

HOUSE No. 2822

The Commonwealth of Massachusetts

PRESENTED BY:

John J. Mahoney

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act further regulating a supplier's refusal to sell brand items.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	DATE ADDED:
<i>John J. Mahoney</i>	<i>13th Worcester</i>	<i>1/20/2017</i>
<i>Linda Dorcena Forry</i>	<i>First Suffolk</i>	
<i>Brian M. Ashe</i>	<i>2nd Hampden</i>	
<i>Daniel M. Donahue</i>	<i>16th Worcester</i>	
<i>Paul R. Heroux</i>	<i>2nd Bristol</i>	
<i>Joan B. Lovely</i>	<i>Second Essex</i>	
<i>Daniel J. Ryan</i>	<i>2nd Suffolk</i>	

HOUSE No. 2822

By Mr. Mahoney of Worcester, a petition (accompanied by bill, House, No. 2822) of John J. Mahoney and others for legislation to further regulate alcoholic beverage suppliers sale of brand items. Consumer Protection and Professional Licensure.

The Commonwealth of Massachusetts

**In the One Hundred and Ninetieth General Court
(2017-2018)**

An Act further regulating a supplier's refusal to sell brand items.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 Chapter 138 of the General Laws is hereby amended by inserting at the end of section
2 25E the following paragraphs:

3 (b)(1) Notwithstanding the above, if a successor supplier who is independent
4 from and not in any way affiliated with its predecessor supplier acquires all or substantially all of
5 the assets of another supplier through merger or acquisition, or purchases, acquires or is the
6 assignee of a brand or a particular item having a brand name of malt beverages from another
7 supplier, with the predecessor supplier retaining no control of the successor supplier or the brand
8 or particular item having a brand name of malt beverages, hereinafter referred to as an event of
9 succession, the successor supplier may, within 90 days of the date of the merger, acquisition,
10 purchase, or assignment, give written notice as specified in paragraph (b) of this section of its
11 intent to refuse to sell to an existing wholesaler the acquired brand or particular item having a
12 brand name or of malt beverages. Such notice shall be delivered to the commission and to the

13 wholesaler to whom the predecessor supplier had made sales of the acquired brand or particular
14 item having a brand name. For purposes of paragraph (b) of this section, “malt beverages” shall
15 mean malt beverages as defined in section 1 of this chapter or such products that are determined
16 to be malt beverages for the purposes of federal or state law.

17 (2) Any notice of intent to refuse to sell from a successor supplier to a wholesaler
18 of the acquired brand or particular item having a brand name of malt beverages shall be received
19 at the wholesaler’s principal place of business within the 90-day period. If notice is not received
20 within this 90-day period, it shall be an unfair trade practice and therefore unlawful for any
21 successor supplier to refuse to sell to the wholesaler any brand or particular item having a brand
22 name of malt beverages unless the successor supplier has good cause for discontinuance as
23 specified in this section. The written notice shall state under oath with particularity the facts on
24 which the successor supplier relies to conclude that an event of succession as specified in
25 paragraph (b) of this section has occurred.

26 (3) Upon issuing the notice of intent to refuse to sell pursuant to paragraph (b) of this
27 section, the successor supplier shall pay to the wholesaler the laid-in cost of the wholesaler’s
28 inventory of the brand or particular item having a brand name of malt beverages being
29 terminated plus the laid-cost of the sales and marketing material, including freight and cartage,
30 plus the fair market value, based on the 12 months immediately preceding the date of the closing
31 of the acquisition, for the wholesaler's business that is directly related to the sale of the brand or
32 particular item having a brand name of malt beverages which the successor supplier intends to
33 refuse to sell. For the purposes of this section, “fair market value” shall mean the price that the
34 wholesaler’s business that is related to the terminated brand or particular item having a brand
35 name would sell for in an arms-length transaction between a willing buyer and a willing seller as

36 of the date the notice was received by the wholesaler being terminated under paragraph (b) of
37 this section, with neither being required to act, and both having reasonable knowledge of the
38 relevant facts. The fair market value due for the wholesaler's business that is directly related to
39 the sale of the terminated brand or particular item having a brand name of malt beverages shall
40 include, but shall not be limited to, the appraised market value of those assets of the wholesaler
41 principally devoted to the sale of the terminated brand or particular item having a brand name of
42 malt beverages and the goodwill associated with the brand or particular item having a brand
43 name malt beverages.

