

Appendix J: “Wholesale Licensee” Definition

Are out-of-state wholesalers of malt liquor and wine included in the definition of “wholesale licensee” in §2(34)?

Relevant definitions:

§2(14)	“Licensee’ means a person licensed by the bureau. ‘Licensee’ includes, but is not limited to, agency liquor stores and certificate of approval holders.”
§2(34)	“‘Wholesale licensee’ means a person <i>licensed</i> by the bureau as a wholesaler.”
§2(35)	“‘Wholesaler’ means a person who engages in the purchase and resale of malt or brewed beverages or wines, or both . . .”

Analysis:

- Technically, the definition in §2(34) excludes out-of-state wholesalers of malt liquor or wine, who receive a “certificate of approval” from the bureau under §1361 rather than a wholesaler “license” under §1401. The word “licensed,” which appears in the definition of wholesale licensee, is not defined. The plain meaning of “licensed” does not include entities with a certificate of approval. Thus, since out-of-state wholesalers are not *licensed*, they are apparently not “wholesale licensees”.
- But, the word “licensee” is defined in §2(14) to include certificate of approval holders, and use of the word “licensee” in the defined term suggests that wholesale licensees might also include certificate of approval holders. This reading of the term “wholesale licensee” would include not only in-state wholesalers of malt liquor or wine that have obtained licenses but also out-of-state wholesalers of malt liquor or wine that have obtained certificates of approval.

This interpretation is supported by the definition of “wholesale licensee” in §1451(5)—for purposes of the Wholesale Licensee Agreement Act. This definition (quoted below) includes only in-State wholesalers of malt liquor or wine and also “notwithstand[s]” the definition in §2(34), which would be unnecessary if the definition in §2(34) also only includes in-State licensed wholesalers.

§1451(5)	“As used in this chapter . . . <i>Notwithstanding section 2, subsection 34</i> , ‘wholesale licensee’ means any person holding a wholesale malt liquor or wine license within the State, offering malt liquor or wine for sale or resale to retailers, without regard to whether the business of the person is conducted under the terms of an agreement with a certificate of approval holder.”
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See also §707-A(2) (allowing hotels and manufacturers to have tied financial interests as long as it has no interest in a “*Maine* wholesale licensee”); §1365 (requiring tax to be paid for certain products sold to “a wholesale licensee *in the State*”) – in these provisions the word “*Maine*” or phrase “*in the State*” would be unnecessary unless “wholesale licensee” includes out-of-state entities. *See also* §1371(3)(A) (“*Maine* wholesale licensees”); §1364(3)(B) (same); §1364(4) (“wholesale licensees in the State”).

Suggestion: Assess whether out-of-state wholesalers of malt liquor or wine is intended to be included in each of the sections of Title 28-A that employ the term “wholesale licensee.” **See attached table listing these provisions.** Then, rewrite the “wholesale licensee”

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definition in §2(34)the way that makes the most sense and clarify the scope of any statute that currently uses the phrase “wholesale licensee” but that has a different scope then the amended “wholesale licensee” definition.

Are the following statutes—governing “wholesale licensees”—intended to govern out-of-state wholesalers of malt liquor or wine that have obtained certificates of approval to sell their products in Maine?

