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Sequence Number: 02-28-16
 Rule ID(s): 6128
 File Date: 2/29/16
 Effective Date: 5/29/16

Rulemaking Hearing Rule(s) Filing Form

Rulemaking Hearing Rules are rules filed after and as a result of a rulemaking hearing (Tenn. Code Ann. § 4-5-205).

Pursuant to Tenn. Code Ann. § 4-5-229, any new fee or fee increase promulgated by state agency rule shall take effect on July 1, following the expiration of the ninety (90) day period as provided in § 4-5-207. This section shall not apply to rules that implement new fees or fee increases that are promulgated as emergency rules pursuant to § 4-5-208(a) and to subsequent rules that make permanent such emergency rules, as amended during the rulemaking process. In addition, this section shall not apply to state agencies that did not, during the preceding two (2) fiscal years, collect fees in an amount sufficient to pay the cost of operating the board, commission or entity in accordance with § 4-29-121(b).

Agency/Board/Commission:	Tennessee Alcoholic Beverage Commission
Division:	
Contact Person:	E. Keith Bell (Keith Bell is also the disc acquisition contact)
Address:	500 James Robertson Parkway, 3 rd Floor, Nashville, TN
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Revision Type (check all that apply):

- Amendment
 New
 Repeal

Rule(s) Revised (ALL chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please enter only ONE Rule Number/Rule Title per row)

Chapter Number	Chapter Title
0100-11	Rules for Sales of Wine at Retail Food Stores
Rule Number	Rule Title
0100-11-.01	Licenses and Permits
0100-11-.02	Issuance of Initial Licenses
0100-11-.03	Conduct of Business
0100-11-.04	Renewal
0100-11-.05	Responsible Vendor Training Program
0100-11-.06	Operation of Liquor By The Drink Establishments Within Retail Food Stores
0100-11-.07	Conduct of Industry Members with Retail Food Stores

(Place substance of rules and other info here. Statutory authority must be given for each rule change. For information on formatting rules go to http://sos.tn.gov/sites/default/files/forms/Rulemaking_Guidelines_August2014.pdf)

Rules 0100 are amended by adding the following language as a new chapter 0100-11:

**RULES
OF
ALCOHOLIC BEVERAGE COMMISSION**

**CHAPTER 0100-11
RULES FOR SALES OF WINE AT RETAIL FOOD STORES
TABLE OF CONTENTS**

0100-11-.01	Licenses and Permits
0100-11-.02	Issuance of Initial License
0100-11-.03	Conduct of Business
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0100-11-.06	Operation of Liquor by the Drink Establishments within Retail Food Stores
0100-11-.07	Conduct of Industry Members with Retail Food Stores

0100-11-.01 Licenses and Permits.

- (1) Procedure for Off-Premise Retail Food Store Wine License Application. An application for a retail food store wine license shall be made on forms provided for such purpose by the Commission. In addition to completing and filing such forms, data, written statements, affidavits, evidence or other documents deemed a part of the application, an applicant shall provide the Commission with the following information:
 - (a) Applications shall be submitted to the TABC Headquarters offices in Nashville, Tennessee or on-line at the TABC website. In addition to the application and other forms provided by the Commission, the following data, written statements, affidavits, evidence or other documents must be submitted in support of an application for a retail food store wine license:
 1. Completed application;
 2. Completed questionnaires from all individuals having at least a ten percent (10%) ownership interest in the business and from all executive officers of a corporate applicant. As used in this rule, the term "executive officers" shall mean each of the following four persons: (1) the President or Chief Executive Officer (CEO); (2) the Vice President or Chief Operating Officer (COO); (3) the Secretary; and (4) the Treasurer or Chief Financial Officer (CFO). The term "executive officers" shall include the four (4) individuals that best fit into each of the above categories, respectively and shall not include more than four (4) individuals, including assistant Secretaries, assistant officers, and other such individuals.
 3. Proof of possession of the licensed premises, i.e., lease agreements, assignments, subleases, and/or deed to property;
 4. Affidavit from the landlord or owner of the proposed location of the applicant's retail food store stating that there does not exist any lease or deed restrictions or covenants limiting or restricting the sale or distribution of wine or other alcoholic

products (i.e. alcoholic beverages and/or beer as defined in T.C.A. § 57-5-101) by any tenant within the same shopping center or development of the applicant.

5. A copy of any management or franchise agreement, if applicable.
 6. Affidavit regarding amount of sales taxable sales of the applicant and copies of applicant's sales tax returns filed with the Tennessee Department of Revenue for the last complete business year;
 7. Affidavit regarding amount of retail floor space of the applicant;
 8. If not included in the lease, a site-plan designating the premises and the parking areas.
 9. Certificate of Good Moral Character, Zoning and Approved Sales of Wine by local option election, as required by T.C.A. §§ 57-3-801, 57-3-805 & 57-3-806, issued within one hundred eighty (180) days of the applicant's application and signed by the county executive or chair of the county commission in which the licensed premises are to be located if outside the corporate limits of a municipality or, if within a municipality, signed by the mayor (or highest executive officer) or a majority of the commission, city council, or legislative body of the municipality.
 10. Inspection by the Tennessee Alcoholic Beverage Commission;
 11. Acknowledgment of the rules and regulations;
 12. Proof that applicant entity, if a corporation, LLC, LP, etc., is registered with the Tennessee Secretary of State's office, and the submission by said applicant entity of a Certificate of Existence/Good Standing issued by the Tennessee Secretary of State's Office within thirty (30) days of applicant's application for a new or renewed license. If applicant entity was formed in another state or foreign jurisdiction, applicant must submit a Certificate of Authorization issued by the Tennessee Secretary of State's Office within thirty (30) days of applicant's application for a new license or renewal of an existing license.
 13. Corporate charter/Articles of Organization;
 14. List of Officers/Owners/Members/Partners. Any owner of less than ten percent (10%) of the applicant need not be individually identified;
 15. Sales & Use Tax Certificate of Registration;
 16. Application fee;
 17. Completed declarations of citizenship to be submitted by owner(s), member(s), executive officer(s), and/or principal(s) of the applicant and others as required by P.C. 1061 (2012);
 18. Designation by the applicant of a TABC permitted manager or managers who will be in actual control of the retail wine sale operations upon the applicant's premises; and
 19. Any other information that the Tennessee Alcoholic Beverage Commission may request pursuant to the provisions of Tenn. Code Ann. §57-3-801, et.seq.
- (b) In addition, any of the following documents which exist must also be submitted:

