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Mr. Steven G. Frost, Chairman
Uniform Law Commission
Alcohol Direct Shipping Compliance Act Committee
June 4, 2021

Re: Alcohol Direct Shipping Compliance Act

Chairman Frost and Commissioners:

The Wine & Spirits Wholesalers of America (WSWA) thanks you for your dedication and thorough review of a complicated issue during this drafting committee process. The Uniform Law Commission (Commission) has done commendable work bringing to light important, timely issues regarding (i) alcohol producer direct-to-consumer (DTC) shipping, as well as (ii) retail interstate shipping, both exceptions that exist outside the effective, well-functioning three-tier regulatory structure.

We applaud the Commission's efforts to address the ever-increasing compliance and enforcement struggles that state regulators and legislators face nationwide due to the lack of transparency in winery DTC sales of alcohol.

The Commission has been tasked to find workable solutions in a wine-DTC system that is riddled with loopholes and negatively impacts each state's enforcement efforts and ultimately its citizens. You have identified tools, albeit imperfect, to bring some clarity to a broken system.

As an initial matter, it is a mistake to allow the interstate shipment of any alcohol, and WSWA opposes interstate shipment of alcohol to consumers by any entity. Regulatory reports to state legislatures consistently demonstrate that illegal interstate shipments are rampant and growing as states create shipping exceptions. Moreover, the compliance and safety controls consumers and non-consumers alike benefit from in the long-standing three-tier system cannot be replaced.

Let's not forget that the practical alcohol regulatory structure, purposefully unique to each state under the 21st Amendment, has been in place for over eight decades and still works well today. These structures serve important public health and safety and other legitimate state goals, such as prevention of underage access, maintenance of effective state oversight through transparency and accountability, and ensuring product safety while providing consumers with choice and convenience.

When a state departs from these structures and allows interstate shipping, its legislators need to equip regulators with better tools to manage what quickly becomes a murky marketplace. We remind states that they do not need to choose between proven public safety procedures and consumer choice and convenience. There are market solutions available within the established regulatory structure. Local, licensed delivery by in-state retailers, for example, is an innovation that answers consumers' needs without the abandonment of appropriate state oversight.

WSWA submits the following comments in response to the draft circulated prior to the March 4, 2021 ULC discussion call. Our suggestions preserve public health and safety and other legitimate state interests while maintaining a fair, competitive, and dynamic alcohol marketplace.

Below are the WSWA Comments:

Section 2: Definitions

Clarify the Distinction between "Delivery" and "Shipping." Committee members and observers unequivocally express that the draft would benefit from clear, concise definitions differentiating "interstate shipping" from "local delivery."

Local, licensed delivery is a consumer convenience option that exists within the state-based regulatory system and is distinct from shipping. Without clear definitions, state laws and regulations can confuse "delivery" with "shipping." Inadvertently, states may use one or both words overbroadly or create unintended, troublesome loopholes.

In the past, the industry relied upon the use of a "common carrier" to help draw this distinction, but common carrier business models have shifted and may now include local delivery, causing the term to be less reliable. We respectfully urge the drafting committee to focus on defining these two distinct terms, which would help states and the industry clarify what is allowed and reduce loopholes.

Section 3: Registration of Logistics Shippers

States Remain in the Dark (and Can Enable Illegal Shippers) when Lack of Oversight Exists on All Parts of the Supply Chain. The proliferation of illegal alcohol shipments into states and the lack of transparency on who the shippers are has left states in the dark, undercutting state regulatory authority. "Logistics shippers," more commonly referred to as "fulfillment houses," have drawn lots of attention lately for their large role in the wine shipping marketplace and their ability to be used to conceal where alcohol shipments are originating from. Without a license, state regulators face a dearth of information on logistics shippers and cannot understand their activities and for whom they ship on behalf of.

Alcohol producers and, in some cases retailers, commonly use these fulfillment houses that warehouse, pack, and ship online, direct-to-consumer orders on behalf of the supplier or retailer. These fulfillment centers often operate without an alcohol license in the states to which the orders they fulfill are shipped, despite purposefully directing alcohol into certain states and profiting from the facilitation of alcohol sales.