Citation	Description	Intent to include out-of-state wholesalers of malt liquor or wine that have certificates of approval?
§4(1)(D)	Times when wholesale licensees may deliver “liquor” in Maine. <i>See also</i> §713 below.	<i>Probably only involves in-state wholesalers, unless out-of-state wholesalers are permitted to make sales and deliveries in Maine.</i>
§83-B(8)	Wholesale licensee may sell malt liquor and wine to an unlicensed food service organization that caters international flights/boat trips.	?
§86	Prohibits Commission members and commission or board employees from accepting samples or anything of value from “a manufacturer, wholesaler, wholesale licensee or retail licensee.”	<i>Note: probably should remove “wholesale licensee” as redundant to the word “wholesaler”.</i>
§705(1), (1-A)(1) & (1-E)	Prohibits wholesale licensees from accepting any type of payment for liquor except cash, check or electronic funds transfer.	?
§707(5) & (7) and §1363(2) & (2)(B)	<p>Three-tier financial separation rules:</p> <ul style="list-style-type: none"> • §707(5): prohibits wholesale licensees from having financial interests in (A) out-of-state manufacturers or wholesalers of malt liquor; (B) licensed Maine manufacturers; or (C) licensed retailers. <ul style="list-style-type: none"> ○ §707(7): exception allowing wholesale licensees to receive “normal credits” for purchase of malt liquor or wine from in-state or out-of-state manufacturers. • §1363(1): prohibits manufacturers from having a financial interest in a wholesale licensee. • §1363(2): prohibits in-State and out-of-state manufacturers from loaning money to wholesale licensee or outfitting the wholesale licensee’s business (with some exceptions: like vehicle painting). 	<i>Note: The relationships that are the opposite of §707(5)(C) are prohibited by §707(3), which prevents licensed retailers from having a financial interest in a Maine wholesaler or foreign wholesaler. Does this provision—and the general theory of the three-tier system—suggest that out-of-state wholesalers are intended to be included in all of these three-tier provisions?</i>

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Citation	Description	Intent to include out-of-state wholesalers of malt liquor or wine that have certificates of approval?
§708(1) & (2)	<ul style="list-style-type: none"> • §708(1): Prohibits certificate of approval holders from giving special discounts or volume discounts, except those offered to “all wholesale licensees.” • §708(2): Prohibits wholesale licensees from offering special discounts or volume discounts, except those offered to all retail licensees. 	?
§708-A	Authorizing “a certificate of approval holder, wholesale licensee or retail licensee” to offer in-pack sweepstakes, games and contests.	<i>Regardless of the scope of the term “wholesale licensee”, out of state wholesalers are covered by the term “certificate of approval holder”</i>
§710(1)	Prohibition on number of signs advertising liquor on the outside of any building or premises under a person’s control – with an exception for “wholesale licensees and certificate of approval holders.”	<i>“Certificate of approval holder” includes out-of-state wholesalers, so if out-of-state wholesalers are not considered “wholesale licensees” it has no substantive effect on this provision.</i>
§713(2), (3) & (4)	Restrictions applicable when wholesale licensees sell and deliver malt liquor or wine by truck.	<i>Probably only involves in-state wholesalers, unless out-of-state wholesalers are permitted to make sales and deliveries in Maine.</i>
§752	Requiring wholesale licensees to keep records of their transactions with brewers, wineries, other wholesalers and retailers for 2 years.	?
§803(9)	Wholesale licensee or certificate of approval may pay a consensual fine (“offer in compromise”) as alternative to administrative discipline – if the compromise is approved by the District Court.	<i>“Certificate of approval holder” includes out-of-state wholesalers, so if out-of-state wholesalers are not considered “wholesale licensees” it has no substantive effect on this provision.</i>
§1012(6)(D)	A hotel must purchase the malt liquor or wine used to stock a minibar from a wholesale licensee.	<i>Probably not intended to include out-of-state wholesalers, who generally may not sell their products directly to retailers. §1361(4).</i>
§1051(8)(L, P, Q & R)	<p>Lead in: on-premises retail licensees may conduct taste-testing event with a certificate of approval holder or wholesale licensee.</p> <ul style="list-style-type: none"> • ¶L liquor must be purchased from a wholesale licensee or agency liquor store. <p>A “certificate of approval holder” or wholesale licensee may:</p> <ul style="list-style-type: none"> • ¶P: provide food and snacks; • ¶Q: provide advertising material and promotional displays; and • ¶R: distribute inexpensive novelties. 	<p><i>“Certificate of approval holder” includes out-of-state wholesalers, so if out-of-state wholesalers are not considered “wholesale licensees” it has no substantive effect on the lead-in language of §1051(8) or the language of ¶¶P, Q or R.</i></p> <p><i>The real question is whether the malt liquor or wine used in these taste-testing events may be purchased from out-of-state wholesalers under ¶L? The answer is probably “no”. See §1361(4).</i></p>

