

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

March 18, 2015

Opinion No. 15-23

Tennessee Whiskey

Question

Does Tenn. Code Ann. § 57-2-106(c) violate any state or federal law, rule, or regulation or any provision of the Tennessee Constitution or the United States Constitution?

Opinion

Tennessee Code Annotated section 57-2-106(c) constitutes impermissible discrimination in violation of the equal protection provisions of the Fourteenth Amendment to the United States Constitution, as well as impermissible class legislation in violation of article XI, section 8, of the Tennessee Constitution.

ANALYSIS

In 2013, the General Assembly enacted Tenn. Code Ann. § 57-2-106 which prohibits an intoxicating liquor from being advertised, described, labeled, named, sold or referred to for marketing or sales purposes as “Tennessee Whiskey,” “Tennessee Whisky,” “Tennessee Sour Mash Whiskey,” or “Tennessee Sour Mash Whisky” (collectively hereinafter “Tennessee Whiskey”) unless the intoxicating liquor is:

- (1) manufactured in Tennessee;
- (2) made of a grain mixture that is at least fifty-one percent (51%) corn;
- (3) distilled to no more than one hundred sixty (160) proof or eighty percent (80%) alcohol by volume;
- (4) aged in new, charred oak barrels in Tennessee;
- (5) filtered through maple charcoal prior to aging;
- (6) placed in the barrel at no more than one hundred twenty-five (125) proof or sixty-two and one half percent (62.5 %) alcohol by volume; and
- (7) bottled at not less than eighty (80) proof or forty percent (40%) alcohol by volume.

Tenn. Code Ann. § 57-2-106(a).

Most of these requirements are based on the standards of identity for bourbon created by the Alcohol and Tobacco Tax and Trade Bureau. *See* 27 C.F.R. § 5.22(b)¹; House State Government Subcommittee, Remarks of Jeff Arnett, 7th Master Distiller of the Jack Daniels Distillery on H.B. 1084, 108th General Assembly (March 26, 2013). The fifth requirement – that the intoxicating liquor be filtered through maple charcoal prior to aging – is unique to Tenn. Code Ann. § 57-2-106. This requirement is commonly referred to as the “Lincoln County Process.” Dominic Roskow et al., *Whiskey Opus* 183 (2012); Ian Wisniewski, *Filtering Out*, *Whisky Magazine*, July 2011, at 26; House State Government Subcommittee, Remarks of Dick Lodge, Rep. Jack Daniel’s Distillery, 108th General Assembly (March 20, 2013). This “charcoal mellowing” process occurs when the whiskey is filtered through charcoal before going into the casks for aging. Roskow et al., *supra*, at 183; Wisniewski, *supra*, at 26; House State Government Subcommittee, Remarks of Rep. Alexander on H.B. 1084, 108th General Assembly (March 20, 2013). This process is designed to distinguish Tennessee Whiskey from bourbon. Wisniewski, *supra*, at 26; House State Government Subcommittee, Remarks of Rep. Alexander on H.B. 1084, 108th General Assembly (March 20, 2013); Senate State & Local Government Committee, Remarks of Senator Tracy on S.B. 1195, 108th General Assembly (March 26, 2013).

One distillery is exempt from using the Lincoln County Process by virtue of Tenn. Code Ann. § 57-2-106(c), which provides:

Subdivision (a)(5) shall not apply to intoxicating liquor manufactured at a distillery located in a county that authorized the manufacturing process by referendum after January 1, 1979, and prior to January 1, 1980; provided, however, that any such distillery was first licensed by the state alcoholic beverage commission after January 1, 2000, and before January 1, 2001.

Legislative history reveals that Tenn. Code Ann. § 57-2-106(c) was enacted to allow Prichard’s Distillery to continue using the term “Tennessee Whiskey” even though it does not use the Lincoln County Process. House State Government Subcommittee, Remarks of Rep. Alexander on H.B. 1084, 108th General Assembly (March 20, 2013); Senate State & Local Government Committee, Remarks of Senator Tracy on S.B. 1195, 108th General Assembly (March 26, 2013).

