

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Liquor Control Commission

Regulation/Package Title: : 2014 Proposed Amended Rules

Rule Number(s): 4301:1-1-8, 14, 25 (Permits) and 4301:1-1-30, 44, 45

(Promotions/Advertising)

Date: 1/29/15

Rule Type:

New

5-Year Review

Amended

Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

Advertising/Marketing:

4301:1-1-30 sets forth the procedures for conducting tastings of beer, wine, mixed beverage, or spirituous liquor to determine the quality and character of the product for marketing purposes, and requires that tastings receive prior written approval by the Division. The amendment reflects a technical change incorporating into Rule 30 the permit category "A-1c" and the words "to the attendees".

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4301:1-1-44 defines the terms advertisement and sign, and describes the requirements for permitted and prohibited conduct when advertising alcoholic beverage products by manufacturers, suppliers, wholesale distributors and retail permit holders. The proposed amendment was to specifically reference social media as an acceptable method of advertising alcohol beverages.

4301:1-1-45 describes the requirements for lawful contests, prizes, sales incentive programs, rebates and other promotions conducted by manufacturers and suppliers of alcoholic beverages. The proposed amendments would permit unrelated manufacturers to offer cross promotions of either an alcohol beverage product or a non-alcohol item, and to provide in addition to cash rebates, merchandise or an item of value.

Permits:

4301:1-1-8 applies to current and former permit holders and describes the circumstances and effective date when a permit can be issued, transferred, or renewed at a particular location, where a permit has been revoked for cause or rejected under specified regulations. The Commission has discretion to waive enforcement of Rule 8 when special circumstances are demonstrated. The proposed amendment maintains the same content; however the proposed changes are meant to make the format of this rule easier to follow and to clarify the language of this rule.

4301:1-1-14 This rule sets forth the guidelines for transferring an interest in, location, or ownership of a permit, which may occur as a result of the sale of the business, death of the permit holder, bankruptcy, receiver or guardian appointment, seizure by the IRS or other federal entity, or from one family member to another. This rule presently gives the Commission the option to hold a transferee operating the business responsible for violations occurring while the transfer application is pending. The proposed amendment deletes inconsistent language in paragraph (E), which currently provides that if a violation occurs while an application to transfer the permit is pending, the Commission may consider this violation against a future permit holder, under a new prospective permit number.

4301:1-1-25 This rule deals with "H" permits and the transportation of alcoholic beverages within Ohio. The proposed amendment to delete the words "or transport out of this state" is a technical change reflecting the application of the Commission's rules within the State of Ohio.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

4301.03 generally & the following amplifying statutes:

4301:1-1-30 -- 4301.03

4301:1-1-44 -- 4301.03 (B) and (E), 4301.22; 4301.24

4301:1-1-45 -- 4301.22; 4301.24

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4301:1-1-8 -- 4301.03(G)

4301:1-1-14 -- 4301.26

4301:1-1-25 -- 4301.03 (J); 4303.22

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?

If yes, please briefly explain the source and substance of the federal requirement.

No and No

4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

N/A

5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

Because alcoholic beverages are unique products they warrant strict regulation to promote temperance by preventing consumption by underage persons and by discouraging abusive and excessive consumption by adults. The marketing and advertising restrictions are designed to prevent aggressive marketing strategies that could promote excessive consumption. These rules generally reflect the policy and intent of the Commission to maintain effective control over the sale and distribution of alcoholic beverages.

Further, these regulations are necessary to promote orderly markets by requiring transparent, accountable and stable distribution, and to prevent unfair competition. This is accomplished by protecting the integrity of the three-tier system and the interactions between the manufacturers/suppliers, the wholesale distributors, and the retailers.

6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

The provisions in these rules are already implemented, and active state supervision already exists. The Division of Liquor Control implements the permitting process, monitors the sale and distribution of alcoholic beverages in Ohio and may initiate citation actions of an “administrative” nature such as a permit holder presenting a bad check for a renewal application. The Department of Public Safety, Ohio Investigative Unit (“OIU”) may also investigate and enforce these provisions.

Rules 4301:1-1-44 and 45 specifically help implement ORC §4301.22 (Sales of beer and intoxicating liquor) and §4301.24 (Manufacturers and wholesale distributors), while 4301:1-1-30 addresses alcohol beverage tastings for product quality and character.