1. Management agreements;
 2. Bill of sale.
- (c) If a county or municipality wherein the applicant intends to conduct business fails to grant or deny the certificate required by T.C.A. § 57-3-806 within sixty (60) days of receipt of the written application for a certificate, the certificate is deemed to be granted.
- (2) If a lease agreement, assignment, sublease or other documentation executed by the applicant for a Retail Food Store Wine license and the owner or landlord of the proposed location, sought to be licensed, contains provisions that would limit or restrict the sale or distribution of wine or other alcoholic products (i.e. alcoholic beverages and/or beer as defined in T.C.A. § 57-5-101) within the same shopping center or other development whereupon the applicant seeks to license its premises, the applicant and the owner or landlord of the proposed location, shopping center or other development, must submit documentation acceptable to the Commission waiving any such restrictions to any and all tenants within the same shopping center or other development. An applicant is not required to obtain and submit the leases of other tenants of the shopping center or other development. However, lease or deed restrictions or covenants imposed by an owner or landlord limiting or restricting the sale or distribution of wine or other alcoholic products (i.e. alcoholic beverages and/or beer as defined in T.C.A. § 57-5-101) by other tenants within the same shopping center or development will serve to prohibit the issuance to the applicant of a retail food store wine license at the proposed location.
- (3) An applicant for a retail food store wine license shall identify all retail liquor stores within 500 feet measured from the closest outside wall of the confines of the retail food store to the closest outside wall of the retail liquor store. An applicant may submit waivers of the permission required pursuant to TCA §57-3-806(e) from the retail liquor stores located within 500 feet of the applicant's retail food store, signed by the owners of such retail liquor stores, and such waivers shall be deemed to be written permission from the retail liquor store for the issuance of the retail food store wine license to the applicant.
- (a) Upon receipt of an application for a retail food store wine license application, and in the absence of the submission of a signed waiver from the owner of a retail liquor store located within 500 feet of the applicant's retail food store, the Commission shall notify the retail liquor store, by email if the retail liquor store has provided an email address or by telephone if not provided, of the applicant requesting said waiver.
 - (b) The retail liquor store shall have 30 days to respond to the communication from the Commission by either granting permission for the issuance of a retail food store license or denying the issuance of a retail food store license.
 - (c) If the retail liquor store does not respond within 30 days, such non-response shall be considered a denial of permission.
 - (d) If a retail liquor store denies permission for the issuance of retail food store wine license, it shall immediately cease selling all items identified in T.C.A § 57-3-404(e). A retail liquor store may not resume selling the items identified in T.C.A § 57-3-404(e) until permission is granted to the retail food store wine applicant and the Commission is notified in writing of this grant of permission or July 1, 2017, whichever occurs first.
 - (e) The grant of permission to a retail food store shall survive any and all subsequent purchases of a retail liquor store by a new owner and once a written grant of permission has been given to a retail food store it may not be rescinded.

- (4) **Restriction on License after Revocation.** If a retail food store wine license is revoked by the Commission, for a period of one (1) year following revocation, no subsequent license shall be issued to the spouse, child or children, daughter-in-law, son-in-law or other person having any interest in the business of the licensee whose license was revoked. Additionally, for a period of one (1) year following revocation, no license shall be issued at the same location or in close proximity of the same location. The Commission may, in its discretion, waive the prohibition regarding locations.
- (5) **Must Surrender License If Business Discontinued.** Whenever any licensee discontinues business for any reason, it shall immediately notify the Commission in writing and surrender its license.
- (6) **Time Requirement to Commence Business.** Approval of the issuance of a retail food store wine license by the Commission shall automatically expire ninety (90) calendar days after such approval if the licensee has not opened for business, unless a written request is received and granted for an extension.
- (7) **Business Name Change.** At least seven (7) calendar days prior to any change in its business name or "d/b/a", a licensee shall submit the proposed change in writing to the Commission for approval. Upon approval and within a reasonable time, the Commission will amend the licensee's electronic record to reflect the licensee's new business or "d/b/a" name.
- (8) **Display of License.** Any person, partnership, corporation, or other legal entity holding a retail food store wine license shall prominently display and post, and keep displayed and posted, in a conspicuous place in the licensed premises, the license so issued.

Authority: T.C.A. §§ 57-1-209, 57-3-104(c)(4), 57-3-803, and 57-3-806. **Administrative History:** Original rule filed

0100-11-.02 Issuance of Initial Licenses.

A retail food store wine applicant may not sell wine to patrons or customers, in sealed packages only, and not for consumption on the premises until it has been issued a retail food store wine license. Retail food store wine licenses shall not be issued prior to July 1, 2016.

Authority: T.C.A. §§ 57-3-104(c)(4) and 57-3-803. **Administrative History:** Original rule filed

0100-11-.03 Conduct of Business.

- (1) **Advertising.** The provisions of rules, 0100-03-.02, 0100-03-.03, 0100-03-.04, 0100-03-.05, 0100-03-.06, 0100-03-.07, and 0100-03-.08 apply to retail food store wine licensees in the same manner as they apply to off premises retailers licensed pursuant to T.C.A. § 57-3-204.
- (2) **Responsibility for Penalties and Violations.**
 - (a) Licensees are at all times responsible for the conduct of their business and are at all times directly responsible for any act or conduct of any employee which is in violation of the laws of Tennessee, the rules and regulations of the Commission, whether the licensee be present at any such time or not. This section is defined to mean that any unlawful, unauthorized, or prohibited act on the part of an agent or employee shall be construed as the act of the licensee, and the licensee shall be proceeded against as though it were present and had an active part in such unlawful, unauthorized, or prohibited act, and as if having been at the licensee's direction and with its knowledge.