Subsection (c) of Tenn. Code Ann. § 57-2-106 is essentially a “grandfather” provision. A “grandfather clause” is defined as “an exception to a restriction that allows all those already doing something to continue to do it, even if they would be stopped by the new restriction.” *Teague v. Campbell Cnty.*, 920 S.W.2d 219, 221 (Tenn. Ct. App. 1995) (citation omitted). This type of clause implicates the equal protection provisions of the Fourteenth Amendment to the United States Constitution and article XI, section 8, of the Tennessee Constitution, which prevents the General Assembly from enacting “special legislation” for the benefit of specific individuals or localities in an arbitrary and capricious manner. Because subsection (c) does not impermissibly interfere with a fundamental right or operate to the peculiar disadvantage of a suspect class, there need only be a rational basis for the provision in order to sustain its validity under both the federal

¹ Under 27 C.F.R. § 5.22(b), “whisky” is defined as a product of fermented grains distilled at less than 190 proof, stored in oak containers, and bottled at not less than 80 proof. Then, “bourbon whisky” is further defined as whisky distilled to no more than 160 proof from a fermented mash of not less than 51% corn, rye, wheat, malted barley, or malted rye grain, and stored at no more than 125 proof in charred new oak containers. 27 C.F.R. § 5.22(b)(1)(i).

and state constitutions. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976); *Brown v. Campbell Cnty. Bd. of Educ.*, 915 S.W.2d 407, 413-14 (Tenn. 1995).

A grandfather clause exempting existing businesses from newly imposed operating restrictions is constitutionally permissible in certain circumstances. In *Fleet Transport Co., Inc. v. Tennessee Pub. Serv. Comm'n*, 545 S.W.2d 4 (Tenn. 1976), the Tennessee Supreme Court found that a statute providing grandfather status to certain commercial haulers of petroleum products and exempting them from the requirement of proving public convenience and necessity before the Public Service Commission did not violate constitutional provisions against unreasonable class legislation. The Court reasoned that the grandfather clause was not limited in its application to isolated carriers or individuals, but that it pertained to all commercial haulers engaged in operation before the effective date of the law requiring certificates of convenience and necessity. Thus, it recognized and protected those legitimately operating their businesses before the law was changed. *Id.* at 7.

The grandfather clause in Tenn. Code Ann. § 57-2-106(c) is unlike the one in *Fleet Transport* since it applies to only one business. No other distillery that existed prior to the passage of Tenn. Code Ann. § 57-2-106 can take advantage of the exemption. While legislative history indicates that Prichard's Distillery may be the only existing distillery that sold a product labeled "Tennessee Whiskey" without using the Lincoln County Process when Tenn. Code Ann. § 57-2-106 was enacted,² subsection (c) does not create "grandfather rights" for distilleries on this basis. In fact, subsection (c) does not even address distilleries that were already selling products labeled "Tennessee Whiskey." Subsection (c) merely employs specific dates in order to exempt one distillery from the Lincoln County Process requirement. There is no discernable reason to distinguish one distillery from other existing distilleries on this basis, especially since the exemption at issue is purportedly the one that distinguishes Tennessee Whiskey from bourbon. Thus, Tenn. Code Ann. § 57-2-106(c) constitutes impermissible discrimination in violation of the equal protection provisions of the Fourteenth Amendment to the United States Constitution, as well as impermissible class legislation in violation of article XI, section 8, of the Tennessee Constitution.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

² House State Government Subcommittee, Remarks of Rep. Evans, 108th General Assembly (March 20, 2013).

LAURA T. KIDWELL
Senior Counsel

Requested by:

The Honorable Bill Sanderson
State Representative
204 War Memorial Building
Nashville, Tennessee 37243