

Minnesota Attorney General: Administrative Rules Proceedings

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STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE MINNESOTA DEPARTMENT OF PUBLIC SAFETY
LIQUOR CONTROL DIVISION

In the Matter of the Proposed Adoption of Rules of the State Department of Public Safety Governing Standards for Administration of the Intoxicating Liquor Act.	REPORT OF HEARING EXAMINER

The above-entitled matter came duly on for hearing before William Seltzer, Hearing Examiner, on the 24th day of August, 1977, in the Auditorium, State Office Building, Saint Paul, Minnesota, commencing at approximately 9:00 a.m. Said hearing was duly recessed and reconvened as follows: 25th day of August, 1977, Room 81, State Office Building; 26th day of August, 1977, Room 81, State Office Building; 28th day of September, 1977, Room 53, State Office Building; all in Saint Paul, Minnesota.

Stephen P. Kilgriff and Alan H. Maclin, Special Assistant Attorneys General, appeared for and on behalf of the Minnesota Department of Public Safety, Liquor Control Division (hereinafter sometimes referred to as "Department"), in support of the within considered proposed rules.

Appearances were duly noted for the record by Solly Robins, Esq. of the firm of Robins, Davis and Lyons, Minneapolis, Minnesota, on behalf of Ed Phillips & Sons Company; James C. Erickson, Esq. of the firm of Larkin, Hoffman, Daly & Lindgren, Minneapolis, Minnesota, on behalf of Old Peoria Company, Incorporated, Griggs, Cooper and Company, Incorporated and Johnson Brothers Wholesale Liquor Company; Robert Latz, Esq. of the firm of Sach, Latz and Kirshbaum, Minneapolis, Minnesota, on behalf of the Minnesota Beer Wholesalers Association; Stephen P. Larson, Esq. of the firm of Flora, Johnston and Larson, Long Prairie, Minnesota, on behalf of Minnesota Distillers Incorporated; Elliot Kaplan, Esq. of the firm of Robins, Davis and Lyons, Minneapolis, Minnesota, on behalf

of Coors Beer; O. Bernard McGuire, Saint Paul, Minnesota, on behalf of Somerset Importers Limited; and Jack V. Hoene, Burnsville, Minnesota, on behalf of the Distilled Spirits Council of the United States.

A panel of three testified on behalf of the Department and responded to questions posed by the public. The panel consisted of Joseph V. Novak, Director, Liquor Control Division, Minnesota Department of Public Safety; John A. Muer, Assistant Director, Liquor Control Division, Minnesota Department of Public Safety; and James L. Pederson, Assistant Commissioner, Minnesota Department of Public Safety.

All interested persons, representatives of individuals or associations, and other interested groups present at the hearing had an opportunity to present evidence and question witnesses.

The record of proceedings remained open through the 18th day of October, 1977. Pursuant to Minn. Stat. § 15.0412, subd. 4 (1977 Supp.), the Hearing Examiner's Report is to be completed within 30 days after the close of the hearing record unless the Chief Hearing Examiner, upon written request of the agency and the hearing examiner, orders an extension. Written requests for an extension of the 30 day period were filed with the Chief Hearing Examiner by the Department of Public Safety and the Hearing Examiner. Such extension was granted in writing by the Chief Hearing Examiner.

Pursuant to Minn. Stat. § 15.0412, subd. 4 (1976), this Report shall be available for review to all affected individuals upon request for at least five days. The Department of Public Safety, Liquor Control Division shall, if it proposes to adopt the rules as originally proposed or amended, submit the complete hearing record, including its Findings and Order to the Chief Hearing Examiner no earlier than ten days subsequent to the receipt of this Report. Such submission shall also clearly indicate any changes made to the rules as originally proposed, preferably in the format that will be submitted to the State Register for publication. The Chief Hearing Examiner shall complete his review

and submit his Report to the Minnesota Department of Public Safety on the issue of substantial changes, if any, in the proposed rules within ten calendar days after receipt of the Findings and Order of the Commissioner of the Minnesota Department of Public Safety. Thereafter, the Minnesota Department of Public Safety shall be responsible for filing the rules with the Attorney General.

The Hearing Examiner, upon all records, files, evidence, arguments of counsel, and written comments filed before the close of the record, hereby makes and issues the following Findings of Fact, Conclusions and Recommendations:

FINDINGS OF FACT

1. On July 29, 1977, the Commissioner of Public Safety filed the following documents with the Chief Hearing Examiner:

(a) a copy of the proposed rules;
(b) a proposed Order for Hearing;
(c) a proposed Notice of Hearing; and
(d) a statement of the estimated length and number of people attending the hearing.

On July 18, 1977, a Notice of Hearing and a copy of the proposed rules were published at 2 State Register 96 et seq.

On July 21, 1977, the Department of Public Safety mailed Notice of Hearing to all persons and associations who had registered their names with the Secretary of State for the purpose of receiving such Notice.

On July 29, 1977, the proposed documents filed were accepted by the Minnesota Office of Hearing Examiners as proper and correct as to form and content. Thus, on July 29, 1977, the Department of Public Safety filed the following documents:

(a) Order for Hearing;
(b) Notice of Hearing;
(c) Affidavit of Receipt of the Secretary of State's list;
(d) Affidavit of Mailing;
(e) Secretary of State's Certificate and list;
(f) Statement of Need; and
(g) Statement of Evidence, including the names of witnesses to be called and Department personnel who will represent the agency.

The documents were available for inspection at the Office of Hearing Examiners from the date of filing to the date of hearing.

2. All other relevant, substantive and procedural requirements of statute or rule have been complied with for the purpose of establishing jurisdiction of the subject matter to proceed to public hearing pursuant to law.

3. Five typographical errors appeared in the proposed rules as published in the State Register on July 18, 1977. The typographical errors are noted of record as follows: Beginning at page 100, the upper left hand column, about the fifth line down, in Liquor 38A, the third line states, "in accordance with the privileges...". The second "with" should be deleted. At page 101, in the left hand column about three-quarters of the way down in Liquor 38 E 3, the middle portion of that paragraph that begins, "all price schedules must indicate the one case wholesale price of each...", the word is misspelled as "branc", but should be "Brand". At page 102, Liquor 38 E 16, the bracket there begins to the left of the word "the". It should begin to the left of the number 16. Number 16 itself should be deleted. At page 104, there are two corrections. In the upper left hand column "new or proposed Liquor 38 J", the sixth line, the sentence begins "however, intoxicating liquors" and "ethyl alcohol" should be inserted there. In a right hand column, Liquor 56 "on sale", the word "sale" is printed with a capital S and should be a small s.

4. That Minn. Stat. § 299A.02, subd. 2 (1976), grants the Commissioner the authority to administer and enforce the provisions of chapter 340 except for those provisions thereof for which administration and enforcement are reserved to the Commissioner of the Minnesota Department of Revenue. Pursuant to subdivision 3 of Minn. Stat. § 299A.02, the Commissioner has the power to make all reasonable rules to affect the object of chapter 340. The administrative rulemaking process of the within subject proceeding is subject to the Minnesota Administrative Procedures Act.

5. That at the beginning of the public hearing convened on August 24, 1977, the Department of Public Safety proposed an amendment to Liq 67 A 1 to delete the word "female" and replace

that word with "person". The reasoning of the Department of Public Safety was that the word change is in keeping with public policy of the State of Minnesota to avoid discrimination based upon gender. [Tr. p. 17]

However, this proposed amendment was not reflected in the proposed rules nor published in the State Register. Based on the fact that this proposed amendment was not properly noticed, it cannot be considered or adopted by the Commissioner.

6. [Proposed Liq 1] Proposed rule Liq 1 is the definitional section of the proposed amended rules.

The only proposed amendment is to Liq 1 G which defines "importer".

The existing definition does not include those classes of persons located within the State of Minnesota. The amendment would include persons located within the State, as well as those located outside the State of Minnesota. Such amendment is found to be reasonable and necessary and should be adopted by the Commissioner.

Finally, references to "brewer" and "beer" are eliminated from the classification falling within the definition of "importer" based on the proposition that the word, as defined and used in the proposed rules, only applies to distilled spirits and wine.

One party opined that since "brewer" was excluded under the proposed definition of "importer", that "winer" should also be excluded. [Tr. pp. 32-35] While Minn. Stat. § 340.113 (1976) speaks to "Importers of Intoxicating Liquors" (emphasis added) and may be interpreted so as to include both brewers and winers under the definition of "importers of intoxicating liquors", it is not necessary for the proposed rules to define "importer" in such a way as to include "brewer" or exclude "winer". It is found that brewers and winers can be and are distinguishable by virtue of the statutory provisions applicable to each. Brewers are governed by Minn. Stat. §§ 340.02, 340.032, 340.401, and 340.402 (1976), while winers are not otherwise singled out under different licensing provisions except those pursuant to section 340.113.

Thus, the term "importer" may apply to winers and not to brewers in certain instances, and the exclusion of "brewer" from the regulatory definition of "importer" is appropriate.

That party argued that: "The entire proposed rule seems to be bottomed on", Minn. Stat. § 340.114 (1976). [Tr. p. 33] Chapter 340.114 prohibits and makes unlawful certain specific discriminations in the chain of distribution up to and including the wholesale level. The opponent argued that since wine and beer are excluded from the operation of section 340.114, winers and brewers should be treated consistently in the definition of "importer". While it is true that wine and beer are specifically excluded from the operation of Minn. Stat. § 340.114 (1976), it is not true that the definition of "importer" as used in the regulatory scheme must be designed to fit within the statutory scheme of section 340.114. Rather, the definition must have a reasonable relationship to the regulatory scheme designed to implement the complete Intoxicating Liquor Act rather than one section thereof.

It should also be noted that proposed rule Liq 39, which is predicated on Minn. Stat. § 340.114, specifically carries forth the exclusion of winers and brewers from the operation of section 340.114.

During the public hearing, another party raised objection to the fact that the proposed definition of "importer" included not only the holder of an importer's license, but also holders of manufacturers' and wholesalers' licenses. [Tr. pp. 31-32]

The right (more appropriately, the "privilege") to import intoxicating liquor into the State of Minnesota is conferred by: (1) Minn. Stat. § 340.113 (1976), which establishes the scheme for a licensee to obtain an importer's license, and (2) Minn. Stat. § 340.11 (1976), which pertains generally to "licenses" and provides for licenses of both manufacturers' and wholesalers'. Subdivision 2 of section 340.11 specifically states that: "A manufacturer's or wholesaler's license shall include the right to import."

The objector asserted that although wholesalers' and manufacturers' have the right to import, such license holders should not be referred to as importers based on the proposition that there should be a distinction established in the rules between a wholesaler or manufacturer who has the right to import, on the one hand, and a licensee that is specifically licensed as an importer pursuant to Minn. Stat. § 340.113. If the objector's proposition were adopted, there would be a far reaching distinction between parties having a right to import by reason of holding a wholesalers' or manufacturers' license and a party holding a license designating them as a licensed importer. In such case, the provisions of Minn. Stat. § 340.114 pertaining to unlawful discrimination would not apply uniformly to all parties having the "right to import". There is some authority for the objector's proposition found in section 340.114 itself. For example, subdivision 1 states:

> All licensed importers shall offer for sale on an equal basis to all licensed wholesalers and manufacturers all intoxicating liquor brought into the State of Minnesota. (Emphasis added)

On the other hand, subdivision 3 states:

> No licensed importer or manufacturer shall offer to sell or any licensed wholesaler any intoxicating liquor at a bottle or case price which is higher than the lowest price at which such item of liquor is contemporaneously being sold by such importer or manufacturer to any wholesaler anywhere in any other state of the United States or in the District of Columbia or to any state or state agency which owns and operates retail liquor stores.... (Emphasis added)

Thus, there seems to be a differentiation between "licensed importers" and manufacturers' and wholesalers' that have a right to import by reason of their particular license.

The dilemma is apparently solved by a Minnesota Supreme Court 1975 decision which found reasonable the trial court's construction of the Intoxicating Liquor Act that a licensee holding a wholesalers' or manufacturers' license is a "licensed importer", since a wholesalers' and manufacturers' license explicitly includes the right to import, notwithstanding the fact that such licensee did not hold an importers' license under Minn. Stat.

§ 340.113. Federal Distillers, Inc., et al. v. State of Minnesota and Joseph Novak, 229 N.W.2d 144 at 156. The Supreme Court's utterance which affirmed the finding of the trial court prohibits the Hearing Examiner from placing an interpretation on the meaning of "licensed importer" which would be in conflict thereof.

In accordance with the foregoing, it is found that proposed rule Liq 1 G is reasonable and necessary as originally proposed including the minor amendments not discussed in this Paragraph 6, which are found to be non-substantive and non-controversial. Thus, the Commissioner should adopt proposed rule Liq 1 G.

7. [Proposed Liq 2] This proposed provision adds definitions of "commissioner", "department", and "office" or "this office". All three definitions are necessary terminology in order to implement by administrative rule Minn. Stat. § 340.081 (1976), which abolished the Offices of Liquor Control Commissioner and transferred certain powers and duties thereof to the Commissioner of Public Safety. Therefore, the proposed rule is found to be reasonable and necessary and should be adopted.

8. [Proposed Liq 3] This proposed rule provides for severability if any provision of the liquor rules are declared invalid or unenforceable. Such provisions are common throughout the regulatory scheme adopted by various state agencies of the State of Minnesota. This rule is found to be reasonable and necessary and should be adopted by the Commissioner as originally proposed.

Upon application of its provisions, the rule should be applied logically in accordance with the thrust of the particular decision which brings the rule into play.

9. What was formerly Chapter Two of the Liquor rules [Excise and Surtaxes] is appropriately deleted. Such taxing authority is transferred to the Commissioner of Revenue pursuant to the transfer of functions effected by Minn. Stat. § 340.081 (1976), and Laws 1976, Chapter 5. [DPS Exhibit No. 4 at p. 7; Tr. p. 39]

The Department of Revenue supported this change. [Tr. pp. 39, 40]

Accordingly, the proposed deletion is reasonable and necessary. Existing Liquor rules numbered 4 through and including 23 can be reserved for future use.

10. That in accordance with the appropriate deletion of Chapter Two of the Liquor rules, Chapter Three of the existing rules is appropriately redesignated in the proposed rules as Chapter Two.

11. [Proposed Liq 24] The rule is entitled, "Permits and Fees". The proposed amended rule clarifies and adds language providing information governing applications for licenses and permits required by the Intoxicating Liquor Act. The amendment also eliminates language from the existing rule which is merely repetitious of statutory language.

No substantial comments or objections were voiced in opposition to this amended rule.

Accordingly, proposed Liq 24 is found to be reasonable and necessary and should be adopted by the Commissioner as originally proposed.

12. Existing rules Liq 25 through 34 are proposed to be deleted. These ten rules are merely repetitious of language contained in statutory provisions and it is found that they should be deleted in their entirety to avoid mere reproduction of statutory language. [Minn. Laws 1977, ch. 43, § 2, subd. 1]

13. [Proposed Liq 25] Proposed Liq 25 [Regulatory Permits and Fees] is designated as Liq 35 in the existing regulations.

The rule heading and its introductory paragraph contain certain stylistic and grammatical changes which were not intended to alter the substance of the rule. However, the Hearing Examiner recommends for purposes of consistency and specificity, certain language changes to the proposed amended introductory paragraph are advisable. Such language changes are specified hereinbelow and reflect the Hearing Examiner's suggestion as compared to the rule as originally proposed:

Any person engaged in the purchase, sale, or use for any purpose other than personal consumption of intoxicating alcoholic beverages or ethyl alcohol, or any vehicle used to transport intoxicating alcoholic beverages or ethyl alcohol shall obtain the appropriate regulatory permit and identification card from the Commissioner as provided in this rule. The regulatory fee for each permit is $5.00 and shall be submitted together with the appropriate application form provided by the Commissioner. All identification cards and permits shall expire on December 31st of the year issued and are not transferable. The authority to engage in the purchase, sale, use or transport ~~order, sell, purchase, solicit or deliver~~ granted by the card or permit in this section may be revoked by the Commissioner upon evidence of a violation by the holder of such a card or permit of any of the provisions of Minn. Stat. ch. 340, or any rule of the Commissioner made pursuant to law.

Additionally, it is recommended that the introductory paragraph clearly specify the physical location at which the card or permit is expected to be kept by the holder thereof. For example, the Commissioner may designate that such card or permit be retained in the cab of a vehicle, on the person of a representative or agent, or displayed on the premise of a business establishment.

It is found that the introductory paragraph of proposed Liq 25 be adopted by the Commissioner either with the changes recommended hereinabove, or as originally proposed.

13a. Subdivision A of proposed Liq 25 is amended so that any distiller, rectifier, winer, or wholesale distributor, whether located within the State of Minnesota or outside the State, will be required to have its representative obtain an identification card. Under the existing rule, firms located within the State of Minnesota were excluded.

Subdivision A is also amended to prohibit distillers or winer representatives from giving any financial inducement to wholesalers' salesmen in order to promote sales to retailers. This provision is designed to prevent unfair competition and in furtherance of a policy to encourage all financial inducements to be passed directly to the wholesaler in the form of lower prices; hopefully resulting in lower retail prices to the final consumer. "Winer representatives" are added because the above rationale applies equally to the sale of wine as to distilled spirits.

