaler has failed to cure such defaults or deficiencies after a period for cure, as provided for in clause (C) of

subparagraph (ii) of paragraph (e) of subdivision two of this section.

(b) No brewer shall amend or materially modify or otherwise terminate any essential and material term or requirement of an agreement unless the brewer has good cause therefor and has furnished the affected party with at least fifteen days prior notification as required by subdivision five of this section.

(c) Notwithstanding any provision of this subdivision to the contrary:

(i) Any brewer with an annual volume as defined in subparagraph (iv) of this paragraph of less than three hundred thousand barrels of beer and whose sales to an affected beer wholesaler are three percent or less of the beer wholesaler's total annual brand sales measured in case equivalent sales of twenty-four--twelve ounce units may terminate an agreement with any beer wholesaler without having good cause for such termination, as defined in paragraph (e) of subdivision two of this section, and shall not be subject to liability to the beer wholesaler under paragraph (b) of subdivision seven of this section provided that, prior to the effective date of the termination, the brewer pays the beer wholesaler the fair market value of the distribution rights which will be lost or diminished by reason of the termination. If such brewer and beer wholesaler cannot mutually agree to the fair market value of the applicable distribution rights lost or diminished by reason of the termination, then the brewer shall pay the beer wholesaler a good faith estimate of the fair market value of the applicable distribution rights.

(ii) If the beer wholesaler being terminated under subparagraph (i) of this paragraph disputes that the payment made by the brewer was less than the fair market value of the distribution rights, then the beer wholesaler may within forty-five days of termination submit the question of fair market value of the applicable distribution rights lost or diminished by reason of the termination to binding arbitration before a panel of three neutral arbitrators appointed in accordance with the commercial arbitration rules of the American Arbitration Association, which panel shall determine by majority decision whether the brewer's payment meets the requirements of subparagraph (i) of this paragraph. If the arbitration panel rules that the payment made by the brewer to the beer wholesaler upon termination was less than the fair market value of distribution rights lost or diminished by reason of the termination,

then the brewer must pay the beer wholesaler the difference between the payment made to the beer wholesaler and the determined fair market value plus interest. If the arbitration panel rules that the payment made by the brewer to the beer wholesaler upon termination was more than the fair market value of distribution rights lost or diminished by reason of the termination, then the beer wholesaler must pay the brewer the difference between the payment made to the beer wholesaler and the determined fair market value plus interest. All arbitration fees and expenses shall be equally divided among the parties to the arbitration except if the arbitration panel determines that the brewer's payment upon termination was not a good faith estimate of the fair market value, then the panel may award up to one hundred percent of the arbitration costs to the brewer.

(iii) Notwithstanding any provision of this section to the contrary, for purposes of this paragraph, the term "brewer" shall mean any person or entity engaged primarily in business as a brewer or manufacturer of beer.

(iv) For the purpose of this paragraph, the term "annual volume" shall mean: (1) the aggregate number of barrels of beer, under trademarks owned by that brewery and brewed, directly or indirectly, by or on behalf of the brewer during the measuring period, on a worldwide basis, plus (2) the aggregate number of barrels of beer brewed, during the measuring period, directly or indirectly, by or on behalf of any person or entity which, at any time during the measuring period, controlled, was controlled by or was under common control with the brewer, on a worldwide basis. Annual volume shall not include beer brewed under contract for any other brewer. There shall be no double counting of the same barrels of beer under clauses one and two of this subparagraph.

(v) For the purposes of this paragraph, the term "measuring period" shall mean the twelve month calendar period immediately preceding the date notice of termination, as required under subparagraph (i) of this paragraph, was given by a brewer to the beer wholesaler.

5. Notice of default or deficiency. (a) Except as provided in paragraph (d) of this subdivision, no brewer may cancel, fail to renew or terminate an agreement unless the brewer or beer wholesaler furnished prior notification in accordance with paragraph (c) of this subdivision.

(b) Notwithstanding any agreement, no brewer or beer wholesaler may materially amend or modify an essential and material term or requirement unless the brewer or beer wholesaler furnished prior notification in accordance with paragraph (c) of this subdivision.

