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OF WISCONSIN AND UPPER MICHIGAN

The National Association of Theatre Owners of Wisconsin and Upper Michigan

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Testimony

To: Senator Howard Marklein, Chair
Senate Committee on Revenue, Financial Institutions & Rural Issues
From: George Rouman, President
Date: Tuesday, April 25, 2017
Re: Urge Support of Senate Bill 89
Restaurant Definition and Impact on Certain Alcohol Licenses

Chairman Marklein and members of the Senate Committee, as president and on behalf of the National Association of Theatre Owners of Wisconsin and Upper Michigan (NATO) I am asking your support for the passage of Senate Bill 89.

Senate Bill 89 includes a provision that is meant to correct a definition change of "restaurant" that has had the unintended consequence of affecting certain alcohol licenses. The original change was contained in the 2015-17 Biennial Budget (2015 Wisconsin Act 55). If Senate Bill 89 or its companion Assembly Bill 140 are not passed and signed into law by July 1, 2017 - some Wisconsin movie theatres will be unable to renew and therefore lose their Class 'C' liquor license.

Background

The 2015 state budget included a provision that transferred restaurant licensing and inspection activities from the Department of Health Services to the Department of Agriculture & Consumer Protection - Bureau of Food Safety and Inspection. In doing so the definition of "retail food establishment" was modified to include restaurants as a type of retail food establishment. Previously, restaurants were excluded from this definition. Sec. 97.30, Wis. Stats. Further, the definition of "restaurant" was modified to describe a restaurant's "predominant activity" as "the preparation, service, or sale of meals..." Sec. 97.01(14g), which went into effect on July 1, 2016. This updated definition of restaurant is cross-referenced in multiple places in Chapter 125 (Alcohol Beverages), as it relates to alcohol beverage retail licenses.

Since the "predominant activity" of most movie theatres is as the name suggests… operating a movie theatre… the unintended impact of the definition change left some theatres that have operated with a Class C liquor license in years past, suddenly faced the very real prospect of being unable to renew those licenses.

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In early 2016 NATO identified this issue with the Department of Revenue, which lead to the department publishing a memo on March 16, 2016 (see attached) to assist those businesses affected for one-year, buying time for the state legislature to pass a permanent solution before June 30, 2017.

That Department of Revenue memo stated in reference to the changes included in the state budget that, *"These modifications were made solely to accommodate the transfer of restaurant licensing and inspection to the DATCP Bureau of Food Safety and Inspection. There was no intent for these modifications to affect any Chapter 125 licenses or permits."*

It is for these reasons we ask the Committee and the state legislature to please act rapidly on Senate Bill 89 to prevent an adverse impact on our member theatre businesses.

If you have any questions, please feel free to contact me or our lobbyist, Forbes McIntosh, at (608) 332-5205.

Thank you.

State of Wisconsin
Governor Scott Walker

Department of Agriculture Trade and Consumer Protection, Ben Brancel, Secretary
Department of Revenue, Richard Chandler, Secretary

March 16, 2016

To: Wisconsin Town, City, and Village Clerks
From: Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP)
Wisconsin Department of Revenue (DOR)
Re: "Class C" (Wine) License Questions

It has come to our attention that there are questions about food-related license requirements for retail establishments seeking initial issuance or renewal of a "Class C" wine license by a municipality.

The 2015-17 Biennial Budget (Wisconsin Act 55) transferred restaurant licensing and inspection activities from the Department of Health Services to the DATCP Bureau of Food Safety and Inspection, effective July 1, 2016. With this transfer of licensing and inspection activities, minor changes included:

- The definition of "retail food establishment" was modified to *include restaurants* as a type of retail food establishment. Previously, restaurants were excluded from this definition. Sec. 97.30, Wis. Stats., effective July 1, 2016.
- The definition of "restaurant" was modified to describe a restaurant's "predominant activity" as "the preparation, service, or sale of meals…" Sec. 97.01(14g), Wis. Stats., effective July 1, 2016.
- This updated definition of restaurant is cross-referenced in multiple places in Chapter 125 (Alcohol Beverages), as it relates to alcohol beverage retail licenses.

