



Massachusetts Package Stores Association, Inc.

30 Lyman Street - Suite #2 | Westborough, MA 01581
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Monday, July 15, 2019

Written Testimony of the Massachusetts Package Stores Association Submitted to the Joint Committee on Consumer Protection & Professional Licensure for the Hearing on Record of:

- H337** - An Act relative to notification of licensees;
- H338** - An Act relative to inducements in the purchase and sale of alcoholic beverages;
- H339** - An Act relative to alcohol purchasing discounts;
- H344** - An Act to promote alcohol storage space;
- H345** - An Act relative to retailer-backed coupons;
- H351** - An Act relative to farmer-wineries;
- H360** - An Act relative to licensing of liquor retailers;
- H363** - An Act relative to the wholesale of malt beverages produced by a pub brewery;
- S121** - An Act to update the alcohol excise tax; and
- S158** - An Act An act relative to one day alcoholic beverage licenses.

Dear Chairmen Chan and Feeney, and Members of the Joint Committee on Consumer Protection & Professional Licensure,

The Massachusetts Package Stores Association (MPSA) represents independently owned retailers of beer, wine and spirits across Massachusetts. Throughout the 2019 legislative session, MPSA has reported that the state of the alcohol beverages industry in Massachusetts is disruption and instability. The adverse situation continues as the regulatory system is assailed from every direction. MPSA's assertions regarding disruption are once again confirmed by this third group of bills before the joint committee. In this collection of bills, out of state retailers, multi-state supermarket chains, national box-stores, craft brewers and e-commerce shippers all seek to by-pass and usurp three-tier regulation in Massachusetts. Their shared intent is to increase revenues by undermining and replacing the independent retailers of beer, wine and spirits who produce over a billion dollars in state excise taxes and 19,000 jobs to the residents of Massachusetts.

Many additional factors are influencing the flood of bills impacting alcohol beverages that are under review by the joint committee. The tariff wars, oversaturation of the marketplace, loss of sales resulting from cannabis, and unchecked illegal sales by out of state retailers are all siphoning revenues and excise taxes to the state from the retail space in Massachusetts. There is also the threat of an online lottery and fallout from *Tennessee Wine & Spirits Retailers Association (TWRSA) v. Thomas, No. 18-96*.

The *TWRSA v. Thomas* decision should be deeply worrisome because many regulations of alcohol beverages in Massachusetts, which affect interstate commerce, are now challengeable by out of state interests as a violation of the "dormant Commerce Clause." At issue is the new and difficult to surpass burden placed upon the state in demonstrating the legitimacy of alcohol beverages regulations. It is in the context of reducing disruption, that MPSA has proffered testimony on ten (10) bills currently before the joint committee. This testimony is supplemental, but no less impactful, to the twenty-one (21) bills that MPSA testified on at the June 10th hearing, and MPSA's testimony on ten (10) bills at the hearing held on July 1, 2019.

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MPSA and its membership of independent retailers **oppose** the following bills:

- **H344 - An Act to promote alcohol storage space**, amends GL 138:20 (Alcoholic Liquors: Storage Permits) to authorize a Section 15 licensee to store its alcoholic beverages off premise. H344 further provides that a Section 15 licensee may use stored beverages in the normal course of business, but not for resale to other licensed establishments.
 - H344 is concerning because of the *TWSRA v. Thomas* decision impacting interstate commerce. Now that residency restrictions are challengeable as unconstitutional, multi-state superstore discount retailers and chain supermarkets will abuse H344 to create discount price advantages with wholesalers over their independent small business competitors.
 - Another concern is that these same groups will leverage H344 to break apart the 3-tier system by employing the *TWSRA v. Thomas* decision to by direct, store and then sell to consumers.
 - H344 creates disruption that would terminate businesses and jobs.

H344 – Oppose

- **H345 - An Act relative to retailer-backed coupons**, terminates the longstanding prohibition against discounting with coupons by amending GL 138:25C to permit a Section 15 licensee to issue coupons at discount to customers for the purchase of alcoholic beverages.
 - Allowing retailers to issue coupons for the purchase of alcoholic beverages in high quantities at discount is contrary to over 70 years of public policy intended to prevent overconsumption.
 - A greater concern is how the *TWSRA vs. Thomas* decision may impact H345. In *TWSRA*, Justice Alito, who wrote the majority opinion, indicated that the Constitution bars states from discriminating against “all out-of-state economic interests” – not just out-of-state alcohol and alcohol producers, as the retailers had argued. Consequently, it is understood that states who allow in-state retailers to offer coupons must also permit coupons offered by out-of-state retailers.
 - H345 will have the effect of disruption in the marketplace because multi-state supermarket chains and big box retailers will exploit H345 by using it to lead customers out of independently owned small businesses. Usurping and breaking independent businesses is the intent of H345.