- (b) In disciplinary proceedings, it shall be no defense that an employee or agent of a licensee acted contrary to an order, or that a licensee did not personally participate in the unlawful, unauthorized, or prohibited action or actions. However, mitigating factors as permitted under the Responsible Wine Vendor program may be considered by the Commission.
 - (c) In a disciplinary actions brought against a retail food store wine licensee, any suspension or revocation of a license shall suspend or revoke the ability of the retail food store to sell wine and accept deliveries of wine from wholesalers. A suspension or revocation of a license shall not affect the ability of the retail food store to remain open or to sell other items not regulated by the TABC, including food items, non-food items, and beer.
- (3) **Delivery of Wine.** A wholesaler may deliver wine to a retail food store wine licensee at any time the retail food store location is open to the public and shall deliver only to the business address of the retail food store licensee at its customary loading dock.
 - (4) **All Licensees Must Keep Records Available Three Years.** Each licensee shall keep, for at least three (3) years; all purchase orders, invoices and all other records of all purchases and sales of wine made by such licensee. All such orders, invoices, and all other books and records pertaining to the licensee's operation shall be open for inspection to any authorized representative of the Tennessee Alcoholic Beverage Commission or Department of Revenue and failure to make such available shall be deemed cause for revocation of its license. Such records may be maintained in electronic format, and will be deemed available and open for inspection if the Commission or the Department of Revenue can review such records at the licensed premises or, if such records are stored in a central office, can be supplied to the Commission or Department of Revenue within three (3) business days upon request.
 - (5) **Hours Licensee may Sell Wine.** A Retail Food Store may sell wine only between the hours of 8:00 a.m. and 11:00 p.m. on Monday through Saturday. A Retail Food Store may not make any sale of wine on Sunday or on Christmas, Thanksgiving, Labor Day, New Year's Day, or the Fourth of July.
 - (6) **Mandatory Carding.** Prior to making a sale of wine, a Retail Food Store certified clerk must inspect a valid unexpired government issued form of identification to ensure that the purchaser is over the age of 21. The inspection of the identification must take place in a face-to-face transaction. Any government-issued document that has expired shall not be deemed to be "valid" for purposes of T.C.A. § 57-3-808, and as such, a retail food store may not sell wine to a person who has not provided an unexpired government-issued document that meets the requirements of T.C.A. § 57-3-808.
 - (7) **Sales to Intoxicated Customers.** A retail food store shall not make a sale of wine to a customer who is visibly intoxicated or accompanied by a person who is visibly intoxicated.
 - (8) **Customer assistance.** An employee of a retail food store may assist customers with loading wine in their vehicles as long as the vehicle is parked in the parking area of the licensee and such parking area is identified in the application of the retail food store. A retail food store permitted clerk must check the identification of any person purchasing wine as part of the sale prior to assistance being given to that customer by an employee with loading of wine to a vehicle.
 - (9) **Managers.**
 - (a) Each retail food store wine licensee shall have at least one designated permitted manager, but may have two or more designated permitted managers. Only the retail food store wine licensee's designated permitted manager(s) may place orders for wine

with wholesalers. A designated permitted manager may not be assigned to more than one retail food store wine licensee.

- (b) A designated permitted manager of a retail food store may transfer his or her permit to another retail food store wine licensee by notifying the Commission in writing of the effective date of the transfer. All transfer notifications must be made prior to the designated permitted manager(s) involvement in the placement of wine orders at the new retail food store wine licensee's location.
- (10) **Free Access to Licensed Premises Without Warrant.** Immediate access, without a warrant, to all parts of a retail food store shall at all times be accorded agents, officers or representatives of the Commission.
- (11) **Refusal of Cooperation.** Any licensee, his agent, or employee who refuses to open or disclose records to, or furnish information to, or who furnishes false and/or misleading information to an agent, officer or representative of the Commission upon any matter relating to or arising out of the conduct of the retail food store premises shall subject the license to revocation or suspension.
- (12) **Licensee Responsible For Law and Order on Licensed Premises.** Each licensee shall maintain his establishment in a decent, orderly and respectable manner in full compliance with all laws of Tennessee, Commission rules and regulations, federal statutes, and ordinances and laws of the municipality and/or county where the licensed premises are located at all times. The renting or leasing of the licensed premises for an event to a non-licensed entity, person or corporation is specifically deemed not to be a defense for a violation of this rule and does not diminish licensee's responsibility to comply with this rule.
- (13) **Restriction as to Age of Licensee's Employees.** Nothing herein shall prohibit a licensee from hiring a person under the age of 18 years, however employees under the age of 18 shall not be permitted to sell wine, beer, malt beverages or hard cider in any establishment licensed under the provisions of T.C.A. § 57-3-803.
- (14) **Purchases.** Only the designated permitted manger(s) of a retail food store wine licensee may place orders for wine with wholesalers. No discounts for wine may take into account orders for wine at other locations owned by the licensee.

Authority: T.C.A. §§57-1-209, 57-3-104(c)(4) and (9), 57-3-404(i), 57-3-412, 57-3-803, 57-3-806, 57-3-808, 57-3-811, 57-3-812, and 57-3-815, **Administrative History:** *Original rule filed*

0100-11-.04 Renewal

- (1) In addition to submitting a completed renewal application and the renewal fee, each retail food store wine licensee is required to submit an annual statement detailing its annual total sales revenue and its annual sales taxable sales revenue from the retail sale of food and food ingredients for human consumption. The report of such sales shall not include tax paid as part of the calculations of revenue.
- (2) A retail food store wine licensee shall keep sales and purchase records for a minimum of three years in a manner usual and customary in the industry. Such records may be maintained in electronic format.
- (3) In the event that the retail food store has failed to meet the requirement that 20% of its sales are from sales taxable sales of food and food ingredients for human consumption, the Commission shall notify the licensee that it has one year to come into compliance with the requirement. The licensee shall submit a plan to the Commission detailing its plan on compliance.

