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November 22, 2011

Chairperson Andrew J. Deloney  
Commissioner Teri L. Quimby  
Commissioner Donald Weatherspoon  
Michigan Liquor Control Commission  
7150 Harris Drive  
P.O. Box 30005  
Lansing, Michigan 48909-7505

Alcohol and Gambling  
Enforcement Division

NOV 22 2011

RE: **Request for Declaratory Ruling**  
**Petitioner: Tin Can-West Saginaw, LLC**

Lansing

Dear Commissioners:

This firm represents Tin Can-West Saginaw, LLC, (hereafter "Petitioner" or "Tin Can West") and hereby requests the Michigan Liquor Control Commission ("Commission") issue a Declaratory Ruling, pursuant to Rule 436.1971, addressing the applicability of MCL 436.2025(1) to the statement of facts described below.

### Statement of Facts:

Petitioner holds Class C license #199440, located at 644 Migaldi, Suite 700, Lansing, MI 48917. Petitioner desires to conduct a customer loyalty program whereby customers receive a customer loyalty "10 for 10 Card" at no charge.<sup>1</sup> Customers receive one (1) stamp on their loyalty card upon each visit to Tin Can West. Upon receiving ten (10) stamps on their customer loyalty card, customers receive a \$10 gift certificate which provides: "Good for \$10 towards your tab-valid for redemption on your 11<sup>th</sup> visit-not redeemable for cash."<sup>2</sup> The term "tab" is applicable to food, alcoholic beverage, and/or nonalcoholic beverage.

On September 29, 2011, Petitioner received a visit from a Regulation Agent with the Enforcement Division of the Commission who questioned Tin Can West staff about the "10 for 10 Card" customer loyalty program. Subsequently, Petitioner was issued a Violation Warning Notice for violation of MCL 436.2025(1), which provides as follows: "*A vendor shall not give away any alcoholic liquor of any kind or description at any time in connection with his or her*

<sup>1</sup> A copy of the customer loyalty "10 for 10 Card" is shown in the lower picture attached on Exhibit A.  
<sup>2</sup> A copy of the gift certificate is shown in the upper picture attached on Exhibit A.

*business, except manufacturers for consumption on the premises only.*” The Agent contended that the fact that consumers could redeem the \$10 gift card for consumable goods, including alcoholic liquor, was the equivalent of the licensee giving away alcoholic liquor in violation of MCL 436.2025(1).

**Argument:**

Petitioner contends that its “10 for 10 Card” customer loyalty program does not violate MCL 436.2025(1). The customer receives a gift certificate which they are free to utilize as they see fit. Petitioner does not dictate how the customer uses their \$10 gift certificate. The gift certificate does not require it be used for the purchase of alcoholic liquor nor does it suggest or in any manner limit its usage to the purchase of alcoholic liquor products. Customers may choose to use the gift certificate for the subsequent purchase of food and/or beverage, alcoholic and nonalcoholic. Petitioner is not giving away alcoholic liquor in violation of Section 1025; Petitioner is giving away a gift certificate to loyal customers who redeem the certificates at their discretion.

MCL 436.2025(1) dates back to the immediate end of prohibition in 1933. At that time, the purpose of this statute was to prohibit the unsavory practice of saloons offering free alcohol to customers as an inducement to lure them into their establishments, leading to unsuspecting customers being taken advantage of resulting in further alcohol abuse. We are almost 78 years from the end of prohibition and today’s beverage alcohol industry is markedly different than the prohibition era. The “10 for 10 Card” customer loyalty program conducted by Petitioner is a customer loyalty program that rewards loyal customers with a gift certificate to be used at the customers discretion. It is not a licensee giving away alcoholic liquor to take advantage of unsuspecting customers. Petitioner’s gift certificate is no different than any other gift certificate redeemable in thousands of liquor licensed establishments. The fact that this or any other gift certificate can be used to purchase merchandise including alcoholic beverages is a far cry from a licensee giving away alcoholic liquor.

As previously noted, Petitioner’s gift card is not redeemable for cash. Ironically, if the gift card were redeemed for cash, which would be perfectly legal, this matter would not be an issue to the Commission, even though consumers would be free and clear to utilize the cash for whatever purpose they desired, including the purchase of alcoholic liquor products at Petitioner’s establishment or at any other retail licensed establishment.

**Why the Commission Should Issue a Declaratory Ruling:**

In addition to the direct impact the Enforcement Division’s interpretation has on Tin Can West’s customer loyalty program, the Commission should issue a Declaratory Ruling on the applicability of MCL 436.2025(1) due to the impact this interpretation has on other liquor licensed businesses and their customer loyalty and preferred customer programs, gift certificate programs, discount coupon programs and other marketing programs used by hundreds if not thousands of other retail licensed businesses. The Commission’s current interpretation of this statute will have an extremely negative impact on a wide variety of marketing tools commonly used in today’s beverage alcohol industry. Strictly interpreting the statute in the manner that

resulted in a Violation Warning Notice against Petitioner is wrong and detrimental to Petitioner's business and if evenly enforced throughout the industry will result in a negative impact on the on-premises hospitality industry as well as the off-premises retail licensed industry.

Examples of other marketing programs that are directly impacted by the Commission's interpretation of Section 1025 include:

- Online Marketing Promotions - Internet promotions such as Groupons, DealChicken, BuyWithMe, LivingSocial, Google Offers, Saveology, and other such internet marketing programs, regularly involve alcoholic beverage retailers. These marketing programs provide consumers with the opportunity to participate in a variety of special offers and deals including below cost discounts, "2 for 1 deals", free merchandise, gift certificates, etc. Such promotions do not restrict consumer's usage of the coupons or gift certificates.
- Gift Certificates/Gift Cards - Gift certificates can be retailer specific, redeemable only at a specific retailer or retail chain, or generic such as VISA cards that are generally redeemable market wide. There are a wide variety of ways for consumers to obtain gift certificates/cards including direct purchase by the consumer, purchased by others as gifts, rewarded for survey participation, winning through contest/sweepstakes, rewarded by retailers for customer loyalty or purchase allowances, rewarded by pharmacies for switching prescription business, received through charitable fundraisers, raffles, auctions, etc. Regardless of the source of the gift certificate, consumers are free to choose how to redeem the gift certificate and are not excluded from using it for alcoholic beverage purchases.
- Customer loyalty programs, bottle clubs, mug clubs, etc., conducted by on and off-premises retailers that reward customer loyalty with free merchandise, discounts (often below cost) or gift certificates/cards, which can be used at the consumer's discretion to purchase merchandise, including alcoholic beverages.

The aforementioned uses of gift certificates/cards and discount programs are just a few examples of marketing programs that are prevalent in the retail alcoholic beverage industry. In none of these examples are alcoholic beverages being given away by any retailer who participates in the redemption of the gift certificate/card. In each of these examples the consumer is free to use the redemption reward as they choose, including the purchase of alcoholic liquor if they so desire.

**Conclusion:**

Petitioner's "10 for 10 Card" is a customer loyalty program that rewards loyal customers with a \$10 gift certificate. The redemption of the gift certificate is up to the discretion of the customer. The fact that the customer can choose to redeem the gift certificate for alcoholic beverages is not akin to a retail licensee giving away alcoholic liquor in violation of MCL 436.2025(1). Petitioner's gift certificate is no different than any other gift certificate/card that can be utilized by consumers to purchase merchandise, including alcoholic liquor, at retail licensed locations. Petitioner is giving away a gift certificate, not alcoholic liquor.

There is absolutely no way to determine whether a gift certificate is the result of an original purchase by the consumer or obtained by another means other than purchase. The Commission's interpretation that a consumer is prohibited from redeeming for alcoholic beverages their \$10 gift certificate obtained after completion of Petitioner's "10 for 10 Card" customer loyalty program, or by any other means, essentially prohibits the redemption of all gift certificates/cards for alcoholic beverages at any on-premises or off-premises licensed establishment. To selectively restrict the use of Petitioner's gift certificates would be unfair.

It would be one thing if the coupon were exclusively allowed to be used for the purchase of alcoholic beverages. But that is not the case in Petitioner's situation nor any of the other situations described. As long as a coupon's redemption is not limited to alcoholic beverage only, it should not be viewed as a violation of Section 1025. Petitioner's "10 for 10 Card" customer loyalty program should be deemed legal by the Commission.

Thank you for your prompt attention to this matter.

Very truly yours,

CARLIN EDWARDS BROWN PLLC



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MEB:im  
Attachment  
cc: Doug Johns

11/22/11  
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Exhibit A