H345 – Oppose

- **H351 - An Act relative to farmer-wineries**, is another assault this session by alcohol producers to 3-tier separation and regulation. H351 amends GL 138:19B relative to Farmer-Winery licenses creating an exception allowing a winegrower to operate a farmer-winery that can transport and deliver alcoholic beverages anywhere in the Commonwealth in vehicles owned or leased by them or their employees through a "direct shipment" license.

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- Legislation that blurs the tiers is concerning, but H351 is further worrisome because it has the legal result of opening Massachusetts to the impacts of the *TWSRA* case. *TWSRA* is explicit in its application of the Commerce Clause against state protectionism by holding that any in-state rights must be extended to out of state wine shippers wishing to expand their retail footprint.
- H351 is part of a national effort by online wine shippers, wine clubs and out of state retailers to leverage *TWSRA* as similar bills are before other state legislators.
- The objective of H351 is to increase revenues by replacement of 3-tier with 1 or 2 tier regulation.

351 - Oppose

- **H360 - An Act relative to licensing of liquor retailers**, amends Section 25A of Chapter 138 of the General Laws, by allowing an individual, partnership or corporation having identical ownership or common ownership that is granted, in the aggregate, of two or more licenses under section 15 to combine the alcoholic beverages purchases of such licenses for the purpose of attaining a quantity discount offered by a wholesaler licensed under Section 18.
 - H360 is a well-intended, but only addresses part of the problem created in 2017.
 - The prohibition of cross accumulation, beginning in 2017, was implemented due to a strict interpretation of the statute without taking into consideration long standing past practice, usage of trade and legislative intent. Prior to 2017, the ABCC applied the statute broadly.
 - Extreme disruption and dissent within the retail tier resulted from the change of interpretation as stores across the state lost an ability to discount through volume purchasing while supermarkets and big box retailers maintained the privilege due to their size and volume.
 - **The real fix is H339 - An Act relative to alcohol purchasing discounts.** H339 allows for aggregate and coop purchasing while also establishing a reasonable limit to no more than nine stores. In this manner, both multiple and single store retailers can equally possess the means for securing reasonable discount pricing in an industry facing extreme pressure from national retailers, supermarket chains, New Hampshire and out of state direct shippers.

H360 – Oppose

H339 - Support

- **H363 - An Act relative to the wholesale of malt beverages produced by a pub brewery**, amends GL 138:19D, allowing for the sale of malt beverages out of state and at retail by the bottle to consumers for consumption off premises.
 - H363 is another direct assault to the 3-tier system. The 3-tier system intentionally separates manufacturers, wholesalers and retailers in order to prevent the social ills prior to Prohibition.

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- H363 is also a push toward tied house distribution. Preventing the abuses of tied house and its causal connection to increased alcoholism was part of the intent to establishing three tier regulation in the 1940s.
- H363 is additionally perilous because of implications associated with the *TWSRA* holding. *TWSRA* held that the dormant Commerce Clause is applicable to the sale of alcohol beverages. Under past dormant Commerce Clause cases, if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to “advanc[e] a legitimate local purpose.” Consequently, any in-state action allowing for expanded rights in-state to sell alcohol beverages out of state opens Massachusetts to challenges by out of state retailers and breweries. MPSA contends that more needs to be known concerning the implications of the *TWSRA* case. Until there is a better understanding of *TWSRA*, bills impacting interstate commerce should be studied to determine negative impacts.
- H363 also has the effect of enticing retailers to introduce retaliatory legislation that would allow them to manufacture on premise. Such technology is readily available.

H363 – Oppose

- **S121 - An Act to update the alcohol excise tax**, amends GL 128:21 in several subsections to increase the alcohol excise tax. S121 raises the tax from \$3.30 to \$9.90 per barrel of malt beverage; raises the tax from \$.03 to \$.33 per gallon of cider; raises the tax on wine containing between 3% and 6% alcohol from \$.55 per gallon to \$1.65; raises the tax on champagne or other sparkling wine from \$.70 per gallon to \$2.80; raises the tax on beverages containing between 6% and 15% alcohol from \$1.10 per gallon to \$4.40; raises the tax on beverages containing more than 15% alcohol per gallon from \$4.05 per gallon to \$12.15; raises the tax on beverages containing more than 50% alcohol from \$4.05 to \$12.15.
 - MPSA has expressed repeatedly that competition is very fierce in Massachusetts.
 - Massachusetts is also losing substantial revenues to New Hampshire. New Hampshire has no excise tax. Know upfront that New Hampshire takes advantage of the tax disparity by actively soliciting Massachusetts residents in a state sponsored marketing campaign to purchase non-taxed alcohol beverages.
 - Higher excise taxes in Massachusetts will also push more residents to purchase online to out of state shippers, which is illegal but not adequately enforced.
 - Legislators should also factor in the undeniable loss of retail sales due to the introduction of cannabis.
 - Losses of sales to online shippers, out of state retailers and New Hampshire will exceed any gains created by increasing the excise taxes, which equates to a **net loss for Massachusetts**.