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Citation	Description	Intent to include out-of-state wholesalers of malt liquor or wine that have certificates of approval?
§1055(1)(F)	When Class A restaurants and Class A restaurant/lounges provide complimentary samples of malt liquor or wine to customers, they must purchase the malt liquor or wine from a wholesale licensee.	<i>Probably not intended to include out-of-state wholesalers, who generally may not sell their products directly to retailers. §1361(4).</i>
§1205(2)(K)	Wine used in a taste-testing event conducted by an off-premises retail licensee must be purchased from a wholesale licensee.	<i>Probably not intended to include out-of-state wholesalers, who generally may not sell their products directly to retailers. §1361(4).</i>
§1207(2)(K)	Malt liquor used in a taste-testing event conducted by an off-premises retail licensee must be purchased from a wholesale licensee.	<i>Probably not intended to include out-of-state wholesalers, who generally may not sell their products directly to retailers. §1361(4).</i>
§1355-A(3)(B)(2) & (4)(B)(1)	Small brewery and small winery may sell and deliver their products directly to licensed retailers without first selling to a wholesale licensee.	<i>Probably not intended to include out-of-state wholesalers because the products affected by these provisions are not leaving Maine.</i>
§1361(5)	Quote: “No certificate of approval holder may make it a condition in selling malt liquor or wine to any wholesale licensee that the wholesale licensee may not sell malt liquor or wine manufactured or sold by other manufacturers or foreign wholesalers.”	?
§1364(1)	COA holders must file with BABLO copies of every invoice sent to wholesale licensees and the Maine purchase order. <ul style="list-style-type: none"> • Compare §1364(3)(B) & (4) which impose reporting requirements on COA holders with respect to their interactions with a “<i>Maine</i> wholesale licensee” or “wholesale licensees <i>in the State</i>” 	<i>This reporting requirement appears to apply to a COA’s interaction with a Maine wholesale licensee, but the use of different language in subsection 1 as opposed to subsections (3)(B) and (4) raise the question whether subsection 1 is broader in scope.</i>
§1401(2)(B), (7) & (8)	Section 1401 is the provision for licensing Maine wholesalers. <ul style="list-style-type: none"> • §1401(2)(B): requires payment of a \$600 fee for wholesale licensees’ warehouses other than their principal places of business.” • §1401(7): requires wholesale licensees to maintain a warehouse in Maine and employ licensed sales representatives to solicit orders. • §1401(8): requires wholesale licensees to operate under franchise agreements authorizing sales in certain allocated territories. 	<i>These provisions appear to be specific to Maine wholesalers (should that be made clear in subsection 1, however?)</i>