Finally, language in subdivision A which allows the same person to obtain both a distillery representative's card and a salesman's card is proposed to be deleted. The intent of the deletion is to eliminate situations where the same person represents both a producer and a wholesaler. If a person were able to represent simultaneously both a producer and a wholesaler, a conflict could arise between the person's duty to the producer and the person's duty to the wholesaler, thereby frustrating the intent of Minn. Stat. § 340.114 (1976), which requires all licensed importers bringing intoxicating liquor into the State of Minnesota to offer all such intoxicating liquor for sale on an equal basis to all licensed wholesalers and manufacturers.

It is found that proposed Liq 25 A is reasonable and necessary and should be adopted by the Commissioner.

13b. Subdivisions B and C of proposed Liq 25 are identical to language in the existing liquor rules. According, the Commissioner should adopt Liq 25 B and C.

During the public hearing process, a member of the public expressed concern as to whether or not certain malt liquor salesmen would be required to obtain an identification card under both subdivision A and subdivision C of proposed Liq 25. [Tr. pp. 43-46] Therefore, it is specifically noted in this Report that the transcript of proceedings and the proposed rule on its face clearly indicate that there is not a dual registration requirement under proposed Liq 25 A and C for salesmen of malt liquor. Rather, salesmen would register under the provisions of subdivision C while non-sales representatives would register under the provisions of subdivision A.

13c. Subdivision D of proposed Liq 25 is amended to delete reference to the "Railroad and Warehouse Commission" because that Commission has been abolished. Common carriers are presently licensed by the Department of Public Service.

Additionally, certain non-substantive grammatical changes are made in proposed subdivision D.

It is found that proposed Liq 25 D is reasonable and necessary

and should be adopted by the Commissioner.

13d. Subdivision E of proposed Liq 25 is amended to correct certain non-substantial grammatical errors and for the purposes of renumbering and relettering that subdivision. Otherwise, the language of proposed Liq 25 is identical to language in the existing liquor rules and should therefore be adopted by the Commissioner.

13e. The Distilled Spirits Council of the United States and the National Trade Association of Distillers expressed their concern that proposed Liq 25 would preclude a distillery representative from calling on a retailer to promote his particular product. [Tr. pp. 46-48] Such concern is found to be unwarranted. The intent of the rule is not to inhibit distillers' representatives from contacting retailers to promote his particular product. Rather, the intent of the rule is to prevent such representatives from soliciting orders which can only be taken by appropriate sales personnel.

14. Liquor rule numbers 26 through and including 37 are appropriately reserved for future use. Existing Chapter Four is renumbered Chapter Three in the proposed rules.

15. [Proposed Liq 38] This rule specifies the duties and restrictions upon each manufacturer and wholesale distributor.

Proposed subdivisions A, B, C and D are the same as existing language except for non-substantive grammatical amendments and should be adopted by the Commissioner.

15a. Existing rule Liq 38(d) is appropriately deleted in proposed Liq 38 since the authority for it has been transferred to the Commissioner of Revenue, pursuant to Minn. Stat. § 340.081 (1976).

15b. Existing rule Liq 38(f) [Filing Wholesale Catalogs] is deleted in proposed Liq 38 since the price filing requirements are duplicative of those otherwise required in the rules. [See proposed Liq 38 E.] Such deletion will reduce the price filing burden on wholesalers with no decrease in information available to the public and the Liquor Control Division of the Department

of Public Safety. Therefore, the Commissioner should delete existing rule Liq 38(f).

15c. To summarize Liq 38 thus far, the Hearing Examiner finds that the Commission should adopt proposed rule Liq 38 A, 38 B. 38 C, 38 D and delete existing 38(d) and (f).

15d. Proposed rule Liq 38 E concerns the filing of wholesale price schedules and amendments thereof and consists of seventeen subparts designated as Liq 38 E 1 through and including 38 E 17. The statutory price filing requirements are set forth in Minn. Stat. § 340.983 (1976).

15e. Proposed Liq 38 E 1 [existing Liq 38(g)(1)] is the basic provision which sets forth the requirement of Minn. Stat. § 340.983 (1976) that brand owners and wholesalers must file a wholesale price schedule for all distilled spirits and wine before offering such product for sale in Minnesota. This subpart, although similar to the statutory language, is necessary to place the price filing procedures set forth generally in proposed Liq 38 E in the proper context. Further, this subpart makes clear the statutory requirement that no sale of distilled spirits or wine can be made except in accordance with prices appropriately filed. References to "varying volume prices (discounts)" are deleted since such discounts are only one factor in the actual price charged to the retailer, and the intent of the statute and rules is to include in the price filing all factors considered relevant to the actual price paid by a retailer.

It is found that proposed Liq 38 E 1 is reasonable and necessary and should be adopted by the Commissioner.

15f. Proposed Liq 38 E 2 [existing Liq 38(g)(2), (3) and (4)] implements the statutory requirement that a price schedule shall be filed on the first day of each month and may be amended within five business days thereafter. The change of the price filing date from the tenth day to the first day of each month is necessary to conform the rules to the 1975 amendment to the Intoxicating Liquor Act.

Proposed Liq 38 E 2 is found to be reasonable and necessary and should be adopted by the Commissioner.

15g. Proposed Liq 38 E 3 [existing part of Liq 38(g)(1)] requires that all price schedules must be filed on Form PS 9024 or on such other format as approved by the Commissioner in advance of the filing. Under Minn. Stat. § 340.983 (1976), the Commissioner is authorized to prescribe a form to be used for the filing of wholesale price schedules. Such form is necessary to render the price filings understandable to the public and enforceable by the Department of Public Safety. See also Minnesota Distillers, Inc. v. Novak, supra.

This subpart also sets forth the procedure in which the prices must be filed in order to fully inform the retailer of the actual selling price of the product. The elements considered by the Department of Public Safety to be necessary to fully inform the retailer of the actual selling price of the goods include all allowances, discounts (including varying volume discounts) and credit terms of any nature (including promptness of payment terms) which affect the wholesale price of the liquor or wine to the retailer. It is necessary that all these factors be contained in the price filing in order to satisfy the purpose of the statute that retailers be fully informed of the prices being offered by all wholesalers for distilled spirits and wine.

Proposed Liq 38 E 3 is found to be reasonable and necessary and should be adopted by the Commissioner.

15h. Proposed Liq 38 E 4 [existing Liq 38(g)(10)] as originally noticed for hearing and as proposed and supported by the Department of Public Safety at the onset of public hearing was withdrawn by the Department in its Post-Hearing Memorandum, at pp. 12-17. In place of originally proposed Liq 38 E 4, the Department of Public Safety proposed other language to replace the originally proposed rule subpart.

Therefore, it is not necessary for this Report to address issues raised concerning the originally proposed subpart during the public hearing process. Nevertheless, note should be taken

that Liq 38 E 4 as originally proposed violated the applicable statute in that it permitted the filing of wholesale price schedules more than five days after the original filing. [Minn. Stat. § 340.983 (1976)] The valid objections of the regulated industry were appropriately and correctly put forth by counsel representing Griggs, Cooper & Co., et al. and Ed. Phillips & Sons. [Public Exhibit No. 2, Position of Ed. Phillips & Sons, as received by the Minnesota Office of Hearing Examiners on October 18, 1977]

Additionally, the Department of Public Safety offered the following testimony in support of originally proposed Liq 38 E 4:

> The proposed rules delete the requirement that any amendment to a wholesaler's price filing within the five day period must not go below the lowest price originally filed for that product by any wholesaler.... [Tr. p. 91]

Notwithstanding the above cited testimony in support of originally proposed Liq 38 E 4, the rule only allowed a brand owner or wholesaler to "meet" the competitive price of the same or similar distilled spirits or wine.

Having had the opportunity to fully consider the comments at the public hearing, the Department of Public Safety decided to withdraw originally proposed Liq 38 E 4 and to accept the essential terms of the proposal set forth by industry. It is found that in proposing a new Liq 38 E 4, the Department of Public Safety is continuing the price filing system as it has operated since April 27, 1977. Existing rule Liq 38(g)(10) reads as follows:

> Any manufacturer or wholesaler can meet competitive prices on the same or similar distilled spirits and wine by mailing or filing with the department on or before the fifteenth day of any calendar month, an amendment to his effective "Varying Volume Price" (discount) schedule which lowers his price or prices per case or increases his quantity discounts. Such amended price schedule shall become effective at the same time the competitive price for the same or similar item of the same or competitive brand shall become effective, or immediately if such competitive price schedule shall have become effective.
>
> A quantity discount filed to meet competition may not be filed in an amount that would reduce

the net price of the brand, type or size container below the net price of the competitive brand for the same quantity.

The new proposal falls within the statutory purview of Minn. Stat. § 340.983 (1976). A chief distinction between the new proposal and the proposal as originally notice for hearing is that under the new proposal, brand owners or wholesalers cannot amend after the fifth day for any purpose. The first sentence of the new proposal maintains a floor price system, under which no wholesaler can amend below the lowest price filed by any competitor, and sets the cut-off date as the first of the month, with amendments permitted until the fifth business day. The second sentence of the new proposal, defining the term "net price", is identical to the third sentence of the former proposal, which was amply supported in the record. [Tr. pp. 99, 100] The new proposal's third sentence merely makes clear the intent of the second sentence, as discussed during the public hearing process. [Tr. pp. 173-178]

The Hearing Examiner finds that the original proposal was fatally defective in that it allowed amended price filings more than five days after the original filing in direct contradiction to the applicable statute. Also, it is found that newly proposed rule Liq 38 E 4 is substantively the same as the existing rule except for changes to conform with statutory amendment. Therefore, the new proposal is found to be reasonable and necessary.

New proposed Liq 38 E 4 reads as follows:

If any brand owner or wholesaler elects to file amended prices during the five-day period as provided for in subparagraph 2, he may not file a new price that is lower than the lowest net price filed on the first of the month for the same or similar product by any wholesaler. For the purposes of this section "net price" shall mean the wholesale price, including all allowances, discounts (including varying volume discounts) or terms of any nature (including promptness of payment terms) which affect the wholesale price in any manner. A credit term filed to meet competition may not be filed on a basis more favorable than the terms of the competitive schedule or reduce the net price of the brand, type or size container below the net price of the competitive schedule for the same quantity.

The Hearing Examiner finds that the Commissioner should adopt Liq 38 E 4 as finally proposed.

15i. Proposed Liq 38 E 5 [existing Liq 38(g)(5)] deletes language which could have been construed to permit a wholesaler from not filing a price list each month, thereby causing confusion as to the price offered by a wholesaler and violating the requirements of Minn. Stat. § 340.983 (1976). Under section 340.983, and the proposed rules, if a wholesaler does not file prices for a particular month, such wholesaler is not entitled to sell until such prices are on file. The requirement that the prices filed are not in effect until received by the Department of Public Safety is necessary so as to alert retailers, the Department of Public Safety, and wholesalers as to actual prices being offered to retailers at any given time.

Proposed Liq 38 E 5 is found to be reasonable and necessary and should be adopted by the Commissioner.

15j. Proposed Liq 38 E 6 [existing Lig 38(g)(13)] is necessary to make clear that the Department of Public Safety has the authority to reject a price filing if it is not in conformance with statute or applicable rules. Existing Liq 38(g)(13) expressly allowed rejection of a price filing only if the filing was not deemed enforceable or understandable. Although the rejection of a price filing based upon a violation of any statute or rule is implicitly authorized by the existing rules, the Department of Public Safety appropriately deems it necessary and it is found to be in the public interest to expressly establish this as a separate ground for the rejection of a price filing.

It is found that proposed Liq 38 E 6 is reasonable and necessary and should be adopted by the Commissioner.

15k. Proposed Liq 38 E 7 prohibits the filing of prices by a wholesaler on any brand of distilled liquor or wine which is not in stock or on bona fide order at the time of the price filing. This prohibition is found to be reasonable and necessary to prevent wholesalers from offering deceptively low prices on

products they neither sell nor intend to sell, thereby creating confusion as to the actual prevailing prices of such products.

Two public witnesses suggested that the Department substitute the term "accepted" for the term "bona fide". [Tr. pp. 97-98; 118-119] The Department considered the reasons advanced for the suggested term and adopts the suggestion.

Accordingly, the Hearing Examiner finds that proposed Liq 38 E 7 is reasonable and necessary and should be adopted by the Commissioner with the term "accepted" in place of the term "bona fide".

151. Proposed Liq 38 E 8 is identical to existing Liq 38(g)(7) except for the redesignation number and substituting the word "rule" for the word "regulation". Thus, the Hearing Examiner finds that the Commissioner should adopt what is currently Liq 38(g)(7) as Liq 38 E 8 with the mentioned word change.

15m. Proposed Liq 38 E 9 [existing Liq 38(g)(11)] which prohibits the offer of wine on an original or assorted case basis with distilled spirits and vice versa, amends existing language by adding the phrase, "or other commodities" after the word "wine". The phrase is added to prevent a wholesaler from combining other products ("other commodities") with distilled spirits and thereby shielding a discount for the entire package. The phrase is reasonable and necessary and consistent with Minn. Stat. § 340.983 (1976), which requires in part that:

> No brand owner or wholesaler of distilled liquor or wine shall sell, offer for sale, or solicit any order for distilled liquor or wine unless a schedule of wholesale prices, which shall include varying volume prices, is filed with the Commissioner, on a form prescribed by him, and no sales shall be made except in accordance with such prices....

If "other commodities" could be offered in a "deal" with distilled spirits, the Commissioner would have no way of knowing the actual wholesale price of the various components of the entire package because such "other commodities" may not be subject to the price filing requirements of the Intoxicating Liquor Act.

It is found to be reasonable and necessary that proposed Liq 38 E 9 include the phrase, "or other commodities" and should

be adopted by the Commissioner.

Additionally, proposed Liq 38 E 9 includes a new prohibition that is not currently contained in existing Liq 38(g)(11). The new language reads as follows:

> In addition, no manufacturer, wholesaler or importer of distilled spirits or wine may sell or offer to sell to any retailer any brand of intoxicating liquor under circumstances wherein the purchase of any quantity thereof entitles the retailer to a discount on the purchase price of any other brand or brands of intoxicating liquor.

In its supporting evidence, the Department of Public Safety asserted that the additional quoted language is necessary for the purpose of implementing the intent of Minn. Stat. § 340.983 (1976), by eliminating the possibility of confusion with respect to the actual price of various brands of intoxicating liquor sold as a combination sale. [Tr. p. 94] However, it is found that an appropriate vehicle for eliminating any such confusion is already contained in the proposed liquor rules at Liq 38 E 6, which reads as follows:

> All wholesale price schedules and amendments thereof must be understandable and enforceable by the department. If the department finds any such filing or amendment to be not understandable or not enforceable, or contrary to any statute or rule, it shall be rejected, setting forth the reason for such rejection.

Furthermore, the proposed new additional language does not further the intent of Minn. Stat. § 340.983, but rather exceeds the statutory authority contained therein. The Department of Public Safety asserts that:

> The new language is also added to prevent the manufacturer, importer or wholesaler from selling brands of intoxicating liquor under circumstances wherein the purchase of any quantity of a particular brand entitles the retailer to a discount on the purchase price of any other brand of intoxicating liquor. [Tr. p. 94]

It is found that there is no authority to accomplish the above stated purpose in Minn. Stat. § 340.983. In fact, a review of the Intoxicating Liquor Act reveals that there is no statutory prohibition against either discounts or combination sales. The only requirement which can be gleaned from the Act

is that discounts and combination sales must be reflected in the wholesale price schedules filed with the Department of Public Safety so that the actual wholesale price of each brand involved in such discount or combination sale is ascertainable.

The Department of Public Safety states that:

> Such arrangements prevent the department and retailers from being able to determine the actual price of a product. Discounts given in connection with combinations of products render it impossible to determine the actual price of the individual brands, thus frustrating the objectives of Minnesota Statutes, Section 340.983, 1976. [Tr. pp. 94-95]

If, in fact, a combination sale would render it impossible to determine actual prices, the Department of Public Safety could reject the filing pursuant to proposed rule Liq 38 E 6. More appropriately, the Department of Public Safety could utilize forms that would provide an appropriate breakdown of the price for the individual brands involved in any combination sale. In its Post-Hearing Memorandum, the Department of Public Safety at pages 19 and 20 stated that: "The Department recognizes that the ultimate price for all products involved in the combination is understandable." If the ultimate price for all products involved in a combination sale is understandable, then the argument alleging confusion is substantially diminished. The Department further stated that: "Nonetheless, since the statutory and regulatory framework relating to price filing requires a clear identification of individual prices, which are not identifiable in tie-ins, combination sales cannot be permitted." It is noted that the concept of "...clear identification of individual prices..." is an interpretation of the Department rather than specific statutory language. However, assuming arguendo that the statute requires a clear identification of individual prices, the same can be accomplished by requiring a filing party to supply appropriate breakdowns capable of being massaged to result in a determination of individual prices. Therefore, in addition to being beyond the pale of statutory authority, it is found that the new suggested language is not reasonable in that the problems alleged

can be approached from a more reasonable stance which would not eliminate a commonly accepted practice in the industry.

The following language of the Minnesota Supreme Court in Bielke v. American Crystal Sugar, 206 Minn. 312, 288 N.W. 584 at 586 (1930), bears repeating with respect to the herein discussed new language of proposed Liq 38 E 9.

> It is axiomatic that an administrative body can neither make nor change substantive law. It may adopt administrative rules but in doing so cannot change existing, or make new law,....

Upon challenge to point out the statutory authority for the suggested new language, the Department of Public Safety referred back to section 340.983, which is devoid of language giving the Department of Public Safety authority to prohibit the combination sales envisioned in the newly proposed language. In fact, counsel for the Department of Public Safety concedes that the practice of offering combination prices is legal. [Tr. p. 195]

Minn. Stat. § 340.983 is the State's price filing statute, which provides that all prices shall be filed with the Commissioner and that they must be filed within certain time periods. The statute has nothing to do with combination sales. It states only that prices, including any discounts, must be filed.