(c) The notification required under paragraphs (a) and (b) of this subdivision shall be in writing and sent to the affected party by certified mail. Such notification shall contain:

(i) a statement of intent to cancel, not renew, otherwise terminate, materially amend or modify an agreement;

(ii) a statement of all reasons therefor, stated with particularity; and

(iii) the date on which such action shall take effect.

(d) A brewer or beer wholesaler may cancel, fail to renew or otherwise terminate an agreement without furnishing the prior notification required under this section only:

(i) in the event the affected party has made an assignment for the benefit of creditors or similar disposition of all or substantially all of the assets of such party's business;

(ii) in the event of a conviction or plea of guilty or no contest to a felony which in the reasonable judgment of the brewer may adversely affect the goodwill or interests of the wholesaler or brewer;

(iii) in the event of the revocation or suspension for thirty-one days or more of any license or permit required of the wholesaler for the normal operation of its business;

(iv) in the event there was fraudulent conduct on the part of the brewer or beer wholesaler in its dealings with the other party;

(v) in the event of the failure by either party to pay sums of money to the other party when due or if either the wholesaler or brewer takes any action which would provide grounds for immediate termination pursuant to the reasonable terms of a written enforceable agreement between them, which was freely entered into without threat of termination or other coercion or compulsion and was in full force and effect sixty days from the effective date of the chapter of the laws of nineteen hundred ninety-seven which amended this subparagraph;

(vi) in the event the brewer and beer wholesaler voluntarily agree in writing to terminate the agreement.

6. Right of action. If a brewer fails to comply with the provisions of this section, a beer wholesaler may maintain a civil action in a court of competent jurisdiction within this state for damages sustained in accordance with the laws of this state which shall govern all disputes arising under an agreement or by reason of its making and performance. In any such action the court may grant such equitable relief as is necessary or appropriate, considering the purposes of this section, to remedy the effects of any failure to comply with the provisions of this section or the effects of conduct prohibited hereunder, including declaratory judgment, mandatory or prohibitive injunctive relief, or preliminary or other interim equitable relief; provided, however, that permanent injunctive relief shall not be granted to prohibit the effectiveness of a termination or non-renewal of an agreement in furtherance of a policy of consolidation that is in compliance with subparagraph (i) of paragraph (e) of subdivision two of this section. In any legal action challenging any cancellation, termination or failure to renew, or where an issue is the brewer's compliance with the provisions of subparagraph (i) of paragraph (e) of subdivision two of this section, the brewer shall have the burden of proof that its action was based upon good cause, provided however, the wholesaler shall retain the burden of proof in all other respects. The rights and remedies provided in this section to a beer wholesaler with respect to an agreement with a brewer and to an affected wholesaler or an affected brewer shall be intended to supplement and not be exclusive of any rights and remedies otherwise available pursuant to any other statute, or at law or equity.

7. Reasonable compensation. (a) Any brewer who shall implement a national or regional consolidation policy, pursuant to this section, shall not terminate its relationship with an affected wholesaler until compensation as provided for in this subdivision has been paid. Such brewer shall pay the affected beer wholesaler the fair market value of the distribution rights which will be lost or diminished by reason of the implementation of such policy, together with fair and reasonable compensation for other damages sustained.

(b) Every brewer who without good cause amends, cancels, terminates, materially modifies or fails to renew any agreement, or who in violation of this section causes a beer wholesaler to resign from an agreement or

denies or withholds consent to any assignment, transfer or sale of a beer wholesaler's business assets or capital stock or other equity or debt securities, shall pay the affected beer wholesaler the fair market value of the beer wholesaler's business, including distribution rights, which have been lost or diminished as the result of the brewer's actions.