The Commission will measure the success of these rules by continuing to place restrictions on advertising, contests and promotions of alcoholic beverages to strictly prohibit giving

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away alcohol or reducing the price of alcohol at the point of sale in violation of Ohio law. The Commission will also ensure that tastings, contests and promotions are not conducted in such a manner as to encourage excessive drinking and ensure that any such promotions are conducted with a view toward the maintenance of public decency, sobriety, and good order in any permit premise.

Finally, all citation hearings for violations are conducted before the Commission. Therefore, data related to the type and number of permits issued, consumption, sales and violations as well as related sanctions are routinely collected and reported as between the Division of Liquor Control or the Commission. The Commission can measure the success of these regulations by examining the compliance related data.

Development of the Regulation

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

If applicable, please include the date and medium by which the stakeholders were initially contacted.

The Commission routinely utilizes the Liquor Control Commission website and an “email blast” for communication on rule reviews and amendments, with a comprehensive list of stakeholders, including representatives from governmental agencies including the Ohio Department of Commerce - Division of Liquor Control, the Ohio Department of Public Safety – Ohio Investigative Unit, and industry representatives such as the Wholesale Beer and Wine Association of Ohio (WBWAO), the Ohio Licensed Beverage Association, the Ohio Wine Producers Association, Southern Wine and Spirits Of Ohio, the Ohio Grape Industries Committee, the Ohio Restaurant Association, the Ohio Council of Retail Merchants, Distilled Spirits Council of the US, and the Ohio Grocers Association.

The email blast “Notice” was sent to a comprehensive list of stakeholders on February 28, 2014, clearly identifying all of the 2014 rules subject to 5 year review. The Notice of the 2014 administrative rule review was also posted to the Commission website on March 4, 2014, seeking comments and submissions from these stakeholders by March 31, 2014. The first of several public meeting regarding these rules was held on June 5, 2014. Subsequent public meetings to discuss and receive testimony regarding these rules were conducted on October 10, 2014, November 7, 2014, and January 9, 2015. Stakeholders also had the opportunity to provide additional written materials throughout the year and to speak at the quarterly Commission hearings held in 2014.

8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

As a result of the email notifications and website postings, the following rules generated stakeholder input:

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4301:1-1-44 Advertising, introducing the utilization of social media

On March 31, 2014, the Wholesale Beer and Wine Association of Ohio (WBWAO) proposed revising Rule 44 to specifically recognize social media as an acceptable method of advertising alcoholic beverages in Ohio. After several public hearings, written submissions and discussions with stakeholders' representatives of the alcoholic beverage industry, the Division of Liquor Control and the Department of Public Safety, the Commission concludes it does not serve public policy to amend Rule 44 at this time – the rule in its existing format adequately addresses advertising alcohol beverage products.

4301:1-1-45 Contests, prizes, sales incentive programs, rebates, or other promotions,

On May 23, 2014, stakeholder MillerCoors proposed two modifications to Rule 45 concerning mail in rebates and cross promotions.

Paragraph (E) of the rule, concerning cross promotional marketing currently allows a manufacturer to partner with other companies for companion purchase rebates of an alcohol beverage and a non-alcohol item, so long as the rebate is offered only by the alcohol manufacturer on their own product.

The proposed modification to Rule 45 allows cross promotion with a specific additional item which could be either an alcoholic beverage or non-alcoholic item. MillerCoors worked in conjunction with the Division of Liquor Control to develop this revised language.

The Commission accepted the recommendation to modify Paragraph (E) in Rule 45, allowing a rebate to apply when the companion item is non-alcoholic, or when both items are alcohol beverages.

The other proposal on behalf of MillerCoors was to modify paragraph (D) of Rule 45. Currently the rule allows only cash rebates to the consumer via mail. The proposed modification would allow a consumer to select cash, merchandise or a thing of value. The Commission determined it is not good public policy to expand this portion of the rule beyond allowing a cash rebate.

4301:1-1-8, 14, 25 and 30 (Permit; Marketing/Advertising)

The Division of Liquor Control, the Department of Public Safety, and the Attorney General's Office - Liquor Unit offered amendments to these four rules. A revision of Rule 8 is proposed to reformat and clarify the rule without changing the substance, making Rule 8 simpler and easier to follow for pro se litigants and attorneys less familiar with the Commission's rules and procedures. Additionally technical updates were proposed to Rules 14, 25 and 30.