If there were any legislative inclination to ban combination sales, the Legislature could have banned them. The Department of Public Safety cannot conjecture that the Legislature intended to prohibit combination sales by enacting a price filing statute. The Department of Public Safety may not use the rule-making process to create new and unauthorized legislation to achieve such a prohibition.

A preponderance of the evidence in the record of proceedings shows that retailers experience no substantial difficulty in understanding how combination sales work. The burden of affirmatively presenting facts to support the need and reasonableness for a proposed rule is placed upon the Department of Public Safety. The Department failed to carry forth its burden to indicate that

combination sales confused retailers. If combination sales confuse the Department of Public Safety, adequate remedy is available in proposed Liq 38 E 6.

Testimony elicited at the August 24, 1977 public hearing in this matter, has made it apparent that combination pricing is a well-accepted and popular form of marketing in Minnesota. The record, between page 187 and page 190, contains the testimony of several retailers to the effect that combinations are a valuable aspect of their business. At page 188, a St. Cloud retailer testified that he achieved savings in freight by being able to buy in combinations and other retailers similarly volunteered testimony reiterating his or her satisfaction with these pricing arrangements.

Before the close of the record, a petition was received by the Hearing Examiner signed by 762 purported licensed retailers in the State of Minnesota. Such petition was received October 18, 1977, and read as follows:

> We, the undersigned licensed retailers, object to proposed rule Liq. 38 E (9) prohibiting combination sales for the reasons that we understand the combination sales marketing technique and have no difficulty in determining the actual price of the product we buy; that we use the combination purchase offer to make better buys thus enabling us to pass on savings to our customers.

The additional new language contained in proposed Liq 38 E 9 is patently unreasonable in that it deprives the industry of the benefits of a valuable form of marketing in order to resolve the unrelated problem alleged by the Department of Public Safety wherein the Department asserts that it and retailers are unable to determine the actual price of a product involved in a combination sale. It is found that the facts do not bear out the allegation that retailers have a general problem of being able to determine the actual price of such products. Nor is there a sufficient showing in the record that the Department of Public Safety has a general problem in its ability to determine the actual price of products being sold in combination. If, for some reason, the Department has such a problem, it can be

remedied by invoking proposed Liq 38 E 6; by inquiring further into the situation from the particular firm involved; or by developing a system wherein the industry files the type of information each month which would lead reasonable and prudent men to be capable of breaking down and apportioning particular prices to the particular products involved in a combination sale.

Accordingly, the Hearing Examiner finds that the new additional language in proposed Liq 38 E 9 which begins with the term "In addition" is beyond the pale of the Department of Public Safety's statutory authority; has not been shown to be either reasonable or necessary, and should not be adopted by the Commissioner.

15n. Proposed Liq 38 E 10 provides that if a filing licensee gives written price information to a retailer, such information must contain all allowances, discounts and terms and must be disseminated to all retailers served by the licensee. The Department of Public Safety offered the proposal for the purpose of conforming certain terms in the existing regulations with terms of the proposed regulation. The Department asserted that the substance of proposed Liq 38 E 10 was in conformance with existing Liq 38(g)(14) and (16). [Tr. pp. 51, 95]

Two witnesses objected that proposed Liq 38 E 10 does not cover the subject of existing Liq 38(g)(16) which prohibits the dissemination of such price information on a selective basis, and would result in an endorsement of the practice of special sales to selected retailers by wholesalers. The two witnesses based their objections around a belief that the proposed amended rule pertains to sales. [Tr. pp. 72-79; also see Pub. Exhibit No. 11] It is found that existing Liq 38(g)(14) and (16) concern notice rather than the act of selling.

The two public witnesses expressed concern that proposed Liq 38 E 10 would lead to selective selling between a wholesale house and its selected retailers to the detriment of other retailers served by that particular wholesale house. This argument

is without merit. Proposed Liq 38 E 10 requires a filing licensee to inform "all retailers served by it" of all allowances, discounts or terms and therefore is found to be consistent with the thrust of the existing rules which it will replace. Furthermore, all retailers have access to the price lists filed each month with the Department of Public Safety and wholesalers cannot sell their product unless its price is appropriately filed with the Department.

Certain arguments raised in opposition to proposed Liq 38 E 10 founded on Minn. Stat. § 340.114, side-step the issue because section 340.114 concern sales by importers to wholesalers but does not direct itself to dealing between wholesalers and their retailers. On the other hand, proposed Liq 38 E 10 and existing Liq 38(g)(14) and (16) concern notification by filing licensees in the distribution chain to the retailers being served by such filing licensees.

It is the intent of the Department that proposed rule Liq 38 E 10 apply to written price information. In order to make the intent perfectly clear, it is recommended that the proposed rule read as follows:

> Any filing licensee who publishes, mails, delivers, distributes, advertises or in any other way directly or indirectly, disseminates written price information for distilled spirits and or wine ~~information~~ on its wholesale price schedule or amendments thereto, shall, in any such material, include all such allowances, discounts or terms, and shall disseminate such information to all retailers served by it.

It is found that proposed Liq 38 E 10 is reasonable and necessary and should be adopted by the Commissioner.

15o. Proposed rules Liq 38 E 11, 12 and 13 properly amended existing rules so as to conform and be consistent with the body of the proposed liquor rules and to conform with the language terms therein.

It is found that proposed Liq 38 E 11, 12 and 13 are reasonable and necessary and should be adopted by the Commissioner.

15p. Proposed Liq 38 E 14 [existing Liq 38(g)(20)] conforms the rule with the 1975 amendment to Minn. Stat. § 340.983

(1976). Thus, the proposal aligns the liquor rules with the statutory mandate of filing on the first day of the month rather than the tenth or fifteenth day and appropriately provides for filing the next following day when the original filing date falls on Saturday, Sunday or a legal holiday.

Proposed Liq 38 E 14 is reasonable and necessary and should be adopted by the Commissioner.

15q. Proposed Liq 38 E 15 [existing Liq 38(g)(21)] contains no change from the existing rule other than its redesignation for identification purposes and should therefore be adopted by the Commissioner as Liq 38 E 15.

15r. Proposed Liq 38 E 16 and 17 [existing Liq 38(g)(22) and (23)] are substantively the same as the existing rule and its subparts except for appropriate grammatical changes necessary to conform to the language used in the proposed regulation and in Minn. Stat. § 340.983 (1976). Such grammatical changes are found to be reasonable and necessary and proposed Liq 38 E 16 and 17 should be adopted by the Commissioner.

16. The Department of Public Safety proposed to delete entirely certain provisions of existing Liq 38(g) which are asserted by the Department to be either repetitious or a hindrance to free and open competition among wholesalers. For clarity of reading this Report, it should be noted that existing Liq 38(g) basically appears in the proposed amendments as proposed Liq 38 E. In general, both existing rule Liq 38(g) and proposed Liq 38 E pertain to the filing of wholesale price schedules and the dissemination of such filing information to the general public.

16a. The Department of Public Safety proposed to delete entirely existing Liq 38(g)(6) which defines the word "brand". The Department proposes to delete this provision as unnecessary in view of the fact that "brand" is a commonly understood term in the industry. However, it should be noted that the Department asserts that the deletion is not intended to change the requirement that a wholesale price schedule be filed for each

brand which a wholesaler sells.

It is found that the deletion of existing Liq 38(g)(6) is reasonable and necessary in order to streamline the liquor rules without substantive change and should therefore be deleted by the Commissioner.

16b. The Department of Public Safety proposed to delete entirely existing Liq 38(g)(8) and (9). These two provisions prohibit sales below cost. Existing Liq 38(g)(8) generally prohibits sales by wholesalers below cost while existing Liq 38(g)(9) sets forth the defense that a below cost price can be charged to meet the price of a competitor.

The Department of Public Safety proffered the deletion of the prohibition against below cost sales on the assertion that the subject rule subparts are duplicative of both federal and state law. In support of its proposal, the Department of Public Safety stated that:

> For example, the Bureau of Alcohol, Tobacco and Firearms of the U.S. Department of the Treasury prohibits sales below cost in the liquor industry. See ATF ruling 76-16 and 27 U.S.C. Section 205(b)(3). Moreover, Minnesota Statutes, Section 325.04, 1976, prohibits sales below cost in the State of Minnesota. Any person aggrieved by a sales below cost violation has a private right of action under the Minnesota law. See Minnesota Statutes, Section 325.49, 1976. The Department therefore does not believe a need exists to include additional sanctions against such below cost pricing in its rules. [Tr. pp. 50-51]

Three industry representatives voiced opposition to the deletion; generally asserting that the below cost prohibition prevents predatory pricing, encourages competition, and that existing Liq 38(g)(8) and (9) are more effective than the state and federal laws in accomplishing this goal. [Tr. pp. 53-70] Industry representatives further asserted, and the Hearing Examiner finds, that existing Liq 38(g)(8) and (9) are not, in fact, duplicative of federal and state law.

The Department of Public Safety has the burden of persuasion to show that their proposed amendments are reasonable, necessary and within the purview of statutory authority. In support of the proposition to delete existing Liq 38(g)(8) and (9), the principal

assertion was that the existing provisions are duplicative of other state and federal law. Notwithstanding, the following question was posed to the Director of the Liquor Control Division of the Minnesota Department of Public Safety:

> Mr. Examiner, I might just follow up with one final question. I would like to ask the Liquor Control Director, that if the hearing officer, as a matter of law, were to find that the existing regulation, which you are proposing to delete, is not in fact duplicative, as I have argued, and in fact adds something to the enforcement, would it still be your position that it ought to be deleted? [Tr. pp. 66-67]

The answer to the question was: "Yes". The same basis question was directed to counsel for the Department of Public Safety which elicited the answer: "That is correct. That's why the--". [Tr. pp. 67-68] Thus, it is found that the Department of Public Safety being under an obligation to carry the burden of persuasion in support of its proposal to delete existing Liq 38(g)(8) and (9), failed to do so by offering testimony which flies in the face of the very reasons given in support of the proposed deletions.

While it is found that certain sales below cost are prohibited under state and federal law, it is not true as the "Statement of Need" implies, that existing Liq 38(g)(8) is duplicative of other state and federal laws. In fact, existing Liq 38(g)(8) is more stringent than other state or federal laws.

The "Statement of Need" makes reference to ATF Ruling 76-16 and 27 U.S.C. § 205(b)(3). The federal statute does not speak directly to sales below cost, but the ATF ruling does and is promulgated pursuant to the statute. Contrary to the impression given in the "Statement of Need", the ATF ruling does not prohibit all sales below cost:

> The Bureau does not take the position that a sale below "laid-in" cost is automatically a violation of law, but merely that such a sale is questionable and may be investigated. If an investigation discloses that the discount, price reduction, etc., in in fact a <u>subterfuge for granting financial assistance to a retailer</u>, the Bureau will consider the transaction of a prescribed inducement; if the elements of exclusion in interstate or foreign commerce are also present, a violation of the

> Federal Alcohol Administration Act would be incurred. (Emphasis added) B.A.T.F. Ruling 76-16.

Thus, the Bureau examines sales below cost only to determine whether a wholesaler is granting financial assistance to a retailer.

By contrast, the state statute prohibiting sales below cost is not designed to determine whether a wholesaler is granting financial assistance to a retailer. Minn. Stat. § 325.04, states:

> Any retailer, wholesaler, subjobber or vending machine operator engaged in business within this state, who sells, offers for sale, or advertises for sale, any commodity, article, goods, wares, or merchandise at less than the cost thereof to such vendor, or gives, offers to give, or advertises the intent to give away any commodity, article, goods, wares, or merchandise for the purpose or with the effect of injuring a competitor or destroying competition shall be guilty of unfair discrimination....(Emphasis added)

As can be seen, section 325.04 may be only enforced if it can be proved that a sale below cost was made "for the purpose or with the effect of injuring a competitor or destroying competition." Historically, this burden of proof has been almost impossible to overcome. See, e.g., State by Clark v. Applebaum Food Markets, Inc., 259 Minn. 209, 106 N.W.2d 896 (1961); State by Clark v. Wolkoff, 250 Minn. 504, 85 N.W.2d 401 (1957).

In a recent case, a Hennepin County District Court judge refused to grant a motion for a temporary injunction to prohibit two liquor wholesalers from selling below cost. Old Peoria Company, Inc. v. Twin City Wine Co., et al., Hennepin County District Court (File No. 730840) (Opin. Filed November 29, 1976, see page 2) Given the rationale of the District judge in the Old Peoria Company case, it would appear to be virtually impossible to obtain injunctive relief in the liquor industry under existing Minnesota Statutes. Indeed, in its Post-Hearing Memorandum, the Department of Public Safety, in discussing both federal and state law, stated at page 9:

> While the Department concedes that the existing rules may go beyond Minn. Stat. § 325.04 (1976), 27 U.S.C. § 205(b)(3), and ATF Ruling 76-16 in

prohibiting certain sales or easing the burden of proof for a complaining party in certain situations....

It is found that existing Liq 38(g)(8) prohibits all wholesale sales of intoxicating liquor below cost except for the proviso contained in existing Liq 38(g)(9). Unlike the federal regulation, the existing rules require no proof that the sale below cost was made as a subterfuge for a wholesaler to give financial assistance to a retailer. Unlike the state statute, the existing liquor rules do not require the burdensome proof that a sale below cost was made with the intent to injure competition. Obviously, existing Liq 38(g)(8) and (9) were promulgated and adopted as having distinct advantages over both federal and state statutes.

It is also noted that the Department of Public Safety made no showing that it is desirable within the liquor industry to eliminate the absolute restriction on sales below cost. Rather, the Department of Public Safety supported the reasonableness of the proposed deletions based on an asserted duplication of existing law which is found in this Report to be non-existent in reality.

Accordingly, it is found that the Department of Public Safety failed to carry forth its burden of persuasion in establishing the reasonableness and need of deleting existing Liq 38(g)(8) and (9). Thus, the Commissioner should not delete these provisions.

Notwithstanding the Findings contained hereinabove in this Paragraph 16b., it must be noted that existing Liq 38(g)(8) and (9) ignore the limiting provisions of the above-discussed state and federal law on the subject. The existing regulations are more stringent and exceed such other laws, opening the question of whether or not the existing regulations exceed the Department of Public Safety's authority to adopt the almost absolute prohibitions contained therein. However, the supporting evidence offered by the Department of Public Safety in furtherance of its proposal to delete existing Liq 38(g)(8) and (9) was not based

on the assertion that the existing regulations exceeded the Department's authority and therefore such factors will not be considered in the Findings contained herein which, by necessity, must be based on the record made during the proceedings.

Other factors which may enter into the question of the statutory authority for existing Liq 38(g)(8) and (9) are: The weight to be given existing rules which carry the presumption of validity; and the administrative procedures in effect at the time the subject rules were adopted. It is also noted that existing Liq 38(g)(8) and (9) appear to be quite beneficial in a predatory industry.

It is recommended that some of these issues concerning existing Liq 38(g)(8) and (9) be raised before the Minnesota Legislative Commission to Review Administrative Rules.

16c. The Department of Public Safety proposes to delete existing Liq 38(g)(12) which specifies that all price filings are public records. The Department is correct in its assertion that the provision is duplicative of statutory language and therefore unnecessary. Minn. Stat. § 340.983 (1976), provides in part that:

> ...The commissioner shall maintain such filings in such a manner as to make their contents easily accessible to the public....

It is found that existing Liq 38(g)(12) is duplicative of existing statute and the Commissioner should delete this provision.

16d. The Department of Public Safety proposes to delete existing Liq 38(g)(16) as being duplicative of proposed Liq 38 E 10. The Department's contention is found to be correct. Thus, the deletion of existing Liq 38(g)(16) is reasonable and necessary and the Commissioner should adopt such deletion. [See Paragraph 15n. above]

16e. The Department of Public Safety proposes to delete existing Liq 38(g)(18) which excludes a licensee's salesman who has in his possession a copy of the current filed price lists from having to inform each retailer of prices which he orally quoted other retailers. Since the proposed rules relating to non-

discriminatory distribution of wholesale price lists refer only to written price information, existing Liq 38(g)(18) is unnecessary. The Department has stated that such deletion is not intended to affect the ability of a salesman to inform a retailer orally of wholesale prices and such intent must be attributed to the rules.

Accordingly, it is found reasonable and necessary to delete existing Liq 38(g)(18), and the Commissioner should adopt the newly proposed rules with such deletion.

17. [Proposed Liq 38 F] This proposed rule [existing Liq 38(h)] prohibits the giving of gifts as a sales inducement. The proposed rule amends the existing rule by including "importer" to ensure that the rule applies alike to all firms whose product is finally sold to the public by retailers. No rational basis exists for excluding importers. The proposed rule also adds the phrase, "directly or indirectly through any officer, agent or employee". This amendment is necessary to make clear that the prohibitions of the proposed rule are not to be circumvented through indirect means.

Proposed Liq 38 F is found to be reasonable and necessary and should be adopted by the Commissioner.

18. Proposed Liq 38 G [existing Liq 38(i)] amends the existing rule which forbids sales discrimination. Whereas the existing rule prohibits any manufacturer or wholesale distributor from discriminating in the sale of their products to retail dealers, the proposed amendment would limit the prohibition to "Minnesota" manufacturers and wholesale distributors.