These modifications were made solely to accommodate the transfer of restaurant licensing and inspection to the DATCP Bureau of Food Safety and Inspection. There was no intent for these modifications to affect any Chapter 125 licenses or permits.

Many alcohol beverage licenses expire on June 30 pursuant to state law and must be renewed. DOR and DATCP advise that municipalities consider AT-115 applications submitted before July 1, 2016, to be based on the current statutory definition of restaurant. Current law states:

> "'Restaurant' means any building, room or place where meals are prepared or served or sold to transients or the general public, and all places used in connection with it and includes any public or private school lunchroom for which food service is provided by contract. 'Meals' does not include soft drinks, ice cream, milk, milk drinks, ices and confections…." Sec. 97.01(14g), Wis. Stats.

If you have questions, please contact Wisconsin Department of Revenue Tax Specialist Tom Ourada or Wisconsin Department of Agriculture, Trade and Consumer Protection Director of Food and Recreational Businesses Peter Haase.

WMC

WISCONSIN MANUFACTURERS & COMMERCE

TO: **Members of the Senate Committee on Revenue, Financial Institutions, and Rural Issues**

FROM: **Jason Culotta**
Senior Director of Government Relations

DATE: **April 25, 2017**

RE: **Testimony on Senate Bill 89**

Thank you for the opportunity to share comments with you today about Senate Bill 89, a Department of Revenue (DOR) "housekeeping" bill that unfortunately contains two sales tax increases that should be removed from the bill.

Wisconsin Manufacturers & Commerce (WMC) is the state chamber of commerce and largest general business association in Wisconsin. We were founded more than 100 years ago, and are proud to represent approximately 3,800 member companies of all sizes, and from every sector of our economy. Our mission is to make Wisconsin the most competitive state in the nation in which to do business.

While this type of legislation is necessary to update statutes to reflect appropriate changes in administering tax law, the inclusion of two sales tax increases on businesses and consumers deserves your attention and should be removed from the bill.

The first of these tax increases would reduce the scope of the sales tax exemptions for professional services by allowing DOR to tax "separate and optional fees" that a tax exempt professional may assess to a customer, such as a fee for making copies. For example, an accountant who makes copies for a client would now have to assess sales tax on that amount charged to the client as an "optional" fee.

While debating whether or not professional services should be subject to sales tax is an issue that the Legislature could consider, doing so under the guise of a "technical" bill is inappropriate.

The relevant provisions to allowing sales tax to apply to "separate and optional fees" can be found in Sections 16-21 and 24 of the bill. We ask you to remove these sections from the bill.

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The second sales tax increase hits manufacturers with a tax increase on the fuel and electricity sales used in manufacturing. With the new language in Sections 22 and 23 of the bill, DOR auditors will be able to apply tax to areas of manufacturing which are currently exempt, such as food processors and cheesemakers who may need to refrigerate food before the manufacturing process is considered complete.

Also impacted would be commercial printers that require humidity and temperature controls in order for ink to set or dry and companies that utilize "clean rooms" for testing, research, or high tech production.

Wisconsin industrial electric rates are already the highest in the Midwest and we shouldn't add to this burden by raising taxes on electricity.

Both of these tax increases will make our heavy tax burden worse. WMC asks that these sections be removed from the bill.

In addition to the policy matters presented above, the administrative rule that DOR cites as governing over the fuel and electricity sales tax exemption, TAX 2.11, was adopted in 1978 in relation to an income tax credit that no longer exists. That now-defunct rule is housed in DOR's income tax chapter, and couldn't possibly be a valid rule governing the implementation or enforcement of a *sales tax exemption* that was enacted twenty-five years after TAX 2.11 was promulgated.

DOR has never promulgated a rule to interpret or enforce the sales tax exemption on fuel and electricity consumed in manufacturing since the time the Legislature first enacted the exemption in 2003. Further, the DOR cannot assert that a rule governing income tax credits that was promulgated twenty-five years before the sales tax exemption on electricity was enacted is legally controlling over the sales tax exemption. Consequently, TAX 2.11 is not a valid rule for purposes of this sales tax exemption, and it is not lawful for DOR to use it as a basis to restrict the sales tax exemption for electricity used in manufacturing.

