

Emergency Rules

Title 11—DEPARTMENT OF PUBLIC SAFETY Division 70—Division of Alcohol and Tobacco Control Chapter 2—Rules and Regulations

EMERGENCY AMENDMENT

11 CSR 70-2.240 Advertising of Intoxicating Liquor [and Nonintoxicating Beer]. The division is amending all sections.

PURPOSE: This amendment reflects the elimination of language that the Division of Alcohol and Tobacco Control has been enjoined from enforcing, which now allows manufacturers of intoxicating liquor to offer consumer rebate coupons and advertise of sales price below cost. This amendment further updates the regulation to reflect current trends in advertising, such as advertisements via the Internet, email, and text messages. Language regarding advertising that is duplicative of statute is eliminated, along with language that has become obsolete following the elimination of Chapter 312, RSMo, regarding nonintoxicating beer. Finally, this amendment revises the regulation to enhance clarity and remove unnecessary regulatory restrictions.

EMERGENCY STATEMENT: This emergency amendment is necessary to remove language the division has been enjoined from enforcing by the court's decision in Missouri Broadcasters Association v. Taylor, No. 2:13-cv-04034-MDH (W.D. Mo. June 29, 2018). This case, which dealt with the advertising of alcohol, resulted in the court enjoining enforcement of the regulations contained in 11 CSR subsection 70-2.240(5)(G) and 11 CSR subsection 70-2.240(5)(I). This emergency amendment is necessary to protect governmental interest as members of industry and the public may feel compelled to follow rules that the court has enjoined from enforcement. Additionally, this amendment is necessary following Missouri Broadcasters to reflect new trends in the advertising of alcohol. As a result, the Division of Alcohol and Tobacco Control finds a compelling governmental interest, which requires this emergency action. The scope of this emergency amendment is limited to the circumstances creating the emergency and complies with the protections extended in the Missouri and United States Constitutions. The Division of Alcohol and Tobacco Control believes this emergency amendment is fair to all interested persons and parties under the circumstances. This emergency amendment was filed October 10, 2018, becomes effective October 20, 2018, and expires April 17, 2019.

(1) No person engaged in business as a producer, manufacturer, brewer, bottler, importer, wholesaler, or retailer of intoxicating liquor [or nonintoxicating beer], directly or indirectly, [shall] may publish or disseminate or cause to be published or disseminated [in any newspaper, magazine or similar publication] any advertisement of intoxicating liquor [or nonintoxicating beer], unless the advertisement is in conformity with the regulations.

(A) These provisions [shall] do not apply to the publisher of any newspaper, magazine, or similar publication, unless the publisher is engaged in business as a producer, manufacturer, brewer, bottler, importer, wholesaler, or retailer of intoxicating liquor [or nonintoxicating beer], directly or indirectly.

(2) The term advertisement includes any [advertisement] dissemination of information by print, audio, or video means, whether through the media [of] or otherwise, including but not limited to, radio, television, motion pictures, newspapers, internet, email, texting, website, mobile applications, magazines or similar publications [or any sign or outdoor billboard], or other printed or graphic matter, or any electronic means, except that the term shall not include:

(A) Any label affixed to any container of intoxicating liquor [or

nonintoxicating beer] or any individual covering, carton, or other wrapper of a container; and

(B) Any editorial [or other reading matter] in any periodical or publication or newspaper for the preparation or publication of which no money or other valuable consideration is paid or promised, directly or indirectly, by any person subject to these regulations.

(3) Mandatory [S/statements/.] include:

(A) [The advertiser shall state t/The name and address of the producer, manufacturer, bottler, brewer, importer, wholesaler, or retailer responsible for its publication/.];

(B) [The advertisement shall contain a/A conspicuous statement of the class and type or other designation of the product, corresponding with the complete designation which appears on the brand label of the product/.];

(C) The alcoholic content [shall be] stated in the manner and form in which it appears on the labels of intoxicating liquor [or nonintoxicating beer] advertised/.];

(D) In the case of distilled spirits (other than cordials, liqueurs, and specialties) produced by blending or rectification, if neutral spirits have been used in the production of distilled spirits, [there shall be stated in the advertisement] the percentage of neutral spirits so used and the name of the commodity from which the neutral spirits have been distilled in substantially the manner and form in which these statements appear on the labels of the distilled spirits advertised. In the case of neutral spirits or of gin produced by a process of continuous distillation, [there shall be stated in the advertisement] the name of the commodity from which the neutral spirits or gin have been distilled substantially in the manner and form in which this statement appears on the labels of the distilled spirits advertised/.];

