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.

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); 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,
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

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
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).

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.

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