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BILL



ANALYSIS

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Senate Bill 358 (as enrolled)
Sponsor: Senator Rick Jones
Senate Committee: Regulatory Reform
House Committee: Regulatory Reform

Date Completed: 9-28-17

RATIONALE

According to an administrative rule promulgated by the Michigan Liquor Control Commission, a retail licensee must ensure that an advertising sign for alcoholic liquor that is used inside the licensee's premises is unilluminated and does not have a total area of more than 3,500 square inches, although there is an exception for illuminated advertising signs in a sports or entertainment venue. The Commission's rules provide further specifications for advertising signs, and list entities that may provide and install illuminated signs.

In 2004, then-Attorney General Mike Cox issued an opinion on whether the rules' illuminated sign prohibition violated the First Amendment of the United States Constitution and Article 1, Section 5 of the Michigan Constitution, which protect freedom of speech. The Attorney General opined that illuminated advertising of the kind prohibited by the Commission was "commercial speech", which is defined as speech that proposes a commercial transaction, and is constitutionally protected from "unwarranted governmental regulation". The Attorney General concluded that the Commission's rule violated the U.S. and Michigan Constitutions (Opinion No. 7146).

It has been suggested that the administrative rules regarding illuminated signs be codified, but with modifications to address the constitutional conflict that Attorney General Cox identified.

CONTENT

The bill would amend the Michigan Liquor Control Code to allow a manufacturer, mixed spirit drink manufacturer, warehouser, wholesaler, outstate seller of beer or mixed spirit drink, or vendor of spirits to provide to a retailer signs that promoted the brands and prices of alcoholic liquor, including special event pricing.

All of the following would apply to a sign:

- The sign could not be illuminated.
- The sign could not have any use beyond the actual advertising of brands, prices, and events related to the alcoholic liquor.
- The sign could not include the name of the retailer.

Also, a sign that was located inside the retailer's licensed premises could not be more than 3,500 square inches in dimension.

A retailer could use an illuminated sign to promote the brand but not the price of alcoholic liquor. A manufacturer, mixed spirit drink manufacturer, warehouser, wholesaler, outstate seller of beer, wine, or mixed spirit drink, or vendor of spirits could not provide to a retailer a sign described in the bill.

The signs allowed under the bill would be in addition to the advertising items that a manufacturer, mixed spirit drink manufacturer, warehouser, wholesaler, outstate seller of beer, wine, or mixed

spirit drink, or vendor of spirits may provide to another licensee under Section 609(2) of the Code. (Section 609(2) allows a manufacturer, mixed spirit drink manufacturer, warehouser, wholesaler, outstate seller of beer, wine, or mixed spirit drink, or vendor of spirits, in a manner consistent with rules, regulations, and orders of the Michigan Liquor Control Commission, to provide another licensee with an advertising item that promotes the brands and prices of alcoholic liquor produced by the manufacturer, sold by the outstate seller of beer, wine, or mixed spirit drink, or distributed by the wholesaler. Except as otherwise provided, the advertising item must not have any use or value beyond the actual advertising of brands and prices of the alcoholic liquor.)

The bill would take effect 90 days after its enactment.

Proposed MCL 436.1610a

BACKGROUND

In Opinion No. 7146, then-Attorney General Cox described a four-part analysis, known as the "*Central Hudson* test", that the United States Supreme Court developed to evaluate whether state action unconstitutionally infringes on commercial speech. First, for commercial free speech to be considered protected by the First Amendment, the expression must concern at least lawful activity and not be misleading. Next, it must be established whether the asserted governmental interest is substantial. If both of those criteria are met, then it must be determined whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

According to the Attorney General's Opinion, Michigan courts adopted the *Central Hudson* test when evaluating rules of the Michigan Liquor Control Commission. Applying the *Central Hudson* test to the Commission's illuminated sign rule, the Attorney General first determined that the advertisement of alcoholic liquor was commercial speech protected by the First Amendment, and that there was no suggestion that the illuminated advertising in question was misleading or related to unlawful activity. The Attorney General then determined, however, that the rule did not directly advance the State's interest, which was said to be the encouragement of "temperance and control of alcoholic beverage traffic by restricting the promotion of alcoholic liquors within licensed retail establishments".

This conclusion was supported by several reasons. Except for size restrictions imposed only on certain licensees, the rule does not limit the use of nonilluminated advertisement to promote alcoholic liquor inside a retail establishment, or the use of illuminated advertisement to promote alcoholic liquor on the outside of the licensed premises. Since the commercial speech in question (an illuminated interior sign) is prohibited only after a patron has entered an establishment, the effectiveness of the rule in advancing the State's interest is remote, according to the opinion. Also, while the rule prohibits illuminated advertisement visible to patrons inside certain retail premises, it also allows retail licensees at sports entertainment venues to erect large illuminated advertising signs that are visible to thousands of prospective customers, including minors. The Attorney General stated, "Unrestricted illuminated advertisement to retailers serving large populations attending sporting events is inconsistent with the state's interest in encouraging temperance and control of alcoholic beverage traffic at retail establishments..."

According to the Department of Licensing and Regulatory Affairs, the rule was primarily associated with preventing the use of neon signs, which are commonly used in liquor-serving establishments located in most states and produced by breweries to advertise their products.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

In order to regulate effectively the importation, manufacture, possession, sale, and transportation of alcoholic beverages in Michigan, it is important that the Commission promulgate unambiguous rules that are lawful. As stated above, however, Attorney General Cox opined that the current rule regarding illuminated advertising signs for alcoholic liquor violates the State Constitution and the First Amendment to the United States Constitution. The bill is necessary to resolve the inconsistency and clarify the law regarding liquor advertising signs.

Legislative Analyst: Drew Krogulecki

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Josh Sefton

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.