Since only Minnesota manufacturers and wholesale distributors are permitted to sell directly to retailers, the proposed amendment is found to be reasonable and necessary and should be adopted by the Commissioner.

Finally, proposed Liq 38 G deletes the phrase, "commissioner's regulation" and substitutes the word "rule". This change is reasonable and necessary and should be adopted by the Commissioner.

19. Proposed Liq 38 H [existing Liq 38(j)] is identical to the existing rule. Therefore, the Commissioner should redesignate the existing rule as Liq 38 H for the purpose of consistency in the proposed rules.

20. Proposed Liq 38 I [existing Liq 38(k)] amends the existing rule so as to authorize a changeover to metric measurements in the liquor industry. It is anticipated that liquor manufacturers will be changing over to metric containers.

It is found that proposed Liq 38 I is reasonable and necessary and should be adopted by the Commissioner.

21. Existing rule Liq 38(l) is proposed to be deleted in its entirety. This provision of the existing rules required manufacturers, winers, brewers and wholesalers to obtain a permit for each employee acting in the capacity of salesmen in the State of Minnesota. The existing rule is appropriately deleted in the proposed rules because it is found to be duplicative of proposed rule Liq 25 A.

Accordingly, it is found that the Commissioner should delete existing rule Liq 38(l).

22. Proposed rules Liq 38 J, K, and L [existing Liq 38(m), (n), and (o)] are identical to the existing rules and should therefore be adopted by the Commissioner with the appropriate redesignation to mesh with the identification scheme adopted in the proposed rules.

23. Proposed rule Liq 38 M [existing Liq 38(p)] deletes the second paragraph of the existing rule since the authorizing power for that section was transferred to the Commissioner of the Department of Revenue pursuant to Minn. Stat. § 340.081 (1976).

It is found that the deletion is reasonable and necessary to comply with the statutory mandate and should be adopted by the Commissioner.

24. Proposed rule Liq 39 is entitled, "Sales to Wholesalers And Manufacturers". The proposed rule was the subject of considerable discussion and comment and is possibly the most disputed rule among the Department's proposed liquor rules. The Department

asserted that the proposed rule implements the provisions of Minnesota Statute Section 340.114 (1976).

The Hearing Examiner researched the liquor laws of many other states but could not find legislation similar to Minn. Stat. § 340.114 (1976). Section 340.114 is an unequivocal piece of legislation which provides, in part, that any licensed importer (which by court interpretation includes licensed Minnesota wholesalers) that brings intoxicating liquor into Minnesota must offer such liquor to all Minnesota wholesalers and manufacturers, on an equal basis. However, the statute neither requires nor compels a licensed importer to offer its product for sale in Minnesota. If election is made not to offer the product, the importer is free to refuse to distribute a particular product in the State without violating statute or the terms of its license.

The apparent concern of the Legislature is to ensure equal treatment among all wholesalers. The statute is set forth in its entirety herein below:

> 340.114 UNLAWFUL DISCRIMINATION PROHIBITED. Subdivision 1. All licensed importers shall offer for sale on an equal basis to all licensed wholesalers and manufacturers all intoxicating liquor brought into the state of Minnesota.
>
> Subd. 2. Without limiting subdivision 1, the following shall be deemed failures to offer intoxicating liquor for sale on an equal basis and are unlawful:
>
> (a) A refusal to sell any intoxicating liquor to a wholesaler or manufacturer, which is offered for sale to any other wholesaler or manufacturer, except when a wholesaler or manufacturer is in arrears on payments for past purchases from the importer who refuses to sell.
>
> (b) A sale of any intoxicating liquor to any wholesaler or manufacturer at a price different from that offered to any other wholesaler or manufacturer, exclusive of shipping costs, except that quantity discounts based upon actual cost savings may be uniformly offered to all wholesalers and manufacturers.
>
> (c) A sale of any intoxicating liquor to any wholesaler or manufacturer on terms of purchase different from those offered any other wholesaler or manufacturer, except that when the importer reasonably believes that a wholesaler or manufacturer will be unable to comply with the existing

terms of credit, then other terms may be employed, including denial of credit.

(d) Any discrimination among wholesalers and manufacturers in satisfying their respective demands for any intoxicating liquor.

(e) A sale conditioned upon an agreement which restricts the wholesaler or manufacturer with respect to customers, area for distribution, or resale price, or which otherwise restrains the wholesaler or manufacturer from competing in trade and commerce.

(f) For purposes of this subdivision and subdivision 1 only, the term "intoxicating liquor" shall not include "pop wines" as the same are defined by regulation of the commissioner.

Subd. 3. No licensed importer or manufacturer shall offer to sell to any licensed wholesaler any intoxicating liquor at a bottle or case price which is higher than the lowest price at which such item of liquor is contemporaneously being sold by such importer or manufacturer to any wholesaler anywhere in any other state of the United States or in the District of Columbia or to any state or state agency which owns and operates retail liquor stores.

In determining the lowest price for which any item of liquor is being sold in any other state or in the District of Columbia, or to any state or state agency which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler, state, or state agency purchasing such item in such other state or in the District of Columbia; provided that nothing contained herein shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of deliver. As used in this subdivision, the term "state taxes or fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia based upon a gallon of liquor.

Subd. 4. Nothing in this section shall apply to any wines or malt beverages regardless of alcoholic content.

Readers of this Report are referred to the following Minnesota Supreme Court decision wherein issues were raised concerning the above quoted statute: Federal Distillers, Inc., v. State of Minnesota and Joseph Novak, 304 Minn. 38, 229 N.W.2d 144 (1975), appeal dismissed, 423 U.S. 908, 96 S. Ct. 209, (1975).

Proposed Liq 39, which is based on section 340.114, contains new subject matter which is not in the existing liquor rules. Proposed Liq 39 reads in its entirety as follows:

Liq 39 Sales to Wholesalers and Manufacturers.

A. All importers, including manufacturers and wholesalers licensed pursuant to Chapter 340, are required to offer for sale to all Minnesota wholesalers and manufacturers all intoxicating liquor (except wines and malt beverages) brought into Minnesota. If such intoxicating liquor is further distilled, refined, rectified, blended, bottled, labeled or prepared in any manner subsequent to its importation into Minnesota, such importers are required to offer for sale to all Minnesota wholesalers and manufacturers the finished product. All such offers shall be made on an equal basis to all such wholesalers and manufacturers.

B. No importer shall offer any intoxicating liquor for sale to any Minnesota wholesaler or manufacturer without first filing with the department, on a form approved by the Commissioner, an itemized list specifying the price, brand, type, container size, proof and age of the liquor so offered. These prices must be filed on the 15th of the month and shall become effective on the first day of the month next succeeding the first full month after the date of filing and shall remain in effect for a period of not less than 30 days and until changed by a subsequent price filing which shall take effect in like manner.

C. All prices filed shall be the lowest prices, as contemplated by Minn. Stat. 340.114, subd. 3, at which such liquor is contemporaneously being sold by such importer in any other state or in the District of Columbia. All such liquor shall be offered for sale to all Minnesota wholesalers and manufacturers on an equal basis, and at the applicable filed price.

The Department's supporting evidence for proposed rule Liq 39 is found in the transcript of proceedings at pages 221 et seq., and its POST-HEARING MEMORANDUM OF DEPARTMENT OF PUBLIC SAFETY at pages 22-35, 45-48, and 51-56.

The proposed rule requires all importers, including manufacturers and wholesalers, to offer for sale to all Minnesota wholesalers and manufacturers on an equal basis all intoxicating liquor brought into Minnesota. Wines and malt beverages are excluded pursuant to Minn. Stat. § 340.114, subd. 4 (1976). The proposed rule includes both intoxicating liquor brought into Minnesota as a finished product ready to be placed upon retailers' shelves and intoxicating liquor which is further distilled, refined, rectified, blended, bottled, labeled, or prepared in any manner subsequent to importation.

The Department asserts that in order to remove any uncertainty and to give full effect to the provisions of section 340.114, it is proper to specify by rule that the requirement to offer for sale to all wholesalers and manufacturers on an equal basis extends to Minnesota-based importers, including manufacturers and wholesalers with respect to private-brand labels sold within the State of Minnesota.

Since proposed rule Liq 39 specifies that all wholesalers and manufacturers will be able to purchase and resell all brands of liquor brought into Minnesota, the Department believes that intra-brand competition may increase. [Tr. p. 223] The Department believes the intent of the statute is to include all importers of intoxicating liquor regardless of location. Thus, those Minnesota-based importers, including wholesalers and manufacturers, who import intoxicating liquor would be treated no differently than those who are based outside the state. [Tr. p. 223]

It was argued on behalf of Minnesota Distillers, Inc. that the Department in proposing Liq 39 was going beyond the authority granted by statute when it included wholesalers and manufacturers under the contraints of section 340.114 and proposed Liq 39. It was argued that Minn. Stat. § 340.114 entitled, "Unlawful Discrimination Prohibited", places the prohibition on "licensed importers" but not on "licensed wholesalers or manufacturers." It was suggested that "licensed importers" are defined under Minn. Stat. § 340.113 (1976) entitled, "Importers of Intoxicating Liquors". Counsel criticized the Department's reading into the phrase, "licensed importers" a meaning which would include wholesalers and manufacturers. The argument was that wholesalers and manufacturers are licensed under Minn. Stat. § 340.11 entitled, "Licenses" but that importers are licensed under section 340.113 and references to "licensed importers" as used in section 340.114, refer only specifically to those importers licensed under section 340.113. Thus, it was concluded that only "licensed importers" duly licensed under section 340.113 are required to offer for sale on an equal basis to licensed wholesalers and manufacturers all intoxi-

cating liquor brought into the state. [Tr. pp. 224-227]

Although the argument of Minnesota Distillers, Inc. seems correct and persuasive at first blush, the Hearing Examiner is bound by case law to reject the position taken by counsel for Minnesota Distillers, Inc. In accordance with the Findings in Paragraph 6 hereinabove, the Hearing Examiner finds that the term "licensed importers" as used in Minn. Stat. § 340.114 (1976) includes licensed wholesalers and licensed manufacturers. This Finding is based upon Federal Distillers, Inc., et al., v. State of Minnesota, et al., supra. In that case, the Minnesota Supreme Court affirmed the decision of the trial court which found that a wholesaler (Ed. Phillips & Sons Company) was a "licensed importer" even though the wholesaler did not hold a license under section 340.113, but held a license under section 340.11 as a licensed wholesaler which explicitly includes the right to import. As stated elsewhere hereinabove, the Hearing Examiner cannot overturn the Supreme Court's affirmation of the propriety of including a licensed wholesaler under the provisions of Minn. Stat. § 340.114 pertaining to licensed importers.

If the Supreme Court had not adopted the trial court's finding that the term "licensed importer" as used in section 340.114 includes "licensed wholesalers", much of the consternation concerning both the statute and proposed Liq 39 would have been eliminated. If the Court had determined that the term "licensed importer" as used in section 340.114 referred only to licensed importers that obtained a license pursuant to Minn. Stat. § 340.113 [IMPORTERS OF INTOXICATING LIQUORS], there would be no question that licensed wholesalers owning their own private-brand label would not fall under the provisions of section 340.114 and accordingly, would not be compelled to sell their own product to competitors.

It is noted that the Minnesota Supreme Court's decision concerning Minn. Stat. § 340.114 (1976) which holds that "licensed importers" includes licensed wholesalers is a judicial utterance which will stand until such time as the court places a

different interpretation thereon, or the Legislature amends or clarifies the applicable statute (e.g., supplying a specific definition for "licensed importer").

It was argued by counsel for Ed. Phillips & Sons Company (Phillips) that the first sentence of proposed rule Liq 39 A is a flagrant distortion of the language of Minn. Stat. § 340.114. The assertion is that the Department repeated the language of the statute, but deliberately excluded the key phrase, "on an equal basis". The party argued that: "All importers must sell to all wholesalers" is not the same thing as "all importers must sell to all wholesalers on an equal basis." However, proposed rule Liq 39 A concludes with the sentence: "All such offers shall be made on an equal basis to all such wholesalers and manufacturers." The obvious intent of the quoted last sentence is to bring the proposed rule within statutory constraints of requiring importers to offer the product to all licensed wholesalers and manufacturers on an equal basis. Accordingly, it is found that proposed Liq 39 A complies with statutory mandate to the extent that the rule does require importers that bring intoxicating liquor into the State of Minnesota to offer the product to all licensed wholesalers and manufacturers on an equal basis. If the intent is not perfectly clear in the proposed language, any ambiguity can be removed by adopting the following language:

> All importers, including manufacturers and wholesalers licensed pursuant to Chapter 340, are required to offer for sale on an equal basis to all Minnesota wholesalers and manufacturers all intoxicating liquor (except wines and malt beverages) brought into Minnesota. If such intoxicating liquor is further distilled, refined, rectified, blended, bottled, labeled or prepared in any manner subsequent to its importation into Minnesota, such importers are required to offer for sale on an equal basis to all Minnesota wholesalers and manufacturers the finished product. ~~All such offers shall be made on an equal basis to all such wholesalers and manufacturers.~~

Objection was also raised to the second sentence of proposed Liq 39 A. The objection was that the second sentence exceeds statutory authority. To better understand the arguments, examples of specific situations are necessary.

Two general categories will be considered: (1) "Distillers", licensed as importers under Minn. Stat. § 340.113 (1976), which manufacture, rectify, blend, bottle and label liquor which is sold to wholesale distributors in Minnesota; and (2) "wholesalers", licensed under Minn. Stat. § 340.11, subd. 2 (1976), to sell liquor at wholesale in Minnesota. It should also be remembered that the Supreme Court affirms the finding that Minnesota licensed wholesalers are "licensed importers" for the purposes of Minn. Stat. § 340.114 (1976). Distillers in category (1) include:

1. Federal Distillers, Inc., a Massachusetts corportation, which bottles its own brands of distilled spirits and sells them to Minnesota wholesalers and also bottles distilled spirits under brands owned and registered by Johnson Brothers Wholesale Liquor Company (Johnson) which are sold to Johnson for reslae to Johnson's retail outlets.

2. Mr. Boston Distiller Corporation, a Massachusetts corporation, which bottles its own brands of distilled spirits and sells them to Minnesota wholesalers and also bottles distilled spirits under brands owned and registered by Johnson Brothers Wholesale Liquor Company (Johnson) which are sold to Johnson for resale to Johnson's retail outlets.

Wholesalers in category (2) include the following:

1. Johnson Brothers Wholesale Liquor Company, a Minnesota wholesaler which deals in liquor and wine and owns registered private-brand labels under which liquor is distilled for it by both Federal and Mr. Boston.

2. Ed. Phillips & Sons Company (Phillips), a Minnesota corporation, and licensed wholesaler carrying on importation, manufacturing and wholesaling operations under that license. Phillips imports bulk whiskey, which it then rectifies, blends, bottles, and labels with its own registered brand labels. Phillips sells these private-brand products to retailers in Minnesota and to wholesalers in other states.

The argument concerning the second sentence of proposed Liq 39 A is that the sentence is a deliberate attempt to manufacture a change in the meaning of section 340.114, so that the Department can force the owners of a valuable property right (private-brand labels) to sell such brands to competing wholesalers.

In the Federal Distillers case, supra, the Supreme Court in discussing the constitutionality of section 340.114, confronted the argument that any interpretation which required the selling of the private label of Johnson Brothers to its competitors would invade Johnson Brothers' right of ownership in its registered private brand labels. The Court stated:

> The argument of plaintiff Johnson that two of its distiller suppliers, Federal and Mr. Boston, are required by the act to sell liquor bottled under brands owned by Johnson to all wholesalers is speculative and hypothetical. There is no indication that the liquor commissioner is about to construe the statute in such a way as to invade Johnson's right of ownership in its registered private brand labels, and the statute on its face clearly does not require such a construction. 229 N.W.2d at 155. (Emphasis added)

It is found that proposed Liq 39 A can be distinguished from the hypothetical circumstances discussed by the Supreme Court. The Supreme Court was addressing the question of whether or not a distiller who bottles liquor for a wholesaler under the registered private-brand label of the wholesaler is required to sell such product to all Minnesota wholesalers. The Court did not address the issue of whether the wholesaler must offer the product for sale to other wholesalers. The Hearing Examiner finds that a seller cannot be forced to sell that which he does not own. Therefore, although distilled spirits brought into the State are subject to the equal sale requirement, the requirement will hinge on whether or not the seller is able to legally offer the finished product for sale. Consequently, it is found that proposed Liq 39 A does not require either Federal or Mr. Boston to sell the products labeled and owned by Johnson to other wholesalers in the State of Minnesota. Rather, the proposed rule requires Johnson Brothers, who have the full bundle of ownership rights, to sell the products produced by Federal and Mr. Boston to all other wholesalers in the State of Minnesota. The difference between the two situations is that Johnson Brothers has sufficient ownership in the end product to lawfully sell the product to others while Federal and Mr. Boston do not own a sufficient bundle of rights to sell the product to anyone except the purchaser (Johnson Brothers) who owns the registered label.

There was strong objection and understandable concern on behalf of Ed. Phillips & Sons that proposed Liq 39 A will require them to sell their private-brand label products to competitors. After Phillips imports bulk whiskey; refines, blends, bottles and labels it with their own brand label, Phillips will no longer have sole distribution rights of their product because it will have to be offered for sale on an equal basis to all other wholesalers in Minnesota. Competing wholesalers will then have the opportunity to sell the Phillips product to retailers. It is Phillips' position that Minn. Stat. § 340.114 has never been interpreted to require that Minnesota owned private-brand labels be sold to competitors of the owners if they are not sold to any wholesaler within the State. Currently, Phillips does not sell its own registered brands to any other wholesalers in the State, but rather sells the product directly to its retail outlets.