(E) Where an advertisement does not mention a specific product but merely refers to a class of intoxicating liquor [or nonintoxicating beer] (such as whiskey or beer) and the advertiser markets more than one (1) brand of intoxicating liquor [or nonintoxicating beer] of that class, or where the advertisement refers to several classes of intoxicating liquor [or nonintoxicating beer] (such as whiskey, brandy, rum, gin, liqueur, wine, beer, etc.) marketed under a single brand, the only mandatory information prescribed by section (1) applicable to advertisement would be the name and address of the responsible advertiser/.]; and

(F) Advertisements by retail establishments which merely refer to the availability of intoxicating liquor [or nonintoxicating beer] in these establishments, but which otherwise make no reference to a specific brand of intoxicating liquor [or nonintoxicating beer shall be] are subject only to the [prohibited statements provisions] prohibitions of section (5) of this rule.

(4) Statements required by these regulations to be stated in any written, printed, or graphic advertisement [shall] should appear in lettering or type of a size, kind, and color sufficient to render them both conspicuous and readily legible. In particular—

(A) Required information shall be stated against a contrasting background and in type or lettering which is at least the equivalent of eight- (8-)/- point type;

(B) [Required] Mandated information [shall] should be so stated as to appear to be a part of the advertisement and [shall] not be separated in any manner from the remainder of the advertisement;

(C) Where an advertisement relates to more than one (1) product, the [required] necessary information [shall] is to appear in a manner as to clearly indicate the particular products to which it is applicable; and

(D) [Required] No mandated information [shall not] may be buried or concealed in unrequired descriptive matter or decorative designs.

(5) No advertisements of intoxicating liquor [or nonintoxicating

Emergency Rules

beer shall) may contain:

(A) Any statement that is false or misleading in any material particular;

(B) Any statement that is disparaging of a competitor's products;

(C) Any statement, design, device, or representation which is obscene, indecent, in poor taste, or conveys a derogatory connotation;

(D) Any statement design, device, or representation of or relating to analyses, standards, or tests, irrespective of falsity, which is likely to mislead the consumer;

(E) Any statement, design, device, or representation of or relating to any guarantee, irrespective of falsity, which is likely to mislead the consumer. Nothing in this subsection *[shall prohibit]* prevents the use of any enforceable guarantee in substantially the following form: "We will refund the purchase price to the purchaser if s/he is in any manner dissatisfied with the contents of this package";

(F) Any statement that the product is produced, blended, brewed, made, bottled, packaged, sold under, or in accordance with any authorization, law, or regulation of any municipality, county, state, federal, or foreign government unless the statement is *[required]* necessary or specifically authorized by the laws or regulations of the government; and, if a municipality, county, state, or federal permit number is stated, the permit number shall not be accompanied by an additional statement relating to it; **and**

[(G) Any statement offering any coupon, premium, prize, rebate, sales price below cost or discount as an inducement to purchase intoxicating liquor or nonintoxicating beer except, manufacturers of intoxicating liquor other than beer or wine shall be permitted to offer and advertise consumer cash rebate coupons and all manufacturers of intoxicating liquor may offer and advertise coupons for nonalcoholic merchandise in accordance with section 311.355, RSMo;]

[(H)](G) Any statement offering free delivery or credit terms to consumers[,] as an inducement to purchase intoxicating liquor [or nonintoxicating beer; and].

[(I) A price that is below the retailer's actual cost.]

(6) *[The] No* advertisement *[shall not]* **may** contain any statement concerning a brand or lot of intoxicating liquor *[or nonintoxicating beer]* that is inconsistent with any statement on the labeling.

(7) *[The advertising shall not]* **No advertisement may** contain any statement, design, or device representing that the use of any intoxicating liquor *[or nonintoxicating beer]* has curative or therapeutic effects or tending to create an impression that it *[does have]* **has** curative or therapeutic effects.

(8) No advertisement *[shall]* **may** contain any statement, design, device, or pictorial representation of or relating to, or capable of being construed as relating to the armed forces of the United States or of the American flag, any state flag, or of any emblem, seal, insignia, or decoration associated with any such flag or the armed forces of the United States; nor *[shall]* **may** any advertisement containing any statement, device, design, or pictorial representation of or concerning any flag, seal, coat of arms, crest, or other insignia, likely to falsely lead the consumer to believe that the product has been endorsed, made *[or]*, used by, or produced *[for or]* under the supervision of or in accordance with the specifications of the government, organization, family, or individual with whom the flag, seal, coat of arms, crest, or insignia is associated.