- (4) The failure of the retail food store to meet the requirement that 20% of its sales are from sales taxable sales of food and food ingredients for human consumption after the one (1) year period shall result in the Commission's revocation of its license to sell wine. In the event of a revocation and for a period of one (1) year following revocation, a subsequent license shall not be issued to the spouse, child or children, daughter-in-law, son-in-law or other person having any interest in the business of the licensee whose license was revoked. Additionally, for a period of one (1) year following revocation, no license shall be issued at the same location or in close proximity (within five miles) of the same location, and the Commission shall not renew a license to the same person, firm or corporation.

Authority: T.C.A. §§ 57-3-104(c)(4) and 57-3-806(d). **Administrative History:** Original rule filed;

0100-11-.05 Responsible Vendor Training Program.

Each retail food store wine licensee shall participate in the Responsible Wine Vendor Program, pursuant to T.C.A. §57-3-818 and be certified pursuant to TABC Rules 0100-12. There shall not be a requirement for a licensee to participate in both the Responsible Wine Vendor Program and the responsible vendor training program established in chapter 5, part 6 of title 57.

Authority: T.C.A. §57-3-104(c)(4) and 57-3-818. **Administrative History:** Original rule filed

0100-11-.06 Operation of Liquor By The Drink Establishments Within Retail Food Stores

- (1) A retail food store wine licensee may also hold a license for on-premises consumption within the location as a retail food store wine licensee. However, the premises of the on-premises consumption license must be physically separated from the retail food store wine licensee's premises. Physical separation may be accomplished by walls, fencing or other means, approved by the Commission, used to indicate that the two areas have been designated to operate separately.
- (2) A retail food store wine licensee must operate an area with an on-premises license as a separate entity from the retail food store. A retail food store may sublease its premises to a different person or entity for purpose of operating an establishment licensed pursuant to T.C.A. 57-4-101, et seq.
- (3) The comingling of the inventory of alcoholic beverages by any person holding a license under T.C.A. §57-3-801 and T.C.A. § 57-4-101 or by any different persons holding licenses pursuant to T.C.A. §57-3-801 and T.C.A. § 57-4-101, is cause for suspension or revocation of any and all licenses that is involved in such activity.

Authority: T.C.A. §§ 57-3-104(c)(4), 57-3-817. **Administrative History:** Original rule filed

0100-11-.07 Conduct of Industry Members with Retail Food Stores

- (1) The provisions of Rule 0100-06 shall apply to retail food stores, except as otherwise provided:
 - (a) An industry member may not provide stocking, rotating, or pricing services on the premises of a retail food store;
 - (b) An industry member may provide product displays, signs, point of sale advertising materials, equipment, supplies, and other items authorized by Rule 0100-06-.03, provided:

1. Such items are provided solely to a permitted manager; and
 2. The industry member may not set up any such display, sign, or item, or perform any service or action whatsoever regarding such item, other than the provision of such item to the permitted manager;
 3. An industry member or TABC permitted representative may provide routine business entertainment pursuant to Rule 0100-06-.03(5) and (6) and educational seminars pursuant to Rule 0100-06-.03(11) to be conducted only upon the industry member's non-bonded TABC licensed premises, provided that such routine business entertainment and educational seminars may only be provided to permitted managers and the licensee, if the licensee is an individual, and to no other employees or agents of the retail food store; and
 4. Samples of wine may not be provided upon the retail food store's premises pursuant to Rule 0100-06-.03(11). Samples may only be provided to a permitted manager or licensee, if licensee is an individual, as part of an educational seminar as authorized in this rule and Rule 0100-06-.03(11).
- (c) An industry member may not provide or sell to a retail food store any combination package containing wine as otherwise authorized by Rule 0100-06-.03(10).
- (2) The provision of any product display, sign, point of sale advertising material, equipment, supply, or other item by a licensed wholesaler solely with regards to beer or other items that are not alcoholic beverages may be provided pursuant to all local ordinances and federal law.
 - (3) No TABC licensed industry member or any employee, agent, representative or salesperson employed by or representing any such TABC licensed industry member shall provide any services to or for the benefit of a retail food store wine licensee including, but not limited to services involving shelving, dressing, displaying, or setting wine inventory owned or purchased by the retail food store licensee. This prohibition shall apply to its TABC licensed industry member if the service is being performed with relation to wine, or alcoholic beverages but not beer. This prohibition shall not apply to any wholesaler, manufacturer or importer of beer or non-alcoholic items that is not licensed by the Commission.

Authority: T.C.A. § 57-1-209, 57-3-104(c)(4) and (9), 57-3-815, and 57-3-907. **Administrative History:**
Original rule filed

* If a roll-call vote was necessary, the vote by the Agency on these rulemaking hearing rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)
MARY MCDANIEL	✓				<i>Mary McDaniel</i>
BRYAN KAEGI	✓				<i>Bryan Kaegi</i>
JOHN JONES	✓				<i>John A Jones</i>

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Tennessee Alcoholic Beverage Commission (board/commission/ other authority) on 12/15/15 (mm/dd/yyyy), and is in compliance with the provisions of T.C.A. § 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on: 10/14/2015

Rulemaking Hearing(s) Conducted on: (add more dates). 12/09/2015

Date: 12/22/15

Signature: *E. Keith Bell*

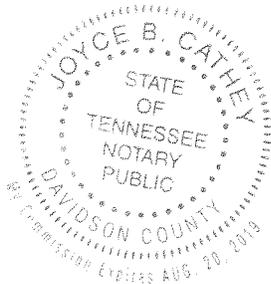
Name of Officer: E. Keith Bell

Title of Officer: Executive Director

Subscribed and sworn to before me on: 12/22/15

Notary Public Signature: *Joyce B. Cathey*

My commission expires on: 8/20/19



All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Herbert H. Slatyer III
Herbert H. Slatyer III
Attorney General and Reporter

2/23/2016
Date

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Effective on: 5/29/16

Tre Hargett
Tre Hargett
Secretary of State

Public Hearing Comments

One copy of a document containing responses to comments made at the public hearing must accompany the filing pursuant to T.C.A. § 4-5-222. Agencies shall include only their responses to public hearing comments, which can be summarized. No letters of inquiry from parties questioning the rule will be accepted. When no comments are received at the public hearing, the agency need only draft a memorandum stating such and include it with the Rulemaking Hearing Rule filing. Minutes of the meeting will not be accepted. Transcripts are not acceptable.

