

Rules Review Committee Rule Reversion Requests

Republic National Distributing
Company – South Dakota

11/20/18

Alcoholic Beverage Law Relevant Background

Per state and federal law, alcoholic beverage wholesalers may promote sales only on the basis of “price competition, salesmanship, reliability as a supplier, and other ordinary competitive business practices.” SDCL 35-4-52

Sales tactics such as volume discounts or the extension of credit are not permitted. Those are illegal inducements.

In South Dakota, price competition in the wholesale market for alcoholic beverages relies on the state’s requirement that wine and spirits prices be electronically reported to the Department of Revenue (DOR) who, in turn, shares that pricing information electronically with all wholesalers.

In South Dakota, the federal ban on providing credit is supported by the DOR’s “do not sell” list - Retailers with invoices older than the legal maximum of 30 days from delivery date may not purchase alcoholic beverages from any wholesaler until their account is current. In this way, both wholesaler (federal) and retailer (state) have a government-enforced sanction against extension of credit.

Price Reporting Rules

64:75:03:02 – 09, 11, 12

- **Status Quo:** Wine & spirits prices and proposed discounts are reported electronically to DOR. DOR then distributes price and discount information electronically to all wholesalers.
- **Cost:** Wholesalers incur labor expense to report prices and planned discounts to DOR on a frequent basis. DOR receives then sends a steady stream of emails to all wholesalers with price data. DOR FTE's are extensive compared to alternative electronic systems that place all reporting responsibility on wholesalers. (However, DOR estimates no fiscal impact from elimination of this function.)
- **Value of Status Quo:**
 - Public policy – Alcoholic beverage sales practices are limited by statute. Pricing is a key, legal sales practice. The current electronic filing system fosters a competitive, dynamic price market for wine and spirits.
 - Retailers – The efficient, dynamic pricing market produced under the status quo results in lower prices for retailers.
 - Wholesalers – The real time price information generated under the current system gives wholesalers the optimum means to compete on the basis of price.

Price Reporting Rules

64:75:03:02 – 09, 11, 12

Reversion request per SDCL 1-26-4.7 The Interim Rules Review Committee may require an agency to revert to any step in the adoption procedure provided in § 1-26-4 if, in the judgment of the committee: ... (8) The proposed rule is not a reasonable implementation of the law as it affects the convenience of the general public or persons likely affected by the proposed rule;”

Adoption of proposed price reporting rules would be unreasonable –

- Proposed rules will make prices much less transparent and will thus limit price competition. This will be a new burden on wholesalers already operating under statutory competition limits.
- Proposed rules’ repeal of current reporting system will lead to a less dynamic, less competitive price market to the detriment of retailers.
- The proposed rules are technologically backwards as they are a devolution from current dynamic, transparent, real-time electronic filing to no filing and increased record storage requirements, presumably on paper, under the rules proposal.
- Yet, despite the proposed rule’s elimination of report filing, it retains (64:75:03:04. Amendment of price schedules.) a burden on wholesalers to note price changes 10 days in advance – even though the requisite note would be designed to reach no audience.
- The premises supporting the proposed rule change are not so. The current rule is used dynamically, is not obsolete, and is redundant to no rule nor statute.
- There are no private sector proponents of the price reporting rule change proposal.
- RNDC-SD has proposed an alternative electronic filing system. Reversion would allow stakeholders time to pursue alternate filing methods.

Retail Delinquency Rules

64:75:04:04. Bad checks 64:75:04:05. Retail delinquency

- Status Quo: Invoices > 30 days in arrears and NSF checks are reported to DOR. Wholesalers are barred from selling to such retailers until retailer's delinquency is cleared.
- Cost: Wholesalers must report late accounts and NSF checks to DOR. DOR produces a weekly report summarizing wholesaler reports. Est. DOR FTE = 2 hours per week.
- Value:
 - Public policy – State “do not sell” list requirement enforces the no credit/30 day payment requirements on retailers. State sanctions against retailers mirror federal sanctions on wholesalers.
 - Wholesalers – “do not sell” list supports timely payment. Provides some benefit to wholesalers vs. wholesalers' obligation for prepayment of alcoholic beverage tax w/o collection allowance such as sales tax remitters receive.

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Adoption of propose retail delinquency rules would be unreasonable –

- Contrary to public policy, the proposed rules will eliminate the sole enforcement provision against retailers receiving credit – a provision that presently mirrors the federal ban on wholesalers offering credit to retailers.
- Proposed repeal of current rules will allow retailers to circumvent the ban on credit sales by carrying debt with one wholesaler while continuing to buy from other wholesalers.
- Current payment timeliness is improving in part due to the “do not sell” list. The proposed repeal of these rules will damage wholesalers’ ability to recover monies owed (including prepaid alcohol excise taxes) with no off-setting benefit to wholesalers.
- The stated premises supporting the proposed rule change are not so. The current rule is used dynamically, is not obsolete, and is redundant to no rule nor statute.
- No private sector entities support the rule change. In oral and written comments, RNDC and the SD Beer Distributors Association opposed the proposed rule change.