Wis. Stat. s. 227.10(1) states that every State "agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute."

Wisconsin courts have interpreted this statute to mean that "any statement of general policy or interpretation of a statute adopted to govern enforcement or administration of that statute must be promulgated as a rule." (see Cholvin v. DHFS, 2008 WI App 127, emphasis added.) The Department should follow suit regarding its administration of the relevant statute adopted in 2003.

HOWARD MARKLEIN
STATE SENATOR • 17TH SENATE DISTRICT

April 25, 2017
Senate Committee on Revenue, Financial Institutions & Rural Issues
Testimony on Senate Bill (SB) 89

Good afternoon!

Thank you committee members for the opportunity to testify in favor of Senate Bill 89 (SB 89). I introduced SB 89 at the request of the Department of Revenue (DOR). This bill makes several technical corrections and minor policy changes that are intended to be revenue neutral or have minimal fiscal impacts.

SB 89 is intended to streamline the processes for both taxpayers and state government. One example is that it removes a duplicative paper file mandate that requires the Department of Natural Resources (DNR) to provide a paper copy of the Managed Forest Law (MFL) to two different bureaus within DOR. The bill changes the requirement to one paper copy.

There are several technical corrections in the bill, which include modernizing assessment roll language to reflect that the roll is electronic rather than on paper by changing words like "strike off" to "correct." It replaces the state statute reference to the since repealed Internal Revenue Code (IRC) definition of "active foreign business income", and replaces in state statute the phantom reference with the verbatim language of the repealed IRC language.

The bill also includes minor policy changes to reflect current law administration. SB 89 ensures that the Capital Gains Exclusion/Deferral Program requires actual and sustained investment by investors in order to claim the associated benefits. It corrects a problem created by the change in the definition of a restaurant last session, and ensures that non-restaurant businesses that have a "Class C" wine license, like paint and sip studios and movie theatres will be able to renew their licenses after June 30, 2017.

Since this bill was introduced, we have heard some concerns from taxpayers with two provisions in the bill. We have drafted an amendment to the bill which will remove the two items if DOR and the taxpayers cannot resolve the concerns. The amendment has not been introduced.

Following my testimony, you will hear from Mike Wagner, the Assistant Deputy Secretary at DOR, who will discuss each of the provisions in greater detail.

Thank you again for allowing me the opportunity to testify in support of this bill, and I would welcome any questions.

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DOR

DOR Housekeeping Bill (Senate Bill 89 / Assembly Bill 140)

March 13, 2017

Update Assessment Roll Language (Section 1)

Explanation: Statutes describing the duties of municipal clerks as they relate to property assessment are outdated. Statutes refer to acts that would occur when the roll was on paper. This provision updates the language to reflect to digital nature of rolls today. Second, clerks currently enter the property classification on the roll, but the statutes do not reflect this activity, and this provision makes this current duty explicit.

Define "Investment" for Capital Gains Deferral/Exclusion Program (Sections 2-4)

Explanation: The word "investment" is not sufficiently defined in the statutes related to the Wisconsin business capital gains deferral/exclusion program. Since "investment" can mean non-ownership lending in addition to purchasing shares or other ownership in a business, the statute needs to be clearer. DOR has administered the program consistent with the proposed clarification that "investment" for the capital gains deferral/exclusion program means the acquisition of stock or other ownership. The bill also closes a loophole in the current law that would allow full exclusion/deferral for financial investments that last for as little as 1 day.

The biennial budget expands the types of businesses that can qualify for this program to include those whose staffing is fully handled by a professional employment organization. That change is an expansion of the program (with an associated fiscal effect). This change is a reflection of the current program with clean-up language (no fiscal effect). The technical changes in this bill and the policy changes in the budget bill are complementary but are not dependent upon each other.

Replacement of Obsolete IRC Reference (Sections 5-6)

Explanation: Instead of defining "active foreign business income" in state statutes, current law references section 861 (c) (1) (B) of the IRC for the definition. The problem is that this section of the IRC was repealed without replacement in 2011 even though the treatment of active foreign business income did not change. This provision would replace the currently obsolete reference to what it was, verbatim, in state statutes.