A copy of a document summarizing Commission responses to public hearing comments is attached.

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rule making process as described in T.C.A. § 4-5-202(a)(3) and T.C.A. § 4-5-202(a), all agencies shall conduct a review of whether a proposed rule or rule affects small businesses.

Public Acts 2014, ch. 554 (commonly referred to as the Wine in Grocery Stores Act) allowed for the selling of wine in retail food stores upon licensure by the Tennessee Alcoholic Beverage Commission (TABC). These rules effectuate the purpose of such Act and create an application process for such licenses. The statute, and the rule effectuating the statute, benefits small business retail food stores throughout the state by allowing such small businesses to expand their business and begin the sale of wine. An exact number of such small businesses affected is impossible to estimate at this time, but is expected to be substantial and significant. The impact of the statute, and the rule effectuating the statute, is beneficial to both small businesses and the consumer by increasing the business of the small business and increasing the number of establishments that a consumer may be able to purchase wine in the state. The requirements specified in the rule are designed to effectuate the purpose and requirements of Public Acts 2014, ch. 554, and any other applicable statute, and there are no less burdensome, intrusive, or costly method for effectuating such purpose and requirements. There are no state or federal counterparts for which this rule can be effectively compared to. The exemption of small businesses from this rule would be detrimental to the small businesses of this state and would be contrary to statute.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (<http://state.tn.us/sos/acts/106/pub/pc1070.pdf>) of the 2010 Session of the General Assembly)

The proposed rule is not projected to have any direct impact on local governments.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

- (A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

Public Acts 2014, ch. 554 (commonly referred to as the Wine in Grocery Stores Act) allowed for the selling of wine in retail food stores upon licensure by the Tennessee Alcoholic Beverage Commission (TABC). These rules effectuate the purpose of such Act and create an application process for such licenses.

- (B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

T.C.A. § 57-3-104(c)(4) requires the TABC to promulgate rules for the enforcement of Chapter 3 of Title 57 of the T.C.A. Public Acts 2014, ch. 554 revised this chapter to allow for the selling of wine in retail food stores upon licensure by the TABC.

- (C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

Retail Food Stores, including Red, White and Food which serves as an umbrella organization representing various grocers in the state, are most directly affected by this rule. To the knowledge of the TABC, except as may be specified in comments made at the rulemaking hearing, Red, White and Food urge adoption of these rules.

- (D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule;

At the time of this filing, there are no such opinions or rulings directly relating to the rule.

- (E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars (\$500,000), whichever is less;

The fiscal note for Public Acts 2014, ch. 554 states that the bill's expected financial impact for the TABC's budget was to increase gross revenues (after subtraction of expected expenditures) was \$961,000 for FY 14-15, \$2,102,200 for FY 15-16, \$1,444,000 for FY 16-17, and \$1,777,000 for subsequent fiscal years. In addition, the fiscal note expected an increase in general fund revenues of \$1,724,800 for FY 14-15, \$7,278,200 for FY 15-16, and at least \$7,677,700 for FY 16-17 and subsequent years. To the best knowledge of the TABC, this rule would not significantly alter the expectations specified in the fiscal note.

- (F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Executive Director E. Keith Bell, Assistant Director Ginna Winfree and Staff Attorney Joshua Stepp

- (G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Executive Director E. Keith Bell, Assistant Director Ginna Winfree and/or Staff Attorney Joshua Stepp

- (H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

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(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

At the time of filing, no such request has been made.



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ALCOHOLIC BEVERAGE COMMISSION
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MEMO

From: E. Keith Bell, Director

Re: Responses to comments made at public rulemaking hearing

Date: December 11, 2015

On December 9, 2015, a rulemaking hearing was held in accordance with the law. At the hearing, various comments were made regarding proposed Rule 0100-11. Below is a summary of the comments and the Tennessee Alcoholic Beverage Commission's (TABC's) responses to such comments:

- (1) OFFICER IDENTIFICATION – Rule 0100-11-.01(1)(a)(2) and (1)(a)(15) –
Comments were presented that the proposed rules requiring officers of a corporation to submit questionnaires and declarations of citizenship were either unnecessary or not sufficiently defined. The TABC deems it to be necessary to require questionnaires and declarations of citizenship for officers of corporations in certain circumstances, but agrees that the proposed rule should be revised to clarify which officers exactly would need to complete such documents, and the proposed rule has been so revised.
- (2) SUBMISSION OF LEASES – Rule 0100-11-.01(2) - Comments were presented requesting that Rule 0100-11-.01(2) be revised to specify that only lease restrictions between the applicant and the applicant's landlord are relevant to bar an applicant from obtaining a license, and that lease restrictions between other tenants of the same shopping center or other development and the landlord were not relevant. We disagree. T.C.A. § 57-3-806(f) states that “[n]o retail food store wine license shall be issued to a retail food store located within a shopping center or other development unless documentation is provided to the commission that the owner of such shopping center or development has imposed no restrictions on the sale of wine or other alcoholic products at the shopping center or development and that it does not impose any restrictions or limitations on the business practices related to the sale or distribution of alcoholic beverages upon any entity that is located within the same shopping center or other development as the proposed location of the retail food store wine license holder.” To TABC staff, it is clear from the plain language of the statute that if the landlord has placed any restriction upon the development or any tenant in the development regarding wine or alcoholic products, then any retail food store applicant within that development would not be eligible for a license. It is the TABC staff's belief that the language of the proposed rule accurately reflects that interpretation and the plain meaning of T.C.A. § 57-3-806(f). That being said, upon further review of the statute and rule, the TABC staff has made two revisions to the

rules. Firstly, it is the opinion of the TABC staff that the use of the term “alcoholic product” instead of “alcoholic beverage” in the statute includes both alcoholic beverages and beer, and the proposed rule has been revised accordingly. Secondly, it is clear upon further review of the statute that the statute not only requires that no such restrictions exist, but it also requires that documentation be provided to the TABC evidencing that no such restrictions exist. To satisfy this requirement, Rule 0100-11-.01(1)(a)(4) has been added to require an affidavit from the landlord or owner of such property.

