Tyler Rudd
Central States Counsel, Wine Institute

LED Proposed Rules - WI Requested Changes to 47-316

Per my comments at the previous LED stakeholder meeting on August 13, I would like to propose some changes to the draft rules for Regulation 47-316. To that end, please see below.

Regulation 47-316. Advertising Practices

(B)(4)(a). A supplier's "consumer rebate" provides a consumer with cash back after the consumer has purchased a supplier's product and has provided proof of product purchase TO THE SUPPLIER upon redemption. THE RETAILER MAY NOT ACT AS THE INTERMEDIARY FOR THE SUPPLIER OR THE CONSUMER.

-- (*The latter insert comes from South Dakota (64:75:04:14.01). The purpose is to ensure that the consumer interacts directly with the supplier or the supplier's agent when uploading a proof of purchase and receiving a redemption.)*

(B)(4)(a)(1). A supplier may provide consumer rebate certificates to consumers through point-of-sale advertising (such as tear pads, shelf talkers, case cards, or other point-of-sale materials), package inserts, or other printed or electronic media. SUPPLIERS ARE PROHIBITED FROM PROVIDING THEIR CONSUMER REBATE CERTIFICATES DIRECTLY TO LICENSED RETAILERS INCLUDING, BUT NOT LIMITED TO, THROUGH THE USE OF A RETAILER'S BONA FIDE LOYALTY OR REWARD PROGRAM OR ON THE RETAILER'S WEBSITE OR MOBILE APPLICATION.

(B)(4)(b)(i). Licensed retailers may redeem suppliers' instant redeemable coupons only after they have been made available BY SUPPLIERS to consumers through general print or electronic media directed at the consumer, package inserts,; or, a supplier's representative or agent, who is not the retailer or their agent, who is providing coupons to consumers at the retail premises for the purpose of product promotion.

(B)(4)(b)(iv). Suppliers may never reimburse licensed retailers, DIRECTLY OR INDIRECTLY, for suppliers' instant redeemable coupons, or provide any financial assistance to the retailer, directly or indirectly. Redemption must be through a third party that is independent from the supplier and the retailer.

Response:

Re: LED Proposed Rules - WI Requested Changes to 47-316

Mr. Rudd,

Thank you for your comments on the proposed regulation. We have incorporated some of your suggestions into the proposed regulation changes for this year. We are not able to make the change you are proposing in (B)(4)(b)(iv) as indirect financial assistance for instant redeemable coupons is permitted under the Liquor Code.

We appreciate your involvement in this year's Liquor Rulemaking Working Group. If you have any further comments, please feel free to send them to the Division.

Sincerely,

Colorado Liquor Enforcement Division

Tyler Rudd

Central States Counsel, Wine Institute

Wine Institute's Comments on Draft Rule 47-316 Advertising Practices

Dear Michelle, Joe, et. al.,

Thank you again for trying to clarify the language in the Advertising Practices of Colorado's liquor rules. As you know, Wine Institute members – like others – are seeking clarification to what is and is not allowed relating to coupons, IRCs, and loyalty programs. We believe the draft rules do a great job making it clear. To that end, we have two comments that I mentioned in the meeting last Wednesday. I believe the first one was agreed upon, but I included it anyway. The second one was a bit rushed, so I wanted to put it in writing. Hopefully, it is clearer this way. If not, I am happy to discuss further.

Here are our suggested changes to the draft rules:

47-316

B.4(b)(ii): In the last sentence, we ask that you amend the language: "*PROHIBITED FROM PROVIDING ~~AN~~ A SUPPLIER'S INSTANT REDEEMABLE COUPON*". Without the change, it sounds like a retailer cannot issue its own IRC.

B.4(b)(iv): The below proposed changes allow suppliers to reimburse the retailer for the redeemed coupons through an independent third party but prohibits suppliers from paying the retailer handling fees or other financial assistance for offering a coupon (which could be viewed

as financial assistance or other questionably-legal assistance). If the retailer does not want to participate in IRCs, they don't have to, but there should remain a prohibition on financial assistance to a retailer from a supplier. We believe this would open a tied house loophole.

> "*Suppliers may never reimburse licensed retailers for suppliers' instant redeemable coupons, or provide any financial assistance to the retailer, directly or indirectly.* ~~*Redemption*~~ *Reimbursement for the amount of the redeemed coupons must be paid to the retailer through a third party that is independent from the supplier and the retailer.*"

Thank you for the stakeholder meetings and providing us the opportunity to provide comments and suggestions.

Response:

Re: Wine Institute's Comments on Draft Rule 47-316 Advertising Practices

Mr. Rudd,

Thank you for your comment. The Division has received it and has incorporated some of your language in the drafted redline changes.