(9) *[An] No* advertisement for distilled spirits *[shall not]* **may** contain:

(A) The words bond, bottled in bond, aged in bond, or phrases containing these or synonymous terms, unless these words or phrases appear upon the labels of the distilled spirits advertised and are stated in the advertisement in **substantially** the manner and form in

which they appear upon the label;

(B) Any statement, design, or device, directly or by implication concerning age or maturity of any brand or lot of distilled spirits unless a statement of age appears on the labels of the advertised product. When any statement, design, or device concerning age or maturity is contained in any advertisement, it shall include (in direct conjunction with the advertisement and with substantially equal conspicuousness) all parts of the statement concerning age and percentages, if any, which appear on the label. However, an advertisement for any whiskey or brandy, which does not bear a statement of age on the label or an advertisement for rum which is four (4) years or more old, may contain general inconspicuous age, maturity, or other similar representations[,] (for example, aged in wood, mellowed in fine oak cask); and

(C) A representation that intoxicating liquor *[or nonintoxicating beer]* was manufactured in or imported from a place or country other than of its actual origin or was produced or processed by one who was not in fact the actual producer or processor.

(10) *[An] No [a]* Advertisement for wine *[shall not]* **may** contain:

(A) Any statement of bonded winecellar or bonded winery numbers unless stated in direct conjunction with the name and address of the person operating the winery or storeroom. Statement of bonded winecellar and bonded winery numbers may be made in the following form: "Bonded Winecellar No. . . .," "Bonded Winery No.," "B.W.C. No.," or "B.W. No.[,] No additional reference to numbers shall be made, *[n]*or *[shall]* any use be made of a statement that may convey the impression that the wine has been made or matured under **the** United States government or any state government supervision or in accordance with **the** United States government or any state government specifications or standards[.];

(B) Any statement, design, device, or representation which relates to alcoholic content or which tends to create the impression that a wine is unfortified or has been fortified or has intoxicating qualities or contains distilled spirits except for a reference to distilled spirits in a statement of composition where the statement is required by these regulations to appear as a part of the designation of the product.

(11) No statement of age or representation relative to age (including words or devices in any brand name or mark) *[shall]* **may** be made, except that—

(A) In the case of vintage wine, the year of vintage may be stated if it appears on the label; and

(B) Truthful references of a general and informative nature relating to methods of production involving storage or aging[.]. *[[For* example, "This wine has been mellowed in oak casks," "Stored in small barrels," or "Matured at regulated temperatures in our cellars," may be made.

(12) The statement of any bottling date *[shall]* **is not [be]** deemed to be a representation relative to age[,] if the statement appears without undue emphasis in the following form: "bottled in," (inserting the year in which the wine was bottled).

(13) No date, except as provided in this section and section (12) of this rule with respect to statement of vintage year and bottling date, *[shall]* **may** be stated unless, in addition to the year and date, *[and]* in direct conjunction with the year and date, **and** in the same size and kind of printing *[there shall be stated]* an explanation of the significance of the date **is stated**. If any date refers to the date of establishment of any business, this date *[shall]* **is to** be stated without undue emphasis and in direct conjunction with the name of the person to whom it refers.

(14) *[The] No* advertisement *[shall not]* **may** represent that the wine was manufactured in, or imported from, a place or country other than

Emergency Rules

that of the actual origin or produced or processed by one who was not in fact the actual producer or processor.

(15) No retail licensee *[shall]* **may** advertise for sale any brand of intoxicating liquor *[or nonintoxicating beer]* unless s/he has the particular brand and size of container or package of intoxicating liquor *[or nonintoxicating beer]* in his/her licensed premises for sale.

(16) No wholesale licensee *[shall]* **may** allow any sign owned by him/her or advertising his/her product to be placed or allowed to remain on or upon any building unless the building has an occupant holding a license issued by the supervisor.

(17) No wholesale or retail licensee *[shall]* **may** use any loudspeaker or public address system to advertise intoxicating liquor *[or nonintoxicating beer]*.

(18) No producer, manufacturer, brewer, bottler, importer, or wholesaler of intoxicating liquor *[or nonintoxicating beer shall]* **may** advertise the retail price or suggested retail price of intoxicating liquor *[or nonintoxicating beer]*.

AUTHORITY: section 311.660, RSMo [1994] Supp. 2018. This version of rule filed Feb. 8, 1973, effective Feb. 18, 1973. For intervening history, please consult the Code of State Regulations. Emergency amendment filed Oct. 10, 2018, effective Oct. 20, 2018, expires April 17, 2019. An emergency amendment and a proposed amendment covering this same material will be published in the November 15, 2018, issue of the Missouri Register.