

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Liquor Control Commission

Regulation/Package Title: Miscellaneous requirements concerning mixed beverages, closing authority, sales reports of B-1 permit holders, and differential pricing practices.

Rule Number(s): 4301:1-1-5, 4301:1-1-16, 4301:1-1-68, 4301:1-1-73

Date: September 24, 2013

Rule Type:

- ☐ New
☒ Not Amended

- ☒ 5-Year Review
☐ Rescinded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.

4301:1-1-5 describes various requirements for manufacturers, suppliers, importers, bottlers, and wholesale distributors of mixed beverages operating in Ohio. The rule requires that every mixed beverage manufacturer, supplier, importer, bottler, or wholesale distributor have the appropriate federal permit issued by the federal government. The rule also requires that these entities, upon request, submit to the Division of Liquor Control ("Division") a statement of

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

the ingredients of any labeled mixed beverage and submit samples for analysis. The statement shall remain confidential, except pursuant to a court order or a subpoena issued by the Liquor Control Commission (“Commission”). The rule also states that these entities cannot fix the price to be charged for any package by any other permit holder. Also, under the rule, no manufacturer, supplier, importer or bottler may differentiate the price sold to wholesale distributors, except upon “reasonable business grounds.” Finally, no wholesale distributor or retail permit holder can be required to participate in any price promotion.

4301:1-1-16 provides that if a permit holder is unable to operate or desires to discontinue the operation of the permit business for a period in excess of 30 days, the permit holder must notify the Division, giving the reason for the request and specifying the period of time the permit holder wishes to remain closed. The permit holder must have a bona fide reason and must be a bona fide operator. Closing authority cannot exceed 180 days, except for good cause, and the permit holder must resume operations at the end of the closing authority period. If the Division determines that the permit holder has been closed in excess of 30 days and has not notified the Division, the Division must issue a citation to the permit holder for failure to exercise permit privileges and for being closed more than 30 days without the consent of the Division.

4301:1-1-68 provides that not more than 20% of total sales of B-1 permit holders (a permit for distribution, sale for home use) may be made to non-permit holders for home use during the immediate previous three months. The rule also requires B-1 permit holders to maintain records for one year for inspection by the Division to verify compliance with the rule.

4301:1-1-73 provides that manufacturers and suppliers who sell beer to wholesale distributors must give 14 days written notice of any price change to wholesale distributors to whom they regularly sell their products before initiating the price change. As soon as practicable, the wholesale distributor must then give notice of any resulting price change to its retail accounts. No manufacturer or supplier who sells beer to wholesale distributors may fix the price to be charged for any package by any other permit holder. No manufacturer or supplier of beer to Ohio wholesalers may differentiate in the price of beer sold to Ohio wholesalers except when based on reasonable business grounds. A differential price may not be based on a wholesaler’s refusal to participate in a price promotion. No manufacturer or supplier of beer may require an Ohio wholesaler to participate in any price promotion.

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

Ohio Revised Code 4301.03

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.

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

This question is not applicable to the rules.

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)?**

These rules generally reflect the policy and intent of the Commission to maintain effective control over the sale and distribution of alcoholic beverages and to prevent abuses caused by the disorderly and unregulated sale of such products. Alcoholic beverages are a unique product that require strict regulation to promote temperance by preventing consumption by underage persons and by discouraging abusive consumption by adults, to promote orderly markets by requiring transparent, accountable and stable distribution, and to prevent unfair competition.

4301:1-1-5 describes various requirements for manufacturers, suppliers, importers, bottlers, and wholesale distributors of mixed beverages operating in Ohio. This rule ensures that they have the appropriate federal permit and serves to protect the public concerning the content and ingredients of mixed beverages. The rule also serves to set limits on the interactions between and among the three tiers of the alcohol distribution system. The provisions help to ensure that one tier of the system is not able to put undue economic pressure on another tier to gain a competitive advantage and that no one tier is allowed to grant favorable treatment of individual members of another tier. This ensures fair competition among manufacturers, wholesalers, and retailers.

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

4301:1-1-16 allows a permit holder who is unable to operate or desires to discontinue the operation of the permit business for a period in excess of 30 days to notify the Division and request authority to close the business for a specified period of time, not to exceed 180 days except for good cause. The rule provides such permit holder “closing authority” and provides a process other than the statutory provisions governing the “safekeeping” of a permit as set forth in Ohio Revised Code 4303.272, which requires that the permit be delivered back to the Division under certain circumstances.

4301:1-1-68 limits the total sales from a B-1 permit holder (a permit for distribution, sale for home use) to non-permit holders for home use during a three month period. The rule ensures that such a distributor may not sell as a retailer, for example, who could not get a permit where quota was filled.