Please do not hesitate to reach out if there you have further comments. We appreciate your continued involvement in the Liquor Rulemaking Working Group.

Tony Ryerson

Vice President, Fios Capital (Applejack)

Tasting Language from the 2023 LAG

Hi Rulemaking,

Tony Ryerson from Applejack. My suggestion at the end of the session today was to add some clarifying language to 47-313 on Tastings to clarify that either the wholesaler or the retailer **MAY** pay for the product (from the retailer's inventory) to be tasted to conform with 2023 LAG Proposal 8. Here is the specific language:

Proposal 8: Off-premises tastings ● Product(s) being tasted must come from the off-premise retail licensee's existing inventory. A manufacturer or supplier may pay for the product to be tasted so long as the manufacturer or supplier purchases said products from the retailer for not more than the retailer's ordinary retail price. 17 ● All containers opened for a tasting must be removed from the licensed premises after the tasting(s) are completed, or access to the open product shall be restricted from public access or separated from items available for sale on the

sales floor. If a container is opened for a tasting, employees may taste the product(s) for educational purposes, or the product may be used for future tastings by consumers. If a product purchased by the manufacturer or supplier for a tasting remains after all tastings have been completed, the opened and unused product shall be returned to the manufacturer or supplier who purchased the product used for the tasting. ● Off-premise retailers will be allowed to taste product(s) of the retailer's choosing, subject to restrictions as to the serving size of any one sample and overall total amounts of all products that are tasted. The total amount of alcohol products to be sampled as a tasting shall be limited to, regardless of the number of items being tasted, not more than four ounces of malt liquor, four ounces of vinous liquor, and not more than two ounces of spirituous liquor per customer per day. (NOTE: these are the same total amounts allowed under the current law.) However, the per sample size of a specified tasted product cannot exceed one ounce for malt liquors, one ounce for vinous liquors, and one-half of one ounce for spirituous liquors per sample. For example, if a consumer is tasting a specific malt liquor, each sample tasted cannot exceed one ounce; if the consumer is tasting 6 different samples of malt liquor, the total of those six samples cannot exceed four ounces. ● Proper identification must be provided by the customer to ensure that all individuals participating in the tasting are 21 years of age or older. No individual who is visibly intoxicated may participate in the tasting. ● Expand the daily time frame in which tastings can be conducted in the State from the current 11:00 AM to 9:00 PM to 10:00 AM to 9 PM (this is only one hour earlier than the current statute). Allow tastings to occur on all days when the off-premise retailer in the State is open. Customers come into stores 365 days a year [assuming Proposal 1 discussed above passes]. The consumer should be allowed to taste products, subject to the restrictions, when they are shopping, regardless of the day. ● Local licensing authorities may, at the local licensing authorities' reasonable discretion, require a retail licensee to apply for or otherwise renew a tasting permit not more than once every year along with the license renewal. This proposal received consensus from the Liquor Advisory Group at the June 2023 meeting with a final vote of 20 in favor, 0 opposed, and 1 with no position. This proposal came from the off-premises retailers that sought greater flexibility to meet customer demand by creating more flexibility for customers to sample products. Discussion of this proposal amongst the LAG included clarification of "retailer's price" and that federal regulation (27 C.F.R 6.95) states a product cannot be purchased for more than the ordinary retail price. It was also clarified that products offered at the tasting must already be present on the retailer's shelves, and manufacturers or suppliers are not permitted to bring in products that the off-premises retailer does not regularly stock for the purposes of the tasting. Public comment from the Brewers Guild included a caution on manufacturers paying for product at the tasting and that this could be misconstrued as financial inducement and advocated for amending the language to read "laid-in cost" or "at cost of product." It was also suggested that a limit be set on the volume that may be supplied so the proposal doesn't benefit those that have money and resources as 18 the only suppliers able to do tasting and allow for a more level playing field for small manufacturers and suppliers. Current statutory language can be found at 44-3-301(10).

This is proposal 8 on tasting not proposal 2 on educational classes. The key word here is “May.” A wholesaler may pay for the product and in many cases wants to because they want to push a brand that a retailer does not necessarily have an interest in pushing. This also allows the retailer to push and pay for product that they may have more of an interest in selling (i.e. excess supply, good price, etc.). Our position is we want maximum flexibility, as stated in proposal 8 to allow for the most robust ecosystem that may highlight items wholesalers want to highlight from time to time and may highlight product that retailers may want to highlight from time to time.

Response:

Re: Tasting Language from the 2023 LAG

Mr. Ryerson,

Thank you for your rulemaking comment. The Liquor Advisory Group has concluded its work, and its report has been finalized. The General Assembly has also debated each of the consensus proposals. As a Division, our primary responsibility is to follow the law, and since this particular change was not included in Senate Bill 24-231, we won’t be able to implement the change in the rule that you are suggesting.