S121 – Oppose

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MPSA also supports four (4) bills that have been introduced to the Joint Committee on Consumer Protection & Professional Licensure, which strengthen three-tier regulation. The bills supported by MPSA and independent retailers of beer, wine and spirits are:

- **H337 - An Act relative to notification of licensees**, requires applicants for a new Section 15 license or a license transfer to notify all other licensees in that city or town prior to a hearing.
 - H337 is needed in order to provide transparency within cities and towns toward the course of distributing Section 15 licenses. The public should know who is buying Section 15 licenses. Justice Brandies once stated that, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; and electric light the most efficient policeman."
 - H337 is also relevant now that legislation has been introduced allowing for out of state trusts to apply for licenses.

H337 - Support

- **H338 - An Act relative to inducements in the purchase and sale of alcoholic beverages**, amends 138:25A, which regulates alcohol licensing, by adding a provision codifying a current ABCC regulation that prohibits an alcohol licensee from permitting or giving anything of substantial value to another to induce the purchase of a certain brand or type of alcohol or to induce another not to buy a certain brand or type of alcohol; H338 also prohibits furnishing an alcohol retailer with human resources to perform merchandising or other functions, with the expectation of stocking, rotation or pricing services of the industry member's own product; subjects licensees that violate these 'pay-to-play' practices to suspension or revocation of their licenses or criminal penalties, including a fine up to \$500 and up to 1 year in the House of Correction.

H338 – Support

- **H339 - An Act relative to alcohol purchasing discounts**, is the industry cure for the cross-accumulation controversy. H339 replaces ambiguous language in M.G.L. c. 138 by expressly allowing licensees with 2 or more licenses to combine the alcoholic beverages purchases of up to 9 licenses to attain a quantity wholesale discount. H339 also allows for individual stores to coop purchase, which was a long standing past practice.
 - An ABCC advisory opinion in 2017 ended the practice of cross accumulation/coop purchasing. This resulted in unprecedented disruption and infighting amongst retailers. The prohibition of cross accumulation was implemented due to a strict interpretation of the statute without taking into consideration long standing past practice, usage of trade and legislative intent. Prior to 2017, the ABCC applied the statute broadly. Extreme disruption and dissent within the retail tier

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resulted from the change of interpretation as stores across the state lost an ability to discount through volume purchasing while supermarkets and big box retailers maintained the privilege due to their size and volume. Many efforts have been attempted to end the controversy.

- H339 resolves the controversy over cross accumulation by amending ambiguous statutory language with explicit clarity based on usage of trade and long-standing past practices. Unlike the other bills addressing cross-accumulation, H339 remedies the controversy in a manner not in conflict with ABCC public policy against purchasing below invoiced cost.
- H339 does not create winners and losers by pitting retailers against each other.
- H339 was drafted in a manner that does not open Massachusetts up to a TWSRA challenge.
- **H339 is the AB industry supported fix to a serious problem.**

H339 – Support

- **S158 - An Act An act relative to one day alcoholic beverage licenses**, closes an abused loophole being exploited by breweries and manufacturers on single day licenses by amending Section 14 of Chapter 138 to cap the number of one-day liquor licenses granted to a single entity to no more than one day 14 licenses.
 - Currently, those looking to open a seasonal beer garden have to obtain a special one-day liquor license from the municipality. State law says that no “person” can be granted more than 30 such licenses a year. Breweries and others have skirted the provision by simply having different employees apply for the permits. The result is that brewery beer gardens that were intended to be short term are open regularly to a point where they become a de facto permanent fixture. This is not the intent to one day licenses.
 - The beer garden loophole is also concerning due to the numerous bills submitted to the joint committee that would permit breweries and manufacturers to retail off premise. Both H230 and H363 were introduced with the knowledge of the beer garden loophole. Consequently, breweries and manufacturers are hopeful in passage of their retail bills so that such sales could convert beer gardens into pop up retail centers, which avoid traditional brick and mortar costs.

S158 – Support

Thank you for reviewing MPSA’s written testimony. Please reach out to MPSA with any questions regarding the three-tier system and independent retailers of beer, wine and spirits.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert A. Mellion".

Robert A. Mellion, Esq.
Executive Director | General Counsel

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