4301:1-1-73 describes requirements between and among the three tiers of the alcohol distribution system concerning the manner and frequency of price changes for beer. The rule requires notice and ensures fairness and consistency in pricing practices. The provisions also help to ensure that one tier of the system is not able to put undue economic pressure on another tier to gain a competitive advantage and that no one tier is allowed to grant favorable treatment of individual members of another tier. This ensures fair competition among manufacturers, wholesalers, and 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 monitors the sale and distribution of alcoholic beverages in Ohio. The Department of Public Safety, Investigative Unit (“OIU”) may investigate and enforce these provisions. Data related to consumption, sales, and violations, as well as related sanctions are routinely collected and reported. The Commission can measure the success of these regulations and Ohio’s regulated pricing structure by examining existing compliance-related data. The cost-benefit of non-compliance by the regulated community is significant because the Commission may suspend or revoke an entity’s liquor license for violations of state rules and regulations.

Development of the Regulation

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

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

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

The Commission initially sought public comment by sending a letter on December 20, 2012 to a comprehensive list of stakeholders, including representatives from governmental agencies and industry such as the Wholesale Beer and Wine Association of Ohio, the Ohio Licensed Beverage Association, the Ohio Restaurant Association, the Ohio Wine Producers Association, Southern Wine and Spirits of Ohio, the Ohio Council of Retail Merchants, and the Distilled Spirits Council of the United States. The Commission requested written comments from stakeholders by January 30, 2013. The Commission also solicited comments from the Division and OIU as the two state agencies directly impacted by the Commission Rules. The Commission allowed public testimony at a public meeting on April 12, 2013.

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

Initially, the Commission received comment from the Ohio Investigative Unit concerning Rule 16, proposing a change to the rule. However, after OIU discussed its proposed changes with the Division, OIU notified the Commission that it would not be pursuing its proposed change.

Other than the proposed change initially made by OIU and later withdrawn, the Commission did not receive any comments that recommended any changes to these rules.

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?

This question does not apply to the proposed rule.

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. Alternative regulations do not need to be considered 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.

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

The Commission did not consider performance-based regulation as the rule is not for performance, but rather to ensure compliance with existing Ohio law and to continue a system of regulation that exists to ensure effective control over the manufacturing, distribution, and sale of alcohol beverages.

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

This rule does not duplicate any existing state regulation.

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 provisions are currently in effect and do not require any change in order to implement existing regulations. The rules impact all Ohio liquor permit holders in each tier of the system and are entirely consistent with the broader policy goals of the 3-tier system of alcohol beverage regulatory control.

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 directly impacted business community includes all classes of liquor permit holders 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

The adverse impact for Rule 4301:1-1-5 is that the rule requires that every mixed beverage manufacturer, supplier, importer, bottler, or wholesale distributor, upon request, submit to the Division a statement of the ingredients of any labeled mixed beverage and submit samples for analysis. There are reasonable compliance costs associated with the rule. Also, the license or authorization to operate of any of these entities may be suspended or revoked for violation of any of the provisions of these rules.

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

The adverse impact for Rule 4301:1-1-16, which sets forth limitations on a permit holder's authority to discontinue operations, is that the Commission may suspend, revoke or reject an entity's permit for noncompliance with the provisions set forth in the rule. There are reasonable compliance costs associated with the rule concerning the required notification to the Division.

The adverse impact for Rule 4301:1-1-68 is that it limits the percentage of total sales that B-1 permit holders may make to non-permit holders for home use during the immediate previous three months. Each holder of a B-1 permit must also maintain records for inspection to verify compliance. There are reasonable compliance costs associated with the rule. The Commission may also suspend or revoke a B-1 permit holder's license for a violation of this rule.

Similarly, the adverse impact for Rule 4301:1-1-73 is that the Commission may suspend or revoke an entity's license for failure to comply with the rules or laws of the state. There are reasonable compliance costs associated with the rule.

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 manufacturer, retailer and distributor is required to comply with these existing regulations. Generally, the Commission can suspend or permanently revoke an entity's license for violations of these rules. So, the adverse impact could ultimately be immeasurable. However, as for the reasonable compliance costs associated with the rules, the Commission does not have data to provide a quantified potential impact.

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

These rules are a significant part of the 3-tier system of regulatory control in Ohio. The system is designed to provide a balanced, transparent, and accountable method of allowing the state to regulate the sale of alcoholic beverages. The rules are designed to create balanced competition between and among manufacturers, wholesalers, and retailers. 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, 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.

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?

Ohio Revised Code 119.14 is not applicable to the proposed rule as there is no penalty associated with the paperwork necessary pursuant to the rule.

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

The Commission website at: <http://lcc.ohio.gov>

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

The Commission phone number at: 614-466-3132

The Commission fax number at: 614-466-4564

Quarterly public hearings.

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov