

BEFORE THE IOWA DEPARTMENT OF REVENUE
HOOVER STATE OFFICE BUILDING
DES MOINES, IOWA

IN THE MATTER OF:

Diageo Americas Inc.
d/b/a Diageo Americas Inc.
3 World Trade Center
175 Greenwich Street
New York, NY 10007

Distiller's Certificate of Compliance Holder
CD0001060

DIRECTOR'S ORDER TO
PETITION FOR WAIVER
FROM A DISCRETIONARY RULE

DOCKET NUMBER: 694116

Pursuant to Iowa Code section 17A.9A (2024) and Iowa Administrative Code chapter 185—19 (2024), the Iowa Department of Revenue ("Department")¹ makes the following ruling on the Petition for Waiver submitted by Diageo America Inc. d/b/a Diageo America Inc. ("Petitioner"):

I. RELEVANT FACTS

All facts presented below are based on the Petition and the Department's records regarding the special order barrel program at issue.

Any manufacturer, distiller, or importer of alcoholic liquors brought into this state for resale must hold a distiller's certificate of compliance. See Iowa Code § 123.23. No brand of alcoholic liquor is permitted to be sold by the Department in this state unless a certificate has been obtained. See *id.* at § 123.23(1). The Petitioner holds a distiller's certificate of compliance.

The Petitioner seeks to waive Iowa Administrative Code rule 185—8.8(4), which requires special order barrel program products be sold and delivered exclusively to the individual class "E" retail alcohol licensee that placed the special order, prohibiting the splitting of these products between two or more class "E" retail alcohol licensees. The Petitioner is seeking the waiver for all suppliers, "now or in the future." (Pet. at 4.)

¹ Effective July 1, 2023 and pursuant to 2023 Iowa Acts, Senate File 514, the Iowa Alcoholic Beverages Division became a part of the Iowa Department of Revenue. See 2023 Iowa Acts ch. 19, § 2355.

II. ANALYSIS

A. Waiver of Department Rules

Iowa Code section 17A.9A allows any person to “petition an agency for a waiver from the requirements of a rule.” However, a waiver cannot be granted unless the “agency has jurisdiction over the rule and the waiver is consistent with any applicable statutes.” Iowa Code § 17A.9A(1). Additionally, waivers cannot override requirements created or imposed by statute. See *id.* The Department is in the process of adopting rules on waivers that will reflect the incorporation of alcohol administration into the Department and apply across department topics. Until those rules are in effect, Iowa Administrative Code chapter 185—19 outlines the procedures for requesting a waiver and the requirements for granting a waiver from Department rules for alcohol matters. Specifically, the Department may only grant a waiver if:

- (1) The division has the authority to promulgate the rule from which the waiver is requested or has final decision-making authority over a contested case in which a waiver is requested; and
- (2) No statute or rule otherwise controls the granting of a waiver from the rule from which the waiver is requested.

Iowa Admin. Code r. 185—19.1(2). These requirements are essentially the same as those described in Iowa Code section 17A.9A(1). Additionally, the Department must find each of the following criteria:

- a. Application of the rule would result in hardship or injustice to the person for whom the waiver is requested.
- b. Waiver from the rule on the basis of the particular circumstances would not prejudice the substantial legal rights of any person.
- c. Provisions of the rule subject to the request for a waiver are not specifically mandated by statute or another provision of law.
- d. Where applicable, substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver is requested.

Iowa Admin. Code r. 185—19.2(1). These requirements mirror Iowa Code section 17A.9A(2). The burden of persuasion rests with the Petitioner to demonstrate by clear and convincing evidence that the Department should exercise its discretion to grant a waiver from a rule. See Iowa Code § 17A.9A(3); Iowa Admin. Code r. 185—19.3(3).

B. Iowa Administrative Code rule 185—8.8

Iowa law permits the Department to adopt rules as necessary to carry out Iowa Code chapter 123. See Iowa Code § 123.10. The Director's rulemaking authority extends to, but is not limited to, "[r]egulating the purchase of alcoholic liquor generally and furnishing of the liquor to class "E" retail alcohol licensees under [Chapter 123], and determining the classes, varieties, and brands of alcoholic liquors to be kept in the state warehouses." *Id.* § 123.10(3). This statutory authority creates the ability for rules to be adopted to regulate the purchase of alcoholic liquor.

Through rulemaking document ARC 5910C, rules were adopted in 2021 to rescind the outdated product management rule chapter and replace it with the Department's current policies and procedures, which had been previously outlined in the 2020 Listing Manual. See 44 Iowa Admin. Bull. 808-15 (Sept. 22, 2021). Spirit "products offered by suppliers as a part of a Special Barrel program purchase[] shall be made available on a special order basis only." 2020 Listing Manual at 10. "Store orders shall be placed individually and shall not be split." *Id.* These policies were implemented to ensure fair distribution of uneven quantities of products among licensees, including procedures for allocating any available barrels.

The special order barrel program authorizes the sale of a supplier's barrel-aged products to class "E" retail alcohol licensees. See Iowa Admin. Code r. 185—8.8. With this program, class "E" retail alcohol licensees are able to provide rare and unique alcoholic liquor products to their customers. The Department's administrative rules require that the special order barrel program products be sold and delivered exclusively to the individual class "E" retail alcohol licensee that placed the special order, prohibiting the splitting of these products between two or more class "E" retail alcohol licensees. The specific rule petitioned for waiver, 185—8.8(4), explicitly states: "Products purchased as part of a barrel program shall be sold and delivered to the individual class "E" retail alcohol licensee that placed the special order. Barrel program special orders and products shall not be split between two or more class "E" retail alcohol licensees."

C. Determination of Waiver

As stated above, a requirement to waive a rule is for the rule to not be specifically mandated by statute and for the waiver of the rule to not be prohibited. See Iowa Code § 17A.9A(1); Iowa Admin. Code rr. 185—19.1, .2(1)“c.” The rule is not specifically mandated by statute or any other provision of law. No provisions of Iowa Code chapter 123 or applicable statutes prohibit the waiver of Iowa Administrative Code rule 185—8.8(4). Another is that the waiver from the requirements of the rule in the specific case would not prejudice the substantial legal rights of any person. See Iowa Code § 17A.9A(2)(d); Iowa Admin. Code r. 185—19.2(1)“b.” Granting the waiver would not prejudice the substantial legal rights of any person. No previous waivers have been submitted or granted concerning this rule. Another requirement to grant a waiver is that substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver is requested. See Iowa Code § 17A.9A(2)(d); Iowa Admin. Code r. 185—19.2(1)“d.” Granting the waiver would not compromise public health, safety, and welfare. The Department finds that these interests remain protected even if the waiver is granted.

However, there is one requirement that the Petitioner has failed to meet. The Petitioner must demonstrate that the application of the rule would impose an undue hardship on the person for whom the waiver is requested. See Iowa Admin. Code r. 185—19.2(1). The Petitioner has failed to meet its burden of demonstrating by clear and convincing evidence that the Department’s enforcement of the ban on splitting barrel program special orders imposes an undue hardship. Since the adoption of the special-order barrel program rule in Iowa Administrative Code chapter 185—8 in 2021, the Petitioner has not shown any proof of hardship. The Petitioner does not point out any specific undue hardship in the Petition that the Petitioner has suffered or will suffer without the waiver. The only statements that come close to a claim of undue hardship are the statement that “[n]ot many accounts, however, can make such a large purchase and yet distribute the product out through a single retail location” and that

the current practice requiring full barrels . . . limits the program to the few accounts that can sell that many cases out of one location. And, given that most individual retail accounts do not have the customer base to purchase and distribute a full barrel, the applicable subsection restricts the number of eligible participants and limits the full potential of the Barrel Program.

(Pet. at. 1-2, 4.) However, these concerns are general rather than specific to the Petitioner. The Petitioner has not demonstrated that the rule creates an undue hardship sufficient to justify waiving this longstanding rule, which is important for the Department's accurate regulation of liquor distribution.

In addition to failing to demonstrate an undue hardship, the Petitioner has failed to present a narrow waiver request. The Department is required to draft waivers that provide the narrowest exception possible to the provisions of the rule, while maintaining the integrity of the rule. See 185 Iowa Admin. Code r. 185—19.2. The Petitioner's request seeks to waive rule 185—8.8(4) entirely—for itself and other suppliers—now and into the future. This is not a narrow request. In fact, it seems more akin to a request for rulemaking than rule waiver.

III. CONCLUSION

The Department may issue an order waiving, in whole or in part, the requirements of a rule if it finds, based on clear and convincing evidence, that all of the criteria set forth in rule 185—19.2(1) have been met. The Petitioner has failed to meet its burden to demonstrate by clear and convincing evidence that all the waiver criteria are met.

IT IS THEREFORE ORDERED:

The Petitioner's request to waive Iowa Administrative Code rule 185—8.8 is **DENIED**.

DATED this 13th Day of November, 2024, in Ankeny, Iowa.

DEPARTMENT OF REVENUE

Mary Mosiman

Mary Mosiman, Director