9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

No scientific data was used to develop these amended rules.

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

The Commission did not consider alternative regulations beyond what has been discussed above, as the current regulations are meeting the state's intended policy goals.

11. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.*

With the exception of Rule 45 discussed below, this area of regulation requires adherence by all permit applicants and permit holders to the same method of implementation and monitoring by the Division of Liquor Control and to the same forms of promotion and advertising. This is essential to ensure consistency, fairness and impartiality regarding permit issuance or disciplinary action taken against permit holders and as part of the three tier system of regulatory control in Ohio.

However, there is an element of performance based activity to Rule 45 as it no longer dictates the specific types of products or partner entities to be combined to meet the requirements of the cross promotion rule. Rather, each manufacture is allowed to develop its own partners and product items for the cross promotion/companion rebate effort so long as their practices do not encourage excessive consumption.

12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

The Commission routinely coordinates with the Division of Liquor Control, the Department of Public Safety – Legal/Investigative Unit and the Attorney General's Office – Liquor Unit, when conducting rule reviews and confirms that no duplication has occurred.

13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

These regulations have been implemented for several years, ensuring predictability, and are equally applied to all permit holders, ensuring consistency – attributes the participants in the three tier system – the manufacturers, distributors, suppliers and retail establishments, seek and prefer.

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

a. Identify the scope of the impacted business community;

The potential scope is all classes of liquor permit holders including applicants seeking new, renewal or temporary permits for their establishment or transport vehicle, and all 3 tiers of the current system from manufacturers to wholesalers to retailers.

b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and

As part of the application process to secure or renew a permit, the adverse impact is the time an employee or owner utilizes to complete the paperwork and be available for the requisite inspections. Additionally, the license or authorization to operate may be subject to fine, suspension or revocation for violation of these rules.

c. Quantify the expected adverse impact from the regulation.

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.

Each entity holding a permit and certain vehicle drivers are required to comply with these existing regulations to ensure the public health and safety within establishments manufacturing, distributing, selling or serving liquor. There will be staff time required to complete and review the application and cross-promotional activities. Generally the Commission can issue a fine, suspend or revoke an entity's license for failure to comply with or violation of these rules so the adverse impact could ultimately be immeasurable. However, the Division of Liquor Control works closely with permit holders and applicants to assist with the advertising/marketing and permit application processes. As for the reasonable compliance costs associated with the rules, the Commission does not have the data to provide a quantified potential impact.

As to the advertising and marketing provisions, each manufacturer, retailer, distributor or supplier is required to comply with these regulations. So while the ultimate adverse impact for a violation of these rules could be suspension or revocation of an entity's license, the actual costs associated for compliance are undertaken by the licensee as part of promoting their products.

15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

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The regulation of the manufacture, distribution, retail sale (commonly referred to as the 3-tier system) and transport of alcoholic beverages in Ohio has been longstanding. These rules are designed to provide a balanced, transparent, and accountable method of allowing individuals and entities to obtain and maintain liquor permits, and to conduct product advertising, promotions and tastings. The regulatory intent of the rules justifies the adverse impact because the sale of alcoholic beverages is a unique industry that requires strict regulation for the health, safety and protection of the public. The state has a compelling interest in promoting safe and temperate consumption of alcohol.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

No, the rules are intended to create a level playing field for all market participants regardless of size. Therefore, all applicants and permit holders for the same type of permit(s) are subject to the same requirements.

17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

While the Division of Liquor Control takes great effort to assure permit applicants, transferees, and advertisers submit the correct documentation, ORC 119.14 is not applicable to these rules as there is no penalty associated with the paperwork necessary pursuant to these rules.

18. What resources are available to assist small businesses with compliance of the regulation?

In addition to all of the Commission contacts listed below, the Division of Liquor Control, the entity responsible for issuing, renewing and monitoring liquor permits and regulating the manufacturing, distribution and retail sale of alcohol beverages, is also available to permit holders via website (<http://www.com.ohio.gov/liqr/>), phone and paper correspondence.

The Commission website: lcc.ohio.gov

The Commission main office at: 77 S. High Street, 18th floor, Columbus, Ohio 43215

The Commission phone number: 614/466-3132

The Commission fax number: 614/466-4564

Quarterly public hearings