(c) In the event that the brewer and the beer wholesaler are unable to agree on the compensation to be paid for the value of the beer wholesaler's business and assets, the matter may with the consent of both the brewer and the beer wholesaler, be submitted to a neutral arbitrator to be selected by the parties; if they cannot agree on such an arbitrator, the same shall be selected by a judge of a court of competent jurisdiction. No brewer or beer wholesaler may impose binding arbitration of any issue as a term or condition of an agreement. Arbitration costs shall be equally divided by the beer wholesaler and the brewer. The award of the arbitrator shall be confirmed by a court of competent jurisdiction in this state, the judgment of which shall be binding.

8. Sale and transfer of beer wholesaler's business. No brewer shall unreasonably withhold or delay its approval of any assignment, sale or transfer of all or any portion of beer wholesaler's corporate equity or debt or assets, including the beer wholesaler's rights and obligations under the terms of an agreement, whenever the person or persons to be substituted meet objectively reasonable standards imposed by the brewer. A wholesaler who sells, assigns or transfers an agreement made pursuant to this section shall provide written notice of such sale, assignment or transfer to all other brewers with whom it has entered agreements.

9. (a) A brewer qualified to do business in the state of New York may hold an interest in a limited partnership licensed by the authority as a wholesaler, when the brewer or its affiliate is a limited partner and the beer wholesaler is the general partner. Notwithstanding any other provision of law, such brewer may loan money to a general partner of an aforementioned limited partnership. Provided, however, any brewer or its affiliate who holds an interest in a limited partnership licensed by the authority as a wholesaler or who loans money to a general partner of such limited partnership may only exercise such control of the business

as permitted by section 121-303 of the partnership law.

(b) Notwithstanding subdivision (a) of this subdivision, no brewer or its affiliate may acquire or hold an interest in or loan money to a general partner of a multiple brands wholesaler unless and until all other brewers having agreements with said multiple brands wholesaler have been afforded sixty days prior written notice of the particular terms and conditions of the limited partnership or loan agreement or of any change therein. A "loan" for purposes of this subdivision shall not include bona fide credit terms for product purchases customarily extended by a brewer to wholesalers in the normal course of business.

(c) For one hundred twenty days after the formation, licensing and commencement of operations as a beer wholesaler of a limited partnership or the making of a loan, and upon at least fifteen days prior notification as required by subdivision five of this section, a brewer may terminate an agreement with a multiple brands wholesaler in the event: (i) a competing brewer or its affiliate becomes a limited partner with or loans money to a general partner of a multiple brands wholesaler, (ii) by reason of said loan, the performance of a loan agreement, or the terms or conduct of the limited partnership, there is a reasonable likelihood that competition between brands of the competing brewers has been or may be significantly reduced in a relevant geographic area or market, and (iii) in lieu of other rights and remedies it might have under this chapter to terminate for good cause, the terminating brewer pays compensation to the multiple brands wholesaler.

10. Coverage. (a) This section shall not apply to written agreements that were in effect prior to the effective date of this section which set forth all terms and conditions of material significance governing the relationship between the brewer and beer wholesaler, including but not limited to the grounds and procedures which govern: (i) termination of the relationship; (ii) approval and disapproval of managers; (iii) change in ownership; and (iv) whether or not the wholesaler is entitled to compensation in the event the wholesaler is terminated for deficient performance under such agreement or without good cause. Provided, however, that this section shall apply to any agreement entered into, and renewals, extensions, amendments or conduct constituting a material

modification of an agreement on or after the effective date of this section.

(b) Where an agreement between a brewer and beer wholesaler in effect prior to the effective date of this section is continuous in nature or has no specific duration or has no renewal provision and fails to set forth all terms and conditions of material significance governing the relationship between the brewer and beer wholesaler, including but not limited to the grounds and procedures which govern: (i) termination of the relationship; (ii) approval and disapproval of managers; (iii) change in ownership; and (iv) whether or not the wholesaler is entitled to compensation in the event the wholesaler is terminated for deficient performance under such agreement or without good cause; such agreement shall be considered for purposes of this section to have been renewed sixty days after the effective date of this section.

11. The requirements of this section may not be altered, waived or modified by written or oral agreement in advance of a bona fide case and controversy arising under a written agreement complying with this section.