- a. A separate comment was made suggesting that the lease restrictions in a development which would prohibit a retail food store from being eligible for a license be expanded to include not just wine and alcoholic products, as specified in the statute, but also any other product that is authorized to be sold by a retail package store under T.C.A. § 57-3-204. It is the opinion of the TABC staff, that such a suggestion is outside of the statute’s scope and the TABC’s authority, and as such should be denied.
- (3) CONFIDENTIALITY – A request was made for the TABC to establish a rule allowing for the redaction of certain confidential information prior to such information being placed in the files of the TABC. It is the opinion of the TABC staff that such a rule is unnecessary, and that such a process can already be performed without any such rule pursuant to the authority of T.C.A. § 10-7-504(a)(24).
 - (4) STORAGE PRIOR TO LICENSURE – A request was made that the TABC, by rule, allow for the delivery of wine to, and storage by, retail food store wine applicants prior to the licensure of any such retail food store wine applicant on July 1, 2015. The TABC does not have any statutory authority to create any such rule. In addition, the laws of the state prohibit any unlicensed entity from storing alcoholic beverages, and, a licensed wholesaler is prohibited from selling, or delivering, alcoholic beverages to any unlicensed person or establishment. The TABC may not supersede these laws by rule to allow the storage of alcoholic beverages by an unlicensed entity and to allow the delivery and sale of alcoholic beverages to an unlicensed entity.
 - (5) SERVICES BY BEER WHOLESALERS – Rule 0100-11-.07(3) – Rule 0100-11-.07(3) was drafted to effectuate the provisions of T.C.A. § 57-3-815, which prohibits a licensed wholesaler from providing any services to or for the benefit of a retail food store wine licensee, including services involving shelving, dressing, displaying, or setting inventory. This statute could be interpreted one of two ways: (1) a licensed wholesaler cannot provide such services with regards to any product that it sells to the retail food store, including beer, or (2) a licensed wholesaler cannot provide such services only with regards to the wine that the wholesaler sells to the retail food store. Initially, TABC staff held the opinion that the first interpretation was applicable and the rule reflected that. Upon the receipt of multiple comments urging the adoption of the second interpretation, and upon further review, TABC staff agrees to adopt the latter interpretation and has revised the proposed rules to reflect that change.
 - (6) SERVICES BY WHOLESALERS - Rule 0100-11-.07(3) – Furthermore, one comment requested that the TABC remove the rule completely and to allow licensed wholesalers to provide any and all services to retail food stores with regards to the wine that the wholesaler sells to such store. Such a request would be in direct conflict with T.C.A. § 57-3-815 and is denied.
 - (7) MANAGEMENT AGREEMENTS – Rules 0100-11-.01(1)(a)(3) and various other rules – Pursuant to T.C.A. § 57-3-803, a retail food store may enter into a franchise or

- management agreement with another person or entity for the making of wine sales. A comment suggested adding the management agreement as a possible proof of possession to be provided pursuant to Rules 0100-11-.01(1)(a)(3) and for that term to be inserted in various other rules. While it is the opinion of TABC staff that such additions are unnecessary, TABC staff, upon further review, agrees that it is necessary that the TABC receive a copy of any such management or franchise agreement, if one exists, and a rule has been added to this effect in Rule 0100-11-.01(a)(5).
- (8) SALES TAXABLE SALES – Rules 0100-11-.01(4) and 0100-11-.04(1) – T.C.A. § 57-3-802 requires that 20% of a retail food store’s sales taxable sales include food and food ingredients, and T.C.A. § 57-3-806(d)(1) requires that such calculation be made on an annual basis. Rule 0100-11-.01(4) required that an applicant provide an affidavit regarding this and copies of applicant’s sales tax returns for the past two years. A comment suggested that the rule be revised to require the past 3 years of sales tax returns and to consider other information. Upon review, it is the opinion of TABC staff that such a revision would be outside of the statute’s scope and the TABC’s authority. Furthermore, upon further review, it is the opinion of TABC staff, that the initial requirement of the rule that 2 years of sales tax returns be provided is outside the scope of the statute and the authority of the TABC, and as such, the proposed rule has been revised to instead require that such tax returns be provided for the last complete business year of the applicant.
- a. A separate comment was made suggesting that the requirement for the past sales tax returns would cause otherwise confidential information to be disclosable pursuant to the Public Records Act. This assertion is incorrect as such information would be confidential pursuant to T.C.A. § 10-7-504(a)(24).
- (9) PROHIBITION AGAINST REMUNERATION – T.C.A. § 57-3-404(i) states that “[n]o retail food store wine licensee may receive any remuneration, by whatever name, at a corporate office located inside or outside this state that affects the profitability of wine or beer sales in this state, that is not made available to all retail licensees or other retail food stores licensed to sell wine or beer in this state.” A comment suggested restating this prohibition in the rules, requiring a certification that this requirement will be followed, and requiring a written agreement from the applicant agreeing to notify the commission of any compensation agreement. TABC staff agrees that the compliance with this statutory provision is of great importance. That being said, it is not believed that the creation of a rule to this effect is either necessary or the best method for ensuring compliance with this statute. Instead, it is the intent of the TABC staff to include a similar certification and/or question regarding remuneration and/or compensation agreements in the application for a retail food store wine applicant.
- (10) ADDITION OF FIRM, PARTNERSHIP, ETC. – Rule 0100-11-.02(4) and other provisions – A comment was made suggesting that language clarifying that certain provisions applying to persons be revised to specify that they also apply to firms, partnerships, limited liability companies, corporations, and other entities. It is the opinion of TABC staff that the term “person” as used in the law, includes and incorporates any and all such companies, firms, businesses and entities, and as such the addition of those terms in addition to the term “person” is unnecessary.
- (11) SUBLEASEE’S AND MANAGEMENT COMPANIES ACCOUNTABLE – A comment suggested clarifying that the proposed rules that specify that the laws of agency apply and that a licensee is responsible for the actions of it’s agents to clarify that such provision would also apply to any business that has a management agreement

