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COVID-19 Stimulus Not Enough To Revitalize Alcohol Industry

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Various economic plagues have hit our on-premise alcohol retailers, including the hospitality and entertainment industries, throughout history. Whether man-made or as a result of natural catastrophes, our favorite hosts have found a way to adjust, modernize and make notable comebacks without federal aid. But the economic fallout due to the coronavirus is different from prior downturns.

The sudden impact of necessary social distancing protocols shut down both local and national chain venues, almost simultaneously, across the country and forced others to adopt immediate changes in operations that come with immediate costs. Congress' $2.2 trillion stimulus package can provide immediate support, but revitalizing the struggling on-premise alcohol industry will take more than money.

Federal and state alcohol regulatory agencies will need to coordinate relief legislation with the hardest-hit industry members, not only for immediate flexibility in trade practices and industry support, but also for long-term success and continued emergency preparedness.

Although the Coronavirus Aid, Relief and Economic Security Act, also known as the CARES Act, does not make specific grants for the struggling hospitality and entertainment industries, the act does allow for flexible use of funds and tax credits with special significance to restaurants and hotels. General allocation of $500 billion in loans and assistance for larger companies and $350 billion in aid for smaller businesses will provide much-needed emergency capital.

The relief package for smaller businesses provides for a $350 billion budget for the Small Business Administration to offer unique loans to businesses with 500 or fewer employees. Calculation of employees under the current version of the act for restaurants, franchises, hotels and motels may be focused on the number of employees at each of the businesses' locations rather than a collective total without regard to affiliation as guidance is issued.

This provision is especially helpful for larger, yet independent, restaurant, hotel and franchise owners. The loan funds can be used for rent, utilities, payroll, health coverage premiums and other debts incurred prior to the coverage period.

Collateral requirements and the "credit elsewhere" requirements have been waived, which is particularly helpful to smaller startup restaurants and those that have just opened this year and may have already fallen short on structured payment plans or loans. The act also includes provisions for inclusion of seasonal employee wages, which are common in both the hotel and restaurant industries and would have accounted for a large part of seasonal expenses during spring break and will hopefully still be necessary during the coming summer months.

The loan is forgiven if used entirely for payroll costs, mortgage interest, or rent and utilities. Any loan amounts not forgiven at the end of one year are carried forward as an ongoing loan with a maximum 4% interest on a maximum 10-year term.

In addition to loan funds, the CARES Act also provides for beneficial tax credits that can open cash flow and incentivize reinvestment in the business. The act allows eligible businesses to write off costs associated with improving their facilities instead of waiting to depreciate improvements over the 39-year life of the property.

This allowance is especially important to the restaurant, hospitality and even movie theater exhibition industry as venue improvements and modifications may be needed to address new operational and sanitation requirements post-coronavirus and appeal to the new customer emerging from weeks of quarantine.

While the immediate access to capital is crucial for the industry's survival, reopening will take industrywide effort and additional cost investments. While the restaurant industry breathed a small sigh of relief as emergency orders steadily allowed for takeout and delivery orders and also lifted prior restrictions on off-premise sales of alcohol to some extent, the added flexibility comes with added costs and confusion with respect to what is and is not permissible, as emergency orders change daily.

Alcohol is one of the most highly regulated products in the U.S., with many laws and restrictions dating back to post-Prohibition legislation. The U.S.' overly complex system of alcohol regulations, which includes regulation on the federal, state and local government levels, govern retail alcohol businesses differently depending greatly on the type of venue.

Restaurants cannot typically operate as liquor package stores by offering sales of alcohol for off-premise consumption. Few states allow the practice regularly, but since last week, most jurisdictions are temporarily allowing restaurants to benefit from off-premise sales of alcohol with food purchases.

Restaurant chains, both large and small, have needed to adjust business models quickly in order to maintain some operational functions. This means taking on more costs of revamping point-of-sale and online ordering systems, additional training for staff, purchasing more takeout supplies, including beer growler containers that have now become coveted items in short supply, and navigating through differing emergency orders across state lines and municipal jurisdictions.

Aside from restaurants, other hospitality and entertainment venues are struggling to adapt and reenvision what their businesses will look like post-coronavirus. Unlike restaurants though, most other on-premise venues like movie theaters, bars and hotels have either been required or have chosen to shut down completely without the ability to adjust to pickup and delivery options, and having most on-premise services being suspended.