Extension Agreements by Designated Agents (Sections 7-8)

Explanation: For federal purposes, a designated agent may sign an extension agreement for all members of a combined group. Current state law is unclear whether a designated agent of a combined group may validly sign an extension agreement for all members of a combined group. This bill provides a parallel ability in state law to federal law that provides a designated agent with this ability.

The benefit of this provision is that there is a parallel state and federal treatment and also that one agent of a combined group can act uniformly on behalf of the rest of the group rather than having separate agreements for each member.

Uniform Information Return Requirements for All Taxpayers **(Sections 9-11)**

Explanation: State statutes and federal tax law both require C-corporations, S-corporations, and individuals to file informational returns (e.g., W-2s and 1099s) for payments of wages, salaries, commissions, bonuses, and rent payments. Federal law only allows business deductions if the taxpayer files the required and related informational returns. State law requires this too for C-corporations and individuals. Except, there is a current oversight in law involving S-corporations, which does not provide DOR with the authority to disallow a business deduction related to unfiled information returns, despite these returns being mandated by existing statutes. In other words, state statutes provide an inconsistent treatment in how DOR may treat mandatory information returns depending upon the filer, despite the mandate to file informational returns being consistent across different taxpayer types. This inconsistent treatment is an oversight in law and is a fraud vulnerability loophole. DOR looks to correct this oversight as it relates to S-corporations. This provision does not create a new requirement on any taxpayer.

Clean-Up to Chargeback Law Change – 2015 Wisconsin Act 317 **(Sections 12-15)**

Explanation: Act 317 requires DOR to complete the chargeback process on behalf of a municipality, regardless of the impact on equalized value (prior statute required there to be an effect on equalized value in order to execute a chargeback). Act 317 passed at the very end of the last session and did not fully clean-up accompanying statutes that reflect much more accessible new chargeback standard. As a result, statutes require DOR and municipalities to continue to maintain chargeback amounts indefinitely until they reach chargeback thresholds. Since chargebacks are now a much more automatic process, the extended recordkeeping and property value thresholds are now largely unnecessary or unreasonable. The provision moves the per property threshold from $500 to $250 and limits chargebacks to the five most recent assessment years, except in the case of a court ruling. The net effect is less extended recordkeeping of small value changes for both municipalities and DOR.

Separate Sales Transactions/Adoption of *Cannon & Dunphy v. DOR*/Other Sales Tax Clean-Up (Sections 16-21 and 24)

Explanation: The July 2, 2015 Wisconsin Tax Appeals Commission's decision in *Cannon & Dunphy, S.C. vs. Wisconsin Department of Revenue* (CCH 401-970) affected the sales tax collection of sales of taxable products when they are provided with nontaxable products, even if the taxable product is provided (a) for a separate and optional fee from the product, and (b) at a later time than when the nontaxable product was provided. While the case related to medical records copying, the new standard set forth in this decision could be used for other appeals or DOR assessments, disrupting longstanding DOR sales tax administration.

Adopting the provisions of the bill as drafted does not have a fiscal effect because it reflects current administration of the tax law and TAC decision without expansion beyond the *Cannon and Dunphy* decision.

The bill also codifies longstanding DOR policy that for sales tax purposes, lodging providers are the consumers of telecommunications/Internet services that they provide to their customers. This has no fiscal effect. This treatment was initially requested by the industry many years ago because if the lodging guest were treated as the telecommunications customer, then the lodging provider

(hotel, motel, camp site; etc.) would be treated as a utility and subject to other regulations that come along with being a utility.

Codify Existing Administration of the Sales/Use Tax Exemption for Fuel and Electricity Consumed in Manufacturing (Section 22-23)

Explanation: The income/franchise tax credit for fuel and electricity consumed in manufacturing was converted into a sales tax exemption in 2006. When the conversion occurred, the qualifying requirement, that the fuel or electricity be used directly in manufacturing, for the income tax credit was not similarly carried forward for the new sales/use tax exemption. DOR believes the legislative intent was to carry over the identical requirements and has been administering the law consistent with that intent since the time of the conversion in 2006. DOR seeks to codify the existing administration of the sales/use tax exemption.