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Citation	Description	Intent to include out-of-state wholesalers of malt liquor or wine that have certificates of approval?
§1402(1), (2) & (3)	<ul style="list-style-type: none"> • §1402(1): Taste-testing events on wholesale licensee’s premises • §1401(2): Taste-testing event conducted by wholesale licensee on a retail licensee’s premises • §1402(3)(A): wholesale licensee <i>or certificate of approval holder</i> may provide the products for the taste-testing event • §1402(3)(D): after taste-testing event, wholesale licensee (what about certificate of approval holder) removes unused products 	<p><i>§1402(1) likely does not include out-of-state wholesalers, who do not have premises in Maine. Unclear if subsections 2 and 3 include out-of-state wholesalers – probably subsection 3 does, given the certificate of approval holder language, but inclusion of language about “certificate of approval holders” is not uniform in these subsections. Are the differences intentional?</i></p>
§1403 all subsections	<ul style="list-style-type: none"> • §1403(1): a wholesale licensee may not import malt liquor or wine from person who does not have a certificate of approval • §1403(1-A): bureau may authorize a wholesale licensee to purchase malt liquor or wine from another wholesale licensee • §1403(2): a wholesale licensee may not sell products to another wholesale licensee unless the products were purchased from a brewery, winery or foreign wholesaler with a certificate of approval • §1403(3): a wholesale licensee selling malt liquor or wine may not require the purchasing wholesale licensee to forgo sell other brands of malt liquor or wine • §1403(4): required wholesale licensee monthly report of sales/purchases to bureau 	<p><i>It may be odd if some of these provisions apply to out-of-state wholesalers, because Maine would be regulating sales that occur out-of-state between two out-of-state entities. But, are any of them applicable to out-of-state entities? (For example, do out-of-state wholesalers “import” malt liquor or wine into Maine as stated in subsection 1? Are reports required under subsection 4 from out-of-state wholesalers who sell their products in Maine?)</i></p>
§1404, §1405 & 1652	<ul style="list-style-type: none"> • §1404: unbonded wholesale licensees must follow specific procedures to ensure payment of excise taxes when ordering and purchasing malt liquor and wine • §1405: bonded wholesale licensees must follow specific procedures to ensure payment of excise taxes when buying malt liquor or wine • §1652: requiring payment of excise tax on malt liquor, wine, and low-alcohol spirits by the Maine manufacturer or the “importing wholesale licensee.” (But §1652(4) requires bureau to open excise tax account with all “wholesale licensees”; ensure correct usage if “wholesale licensee” is redefined to include out-of-state entities.) 	<p><i>These requirements appear to be intended to apply only to Maine wholesalers, not out-of-state wholesalers—why would the bureau regulate out-of-state wholesaler purchases of malt liquor or wine?</i></p> <p><i>Key question: are Maine wholesalers the only entities that “import” malt liquor and wine into Maine – and thus the only entities liable for the excise taxes on imported malt liquor and wine? Compare §2077.</i></p>

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Citation	Description	Intent to include out-of-state wholesalers of malt liquor or wine that have certificates of approval?
§1406(1), (2) & (3)	<ul style="list-style-type: none"> • §1406(1)(A): certificate of approval holders must list for bureau “the wholesale licensees who distribute their products <u>in the State</u>” • §1406(1)(B): a certificate of approval holder must report to bureau changes in its wholesale licensees or their territories <u>in the State</u> • §1406(2): a wholesale licensee must list for bureau all certificate of approval holders whose products it distributes <u>in the State</u> • §1406(3): hearings for COA holder or wholesale licensee to change the time period for providing notice of changes 	<i>The structure of §1406, and the requirements it imposes, suggest that only in-State wholesalers are meant to be included in the phrase “wholesale licensee” in this section.</i>
§1407(1)	Receiving COA holder may not terminate wholesale licensee that is the exclusive distributor of certain brands merely due to transfer of those brands from the prior COA holder that entered the exclusive distribution agreement.	<i>Likely this only protects Maine wholesale licensees, but the language of §1407(1) could be clarified to apply only to Maine distribution agreements.</i>
§1408(1), (2) & (4)	<ul style="list-style-type: none"> • §1408(1): COA holders must report to bureau F.O.B. price for which selling all malt liquor or wine to wholesale licensees • §1408(2): Each wholesale licensee must report to bureau delivered sales prices for malt liquor or wine it sells to any entity • §1408(4): Price change notices to bureau 	<i>If §1408(2) does not apply to out-of-state wholesalers, those entities must nevertheless report their sales prices to the bureau under §1408(1) because they are certificate of approval (COA) holders. The only difference: under §1408(1) they report the shipping point (FOB) price and under §1408(2) they report the delivered price.</i>
Chapter 57 §§1451 to 1465	There are no questions about the definition of “wholesale licensee” for purposes of this chapter, because “wholesale licensee” is defined in §1451(5) specifically only to include wholesalers with a license “within the State.”	
§2077(1-A) & (1-B)	Only a “wholesale licensee, small brewery licensee or small winery licensee” may “transport or cause to be transported malt liquor or wine into the State” in large quantities.	<i>Key question: are Maine wholesalers the only entities authorized to import malt liquor and wine “into” Maine? Or, can an out-of-state wholesaler “cause” malt liquor or wine “to be transported . . . into the State”? Compare §§1404, 1405 & 1652.</i>