Fortunately, for the industry as a whole, alcohol suppliers stepped up early to provide support through charities and other industry organizations, like the National Restaurant Association Educational

Foundation, U.S. Bartender's Guild and first responder groups. Ryan Reynolds' Aviation Gin, Constellation Brands and Bacardi all announced significant contributions to support organizations.

Other suppliers have also offered free online webinars and other resources for COVID-19 relief efforts. However, without flexibility in alcohol trade practice regulations, alcohol suppliers are limited in any types of additional support they can provide to on-premise retailers to assist in the reopening effort and maintain their own brand strength.

Trade practice or "tied-house" laws exist on the federal level and vary from state to state, but commonly prohibit practices such as extensions of credit and consignment sales, or other gifts of funds or support that can tie a retailer to a specific supplier through purchasing incentives or even indebtedness. These practices are common for other lesser regulated industries but prohibited with alcohol products.

Generally, it is unlawful for an alcoholic beverage manufacturer or distributor to give anything of value, including support funds, to any alcoholic beverage retailer (e.g. bar, hotel or restaurant) unless such gift is expressly permitted by federal or state law. The validity of these restrictive laws has frequently been challenged as being violative of First Amendment rights and impermissibly restricting retailer and supplier advertising. Such challenges have generally failed, and recent activity throughout the country indicates that the Federal Alcohol Tobacco, Tax & Trade Bureau, or TTB, has been taking an aggressive approach in enforcing compliance.

In 2017, the TTB announced that it was conducting a joint operation with the Florida Division of Alcoholic Beverages and Tobacco, or DABT, to crack down on tied-house law violations. Aside from its public partnership with the DABT, the TTB also announced its partnership with the Illinois Liquor Control Commission. These joint federal-state investigations have led to settlements resulting in hundreds of thousands of dollars in fines paid to the TTB.

What do these regulations mean for the alcohol industry now, in times when retailers are most immediately impacted?

The most significant impact of current trade practice laws is that they will prevent general freedom of contract in negotiating product support terms that may become critical for struggling on-premise retailers. Alcohol suppliers and retailers, including their employees, officers and shareholders, are prohibited from negotiating for general product and on-premise sales support other than for specifically enumerated exemptions, which usually hold minimal value. Suppliers are legally restricted from offering support funds or marketing initiatives to enhance product sales, employee assistance through gifts, or even credit for continued purchases or deferred payments on prior purchases.

The detrimental loss of sales and customer traffic for hotels, restaurants, bars, nightclubs and movie theaters throughout the country will soon be felt by other tiers of the alcohol industry and food distributors, as purchase orders significantly decrease across the board for all vendors dealing with any of these retailers. Some state alcohol regulatory agencies have started to relax trade practice restrictions to allow for some extension of credit between suppliers, wholesalers and retailers and have lifted restrictions on consignment sales as retailers are eager to return and be credited for unused products.

Even with access to federal aid, on-premise retailers will still need a significant amount of time to make up their losses and stabilize their cash flow. The CARES Act will provide immediate relief from the sudden and shocking drop in customer traffic, but sales are obviously still on the decline. Access to emergency capital and limited credit options may address more direct and immediate economic struggles but more, long-term, negotiated support commitments from all alcohol tiers will be crucial for long-term stability of the industry as a whole.

While we wait for release of CARES Act funds, now is the time for industry members and regulators to come together on modified emergency trade practice provisions that will allow for more direct collaboration and negotiation of support terms between suppliers, wholesalers and on-premise retailers on effective relief support and industry revitalization efforts.

Some areas of consideration for long-term support is improvement to food and alcohol service preparation areas that will now be held to higher sanitation standards, upgrades to point-of-sale equipment and online ordering systems, menu support, upgrades to draft equipment and alcohol storage areas, and of course, reopening and ongoing marketing support.

Access to funds is a critical part of the revitalization effort and ongoing support that will be essential for large and small alcohol retailers. However, the far-reaching impact of business closures requires industry effort and support to help those service employees not only get back to work but remain employed at thriving venues.

Marbet Lewis is founder of Spiritus Law.