To digress for a moment, it is worth noting that somewhat similar situations occur under Minn. Stat. § 340.114 (1976) whereby the distillers and registered owners of so-called "national brands" are required to sell their product to all Minnesota wholesalers on an equal basis. Prior to the passage of the novel legislation in section 340.114, distillers of national brands dealt exclusively with specified Minnesota wholesalers. Such wholesalers spent substantial time and money in promoting the national brand which it was distributing. After passage of section 340.114, all wholesalers were able to take advantage of the markets developed by particular wholesalers since each wholesaler could now obtain any national brand product brought into Minnesota. In the Federal Distillers case, supra, the Minnesota Supreme Court upheld the constitutionality of such statute on its face. Under such circumstances, brands that are not currently being brought into Minnesota are not likely to be introduced for the public's consideration since wholesalers would be acting contrary to good business management by expending time and money in developing a new product when the fruit of such

efforts will be available to all other competing wholesalers. (This topic will be addressed in greater depth elsewhere in this Report.)

The impact of section 340.114 upon the owners of "national brands" has been to deprive the owners of some of the business discretions normally exercised in a free enterprise system. In other words, the owners of national brands can no longer select a particular wholesaler or wholesalers to market their product to retailers. Instead, the owners of national brands must either sell their product, on equal terms, to all wholesalers in the State or refrain from selling the product entirely in Minnesota. In the Federal Distillers case, supra, the Supreme Court stated:

> As a constitutional principle, it is well established that the freedom to contract with respect to one's property and in the conduct of a lawful business to select the party with whom one chooses to do so is a part of the liberty protected by the due process clauses of the State and Federal Constitutions. But, as declared in Nebbia v. New York, 291 U.S. 502, 523, 54 S. Ct. 505, 510, (1934):
>
> > ". . .[N]either property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, to exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."
>
> It is elementary that the state by virtue of its sovereignty may regulate private conduct for public benefit. In the field of economic regulation, without burdening this opinion by historical recital of the changing attitude of the nation's courts, it is settled that the legislature is free to adopt whatever economic policy it deems will promote the public good.

The Supreme Court went on to hold that the Minnesota Legislature could so adopt the economic policies embodied in Minn. Stat. § 340.114 as a reasonable end to accomplish the desired economic goal. It then follows that the owners of national brands are limited in the same fashion as Phillips will be limited pursuant to proposed rule Liq 39; to wit: They are only left with the choice to sell to all wholesalers in Minnesota or refrain from

distributing the product in Minnesota. If it is constitutional to so limit a national brand's property right, it only follows that it would be constitutional to similarly limit a Minnesota "private-brand label" to avoid a constitutional attack based upon due process and equal protection.

Thus, to an extent, distillers of national brands were faced with a similar dilemma that now confronts Ed. Phillips & Sons Company. It could be argued that the principal difference between the two situations is that when a national brand is brought into Minnesota, it is obviously being sold to at least one Minnesota wholesaler while the Phillips brand is not being sold to any wholesaler in the State because Phillips produces the product itself and markets the product directly to retailers. However, as will be discussed later, Minn. Stat. § 340.114 does not hinge on whether or not an intoxicating liquor is sold to a wholesaler, but rather hinges on the condition precedent that intoxicating liquor be brought into the State of Minnesota.

During the hearing process, there was no question raised concerning whether or not Phillips, under section 340.114, is obligated to offer for sale to other wholesalers in the State the bulk whiskey from which their final product is produced. Although the question was not raised, it points out certain ambiguities in the statute if one tried to determine whether or not the statute mandates Phillips to offer its bulk whiskey to competitors before it can lawfully proceed to rectifying, blending, bottling and labeling the final product.

Next, one must consider the situation of Phillips under Minn. Stat. § 340.114 after the bulk whiskey is processed and ready for final consumption. It is the contention of Phillips that the proposed rule goes beyond the statutory language in that it requires Phillips to offer the finished product to all other wholesalers, not at the time the intoxicating liquor is brought into Minnesota, but after it has been processed.

However, much of the argument presented by Phillips is based on the fact that Phillips does not sell its finished product to any wholesaler within the State, but distributes the product directly to retailers. Note must be taken that the prohibition against unlawful discrimination in section 340.114 only applies between importers of intoxicating liquor and wholesalers and manufacturers, but does not extend up the chain of distribution to retailers. Phillips is the sole distributor of its product which is sold by Phillips directly to retail outlets. Arguments based upon the premise that the statute requires a sale to at least one Minnesota wholesaler before its provisions become operable are incorrect. The statutory provision does not direct itself to sales but specifies that: All licensed importers (which includes licensed wholesalers according to the Supreme Court's interpretation) shall offer for sale on an equal basis to all licensed wholesalers and manufacturers all intoxicating liquor brought into the State of Minnesota. (Emphasis added) It is found that the statute, on its face, requires that all intoxicating liquor brought into Minnesota be offered for sale to all wholesalers in the State on an equal basis. There are no limiting provisions in the statute to except the Phillips situation wherein the bulk whiskey is further processed before the final product is produced or where the importer (Phillips) does not sell the product to wholesalers but sells it directly to retailers. A contrary finding is precluded by the Supreme Court's interpretation and affirmation that "licensed importers" includes Minnesota licensed wholesalers.

Specifically, it is found that Minn. Stat. § 340.114 (1976), when considered with the Supreme Court's interpretation of the term "licensed importers" requires all licensed importers and wholesalers that bring intoxicating liquor into Minnesota to offer that product to all wholesalers in the State without any limiting provisions for excepting situations wherein a wholesaler further processes the intoxicating liquor or where

the wholesaler also owns and registered the brand label. The Supreme Court held the statute constitutional on its face and the Hearing Examiner cannot find otherwise at the administrative level.

The Court emphasized that their decision in Federal Distillers, supra, upheld constitutionality only on its face. Clearly, the Hearing Examiner does not have authority to find the statutory provisions unconstitutional now that regulations are being proposed. Rather, the Hearing Examiner must examine the proposed regulation to determine its propriety under a statute which has been held constitutional. It is found that the regulation is reasonable and necessary to implement the statute as passed by the Legislature and interpreted by the Supreme Court. Note should be taken that the Supreme Court stated:

> Plaintiffs' fears that constitutional infirmities will appear upon enforcement must of course await judicial review when and if they arise. Federal Distillers, supra, 229 N.W.2d at 160.

It is clear that in Federal Distillers, supra, the Supreme Court was examining the statute on its face without seeking various hypothetical problems unless and until specific happenings occurred wherein the Court could make specific rulings. If the proposed liquor rules are adopted, any judicial review could be expanded to examining the statute in light of the manner in which it is being construed and applied by reason of new liquor rules.

The Hearing Examiner is convinced that previously the Department took the position that Minn. Stat. § 340.114 (1976) would not be implemented by administrative rule which would require wholesalers such as Johnson and Phillips to offer their private-brand labels to competitors. Nevertheless, there is nothing to prevent a state agency from changing its position before final proposed rules are offered for adoption so long as legal notice constraints and public hearing safeguards are envoked.

The Hearing Examiner is convinced that the Department changed its position based on the discussion which immediately follows. At Page 22 of their brief in the Federal Distillers case, the special assistant attorney general representing the states argues as follows:

> As we pointed out earlier, Johnson has adopted the masochistic habit of construing the Act in a fashion which then gives it reason to complain. Its suggestion that Chapter 664 requires that two of Johnson's suppliers (Federal and Mr. Boston) must sell 'Johnson Brand' spirits to all wholesalers typifies this habit. Respondents have not suggested that the Act will be enforced in the manner which Johnson fears. To the contrary, respondents suggest, for the reasons hereinafter set forth, that the Act does not require the alleged foresale of which Johnson complains.

At Page 148 of the record in the Federal Distillers case, the following exchange takes place as Mr. Jonathan Morgan of the Attorney General's Office cross-examines Mr. Lynn Johnson of Johnson Brothers:

> Q. Now, if by reason of your ownership of the Johnson brand the situation were such that nobody else could buy that brand, you wouldn't have the problems that you referred to in respect to the Johnson brands, would you?
>
> A. Not on that particular brand. I think I understand you correctly. If the law says that no one else can have it, I wouldn't have the problem that I'm anticipating, is that what you are asking?
>
> Q. Precisely.
>
> A. Yes.
>
> Q. In other words, the predicated problems that you have described in reference to the Johnson brand is based on the assumption that I, as a wholesaler, can go to Federal and buy the Johnson brand products?
>
> A. That's correct.

The special assistant attorney general appeared to go to great pains to characterize the threat that anybody would interpret section 340.114 to cover privately-owned labels sold directly to retailers as hypothetical and remote, when he was trying to protect the statute's constitutionality. Yet, the herein considered proposed rule accomplishes the result originally opposed by Mr. Lynn Johnson; to wit: Johnson's distillers

need not offer the Johnson product to all wholesalers in Minnesota, but Johnson itself, as a wholesaler, must offer that same product to all other wholesale competitors in Minnesota. One can only wonder the degree to which the Department's prior position played in the Supreme Court's determination of the Federal Distillers case. Nevertheless, the Hearing Examiner has no way of characterizing the influencing effect of the State's case as presented to the Court in that matter. Furthermore, the fact that the Department apparently changed its position does not invalidate proposed Liq 39 since the Department appropriately noticed the proposed rule within lawful time constraints and subjected the proposal to public hearing.

In light of the proposed liquor rules, certain hypotheticals can be considered. One consideration is the price of intoxicating liquor at which licensed importers must offer their product to all licensed wholesalers in the State. It is found that the statute specifically requires that all sales in this State must be on an equal basis including price, discounts, etc. Additionally, Minn. Stat. § 340.114, subd. 3 (1976), restricts importers from selling intoxicating liquor to any Minnesota wholesaler at a price which is higher than the lowest price at which such item of liquor is contemporaneously being sold by such importer to any wholesaler anywhere in any other state of the country or the District of Columbia, or to any state or state agency which owns and operates retail liquor stores. Within the foregoing constraints, importers must be allowed to set their own price in the Minnesota market place.

Somewhat of an unique situation will apply to Phillips and Johnson Brothers when offering their private-brand labels to other wholesalers. For the purposes of Minn. Stat. § 340.114 (1976), these two wholesale houses are considered "licensed importers" and are free to set their own price for their own product in Minnesota. Whether or not competing wholesale houses will be willing to pay the price requested by the seller will be left to the individual determination of the various wholesale

houses. Nothing in the statute or regulations should be construed to prevent a "licensed importer" from selling at his own price in a free market except for the statutory constraints mentioned above. For example, when considering Phillips' private-brand label, it is assumed that they pay a predetermined cost for the bulk whiskey and incur certain expenses in rectifying and bottling the product before it is finally ready for retail distribution. Phillips cannot be forced to sell the product at their cost of acquisition plus cost of processing. No seller in a free market can be forced to sell his product without profit. Thus, the price of the Phillips product cannot be determined by the actual cost to its own wholesale operation or a confiscatory result would accrue. Likewise, Johnson Brothers cannot be forced to sell their private-brand labeled product to competing wholesalers at their cost of acquisition. Rather, Johnson Brothers must be allowed to establish their own price in the free market as exists in Minnesota.

Ed. Phillips & Sons Company argued that proposed rule Liq 39 A is unreasonable in that it forces the owner of a valuable piece of property to give that property to a competitor to use, abuse or destroy.

The law of the State of Minnesota provides that the owner of a registered trademark owns a piece of property with his rights therein based upon the good name, business investment and hard work associated with it.

> The right in trade-marks, or the exclusive right to use certain symbols or devices placed upon goods offered for sale, is property. Hence the law affords a remedy to the owner against one who violates the right. A trade-mark consists of a word, mark, or device adopted by a manufacturer or vendor to distinguish his productions from other productions of the same article. Hostetter v. Fries, 17 Fed. Rep. 620. The theory on which the right to it, as property, is based, is that a man may have acquired a reputation for excellence in the manufacture or preparation of a certain article for sale, which reputation may be the source of profit to him. In the enjoyment of this reputation, and of the benefit and pecuniary advantages thereof, he ought to be protected as he ought to be and is in the advantages of the good-will

of a business established by him. Cigar-Makers Protective Union v. Conhaim, 41 N.W. 943, 944 (1889)

Just how valuable such a right might be was emphasized in testimony in this matter by Mr. Goldenberg of Old Peoria, who acknowledged at Page 349 of the record that the development of a brand requires effort and marketing in addition to separate investment.

The Hearing Examiner is convinced that the owners, such as Phillips and Johnson Brothers, of private-brand labels have spent substantial money in developing their labels and in effect "improving their property". Similarly, it should be noted, the Hearing Examiner is convinced that wholesalers spent money and effort in developing various "national brands" when such wholesalers had exclusive rights of distributing the product in Minnesota. The effect of Minn. Stat. § 340.114 is to allow competitors to take a "free ride" on past efforts of wholesale houses that previously developed the market for both national brands and wholesalers that promoted Minnesota private-brand labels. At Page 351 of the record, the following exchange occurs between Mr. Goldenberg, representing Old Peoria, which supported proposed Liq 39 and Counsel for Ed. Phillips & Sons Company.

Q. It is a fact, is it not, that when a wholesaler seeks to have a private brand label (made) available to him, he is recognizing that that brand has potential consumer acceptance, is that correct?

A. Has the potential of becoming a national brand. A rectifier starts out, if he gets lucky, he can wind up with a Seven Crown.

Q. But in order to do so he has got to merchandise the product.

A. Correct.

Q. And he has got to spend the capital to do it and he has got to take the risk of his brand catching on, doesn't he?

A. Yes.

Q. And Phillips is widely accepted and popular in the State of Minnesota, isn't it?

A. Not only in Minnesota, in many other states also.

Thus [illegible] § 3[illegible] requir[illegible]
a wholesal[illegible] permitted substantial[illegible] ron
and effort [illegible] developing a particular national brand to re-
linquishing the fruits of such marketing to competitors.
Furthermor[illegible]ute requir[illegible]s owner[illegible] a
private-br[illegible] share [illegible] property right creat[illegible]
in with co[illegible]ore.
the variou[illegible]s and [illegible] in [illegible] [illegible]
product in [illegible]

The [illegible] by [illegible]
practice [illegible] "fast [illegible] [illegible] in
use of a [illegible] [illegible] [illegible]
is sold a[illegible] retailers throughout the State and [illegible]
fore may be sold [illegible] [illegible] [illegible] low price.
The market quickly accepts the brand as a low price item. When
the loss leader's sales end and the price reverts to a
level, the [illegible]er might refuse to pay what he consi-
premium p[illegible] [illegible] [illegible]

Ed. [illegible]
would resul[illegible] [illegible] [illegible] with regard to
the Phill[illegible] [illegible] [illegible] tion, the fol-
lowing te[illegible] [illegible] [illegible] possible footh[illegible]
son's priva[illegible] from the trial level of the [illegible]
Tillers case [illegible] treated wherein examination by [illegible]
Phillips was [illegible]ted by Lyrn[illegible]hnston of Johnson Brothers:

Q. By "[illegible]" do you mean [illegible] leader?

A. It could be used as a l[illegible]. It
[illegible] used to sell [illegible] brand.
[illegible] give you (x) [illegible] Johns-
[illegible] by one case [illegible]

Q. What would happen to your sales of John-
son?

A. No one would have [illegible] interest [illegible]
[illegible] would [illegible].

The [illegible] examin[illegible] the insid
of "foot[illegible]" however, [illegible] ould "
with or [illegible] [illegible] [illegible] the

pervert proposed Liq 39 into a vehicle for accomplishing such unethical goal is not proper reason to reject the proposed rule. It must be remembered that the Department has the power and authority to revoke a wholesalers' license for just cause, including trade practices as described above. If issue is to be taken with the form of competition engendered under proposed Liq 39, the issue appropriately lies with the underlying statute which has been held constitutional on its face and passed into law based upon the social and economic values found by the Legislature. The Supreme Court appropriately declined to second-guess the social and economic goals of the Legislature, and the Hearing Examiner is certainly constrained from so doing.

The touted intent of the Legislature and the Department is to place all wholesalers on an equal basis with respect to their ability to purchase all brands of intoxicating liquor brought into Minnesota by importers; to allow all wholesalers to obtain all brands imported into the State thereby stimulating supply and demand with the end result of holding down or reducing the ultimate retail price to Minnesota consumers; and to stimulate intrabrand competition. The following can be said with regard to the foregoing:

First, Minn. Stat. § 340.114 and proposed rule Liq 39 will place all wholesalers on an equal basis with respect to their ability to purchase all brands of intoxicating liquor imported into the State.

Next, there is a question as to whether or not the current Intoxicating Liquor Act actually promotes lower retail prices for the final consumer. Minn. Stat. § 340.114 addresses itself along the chain of distribution from distillers, importers and wholesalers but does not affect retailers. In other words, the statute does not regulate in any manner retailers or the prices which they charge the consuming public. The statute promotes lower wholesale prices for retailers, there is no guarantee that such savings will be passed on by

the retailer to the consuming public.

Finally, the Intoxicating Liquor Act does, to an extent, stimulate intrabrand competition since all wholesalers can obtain all brands brought into Minnesota for resale to retailers. However, it is found that the stimulation of intrabrand competition is brought about at the expense of interbrand competition. In fact, Minnesota consumers have a smaller choice of brands to select from because certain brands of intoxicating liquor are not distributed in Minnesota. The following examination by counsel for Ed. Phillips & Sons Company of Mr. Goldenberg, Old Peoria, brings the point home:

Q. Well, Mr. Goldenberg, I think Mr. Erickson has brought up some interesting questions. Do you find that the State of Minnesota has more brands, or fewer brands that they did?