with the licensee and any subleasee upon the premises. It is the opinion of TABC staff that such clarification is unnecessary and could potentially add confusion, and thus should be denied. Such an addition could add confusion to the law, as (1) in many, if not most, circumstances in which a management agreement is used, the management company will be the licensee as the management company is the person with ultimate control over the alcoholic beverages and this clarification could be construed to be contrary to this, and (2) in many circumstances, a subleasee may not be permissible, and to the extent that it is, such subleasee would have to be completely separate from the licensed premises of the licensee, and this clarification may be interpreted to be contrary to this. Furthermore, to the extent that a licensee might have possibly have a management agreement with a business that is not the licensee or have a sublease where the subleasee is still a part of the licensed premises, then in those circumstances those persons would be the agents of the licensee and would be subject to this rule as the agents of the licensee without the addition of this clarification.

- (12) LICENSE AFTER REVOCATION – Rule 0100-11-.01(4) – Comments were made suggesting that prohibiting licensure within five miles of a revoked licensee is too prohibitive, and that Rule 0100-11-.01(4)(b) which prohibits licensure, or renewal of a license, for 1 year of a corporation who has a license revoked, could have the impact of, for example, requiring the non-renewal of the licenses of all Krogers in the state upon the revocation of a single Kroger’s store in the state. Upon further review, TABC staff agrees with said comment and has revised the proposed rules accordingly to remove Rule 0100-11-.01(4)(b) and to remove the requirement that a store cannot get a license within 5 miles of a store whose license has been revoked, provided that the requirement that a store within close proximity to a store who’s license has been revoked cannot get a license at that location for one year following revocation, unless commission approval, is still in effect.
- a. There was a separate comment made to revise the rule prohibiting licensure of any entity within close proximity to a retail food store whose license was revoked to instead have that the rule only prohibit such a license of an applicant owned by any of the owners of the license which was revoked. Such a clarification is unnecessary, since the rule applies to all applicants as currently written. Note, under the rule, the Commission may waive this prohibition on a case by case basis, and thus whether or not the applicant is in any manner related to the store whose license was revoked can be considered by the TABC in deciding whether or not to waive the prohibition.
- (13) DISCIPLINARY ACTIONS – Rule 0100-11-.03 – Multiple comments were made regarding this rule and are detailed below:
- a. A comment was made suggesting to add to Rule 0100-11-.03(c) the requirement that a retail food store licensee whose license is revoked cannot sell for on-premises consumption. T.C.A. § 57-3-817 authorizes a retail food store wine licensee to hold a license to sell alcoholic beverages for on-premises consumption (LBD license), provided that both the premises and the business of the LBD is operated separately and distinctly from the business and premises of the retail food store licensee. As such, the activities of off-premises sales are performed pursuant to a retail food store wine license and the activities of on-premises consumption are performed pursuant to an LBD license and both the licenses and the activities performed pursuant to such licenses are completely separate and distinct. Because of this separation, the TABC will generally have no authority to

take action on an LBD license held by an entity or similar entity that holds a separate retail food store wine licensee. An exception to this general rule may be when there is sufficient evidence that the LBD is not being ran separately and distinctly from the retail food store wine licensee as required by law. In such circumstances, the TABC may seek to revoke both licenses, but it is the opinion of TABC staff that in such very limited circumstances, such action can be taken under current law, without the necessity of a rule to that effect.

- b. A comment was made suggesting the deletion of the last sentence in proposed Rule 0100-11-.03 regarding the consideration of mitigation factors. This sentence is used practically verbatim in a similar rule regarding liquor by the drink licensees, and as such, for consistency, the suggested deletion should be denied.
- c. Proposed Rule 0100-11-.03(c) states that the suspension or revocation of a retail food store wine licensee only effects the ability of the retail food store to sell wine and does not effect such stores' ability to sell food items, non-food items, or beer. This rule contrasts to the laws surrounding retail package stores in which the suspension or revocation of such a license requires the entire closure of the retail package store, and the retail package store cannot sell food items, non-food items, or beer during any period of suspension or revocation. A comment was made suggesting that retail food stores and retail package stores needed to be treated the same on this issue, and to do otherwise would be treating one member of the industry unfairly. The difference between the treatment of retail food stores and retail package stores is statutory. The retail food store wine license solely applies to the sale of wine and has no bearing or impact on the sale of other items, and as such a suspension or revocation of that license has no bearing on any item other than wine. A retail package store, however, sells beer and items other than alcoholic beverages under the authority given by it's retail package store license. Let's take beer for example. A retail food store can sell beer pursuant to a local beer board permit and is not selling such beer pursuant to a TABC license, whereas retail package stores do not need a local beer board permit to sell beer, because retail package stores sell beer pursuant to their TABC issued retail package store license. Similarly, other items that a retail package store can sell, are sold pursuant to their retail package store license. Let's take the example of a retail package store that sells Jack Daniel's shirts under their license, and their retail package store license is revoked. In that case, the retail package store cannot stay open and licensed as a retail package store just to sell Jack Daniel's shirts. The retail package store would need to be completely closed. That being said, if a completely different business that was not a retail package store wanted to set up a new business selling Jack Daniel's shirts and other items that they can lawfully sell, then that would be fine, but while a retail package store is a retail package store, they can only sell such other items pursuant to their retail package store license. It is also for this reason, why a retail package store must be completely closed on Sundays and cannot be open to sell solely non-alcoholic items. Notwithstanding this statutory distinction, the TABC does take this distinction into consideration in issuing certain penalties, like suspensions for sales to minors. For LBD licensees (restaurants, bars, etc.) who have a second sale to minor within 3 years, the TABC generally issues a suspension of between 10 and 30 days. Such suspension must be served all at once and cannot be broken up as a few days one day a week. This is done because an LBD under a TABC