County Sales Tax Termination Technical Changes (Section 25-26)

Explanation: The sunset of the Football Stadium District (Lambeau Field/Brown County) sales/use tax in 2015 brought to light technical deficiencies in current law related to what happens when a temporary sales tax ends, especially in terms of refunds and audits. While those issues were corrected in terms of the Football Stadium District, they have not been corrected related to the end of a county sales tax. Florence, Fond du Lac, and Kewaunee are all poised to sunset their respective county sales tax on December 31, 2021. Making these technical corrections now will eliminate the need to pass similar remedial legislation for those counties in 2021.

Reduction in Unnecessary MFL Paper Files from DNR to DOR (Section 27)

Explanation: Statutes require the DNR to provide paper copies of Managed Forest Law Orders to both DOR (Local Government Services Bureau) and the supervisor of assessments. The supervisor of assessments is the DOR's Equalization Bureau in the Division of State and Local Finance. In other words, the law currently has a double paper file mandate to two different bureaus in DOR. The Equalization Bureau only needs summary information and receives that information via electronic means from the DNR. As a result, many reams of paper are used to provide DOR paperwork that is irrelevant and unused. The current mandate requiring MFL orders to be provided to "DOR" should continue, as those paper records are used by the DOR's Local Government Services Bureau.

Clean-Up to Expo District Arena Bill – 2015 Wisconsin Act 60 (Sections 28-29)

Explanation: 2015 Wisconsin Act 60 enabled the construction of the new basketball arena in Milwaukee and updated related provisions regarding the food and beverage expo district tax in Milwaukee County. The final Act 60 language contained some leftover language from earlier bill drafts and did not fully incorporate minor technical language to enable consistent administration of the expo district tax once the stadium bonds are fully paid by the expo district tax. This bill cleans up those minor statutory errors.

Definition of Restaurant Correction (Sections 30-32)

Explanation: 2015 Wisconsin Act 55 re-defined the word "restaurant" as part of the change from restaurant inspections by DHS to DATCP. However, that change had an inadvertent effect on brewpub and other non-traditional restaurant (establishments like movie theaters, painting studios, and stadium concession areas that serve food) licensure. "Restaurant" is referenced several times

in Chapter 125 to authorize brewpubs to operate restaurants, and to authorize restaurants to obtain a specific type of retail license to sell wine ("Class C" license).

2015 Wisconsin Act 55 revised the definition of "restaurant" in sec. 125.02(18), Wis. Stats., to include a new requirement that a restaurant was a building, room or place at which the predominant activity was the preparation, service, or sale of meals to transients or the general public. This new requirement may prohibit certain establishments from obtaining or renewing retail alcohol beverage licenses because their predominant activity is not the preparation, service, or sale of meals. DOR recommends updating the excise statutes to reference the past definition of "restaurant" as it existed prior to 2015 Act 55 for alcohol licensing purposes only.

Passing this provision maintains the status quo in terms of who may or may not receive a "Class C" license. If this provision does not become law by July 1, 2017, the deadline for municipal alcohol beverage license renewal, some municipal clerks will likely start enforcing the law as it is written and deny licensure to brewpubs, movie theaters, painting studios, stadium concession areas, and other affected entities. DOR does not have the authority to overrule the municipal clerks, so this will become a very big issue across the state very quickly as long-licensed establishments will no longer be able to obtain and legally sell alcohol beverages.

Online Posting of Valid Cigarette, Tobacco, Fermented Malt Beverage, and Other Excise Licensees and Permittees (Sections 34-36)

Explanation: This is a customer service improvement for DOR and helps ensure that legitimate wholesalers are known by retailers as legitimate instead of black or gray-market wholesalers. DOR already does this for several other wholesalers, distributors, manufacturers; etc. for other items that have excise taxes, including wineries, liquor wholesalers, and rectifiers of liquor, among others.

State law requires retailers to purchase for resale several excise items only from an authorized manufacturer, distributor, or jobber, or wholesalers in the case of fermented malt beverages, who hold a valid permit from the department. However, DOR is precluded by privacy statutes to disclose licensed manufacturers, distributors, or jobbers or permit-holding fermented malt beverage wholesalers. Current law allows for such disclosure for intoxicating liquor permittees (manufacturers, rectifiers, wineries, wine direct shippers, out-of-state shippers, and wholesalers).