A. Fewer.

Q. Wait. Then they did when the law went into effect?

A. Fewer.

Q. Fewer brands, you mean, Wisconsin has more brands available than Minnesota?

A. Yes, Mr. Robins.

Q. Do you think that they have twice to three times as many brands?

A. I forget the number, but it was a substantial number in excess that we have.

Q. Do you have any knowledge as to why the brands have been reduced in Minnesota?

A. I can give you my personal experience.

Q. Surely.

A. They don't sell.

Q. They don't sell, is that right?

A. Right.

Q. And no manufacturer has any incentive for coming into Minnesota and introducing new brands under this new law, does he?

A. He has little incentive.

Q. Very little.

A. You know, the brand owner has incentive, but he can't find anybody to market it for him.

Q. Why?

A. Well, for the simple reason that a wholesaler buying a new brand knows that he goes out and does the necessary spade work, again, distribution, and is not going to reap the benefits if the brand takes off.

Q. Why not?

A. Because somebody else is going to buy the brand and thereby dilute the purchasing.

Q. So that the consuming public in the State of Minnesota is going to and does lose the opportunity of buying new brands because --

A. That is true.

Q. Isn't that true?

A. Absolutely.

* * *

Q. I say, manufacturers and distillers can refuse to sell to wholesalers in the State of Minnesota brands that they sell in other states?

A. They can refuse to file brands in Minnesota, and they are just not available.

Q. You can't force them to buy it, to sell them, can you?

A. That's right. However, in practice that doesn't happen.

Q. Nevertheless --

A. Now, in practice what happens is that the distiller wants to sell them and can't find distributors. [Tr. pp. 357-360]

The Intoxicating Liquor Act has the realistic potential of creating a sterile market at the wholesale level by eliminating both price and product competition. Distillers (importers) are also somewhat impacted because they can only import their product to Minnesota under the price constraints of Minn. Stat. § 340.114, subd. 3 (1976) and, if such distiller elects to sell the product in Minnesota, it is forced to distribute the product to all wholesalers rather than those selected wholesalers which are deemed, for some reason, to be a better wholesale outlet by the distiller.

Product competition is denied wholesalers because each wholesaler can now obtain the same product for resale which every other wholesaler in the State distributes. The realistic

potential for the elimination of price competition at the wholesale level exists because each wholesaler must file its wholesale price schedules monthly. The filings are public record and available to competing wholesalers and retailers. During the time in which wholesalers can amend their monthly price filings, it is logical to assume that all wholesalers will amend their price down to the lowest price filed by any particular wholesaler in order to meet competition. Since retailers can readily determine which wholesaler is selling a particular product at the lowest price for a particular month, it is logical to assume that the retailer will only purchase the product from the wholesale supplier offering the lowest price. This situation results in a sterile market wherein each wholesaler is denied the essential tools normally necessary for a competitive market (i.e. price and product).

With the realistic potential of eliminating price and product competition at the wholesale level, one wonders what tools are left for sales personnel to induce a retailer to purchase from them. The record is devoid of such information. One must assume that competing wholesalers will act within the confines of legal practices and avoid any temptation to enter into illegal price setting agreements. Any infirmities in the current Intoxicating Liquor Act can only be remedied by the Legislature or judiciary in certain circumstances. Neither the courts nor the Hearing Examiner can lawfully substitute their individual philosophies for the Legislature's. Proposed rule Liq 39 A is the logical extension of Minn. Stat. § 340.114, and is found to be reasonable and necessary in order to implement the statute on its face and as interpreted by the Supreme Court.

Ed. Phillips & Sons Company takes the position that the Department failed to carry forth its burden of showing the need and reasonableness of proposed Liq 39 A. However, Phillips' characterization of the Department's evidence regarding need and reasonableness is erroneous. Phillips' objections are based on the false premise that the Department's case rests on a price

filing index which was submitted into evidence as the sole basis for the Department's formulation of proposed Liq 39 A. However, the Department showed that the need and reasonableness for proposed rule Liq 39 A is to implement the mandate of the statute to place all wholesalers on an equal basis with respect to purchases of liquor products brought into the State. The proposed rule removes any uncertainty concerning the statute and gives full effect to its provisions. [Tr. pp. 222-223; DPS Exhibit No. 4, at pp. 18-19] The Department has made this clear in its testimony at Pages 222-223 of the transcript:

> The need for this provision [Liq 39A] is to implement the mandate of the statute to place all wholesalers on an equal basis with respect to purchases of all liquor product from importers. . . .In order to remove any uncertainty concerning the statute and to give full effect to its provisions, it is necessary to make clear that the requirement to offer for sale to all wholesalers and manufacturers on an equal basis extends to Minnesota-based importers, including manufacturers and wholesalers with respect to all such liquor sold by them within the State of Minnesota.

Phillips' argument concerning the Department's showing of need and reasonableness apparently arose from questions asked to the Director of the Liquor Control Division, concerning a statement by the Department that it believed Liq 39 A would increase "intrabrand competition".

> MR. ROBINS: Mr. Hearing Examiner, may I ask Mr. Novak the factual basis for his stating in his Statement of Need "since all wholesalers and manufacturers will then be able to purchase and resell all brands of liquor, the Department believes that all intrabrand competition may increase." What is the factual basis for that, Mr. Novak?
>
> * * *
>
> MR. NOVAK: Well, to answer the question, I suppose I can put it in this manner. We did have what we call the price index from the time that the law went into effect in July or August of 1975 and we found that in our price index a considerable drop in a wholesale liquor price from the

time it went into effect in the year 1975 with the same increases in '75 and a considerable drop in '76 and maintaining a reasonable level until the last few months in which we have a rise again as far as the wholesale price index is concerned, when we talk about competitiveness of intrabrand. We feel because of the competitiveness that this price index does show and reflect what has happened since the law went into effect. [Tr. pp. 231-232]

In further questioning, counsel for Phillips incorrectly characterized the Department's answer to the factual basis in support of proposed Liq 39 A.

MR. ROBINS: Is this your factual basis for the statement that "since all wholesalers and manufacturers will then be able to purchase and resell all brands of liquor, the Department believes that intrabrand competition may increase", is that your factual basis?

MR. NOVAK: I suppose it's one piece of evidence that we have, yes.

MR. ROBINS: What other pieces of evidence?

MR. NOVAK: I suppose if we are going to take the purpose of the statute and, again, I'm going to take legislative intent. The legislative intent, in our opinion, was for the purpose of all the hearings that I have been to dealing with liquor was based primarily on the reduction of price. And this survey, of course, indicates that and no other thing. And I base my findings based upon that conclusion of the price of the commodities did or were reduced.

MR. ROBINS: So that fairly stated the only factual basis you have for the statement in the Statement of Need and the support for the rule is this survey, which is entitled "Minnesota Wholesale Liquor Price Index" which was compiled and published by a different department, is that right, sir? [Tr. pp. 234-235]

In fact, the price survey was offered as evidence with respect to a question originally posed on behalf of Phillips, that is, the basis for the Department's belief that intrabrand competition would increase. However, the Department clearly pointed out

on several occasions that the need for the particular rule was to "implement the mandate of the statute to place all wholesalers on an equal basis with respect to purchases of all liquor products from importers". [Tr. p. 222] This was clearly brought out in further questioning of Mr. Novak by counsel for the Department:

> MR. KILGRIFF: Mr. Novak, in formulating proposed Liquor 39, did the Department take into consideration any other need or reason for the formulation of the regulation beside the fact that it would increase intrabrand competition?
>
> MR. NOVAK: Yes. The need for this provision, in my estimation, is to implement the mandate of the statute, to place all wholesalers on an equal basis with respect to purchasing all liquor products from importers. [Tr. p. 298]

It should also be noted that early in the hearing a particular phrase in the Department's Statement of Need with respect to proposed Liq 39 A was erroneously characterized by a Department witness. The witness was asked whether the term "person" in the following sentence was intended to include only wholesalers:

> Thus, all importers, including manufacturers and wholesalers, must offer for sale to all Minnesota manufacturers and wholesalers all final products, complete with labels, offered for sale to any person within the State of Minnesota. [Tr. pp. 242-243]

The initial answer of the Department was that the word "person" meant wholesalers. However, in later testimony, the same witness corrected this error by indicating that the term "person" included retailers as well as wholesalers. Nevertheless, the position of both Phillips and the Department with respect to the use of the word "person" in the Statement of Need overlooks the statutory language of section 340.114, which does not direct itself solely to sales, but is directed to "all intoxicating liquor brought into the State of Minnesota".

Simply stated, proposed rule Liq 39 A merely implements the mandate of the statute to place all wholesalers on an equal basis with respect to their ability to purchase all intoxicating

liquor (except wines and malt beverages) brought into the State of Minnesota by importers.

Finally, Ed. Phillips & Sons Company argues that proposed rule Liq 39 A is an unwarranted and arbitrary confiscation of the property rights of private label owners and denies them due process of law. Phillips correctly argues that the ownership of a registered brand or trademark is a property right subject to the full protection of the State and Federal Constitutions including equal protection and due process applications.

In the Federal Distillers case, supra, the Supreme Court held that although the Twenty-first Amendment to the United States Constitution bestows upon the states broad regulatory powers over liquor importation, which powers are someting more than the normal state authority over health, welfare and morals; the Twenty-first Amendment does not empower a state to invade equal protection and due process constitutional rights guaranteed by the Fourteenth Amendment, nor does it limit equal protection and due process guarantees of the Minnesota Constitution. Nevertheless, neither property rights nor contract rights are absolute and equally fundamental with the private right is that of the public to regulate in the common interest.

Therefore, a state, by virtue of its sovereignty, may regulate private conduct for a public benefit. The Court in Federal Distillers, supra, found that the private conduct and property rights which are impacted by Minn. Stat. § 340.114 are so impacted by the Legislature's reasonable belief that a public benefit would accrue. The Court also cautioned that it cannot substitute its ". . .judgment for that of the Legislature as to the wisdom, expediency or effectiveness of this type of regulation. . . ." Accordingly, the Court held that the Legislature is free to adopt whatever economic policy it deems will promote public good. In the particular matter at hand, the Court held with regard to the statute underlying proposed rule Liq 39 that:

> Courts do not pass upon the soundness of social or economic theories in the legislative mind when statutes are enacted in exercise of the police power, ...

Therefore, the underlying statute was held constitutional and proposed rule Liq 39 A is a logical extension of the statute.

It has already been found in this Report that arguments on behalf of the State presented to the Supreme Court in the Federal Distillers case were to the effect that the Department would not adopt a regulation similar to proposed rule Liq 39 A. In all likelihood, such argument was presented in order to avoid a persuasive constitutional attack of the statute on the principles of due process and equal protection. The degree to which the States position taken in the Federal Distillers case swayed the Court cannot be determined at the administrative level. Further, it is found that proposed rule Liq 39 A can only be declared unconstitutional if the underlying statute is found unconstitutional, and the Hearing Examiner does not have the right, power, duty or authority to make such declaration. An interesting question would be whether or not the statute would be held constitutional if it was found that the thrust of section 340.114 could only be enforced by administrative rule which directed the impact of the statute to out-of-state importers bringing intoxicating liquor into Minnesota, while excluding Minnesota-based importers bringing intoxicating liquor into the State.

In accordance with the foregoing, it is found that proposed rule Liq 39 A is reasonable and necessary and should be adopted by the Commissioner.

24a. Proposed rule Liq 39 B implements provisions of Minn. Stat. § 340.114, subd. 3 (1976) which requires that any sale by an importer to a Minnesota wholesaler shall be at the lowest price at which the product is being sold contemporaneously by the importer in any other state or in the District of Columbia. Proposed Liq 39 B sets forth filing procedures to enable the Department to enforce this provision of the statute. Before being able to sell intoxicating liquor to a Minnesota wholesaler or

manufacturer, an importer must first file with the Department an itemized list specifying the price, brand, type, container size, proof and age of the liquor so offered.

Two proposals were made by members of the liquor industry concerning this price filing requirement. The first proposal, offered by a representative of a number of wholesalers, is to insert an added requirement in the provision that the importer mail a copy of its itemized price list filed with the Department to each holder of a wholesale liquor license in Minnesota. [Tr. pp. 365-368] The Department wishes to adopt such proposal asserting that it will assist in the efficient dissemination of price information to Minnesota wholesalers while adding only a very small burden on importers. Thus, the first sentence of proposed Liq 39 B should read:

> No importer shall offer any intoxicating liquor for sale to any Minnesota wholesaler or manufacturer without first filing with the department and mailing a copy of such itemized price list to all Minnesota manufacturers and wholesalers, on a form approved by the Commissioner, an itemized list specifying the price, brand, type, container size, proof and age of the liquor so offered....

The second proposal with respect to proposed Liq 39 B, offered by a representative of the Distilled Spirits Council of the United States, is a change in the time period for the price filing requirement on the importer. [Tr. pp. 382-383] The rule proposed by the Department requires that the prices be filed on the fifteenth day of the month and shall become effective on the first day of the next calendar month, and shall remain in effect until changed by a subsequent price filing. The proposal of the Distilled Spirits Council is to require the price filing on the first day of the month which would become effective on the first day of the next calendar month. Testimony was offered that this would be more acceptable to the industry, and there was no objection offered by any of the wholesalers represented at the hearing. The Department was amenable to this proposal. Thus, the second sentence of proposed rule Liq 39 B should read as follows:

> These prices must be filed on the first day of the month and shall become effective on the first day of the next calendar month, and shall remain in effect until changed by a subsequent price filing which shall take effect in like manner.

It is found that proposed rule Liq 39 B is reasonable, necessary and implements Minn. Stat. § 340.114, subd. 3 (1976). Accordingly, Liq 39 B should be adopted by the Commissioner with the language changes indicated hereinabove.

24b. Proposed rule Liq 39 C implements the statutory requirement of section 340.114, subd. 3, by requiring that the prices filed with the Department be the lowest prices at which the products are being sold contemporaneously by the importer in any other state or the District of Columbia. These price filings are necessary so the Department can make the proper price comparisons and other reviews to ascertain whether the liquor prices charged to Minnesota wholesalers and manufacturers comply with the requirements of the statute. No substantial objections were made to proposed rule Liq 39 C.

It is found that proposed rule Liq 39 C is reasonable and necessary to implement Minn. Stat. § 340.114, subd. 3 (1976) and should be adopted by the Commissioner.

A further proposal was offered at the hearing for an additional subdivision D to Liquor 39. A representative of three wholesalers suggested that language should be included to prohibit the trade practice of certain brand owners or importers of designating exclusive agents for providing special sales, signs and display materials to retailers. The language proposed is the following:

> No manufacturer or importer shall appoint a wholesaler as its exclusive agent for the production and distribution of retail sign or display materials. [Tr. pp. 370-371]

In connection with the above suggested language, a further problem of the allocation of Christmas wrap was discussed. It was alleged that certain suppliers have allocated the amount of Christmas wrap product on an unequal basis to wholesalers in Minnesota.

It was asserted that the above proposed language would

eliminate special arrangements and concessions to particular wholesalers by manufacturers or importers which violates the spirit of section 340.114. Although the assertion may be correct, it is noted that a recommendation to adopt the proposal may violate certain procedural requirements since the proposal was not noticed for hearing. Furthermore, Minn. Stat. § 340.114 addresses itself to "intoxicating liquors" and it could be argued that the new proposal covers subject matter other than "intoxicating liquor" thereby exceeding the authorities found in that statutory provision. The Hearing Examiner is loathe to suggest a further expansion of the unequivocal piece of legislation in section 340.114, which is directed to intoxicating liquors. Accordingly, it is found that the suggested proposal should not be adopted by the Commissioner.

25. Liq 40 is reserved for future use. Existing Chapter Five is renumbered in the proposal to Chapter Four. Existing Chapter Six is renumbered in the proposal to Chapter Five.

26. Chapters Five and Six of the proposed rules, dealing with retail licensees, municipal liquor stores and advertising, contain only two changes from the existing rules: Proposed Liq 56 A and proposed Liq 67 B 2. There were no substantial comments in opposition to these changes.

Proposed Liq 56 A relating to the size of the containers from which on-sale dealers sell liquor is changed to authorize "the metric equivalent" of existing measurements. The addition of metric equivalents is reasonable and necessary to permit the adoption of this form of measurement in the liquor industry. The proposed rule is also amended by adding a prohibition against the purchase by on-sale dealers of certain spirits which are less than 80 proof for sale to the public. This provision is necessary and reasonable to safeguard the consumer and to prevent deception in the dispensing of liquor by the drink.

Since on-sale consumers frequently are unaware of the brand or alcoholic content of liquor dispensed by on-sale dealers, consumers should be able to expect certain minimum standards with

respect to alcoholic beverages they order. It is reasonable to adopt a minimum content of 80 proof in view of the ordinary and customary business practices of on-sale dealers to that effect.

Accordingly, proposed Liq 56 A is reasonable and necessary and should be adopted by the Commissioner.

Proposed Liq 67 B 2 deletes certain words and phrases from the existing rule. Both the existing and the proposed rule prohibit the use of certain words and phrases in advertisements or displays of intoxicating or malt liquor. It is some of these excluded words and phrases which are deleted from the existing rule in the proposal. The deleted words and phrases may, in fact, be useful information for retailers to better inform the public of their particular businesss policies. Therefore, the proposal would allow the use of specified words and phrases.