We have noticed there is a slight misunderstanding for industry members between the rule language for educational classes and tastings, as they are indeed two distinctly different types of events, which is the exact reason educational classes were implemented into law. Although they contain the word “tasting”, they are different than a tasting referenced in 44-3-301(10) C.R.S. For educational classes, a wholesaler may pay for the product, but when they do, they must also participate in the class alongside the retail liquor store. For tastings, the statute clearly states “alcohol beverage used in tastings must be purchased through a licensed wholesaler…at a cost not less than the laid-in cost of the alcohol beverage.”

Thank you for your involvement in the Liquor Rulemaking Working Group. Please do not hesitate to reach out with further comments. We value your input.

Sincerely,
Colorado Liquor Enforcement Division

Bruce Dierking
Hazel's Beverage World

Comment Regarding Proposed Reg 47-304 and Repeal of 47-314

Hi Michelle,

I want to make some observations and comments about the proposed changes to Reg. 47-304 and the proposed repeal of 47-314 regarding changes in ownership.

As you know, the existing rule under subsection 304 A.1. lumps corporations and LLCs together and treats them the same. Subsection A.2. says that no report in change of ownership is required for any single transfer of less than 10% of the capital stock of the corporation. Reg. 47-314 goes on to make it clear that just like corporations, LLCs are not required to report changes of passive ownership interests less than 10%. This creates a level playing field where corporations and LLCs are treated the same.

Under your proposed rules, you would fully repeal Reg. 47-314., and you would amend Reg 47-304 A.1. to apply only to corporations and not LLCs. You would amend subsection A.2. to alter the language but maintain the same standard that corporations are not required to report changes of passive ownership of less than 10% in any one year. You would add LLCs under subsection B., and would require that any transfer of any membership interest in an LLC, regardless of how small, must be reported to the licensing authorities within 30 days. There would be no exemption for passive LLC ownership interests under 10%.

Of course, in all cases, the rules require reporting of changes in controlling interests and changes of officers and managers for both corporations and LLCs, and that is not the issue.

The issue is that you propose to hold LLCs to a very different standard than corporations going forward when that has not been the case in the past. As you probably know, most chains and large businesses are organized as corporations, and most small businesses and family-owned businesses are organized as LLCs. What is the policy justification of favoring the corporate form of business entity over the limited liability company form of entity?

As a practical matter, if you adopt this regulation, both the LED and the local licensing authorities are going to be forced to process hundreds of minor ownership changes every year that have no impact on the control or management of the licensee. For example, when we opened Hazel's, one of my good friends named Leonard Johnson invested some money as a passive investor. It's less than 1%, and he never had any control or management—it is a totally passive investment. Sadly, Leonard passed away in July. At that time, his interest passed by operation of law to his estate. Had the proposed rule been in effect, I would have needed to file a report within 30 days after the date of his death. His estate is going to distribute the interest to his children under the terms of his will, probably sometime later this year when the estate is wound up, and so when that happens, I would be required to file another report. I would

estimate that for Hazel's alone, we might be forced to file around 5-6 reports per year about minor, passive ownership changes to comply with the proposed rule. Multiply that by the hundreds (probably over a thousand) other licensees organized as LLCs, and you are going to have a significant new administrative burden placed both on the LED and the local licensing authorities. I do not understand what the policy objective or benefit of that would be.

Moreover, if you adopt the proposed changes, it will be a blatant case of favoring corporations over LLCs, which as I mentioned above, is a proxy for large, national businesses over small, local ones. I do not believe there is a justification for making such a distinction and doubt that legislators or the Governor would be in favor of that sort of discrimination against small business being baked into an administrative rule. Would you please consider keeping the standards for corporations and LLCs the same? If you really want to see a report for every minor change in ownership, then that requirement should apply to corporations as well as LLCs. But I believe the current rule exempting licensees from reporting passive ownership changes under 10% works well and should be maintained.

Thank you for your consideration.

Bruce

Response:

Re: Comment Regarding Proposed Reg 47-304 and Repeal of 47-314

Mr. Dierking,

Thank you for your rulemaking comment. After discussion with the working group and members of the public, the Division no longer plans on moving forward with the proposed changes. This is a complex and complicated area of law that requires more research. The Division may reconsider this change in out years, but does not plan on addressing it in this year's rulemaking.

We appreciate your comment and involvement in this year's rulemaking. In the future, if you have comments related to rulemaking, please email them to dor_led_rulemaking@state.co.us. For your convenience, I am copying your initial email to the Director below.

Sincerely,

Colorado Liquor Enforcement Division