Parallel licensing, registration, and reporting requirements on direct shippers (i.e., suppliers or, where legal, retailers), fulfillment centers, *and* common carriers is critical for states to gain much needed clarity into the e-commerce marketplace and to hold all entities engaged in purposefully directing alcohol to a state's consumers to the same compliance standards.

Alcohol shipping by unlicensed fulfillment houses creates a wide range of transparency, accountability, health, and safety problems for regulators and consumers. Absent a comprehensive licensing and reporting structure, orders shipped directly from the fulfillment house lack any information, and there is no way to determine if the alcohol was shipped on behalf of a licensed or unlicensed entity. As a result, products shipped by a fulfillment house travel outside of the purview of state regulators - an easy way to mask illegal shipments into a state and avoid paying taxes.

Alcohol shipments from unlicensed fulfillment houses (i) lack of a clear chain of custody to prevent product adulteration, (ii) weaken the state's ability to enforce alcohol laws, (iii) bypass state taxes, (iv) undercut local businesses, and (v) can undermine the rationale for other types of alcohol laws.

These problems can be solved by a licensed and regulated fulfillment house system. Licensure provides regulators the authority to:

- see what shipments by fulfillment houses are properly (or improperly) licensed;
- take enforcement against non-compliant producers, retailers, fulfillment centers, and carriers; and
- ensure violators are subject to the same penalties as in-state licensed businesses.

Some argue that states do not have the power to license fulfilment centers because states' courts lack personal jurisdiction over the businesses. This argument reveals ignorance on how laws are made and how personal jurisdiction works.

Lack of personal jurisdiction over an entity does not invalidate a related law. A law is valid when the law is made under the proper the grant of authority – and it doesn't violate other laws. By contrast, personal jurisdiction doctrine examines the fairness of hauling a party in front of a state's courts. Personal jurisdiction deals with the (potential) parties to a case and where the case can be heard – not whether a law is valid. Applying personal jurisdiction criteria to determine the validity of a law is mixing apples with oranges and is the wrong criteria.

States do have the right to license fulfillment centers. That power is granted from the 10th and 21st Amendments, and such a law doesn't conflict with other constitutional rights such as the dormant Commerce Clause, which has been a popular way to attempt to invalidate alcohol laws recently.

Also, courts do have jurisdiction to haul a fulfillment house that directs alcohol into the state into the recipient state's courts. To assert personal jurisdiction over a party, the standard is "a finding of minimum contacts [that] must come about by an action of the defendant purposefully directed toward the forum State." *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 112 (1987). **In other words, deliberate action towards a state is key and not simply an expectation that an action may have some effect in a state or that a product may end up in a state.**

With fulfillment centers, that test is satisfied. Fulfillment centers purposefully direct alcohol into a state. They are not merely putting products in the stream of commerce. These businesses store, package, and address where the intoxicant product is headed, and they direct that package of alcohol to specific addresses in specific states. They request a common carrier to ship the package and are responsible for notifying the common carrier that the package contains alcohol and for requiring an over-21 years old recipient to sign for the package. Often, they also handle issues with problem shipments. That purposeful and knowing action directed to a state justifies personal jurisdiction over that entity.

If a state were not able to license fulfillment centers or did not have personal jurisdiction over a fulfillment center illegally shipping alcohol into its state, then there would exist a large loophole in the alcohol supply chain that connects the manufacturer to the ultimate consumer in a state. As discussed above, this loophole could allow all types of unwanted, illegal, and unsafe goods (alcohol and other products) to enter the state, unbeknownst to regulators, via companies that ship products into the state. WSWA strongly supports the efforts of the ULC to provide guidance to states in this critical area.

We appreciate your time and consideration.

Heather Calio
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Wine & Spirits Wholesalers of America

WSWA is the national trade association representing the distribution tier of the wine and spirits industry, dedicated to advancing the interests and independence of distributors and brokers of wine and spirits. Founded in 1943, WSWA has more than 350 member companies in 50 states and the District of Columbia, and its members distribute more than 80 percent of all wine and spirits sold at wholesale in the U.S.