44 (4) For the purposes of paragraph (b) of this section, "Supplier" means a person, whether
45 located in this commonwealth or elsewhere, that is authorized to sell malt beverages to
46 wholesalers in this commonwealth.

47 (5) The successor shall, prior to the expiration of 90 days after to the wholesaler's receipt
48 of notice from the successor, offer in writing to the wholesaler a reasonable amount which the
49 successor is willing to pay in settlement of all payments due under this section, with interest
50 thereon, as a payment pro tanto. If such wholesaler elects to accept the pro tanto payment, such
51 election shall be without prejudice to or waiver or surrender of any right to claim a larger sum by
52 proceeding to binding arbitration under this section. If such wholesaler elects not to accept the
53 pro tanto payment, the wholesaler may file a petition for relief under this section.

54 If a wholesaler accepts the pro tanto payment and any arbitrators assess a payment in an
55 amount less than the amount actually paid as a pro tanto payment, the wholesaler shall be
56 ordered by a proper decree to refund to the successor an amount equal to the difference between
57 the pro tanto payment and the amount of payments so found by such arbitrator.

58 (6) If the successor supplier and the affected wholesaler cannot agree on the
59 compensation due to the affected wholesaler under paragraph (b) of this section within the 90
60 days following the notice of its intent to refuse to sell any brand or particular item having a brand
61 name of malt beverages, either party may request that the amount of compensation be
62 determined by final binding arbitration conducted in the commonwealth according to the
63 arbitration process below.

64 (c) (1) Arbitrations under this section shall be administered by the American Arbitration
65 Association or its successor organization. The commercial arbitration rules of the American
66 Arbitration Association or its successor organization shall govern the arbitration. Arbitrations
67 shall be conducted before a panel of 3 arbitrators. Within 15 days after the commencement of
68 arbitration, each party shall select one person to act as arbitrator, and the two so selected shall
69 select a third arbitrator within 30 days of the commencement of the arbitration. If any arbitrator
70 is not selected within 45 days after notice of the arbitration being filed, such arbitrators shall be
71 selected by the nearest office of the American Arbitration Association or its successor
72 organization. All arbitrators shall serve as neutral, independent and impartial arbitrators.

73 (2) The arbitration proceeding shall conclude not later than 90 days after the date of the
74 notice of intent to arbitrate is transmitted to the other party, unless the parties agree to extend the
75 time by agreement or the arbitrator extends the time for good cause shown. Any arbitration held
76 pursuant to this section shall be in lieu of all other remedies and procedures. The costs of the
77 arbitrators and any other costs of the arbitration shall be equally divided by the parties engaged
78 in the arbitration. Each party shall bear all other expenses related to the arbitration. The panel of
79 arbitrators shall render a written, reasoned decision not later than 30 days after the conclusion of

80 the arbitration proceeding, unless the parties agree to extend the time by agreement or the
81 arbitrators extend the time for good cause shown.

82 (3) The arbitration decision shall be subject to judicial review pursuant to chapter 30A.
83 Any arbitration decision issued under this section may be enforced by commencing a civil action
84 in any court of competent jurisdiction in Massachusetts.

85 (4) Any party duly notified of an arbitration involving its rights that fails to participate in
86 an arbitration proceeding held pursuant to this section waives all rights it would have had in the
87 arbitration and is considered to have consented to the determination of the panel of arbitrators.

88 SECTION 2. Chapter 138 of the Massachusetts General Laws as appearing in the 2012
89 Official Edition is hereby amended by adding the following section:-

90 Section 79. If any provision of the Chapter 138 of the Massachusetts General Laws, or its
91 application to any person or circumstance, is determined by a court to be invalid or
92 unconstitutional, the remaining provisions shall be construed in accordance with the intent of the
93 legislature to further limit rather than to expand commerce in alcoholic beverages, to enhance
94 strict regulatory control over taxation, distribution and sale of alcoholic beverages through the
95 three-tier regulatory system imposed by the Massachusetts liquor control act upon all alcoholic
96 beverages including malt beverages.