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WINE & SPIRITS
WHOLESALE ASSOCIATION

February 6, 2012

To: House Federal & State Affairs Committee
From: R.E. "Tuck" Duncan
General Counsel, Kansas Wine & Spirits Wholesalers Association
RE: HB 2550

We support the modifications proposed by HB2550. However, merely deleting the suggested language may not accomplish the intended result.

Current law provides:

41-104. Acts with regard to alcoholic liquor prohibited unless allowed by statute; exceptions. No person shall manufacture, bottle, blend, sell, barter, transport, deliver, furnish or possess any alcoholic liquor for beverage purposes, except as specifically provided in this act, the club and drinking establishment act or article 27 of chapter 41 of the Kansas Statutes Annotated, except that nothing contained in this act shall prevent..."

The Agency has interpreted this language to mean that unless the legislature specifically authorizes a particular act, it is not authorized.

The Kansas Liquor Control Act is a criminal law as it provides for criminal fines and loss of freedom. As you know in order to be found guilty of a criminal law, the prosecution must show that the defendant intended to act as he did; while in civil law, you may sometimes be responsible for your actions even though you did not intend the consequences. The definition of a crime specifies the act that constitutes the crime — all crimes require a prohibited act and a prohibited intent. KSA 41-104 turns that proposition on its head. The description must be sufficiently specific to allow persons to avoid committing the act. Courts commonly classify statutory crimes as *mala prohibita*

"Generally speaking, where the law imposes criminal liability for certain conduct, the scienter element requires 'no more than that the person charged with the duty knows what he is doing. ... [Citation omitted.] This general rule is based on the deeply-rooted principle that ignorance of the law or mistake of law is no defense to criminal prosecution. [Citations omitted.] 'Based on the notion that the law is *definite* and *knowable*, the common law presumed that every person knew the law.' *Cheek v. United States*, 498 U.S.192, 199, 111 S. Ct. 604 (emphasis supplied).

Under K.S.A. 41-104 you cannot be presumed to know the law. A *malum prohibitum* offense is wrong only because a statute makes it so, and K.S.A. 41-104 needs to be revised to meet the current standards of criminal culpability. Thank you for your attention to this matter.