Accordingly, proposed Liq 67 B 2 is found to be reasonable and necessary and should be adopted by the Commissioner.

27. Chapter Seven [existing Chapter Eight] of the proposed rules deals with brand label registration and analysis of alcoholic beverages. Most of the changes in this proposed chapter were the result of a reexamination of the Department's role in the task of brand label registration due to the fact that the Legislature eliminated most of the funds for these activities for fiscal year 1978. [Tr. pp. 438-440] The reduction of funds, however, was not followed by an elimination of the statutory requirements imposed on the Department with respect to these activities. [See, Minn, Stat. § 340.62 (1976)] Therefore, the Department is under a continuing obligation to enforce statutory requirements in this area, but at a severely reduced funding level.

Given the fact of funding cuts, the Department undertook a two-fold approach to the rules in proposed Chapter Seven. First, it was determined that all the rules dealing with brand label registration should be examined for ways to economize due to the

reduced funding level. Second, given the apparent intent of the Legislature to either eliminate or at least reduce brand label registration, the Department decided to re-examine the statutory requirements and to enforce only those minimum requirements clearly set forth in the applicable statutes. Given the above circumstances, the Department recommended the following amendments:

27a. [Proposed Liq 71] This provision requires that all brand labels be approved and registered by the Commissioner before the distilled spirits, wine or malt beverages may be sold in Minnesota. A proposed new subparagraph is added to the rule regarding brand label approval to allow the importation of samples without registration. The proposal will relieve importers and wholesalers from the expense and inconvenience of registering products which they bring into the State solely for sample purposes to determine whether to carry such products on a regular basis. Subparagraph B makes clear that any alcoholic beverages whose brand label has not been approved and registered will be confiscated by the Department.

It is found that proposed Liq 71 is reasonable and necessary and should be adopted by the Commissioner.

27b. The Department proposes to delete existing rule Liq 72 which is the brand label ownership provision of the existing rules. Under the existing rule, only the owner of a brand label or his assignee could register the label. If existing Liq 72 is deleted, any person duly licensed to import alcoholic beverages would be entitled to seek approval and registration of a brand label under the new proposed rules.

In making this proposal, the Department asserts that it has taken into consideration the anticompetitive effect of allowing only a brand owner or his agent (assignee) to register its brands. The assertion is that the existing rule allows the brand owner to control the states in which his product is being sold and can thereby deprive Minnesota consumers of choices of alcoholic beverages which are available in other states.

It is not clear whether or not the Department is also proposing to delete existing Liq 72 in furtherance of a policy to economize due to the above-referred to reduced funding level. However, there was no showing by the Department that the deletion of existing Liq 72 would lessen any administrative burdens upon the Department in order to economize.

In its POST-HEARING MEMORANDUM OF DEPARTMENT OF PUBLIC SAFETY, the Department supported this proposal by stating at Page 36 the following:

> Given the fact of funding cuts and the apparent intent of at least some legislators to eliminate brand label registration altogether, the Department undertook a two-fold approach to the rules in proposed Chapter Seven. First, it was determined that all the rules dealing with brand label registration should be examined for ways to economize due to the reduced funding level. Second, given the apparent intention of the legislature to eliminate or at least reduce brand label registration, a decision was made to reexamine the statutory requirements and to enforce only those minimum requirements clearly set forth in the applicable statutes....

The proposed deletion of existing rule Liq 72 is contra-indicated by the Department's own statement quoted above. As previously stated, there was no showing that the deletion of existing Liq 72 would have any economizing effects for the Department. Furthermore, the Department's interpretation of the Legislature's intent to eliminate or reduce brand label registration is inconsistent with the Department's proposal to eliminate existing Liq 72 since the deletion of this rule could have the affect of increasing rather than reducing registrations. On this basis alone, it is found that the Department has not adequately supported its proposal to delete existing rule Liq 72.

In its Statement of Need, the Department supported the proposed deletion of existing Liq 72 on the assertion that the deletion would stimulate competition. However, it is found that there was no showing that the deletion of existing Liq 72 would, in fact, stimulate competition or negate any anticompetitive effect of the existing rule.

Existing Liq 72 is founded upon Minn. Stat. § 340.62 (1976). Clearly, the statutory provision is under the general heading,

"EXCISE TAX" and was adopted under the proper legislative purpose of producing revenue and giving the state a vehicle to examine the integrity of brands brought into Minnesota in order to protect the health and welfare of the consuming public. The existing rule bears a reasonable relationship to the legislative purpose in that it allows the state redress against a registering party if, for some reason, the registered product is not deemed fit for consumption. On the other hand, deletion of existing Liq 72 allows any licensed importer to register a brand label even though such registrant does not manufacture or produce the product. This reduces the state's ability for proper redress against the manufacturer since the manufacturer may not be a party to dealings in the State of Minnesota.

Very strong and convincing cases were made on behalf of Coors Beer and the Midwest Council for the Wine Institute of their reasonable concern about the proposed deletion of a rule which specifies that labels can only be registered by brand owners or their agents. The argument was that the deletion of the requirement would seriously jeopardize the integrity of products that are sold in this State. [Tr. pp. 396-425] In summary, the objecting parties showed that deletion of existing Liq 72 could reasonably be expected to remove a manufacturer's ability to maintain quality control over his own product if the product is sold in Minnesota and registered by a party over which the manufacturer has no control. Such end result is inconsistent with a statute that is designed, in part, to enhance the State's ability to police the integrity of a product imported into Minnesota. If the State could not reach the manufacturer, redress would be limited to an importer who may not be in privy with the manufacturer nor motivated to protect the integrity of the product itself.

Finally, the deletion of existing Liq 72 removes from a distiller/manufacturer the ability to determine whether or not its product should be distributed and sold in the State of Minnesota. This result could conclude with constitutional arguments

and embroil the State of Minnesota in issues raised in cases like Adolph Coors Company v. A. and S. Wholesalers, 1977-2 Trade Cases ¶ 61565 (10th Circuit, 1977); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); Continental TV v. G.T. Sylvania, 97 S. Ct. 2549 (1977).

It is found that the proposed deletion of existing rule Liq 72 is neither reasonable nor necessary and that the Commissioner should not delete existing Liq 72.

28. Proposed rule Liq 72 [existing Liq 73] pertains to information which must be filed with the Commissioner along with registration of brand labels.

In order to simplify the registration requirements, the following changes are made in proposed Liq 72:

(1) The check in the amount of $10.00 will no longer be required to be certified.

(2) Only one set of front and back labels and others labels need be submitted, rather than two.

(3) Only one set of photostatic copies of beer cans and lids need be submitted, rather than two.

(4) Containers of malt beverages need be submitted for analysis only when requested by the Commissioner.

(5) Assigned chemical analysis of the product and a verified statement that the product will correspond in all respects to the sample and analysis need be submitted only when requested by the Commissioner.

There were no substantial adverse comments to the above-referred amendments. However, the proposal would delete existing Liq 73(f) on the assumption that brand ownership of a label will no longer be required for registration purposes. In accordance with the findings of Paragraph 27b. hereinabove, existing Liq 73(f) should be adopted and incorporated into proposed Liq 72. Otherwise, it is found that proposed Liq 72 is reasonable and necessary and should be adopted by the Commissioner.

29. Proposed rule Liq 73 is identical to existing rule Liq 74 and should be adopted by the Commissioner.

30. Proposed rule Liq 74 [existing Liq 75] pertains to the abandonment of importation of any brand of alcoholic beverages

into Minnesota. The proposal would delete the existing requirement that the brand label registrant for malt beverages submit a letter to the Department each month of each year indicating the brands of beer shipped into or sold in the State of Minnesota. It is found that such deletion will eliminate the burden of filing information which is not essential to the Department's duties.

Accordingly, it is found that proposed rule Liq 74 is reasonable and necessary and should be adopted by the Commissioner.

31. Proposed rules Liq 75, 76 and 77 are identical to existing rules and should be adopted by the Commissioner.

32. In the proposal, Liquor rules numbered 78 through 79 are appropriately reserved for future use.

33. Proposed rule Liq 83 pertains to certain manifests or invoices. The Department's rules dealing with the manifest or invoice for liquor shipped into Minnesota are appropriately simplified. Only two copies, rather than four, are required to be submitted in order to eliminate unnecessary paperwork for importers and the Department.

The reference to certification labels in proposed Liq 83 B is appropriately deleted since the Department does not deem such information necessary to discharge its duties.

Existing Liq 83(c), prohibiting the release or unmanifested shipments to consignees, is appropriately deleted because the Department believes it unduly penalizes the consignee of liquors for the possible failure of the consignors to forward the manifest to the Department in a timely fashion.

Except for the changes stated hereinabove, proposed Liq 83 is the same as existing Liq 83. It is found that proposed Liq 83 is reasonable and necessary and should be adopted by the Commissioner.

34. Proposed rule Liq 84 pertains to the transportation of distilled spirits into Minnesota. The proposed rule is identical to the existing rule except for an appropriate reference change in

proposed Liq 84 A and the deletion of existing subpart (b). The deletion is reasonable in view of the recommendation hereinabove to delete existing Liq 83(c) prohibiting the release of unmanifested shipments to consignees.

Accordingly, proposed Liq 84 is reasonable and necessary and should be adopted by the Commissioner.

35. Chapter Ten of the existing Liquor rules is renumbered to Chapter Nine in the proposed rules.

36. Proposed rule Liq 92 pertains to the standards of fill for distilled spirits. The standards of fill for distilled spirits are proposed to be amended in order to authorize the importation and sale of metric equivalent containers. It is reasonably anticipated that liquor manufacturers will be changing over to metric containers. There was no substantial objection to proposed Liq 92.

Accordingly, proposed rule Liq 92 is found to be reasonable and necessary and should be adopted by the Commissioner.

37. Proposed rule Liq 95 pertains to the standards of fill for wine. The standards of fill for wine are also amended to authorize the importation and sale of metric equivalent containers. There was no substantial objection to proposed Liq 95.

Accordingly, proposed rule Liq 95 is found to be reasonable and necessary and should be adopted by the Commissioner.

38. Proposed rule Liq 98 pertains to labeling requirements and alcoholic content. It is proposed that the term "strong" (for any malt beverage products sold in cans) be permitted to be placed on the can in any permanent medium. The proposal will allow the beer producer more latitude in using new processes for the permanent identification of strong and 3.2 beer.

A new provision is added to clarify the Department's authority to confiscate any product not labeled in accordance with the proposed rule.

Proposed rule Liq 98 is found to be reasonable and necessary and should be adopted by the Commissioner.

39. Proposed rule Liq 99 substitutes the word "rule" for the word "regulation" and again, makes it clear that any product not appropriately labeled is subject to confiscation by the Commissioner.

There was no substantial objection to proposed Liq 99 and it is found that the proposal is reasonable and necessary and should be adopted by the Commissioner.

40. Proposed rule Liq 100 pertains to the standards of fill for malt beverages. The proposal is amended to authorize the importation and sale of metric equivalent containers for malt beverages.

Proposed rule Liq 100 is found to be reasonable and necessary and should be adopted by the Commissioner.

41. Chapter Eleven of the existing Liquor rules is renumbered to Chapter Ten, Chapter Twelve of the existing rules is renumbered to Chapter Eleven, Chapter Thirteen of the existing rules is renumbered to Chapter Twelve.

42. Proposed rule Liq 123 pertains to the "Permit Holders Report". The rule is amended so that a permit holder is required to file only an annual report instead of monthly reports. This amendment will result in a reduction of the burden of filing and will render more efficient the Department's administration of this provision without reducing necessary information.

Accordingly, proposed rule Liq 123 is found to be reasonable and necessary and should be adopted by the Commissioner.

43. The proposed Liquor rules contained a proposed Form PS 9024, governing the format of brand owner or wholesale price schedules. No substantial objection was raised to the proposed Form format.

CONCLUSIONS

A. That the Minnesota Department of Public Safety, Liquor Control Division, and the Hearing Examiner duly acquired and now have jurisdiction over the within considered proceedings.

B. That all relevant, legal and procedural requirements of statute and regulation have been properly complied with for the

purpose of proceeding to public hearing and issuing the within Report.

C. That before the close of the record, certain Legislators submitted letters to the Hearing Examiner indicating that they were involved in authoring or passing M. S. 340.114, and that it was not the intent of the Legislature to treat Minnesota produced "private labels" distilled spirit products on the same basis as "national brands" produced by manufacturers outside the State. Nevertheless, the submissions were made in written form after the public hearings and were, therefore, not subject to questioning. More importantly, such written submissions of individual Legislators cannot be used in this Report to determine legislative intent. See, Minn. Stat. § 645 (1976). Interestingly, Minn. Stat. § 340.114 does not refer to: "national-brand labels", "Minnesota owned private-brand labels", "private-brand labels", etc. The only statutory phrase which might be referenced for the purpose of distinguishing between so-called "national-brand labels" and "private-brand labels" is the use of the phrase "licensed importers" in Section 340.114. If the phrase "licensed importers" were to be interpreted as referring only to importers that bring intoxicating liquor into Minnesota, while excluding Minnesota wholesalers, the thrust of Minn. Stat. § 340.114 would be directed only to so-called "national-brand labels" but not "private-brand labels" produced in Minnesota. Nevertheless, such interpretation of the statute is currently foreclosed by the Supreme Court's affirmation of a Minnesota trial court's finding that it is reasonable to interpret the phrase "licensed importers" as including licensed wholesalers. A contrary result can only be reached if the Supreme Court interprets the phrase differently, or if the Legislature acts.

RECOMMENDATIONS

IT IS HEREBY RESPECTFULLY RECOMMENDED: That the Commissioner of the Minnesota Department of Public Safety adopt the within subject rules, in accordance with the Findings hereinabove.

Any language changes, deletions or additions necessitated by the Findings hereinabove will be reviewed by the Chief Hearing Examiner when determining the issue of "substantial change".

Dated: January 20, 1978.

William Seltzer

WILLIAM SELTZER
Hearing Examiner

STATE OF MINNESOTA

COUNTY OF RAMSEY

BEFORE EDWARD G. NOVAK

COMMISSIONER OF PUBLIC SAFETY

In the Matter of the Proposed Adoption of Rules of the State Department of Public Safety Governing Standards for Administration of the Intoxicating Liquor Act.

FINDINGS OF FACT, CONCLUSIONS AND DECISION

The above-entitled matter came on for hearing before William Seltzer, Hearing Examiner, on the twenty-fourth day of August, 1977, at 9:00 a.m. in the Auditorium, State Office Building, Saint Paul, Minnesota, after proper notice required by Minn. Stat. § 15.0412 (1977 Supp.) was served upon all persons, associations and other interested groups registered with the Secretary of State for that purpose.

After affording interested persons an opportunity to present written and oral data, statements and arguments, having heard all of the testimony, having considered all the evidence adduced and upon the records, files and proceedings herein, the Hearing Examiner has made his findings, attached hereto. Upon review of the Hearing Examiner's findings and the evidence and statements submitted by interested parties, I find the following:

1. The report of the Hearing Examiner is hereby adopted as the findings of fact, conclusions and decision of the Commissioner of Public Safety except for the following sections.

2. Proposed Liq 25: The Department has accepted the suggested language changes made by the Hearing Examiner. However, the Hearing Examiner also recommends that this introductory

paragraph specify the physical location at which the card or permit is expected to be kept by the holder.[1/] The Department believes that such a designation is unnecessary and would merely complicate the language of this paragraph. Identification cards, which are issued to persons, are to be carried by that person. Permits, which are issued with respect to any vehicle used to transport intoxicating alcoholic beverages or ethyl alcohol, should be carried in that vehicle.

It should be noted that the recommendations of the Hearing Examiner with respect to this rule did not alter the sufficiency of the rule as originally proposed. The Hearing Examiner clearly states that "(i)t is found that the introductory paragraph for proposed Liq 25 be adopted by the Commissioner either with the changes recommended hereinabove, or as originally proposed".[2/] The Department has accepted certain suggested language changes of the Hearing Examiner, but prefers to retain the remainder of the originally proposed language.

3. Proposed Liq 67A1: The Hearing Examiner rejected the Department's amendment proposed at the beginning of the public hearing to delete the word "female" and replace it with the word "person" in Liq 67A1. The Hearing Examiner based his rejection on the fact that the amendment was not properly noticed and therefore could not be considered or adopted by the Commissioner.[3/]

1/ Report of Hearing Examiner, p. 10.

2/ Id.

3/ Id.

Although the Hearing Examiner is of the opinion that proper notice of this change was not given, it should be noted that the Notice of Hearing specifically stated that the Commissioner proposed to adopt rules relating to "advertising".[4/] Moreover, the Hearing Examiner has approved a number of changes which were suggested by the agency or the industry during the course of the public hearing held in this matter, and we believe this change should be included in that category.

The Department submits that all notice requirements were substantially met by the Notice of Hearing and the introduction of the language change at the hearing. Anyone interested in changes in the advertising provisions of the rules was placed on notice by the Notice in the State Register. All participants at the hearing were given the opportunity to comment on the proposed change, and no opposition was recorded. Therefore, the Commissioner intends to adopt the change from "female" to "person" in its final rules.

4. Proposed Liq 39A, former Liq 72 and proposed Liq 71-77: The Hearing Examiner also recommends that the Department promulgate proposed Liq 39A and retain former Liq 72, which the Department had indicated it wanted to delete. The Department has decided to hold in abeyance action on both these recommendations due to the pending legislation in the Minnesota State Legislature

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4/ Notice of Hearing, 2 State Register 96 (July 18, 1977).

which could alter considerably one or more of these rules.[5/] Since these recommendations are not being acted on at this time by the Commissioner, the existing practices and regulations will be in effect until the Department takes action on the aforementioned proposed rules.