suspension can still sell food and beer, and thus, given that, such a suspension is an adequate and necessary penalty to ensure compliance with the laws regarding the sale of alcoholic beverages or beer to minors. For a retail package store that has a similar second sale to minor, however, a suspension of between 5 and 10 days is issued and the suspension may typically be held one day a week, for so many weeks. This is done exactly because a retail package store must be closed during a suspension and cannot be open or sell any other items during a suspension, and without that fact, the suspension terms that are applied to LBD's would have otherwise been made applicable to retail package stores. Therefore, the suggestion that the TABC has not and is not taking all steps necessary to ensure a fair playing field among all industry members is disingenuous.

- (14) STORAGE – Rule 0100-11-.03(3) – A comment was made suggesting to clarify that a retail package store cannot store any alcoholic beverages outside of its licensed premises. As such activity is illegal under present law, such a clarification in the rules would be unnecessary.
- (15) RESPONSIBLE VENDOR PROGRAM – Rule 0100-11-.05 – A comment was made suggesting that the proposed rule be revised to make clear that a retail food store wine licensee can choose whether to participate in the Responsible Wine Vendor Program or the Responsible Beer Vendor Program. Upon careful consideration of both the comment and the proposed rule, it is the opinion of TABC staff that the proposed rule is properly worded and that no change in the proposed rule would be either proper or necessary.
- (16) MINIMUM PRICING OF WINE – A suggestion was made to add into the rules the provisions of T.C.A. § 57-3-901, et seq. verbatim. It is the opinion of TABC staff that such an addition would be unnecessary, as such provisions are already in the applicable statutes and restating such provisions verbatim in the rules does not accomplish anything of value. Furthermore, in the event that it should be determined that a clarification of T.C.A. § 57-3-901, et seq. by rule is necessary, it is the present intent of TABC staff that such clarification would be accomplished at another time and through the creation of a completely separate rule.
- (17) CERTIFICATE OF GOOD MORAL CHARACTER – Rule 0100-11-.01(c) – Under the original proposed rule, if a retail food store applicant applies for a required certificate of good moral character from a city or county after March 1, 2016, and the city or county fails to grant or deny the certificate within 60 days of application, then the certificate is deemed to be granted. A comment was made that this rule may not be adequate to ensure that such certificates could be obtained in time for the applicant to be licensed by July 1, 2015, and suggesting that the language “March 1, 2016” be removed and that this rule apply upon the city or county receiving a request, instead of an application, for a certificate, instead of an application. TABC staff agrees that the date of March 1, 2016 is too far out, and has accordingly revised the rule instead make it effective January 1, 2016. However, in the opinion of TABC staff, the TABC does not have the authority to deem the certificates granted if not granted or denied within 60 days of receipt of a “request” for such certificate. The practical effect of this change would be for the TABC to deem a certificate to be granted after 60 days of a request being made for a certificate, even if the city or county had not established any application or review process for granting a certificate at the time the request was made. T.C.A. § 57-3-806(h) states that “[a] failure on the part of the issuing authority to grant or deny the certificate within sixty (60) days of the written application for

such shall be deemed a granting of the certificate.” The statute specifically says application, and the TABC does not have the authority to change this by rule. In the opinion of TABC staff, for the TABC to deem a certificate to be granted before a city or county has established any process for the acceptance or review of applications for a certificate would be contrary to law and would be preempting the lawful authority of the local government to make a determination whether or not a certificate should be issued upon application.

- (18) MANDATORY CARDING – Rule 0100-11-.03(6) – Comments were made suggesting that this rule be revised to clarify that a person over the age of 55 does not need to be carded and that a retail food store can accept expired government issued identifications. The language of the proposed rule is substantially the same as a similar rule for retail package stores. This rule is based off of T.C.A. § 57-3-808(a), which creates a defense to the mandatory carding requirement if a person reasonably appears over the age of fifty. Regarding expired identifications, the statute requires that the licensee view a “valid, government-issued document,” and an expired document is not a valid document. Because the statute creates a defense for not carding persons who appear over 50, instead of stating that there is no requirement to card persons over 50, and because the statute requires that the document be valid at the time of presentation, not solely at the time of issuance, it is the opinion of TABC staff that no change in the proposed rule is necessary or proper.
- (19) SALES TO INTOXICATED CUSTOMERS – Rule 0100-11-.03(7) – A suggestion was made that the language “may not” be changed to “shall not” for clarification purposes. The TABC staff agrees and that suggested change has been made.
- (20) CUSTOMER ASSISTANCE – Rule 0100-11-.03(8) – The original proposed rule allowed a retail food store to assist with loading wine purchased by a customer of the store to the customer’s vehicle, but implied that such activity must be done by a certified clerk and only the same certified clerk who had reviewed the customer’s identification. A comment was made suggesting that the language be modified to clarify that any employee of the retail food store could assist with such loading of wine, as long as the customer’s identification was checked by a certified clerk prior to such sale and assistance. The TABC staff agrees with the proposed clarification, and has made the appropriate changes accordingly.

Sincerely,



E. Keith Bell

Executive Director

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May 6, 2016

Joshua Stepp
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Dear Mr. Stepp,

Per our phone conversation on April 29, 2016, we have corrected Rule 0100-11-.03, paragraph (14) to read: "Only the designated permitted manager(s) of a retail food store wine licensee may place orders for wine with wholesalers." If you should have questions, please feel free to contact me at (615) 741-2650.

Sincerely,

Cody Ryan York
Director of Publications