Exhibit A - Memorandum
Recommending Uniform Act

TO: **Steve Wilborn; John McGarvey**

FROM: **Stephen B. Humphress**

DATE: **July 15, 2018**

RE: **Uniform Law Commission**
Consideration of Direct to Consumer ("DTC") Distilled Spirits Shipping Law

In 1934, The 21st Amendment to United States Constitution ended Prohibition by repealing the 18th Amendment. More importantly for purposes of this memorandum, the 21st Amendment placed primary responsibility for regulating alcoholic beverages on state governments.

After Prohibition, each state enacted very different laws to regulate alcoholic beverages in their respective states. States experimented with different methods to regulate and control the alcohol industry to prevent the excesses and abuses that led to Prohibition. The states were also eager to devise methods to levy and collect taxes on alcohol producers.

Both of these concerns led states to create three tier distribution systems ("three-tier systems") which separated producers from retailers. Under a three -tier system, producers may only sell to wholesalers, wholesalers sell to retailers, and retailers sell to consumers. States' three-tier systems and laws vary greatly from state to state.

Under original state three-tier systems, producers (distilleries, wineries, and brewers) were not able to sell their products directly to consumers. Over the years states created differing three-tier exceptions whereby producers are now able to sell their products directly to consumers ("DTC"). These DTC exceptions were originally created to assist start-up businesses in competing by promoting consumer demand for their products. Today DTC exceptions are viewed as promoting economic and business development, creating jobs, and promoting tourism in the states.

Each state has different laws about which producers and which products can be sold directly to consumers. Some states only allow DTC for smaller producers with production limits. Some states allow DTC by wineries, but not distilleries or breweries. Some states allow DTC wine to be sold and **shipped** directly to consumers, but not distilled spirits Some states require consumers to purchase the products during an in-person/face-to-face visit to the production facility in order to have the products shipped home.

Recent mergers and consolidation of wholesalers at a national level has resulted in smaller producers having difficulty in entering some state markets. Because of low sales volume, national wholesalers have no interest in carrying some small producers' products. As such, many products of smaller producers are not available in some state markets.

The emergence of e-commerce technology and DTC shipping allows small producers the potential to have market access in all states and promotes free market competition. DTC shipping also as the potential to provide consumers with more choices and the ability to obtain products not carried by wholesalers in their respective states. As such, a uniform law on DTC shipping promotes free market competition and consumer choice.

Currently, only (8) eight states and the District of Columbia allow some form of DTC distilled spirits shipping (Arizona, Hawaii, Kentucky, Nebraska, Nevada, New Hampshire, North Dakota, Rhode Island, and DC).

A uniform DTC distilled spirits shipping law, enacted by the various states, would promote interstate commerce, increase national economic development and tourism, increase state revenues, provide market access and competition by small producers, increase consumer choice and meet consumer's increasing e-commerce shopping demands. The complexity and vast differences between the states' alcoholic beverage laws also makes interstate commerce difficult for businesses. A uniform shipping law would promote interstate commerce.

A successful uniform DTC distilled spirits shipping law effort may also lead to future comprehensive efforts to modernize and bring more uniformity to other state alcoholic beverage laws. Uniformity, or even some consistency, of state laws would greatly aid businesses and interstate commerce of alcoholic beverages.

There are two (2) state government alcoholic beverage associations who could assist in providing expertise in drafting a uniform DTC distilled spirits shipping law: (1) the National Alcohol Beverage Control Association ("NABCA") https://www.nabca.org/; and, (2) the National Conference of State Liquor Administrators ("NCSLA") http://www.ncsla.org/.

Two (2) potential academic persons with alcoholic beverage industry knowledge who could assist in drafting a uniform DTC distilled spirits shipping law are: (1) Brannon P. Denning, Associate Dean for Academic Affairs and Professor at the Cumberland School of Law, Samford University; and, (2) Christopher R. Riano, General Counsel for The New York State Liquor Authority, Constitutional Law and Government Lecturer at Columbia University.