DOR proposes to publish two lists on the DOR website to treat cigarette/tobacco product and fermented malt beverage licensees/permittees consistent with the treatment of intoxicating liquor permittees. The new lists would be: 1) licensed cigarette and tobacco manufacturers, distributors, or jobbers, and 2) permit-holding wholesalers, brewpubs, and out-of-state shippers of fermented malt beverages.

Eliminate State-Paid Interest Payments on Unclaimed US Savings Bonds (Sections 37-38)

Explanation: Statutes require the administrator of unclaimed property (currently DOR) to pay up to 6% interest per year on property that is interest-bearing at the time the holder turns over property to the administrator. This includes US Savings Bonds, which earn a fixed amount of federal interest or reach final maturity regardless if the property is held by the owner or exists as unclaimed property. As a result, DOR must pay interest on fully mature savings bonds, which creates an

incentive/reward to property owners for leaving US Savings Bonds unclaimed after maturity. DOR seeks to eliminate this state-paid interest requirement on US Savings Bonds.

Police and Fire Protection Fee Technical Corrections (Sections 39-44)

Explanation: DOR administers the Police and Fire Protection Fee (PFPF) under contract with the Public Service Commission.

DOR administers the Police and Fire Protection Fee under the standards in PSC Rule 172. Instead of DOR relying on another agency's rules, DOR is seeking to make the authority explicit in the tax statute and correct missing references in current law. If the Fee is ever repealed, these changes become unnecessary. However, until that day, things like appeal rights are not provided in statute for those subject to the Fee.

DOR administers both the $0.38/line PFPF for pre-paid cell plans and the $0.75/line PFPF for monthly plans. However, statutes only specifically authorize the PSC to contract with DOR to administer the $0.38/line fee. DOR seeks to make clear that the PSC has the authority to contract with DOR to collect the PFPF for both prepaid and monthly plans.

Explicitly Prohibit Lottery Ticket Courier Services (Sections 45 and 48)

Explanation: Wisconsin's constitution prohibits purchasing lottery tickets from a residence by electronic means (over the Internet). In addition, retailers must pass a background check and have no tax delinquency to be a licensed lottery selling agent. There is a formal contract with requirements that must be met to be a lottery retailer. Other states have similar requirements for lottery retailers.

However, a trend in a number of states, including Minnesota, is the emergence of private lottery ticket courier services. These couriers purchase (or claim to purchase) lottery tickets on behalf of their customers in other states and then resell them online or provide numbers from supposedly-purchased tickets to a third party. DOR seeks to eliminate this attempted circumvention of the constitutional provision by explicitly banning online lottery ticket sales by banning lottery ticket courier services.

Update the Lottery's Fingerprinting Requirement Statute (Sections 46-47, 49, and 51)

Explanation: DOR currently requires Lottery employees to provide a fingerprint for the purposes of an FBI background check both upon hiring (explicit in statute) and every five years thereafter (best practices).

The FBI recently began cautioning DOR that in the near future, they would no longer provide fingerprint background checks after the initial hire of Lottery employees due to the lack of a statutory mandate. DOR also seeks to maintain the integrity of the Lottery by requiring all vendors and third parties who come into contact with sensitive Lottery information to also have initial and recurring fingerprint background checks.

Lottery Prize Offsets **(Section 50)**

Explanation: If a lottery player wins a prize worth $600 or more, the lottery player is required to claim the prize at either DOR's Madison or Milwaukee office. DOR offsets delinquent tax debts, delinquent child support, or other delinquent debts referred to the agency via the State Debt Collection program from lottery prizes of $1,000 or greater. The current discrepancy between the in-person lottery prize claim requirement ($600) and offset threshold ($1,000) means that individuals with delinquent debts between $600 and $999 receive their full lottery prize even though they have tax or other debt delinquencies. In other words, we provide checks to some lottery players that owe the state money. DOR seeks to harmonize the in-person claims and offset threshold at $600.

Prepared by: Michael W. Wagner
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