There are several alcoholic beverage industry groups that would support a uniform law on DTC distilled spirits shipping. In light of its recent "Bourbon without Borders" efforts, the Kentucky Distillers Association ("KDA") https://kybourbon.com/, and its member distilleries would support a uniform law. The Distilled Spirits Council ("DISCUS") https://www.distilledspirits.org/ would support a uniform law.

Among the alcoholic beverage producers, the wine industry has been most active in promoting DTC wine shipping by wineries. As a result of the wine industry's efforts over the years, almost all the states now allow some form of DTC wine shipping. https://wineinstitute.compliancerules.org// The Wine Institute would likely support a uniform law as supportive of their DTC efforts. https://www.wineinstitute.org/. The wine industry has drafted its own Model Direct Shipping Bill to allow wine shipping. http://freethegrapes.org/model-direct-shipping-bill/.

Common carriers like United Parcel Service and FedEx would also support a uniform law on DTC distilled spirits shipping. Any resulting uniform law would need to address concerns about potential criminal or civil penalties for common carriers who ship alcoholic beverages and place primary responsibilities on sellers and buyers.

DTC shipping laws are generally opposed by those alcoholic beverage industries who believe they will lose money if DTC is allowed. Most DTC laws bypass the middle distribution tier, so the Wine & Spirits Wholesalers of America ("WSWA"), http://www.wswa.org/, and the National Beer Wholesalers Association ("NBWA") https://www.nbwa.org/, would likely oppose a uniform DTC distilled spirits shipping law.

Large national retailers may oppose a uniform DTC distilled spirits shipping law as perceiving consumer sales by producers as competition. However, retailer competition concerns are largely imaginary since DTC prices are higher than local retailer prices due to additional shipping costs. Most DTC purchases are by visitors, not local residents, who desire to ship products back to their homes.

Some states are "control states" meaning the state government sells alcoholic beverages. Control states may also oppose a uniform law on DTC distilled spirits shipping for the same reason as retailers: perceived competition. However, states also benefit from start-up/new producer facilities that promote state economic development, create local jobs, benefit state tourism efforts, and increase state tax revenues. Many start-up and new producers need DTC for their business models to succeed.

Some alcohol prevention groups may oppose a uniform law on DTC distilled spirits shipping as being perceived as increasing availability or minor access to alcohol. Modern health statistics do not support these concerns.

The recent United States Supreme Court ruling in *South Dakota v. Wayfair, Inc*., No. 17-494, 2018 WL 3058015 (June 21, 2018), aids a uniform DTC distilled spirits shipping law effort. States now have the ability to collect taxes from out-of-state producers who ship products directly to consumers in their states. Some states have previously opposed DTC due to their inability to collect such taxes under the prior *Quill v. North Dakota, 5*04 U.S. 298 (1992) holding.

Any resulting uniform DTC distilled spirits shipping law must treat in-state and out-of-state producers the same so as not to discriminate against interstate commerce in violation of the dormant commerce clause. *See, Granholm v. Heald*, 544 U.S. 460, 125 S.Ct. 1885 (2005). Following *Granholm*, a split in the U.S. Circuit Courts has developed regarding whether state laws can condition a winery's ability to ship wine upon a consumer's in-person/face-to-face purchase requirement at the winery. The Sixth Circuit has held that in-person purchase requirements are unconstitutional as having a "discriminatory affect." *See, Cherry Hill Vineyards, LLC v. Christopher L. Lilly*, 553 F.3d 423 (6th Cir. 2008). The Seventh Circuit and Ninth Circuit have conversely held that face-to-face purchase requirements do not violate the dormant commerce clause. *Baude v. Heath*, 538 F.3d 608 (7th Cir. 2008); *Black Star Farms, LLC v. Oliver*, 600 F.3d 1225, 1234-1235 (9th Cir. 2010).

Any resulting uniform DTC distilled spirits shipping law would need to address or provide alternative language to address the split in Circuits regarding conditioning a DTC distilled spirits shipping privilege on an in-person/face to face purchase requirement.