Dated: Feb. 28, 1978

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC SAFETY

Edw. G. Novak

EDWARD G. NOVAK
Commissioner of Public Safety

5/ See S.F. 1076 (Liq 39A); H.F. 2349 and H.F. 2355 (former Liq 72 and proposed Liq 71-77).

STATE OF MINNESOTA

COUNTY OF RAMSEY

BEFORE EDWARD G. NOVAK

COMMISSIONER OF PUBLIC SAFETY

In the Matter of the Proposed Adoption of Rules of the State Department of Public Safety Governing Standards for Administration of the Intoxicating Liquor Act.

ORDER ADOPTING RULES

The above-entitled matter came on for hearing before William Seltzer, Hearing Examiner, on the twenty-fourth day of August, 1977, at 9:00 a.m., in the Auditorium, State Office Building, Saint Paul, Minnesota, after proper notice required by Minn. Stat. § 15.0412 (1977 Supp.) was served upon all persons, associations and other interested groups registered with the Secretary of State for that purpose.

After affording interested persons an opportunity to present written and oral data, statements and arguments, having considered all the evidence adduced and upon the records, files and proceedings herein, and applicable statutory standards or criteria, and having considered the findings of fact and recommendations of the Hearing Examiner,

NOW, THEREFORE, IT IS ORDERED that these rules identified as the Rules of the State Department of Public Safety Governing Standards for Administration of the Intoxicating Liquor Act, with the exception of proposed Liq 39A, former Liq 72 and proposed Liq 71-77, are adopted this 28th day of February, 1978, pursuant to the authority vested in me by Minn. Stat. § 299A.02, Subd. 3 (1976).

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC SAFETY

Edw G Novak

EDWARD G. NOVAK
Commissioner of Public Safety

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE MINNESOTA DEPARTMENT OF PUBLIC SAFETY
LIQUOR CONTROL DIVISION

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE STATE DEPARTMENT OF PUBLIC SAFETY GOVERNING STANDARDS FOR ADMINISTRATION OF THE INTOXICATING LIQUOR ACT.	REPORT OF THE CHIEF HEARING EXMAINER

WHEREAS, hearings were held on August 24, 25 26, and 28, 1977, before William Seltzer, a Hearing Examiner of the State Office of Hearing Examiners, on the above-entitled matter in compliance with Minn. Stat. § 15.0412, Subd. 4; and

WHEREAS, the Report of Hearing Examiner made pursuant to Minn. Stat. § 15.052, Subd. 3, was issued to the Department of Public Safety, Liquor Control Division, on January 20, 1978; and

WHEREAS, the Department of Public Safety has now determined to adopt its rules, with the exception of Rules Liq 39A and Liq 71 through 77, including former Liq 72, pursuant to Minn. Stat. § 15.0412, Subd. 4; and

WHEREAS, the Department of Public Safety has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. § 15.052, Subd. 4, and Rule HE 107; and

WHEREAS, the Chief Hearing Examiner finds that the final proposed rules are not substantially different from those proposed at the public hearings and that the Department of Public Safety has met all requirements of Minn. Stat. § 15.0412, Subd. 4.

NOW, THEREFORE, upon receipt of this Report, the Department of Public Safety has the responsibility of submitting the complete hearing record and the rules as adopted by the Department to the Attorney General and to publish in the State Register, all pursuant to Minn. Stat. § 15.0412, Subd. 4.

Dated this 6th day
of March, 1978.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

PROPOSED RULES

MINNESOTA DEPARTMENT OF PUBLIC SAFETY

LIQUOR CONTROL DIVISION

~~Definitions~~ Introduction

Liq 1 In the statutes and ~~regulations~~ rules the following words and phrases will be used and shall have the meaning as hereinafter defined:

~~(g)~~ G. Importer~~,~~ means any ~~out-of-state~~ distiller, rectifier, winer, ~~brewer,~~ wholesale distributor or person within or without the state licensed to ship distilled spirits, wine~~,~~ or ethyl alcohol ~~or beer~~ to Minnesota manufacturers and wholesale distributors. ~~Sections 340.113 and 340.493.~~

Liq 2 As used in these rules the following words shall have the meanings as ascribed thereto:

A. "Commissioner" means the Commissioner of Public Safety or his duly appointed delegate.

B. "Department" means the Minnesota Department of Public Safety, Liquor Control Division.

C. "Office" or "this office" means the office of the Liquor Control Division.

Liq 3 If any paragraph, sentence, clause, or phrase of the rules of the department is declared invalid or unenforceable for any reason, such decision shall not affect the validity or enforceability of the remaining provisions of these rules.

Liq ~~2-4~~ 4-23 Reserved for Future Use.

CHAPTER TWO, EXCISE AND SURTAXES, was transferred to the Commissioner of Revenue pursuant to the transfer of functions effected by Laws 1976, Chapter 5, and is therefore deleted from the Liquor Control Rules.

CHAPTER THREE is renumbered to CHAPTER TWO

Liq 24 Permits and Fees.

~~Minn. St. Section 340.11, Subd. 1 provides that no person shall manufacture,~~

~~import, transport, sell, purchase for resale, or use in the manufacture of commercial products any alcoholic liquors fit for beverage use unless such person has applied and received from the Commissioner a license or permit authorizing the manufacture, importation, transportation, sale or the purchase for resale of such alcoholic liquors or for the use of such products and ethyl alcohol for industrial or non-industrial purposes.~~ Application forms for ~~such~~ licenses or permits required by Minn. Stat., Chapter 340 shall be furnished by the Commissioner upon request. The Commissioner shall not issue any such license or permit unless the applicant therefor has paid the appropriate license and permit fees required by Minnesota law and, if required, has filed a corporate surety bond.

~~Liq. 25. MINNESOTA MANUFACTURER OR WHOLESALE LICENSE FEE AND BOND REQUIRED.~~

~~(a) Minn. St. Section 340.11, Subd. 14 provides for a license fee for the manufacturer or wholesaler of distilled spirits and wine of $5,000 and such license shall be in effect for one year from the date of issuance. Minn. St. Section 340.12 provides for a corporate surety bond in the amount of $10,000 which shall accompany the license application and fee.~~

~~(b) The duplicate license fee for a manufacturer or wholesaler of distilled spirits and wine is $3,000 and such duplicate license shall be in effect and run concurrently with the period of the parent license. No bond is required.~~

~~(c) Minn. St. Section 340.485, Subd. 2 provides that the licensee shall file a penal bond in the sum not to exceed $50,000 effective July 1 of each year and which sum shall be determined by the Commissioner. Such bond shall be conditioned on the payment of~~

taxes due the state for each month.

Liq. 26. OUT STATE DISTILLERS, RECTIFIER, WINER OR WHOLESALE DISTRIBUTOR LICENSE FEE.

Minn. St. Section 340.113 provides for a license fee for any out-of-state distiller, rectifier, winer or wholesale distributor of distilled spirits, wine or ethyl alcohol of $150 and such license shall be in effect for one year from the date of issuance. No bond required.

Liq. 27. EXCLUSIVE MANUFACTURER OR WHOLESALER OF WINE LICENSE FEE AND BOND.

In addition to the provisions of Liq. 25 (c) above, Minn. St. Section 340.11, Subd. 14 provides for a license fee for the manufacturer or wholesaler of wine containing not more than 25 percent of alcohol by volume of $500 and such license shall be in effect for one year from the date of issuance. Minn. St. Section 340.12 provides for a corporate surety bond in the amount of $5,000 which shall accompany the license application and fee.

Liq. 28. EXCLUSIVE WHOLESALER OF SACRAMENTAL WINE LICENSE FEE AND BOND.

Minn. St. Section 340.17 provides for a license fee for a wholesaler of sacramental wine of $25 and such license shall be in effect for one year from the date of issuance. A corporate surety bond in the amount of $1,000 shall accompany the license application and fee.

Liq. 29. MINNESOTA BREWER LICENSE FEE AND BOND.

Minn. St. Section 340.402 provides for a license fee for a brewery manufacturing malt beverages containing more than 3.2 percent of alcohol by weight of $1,000 and such license shall be in effect for one year from the date of issuance. Minn. St. Section 340.403, Subd. 1 provides for a corporate surety bond in the amount of $5,000 which shall accompany the

~~license application and fee.~~

~~Liq 30 WHOLESALE DISTRIBUTOR OF MALT BEVERAGE LICENSE FEE AND BOND.~~

~~(a) Minn. St. Section 340.402 provides for a license fee for a wholesaler of malt beverages containing more than 3.2 percent of alcohol by weight of $200 and such license shall be in effect for one year from the date of issuance. Minn. St. Section 340.403, Subd. 1 provides for a corporate surety bond in the amount of $1,000 which shall accompany the license application and fee.~~

~~(b) Minn. St. Section 340.402 provides for a duplicate license fee for a wholesaler of malt beverages containing more than 3.2 percent of alcohol by weight of $15 and such license shall be in effect and run concurrently with the period of the parent license. No bond is required.~~

~~(c) Minn. St. Section 340.02, Subd. 5 provides for a license fee for a wholesaler of malt beverages containing not more than 3.2 percent of alcohol by weight of $10 and such license shall be in effect for one year from the date of issuance. No bond is required.~~

~~Liq 31 OUT STATE BREWER LICENSE FEE AND BOND.~~

~~Minn. St. Section 340.493, Subd. 2 provides for a license fee for an out-of-state brewer or wholesale distributor of malt beverages of $100 and such license shall be in effect for one year from the date of issuance. The applicant shall file a corporate surety bond in the amount of not less than $1,000 and not more than $5,000; whatever sum shall be required by the Commissioner.~~

~~Liq 32 COMMON CARRIER LICENSE FEES AND BOND.~~

~~(a) Minn. St. Section 340.11, Subd. 3 provides for a license fee for a~~

common carrier selling at retail distilled spirits and wine to passengers of $100 and such license shall be in effect for one year from the date of issuance. Minn. St. Section 340.12 provides for a corporate surety bond in the amount of $1,000 which shall accompany the license application and fee.

(b) The duplicate license fee for a common carrier selling at retail distilled spirits or wine to passengers is $10 and such duplicate license shall be in effect and run concurrently with the period of the parent license. No bond is required.

(c) The Sunday license issued by the Commissioner to common carriers as provided by Minn. St. 340.14, Subd. 5, (c) shall run concurrently with the period of the parent license. No bond is required.

(d) Minn. St. Section 340.02 provides for a license fee for a common carrier selling at retail non-intoxicating malt beverages to passengers of $25 and such license shall be in effect for one year from the date of issuance. No bond is required.

(e) The duplicate license fee for a common carrier selling at retail non-intoxicating malt beverages to passengers is $2 and such duplicate license shall be in effect and run concurrently with the parent license.

Liq - 33 - PHARMACISTS' SPECIAL PERMIT.

Minn. St. Section 340.18 provides for a special permit of $5.00 for pharmacists or druggists to sell intoxicating liquor for medicinal purposes on bona fide prescriptions.

Liq - 34 - BOTTLE CLUB FEES.

Minn. St. Section 340.119 provides for a permit fee of $100.00 for private clubs and public places that qualify to permit their patrons

~~to-consume-and-display-alcoholic-beverages-on-the-premises-as-covered by-Chapter-Eleven-of-these-regulations.--Such-permits-shall-be-in-effect July-1-through-June-30-each-year.~~

Liq -~~35~~ 25 Regulatory ~~Permit-Fees.~~ Permits and Fees.

Any person engaged in the purchase, sale, or use for any purpose other than personal consumption, or any vehicle~~s~~ used to transport intoxicating alcoholic beverages or ethyl alcohol shall obtain the appropriate regulatory permit and identification card from the Commissioner as provided in this ~~regulation~~ rule. The regulatory fee for each permit is $5.00 and shall be submitted together with the appropriate application form provided by the Commissioner. All identification cards and permits shall expire on December 31st of the year issued and are not transferable. The authority to order, sell, purchase, solicit or deliver granted by the card or permit in this section may be revoked by the Commissioner upon evidence of a violation by the holder of such a card or permit of any of the provisions of Minn. ~~St.~~ Stat. Chapter 340, ~~and~~ or any rule ~~or regulation~~ of the Commissioner made pursuant to law~~;~~. ~~by-the-holders-of such-cards-or-permits.~~

~~(a)~~ A. ~~Distillery-Representative's-Identification-Card.~~ Representatives' Identification Cards Required. Any distiller, rectifier, winer, or wholesale distributor ~~located-in-other-states-and~~ having one or more assigned representatives in the State of Minnesota shall for each representative so assigned apply to the Commissioner on Form No. 46 for a ~~Distillery~~ Representative's Card. ~~Such-distillery~~ A distiller or winer representative, except as provided in subparagraph C of this paragraph, shall ~~neither-solicit-nor~~ not, directly or indirectly, take orders from retail licensees, nor shall he give any financial inducement to any wholesaler's salesman to promote the sale to a

retailer of any alcoholic beverage. ~~Residents of Minnesota may apply for both Distillery Representative and Salesman's Cards and may be issued both cards subject to approval of the Commissioner.~~

~~(b)~~ B. Retailer's or Pharmacist's Identification Card. Any "on-sale" or "off-sale" liquor dealer or any purchasing agent of any municipal liquor store or any pharmacist or druggist holding permits issued by the Commissioner to sell medicinal liquors on prescription shall apply to the Commissioner on Form No. 84 for a permit to purchase distilled spirits, wine or malt beverages containing more than 3.2 percent of alcohol by weight from any manufacturer or wholesale distributor or any agent or representative thereof. Such identification cards shall be presented to the manufacturer or wholesale distributor or the agent or representative thereof when ordering distilled spirits, wine or malt beverages. Manufacturers or wholesale distributors or any agent or representative thereof shall not sell distilled spirits, wine or malt beverages having alcoholic contents as hereinbefore described to any licensee, permit holder, or purchasing agent of a municipal liquor store unless such person presents a Retailer's or Pharmacist's Identification Card issued by the Commissioner for the current year.

~~(c)~~ C. Salesman's Identification Card. Minnesota manufacturers, brewers, winers, and wholesale distributors shall for each employee acting in the capacity of a salesman or agent apply to the Commissioner on form No. 80 for a Salesman's Identification Card, which card shall be the authority for such employee to solicit orders from licensed

retail dealers, permit holders, or municipal liquor stores. Salesman's Identification Cards shall not be issued to retail licensees, managers of clubs, municipal liquor store employees, or persons engaged in the sale of alcoholic beverages at retail in the regular course of their employment.

~~(d)~~ D. Vehicle permit. All common carriers other than railroads, their motor affiliates, or public water transportation carriers, transporting into ~~and~~ or within the State of Minnesota, distilled spirits, wine, ~~and~~ or malt beverages containing more than 3.2 percent of alcohol by weight shall apply to the Commissioner on Form No. 38 for vehicle permits for each vehicle used in the transportation thereof. Such permit shall be issued only to common carriers licensed by the Minnesota ~~Railroad-and-Warehouse-Commission~~ Department of Public Service and to Minnesota manufacturers, winers, brewers, wholesale distributors, retail "off-sale" dealers licensed to sell intoxicating liquor, and other qualified persons, PROVIDED that no permits are required for trailers. Intoxicating liquor transported in any manner other than specified herein shall be confiscated and surrendered to the Commissioner for final disposition.

E. The following permits shall expire one year from date of issuance.

~~(e)~~ 1. Doctor's alcohol permit. Any physician, dentist, or veterinarian requiring ethyl alcohol in connection with their profession shall apply to the Commissioner on Form No. 44 for a permit to purchase ethyl alcohol.

~~(f)~~ 2. Food Manufacturer's permit. Any manufacturer of food products requiring intoxicating liquors in connections with such manufacture shall apply to the Commissioner on Form No. 76 for a permit to

purchase, possess and use intoxicating liquors.

~~(g)~~ 3. Hospital or sanatorium permit. Any hospital or sanatorium requiring medicinal liquors or ethyl alcohol to administer to patients on physician's prescription shall apply to the Commissioner on Form No. 47 for permit authorizing the purchase thereof.

~~(h)~~ 4. Pharmacist or druggist purchase alcohol permit. Any pharmacist or druggist requiring ethyl alcohol for the compounding of medicine shall apply to the Commissioner on Form No. 60 for a permit to purchase, use and possess ethyl alcohol.

~~(i)~~ 5. Purchase alcohol permit.

~~1.~~ a. Any person engaged in the manufacture of medicinal, pharmaceutical, antiseptic, flavoring extracts~~,~~, syrups~~,~~, foods~~,~~, scientific, chemical, mechanical, or industrial products, which are unfit for beverage use, or

~~2.~~ b. any municipal, county~~,~~ or state agency, or any university, college~~,~~ or laboratory used exclusively for scientific research, or any hospital or sanatorium using ethyl alcohol in connection with manufacture or research shall apply to the Commissioner on Form No. 81 for a permit to purchase ethyl alcohol.

Liq ~~36~~ 26-37 Reserved for future use.

CHAPTER FOUR is renumbered to CHAPTER THREE.

Liq 38 The duties and restrictions upon each manufacturer and wholesale distributor are as follows:

~~(a)~~ A. Sales to retailers. Manufacturers and wholesalers shall not sell at retail except~~ing only~~ in accordance with the privileges granted to breweries by Minn. ~~St.~~ Stat. ~~Section~~ 340.02, subd. 10 and 340.11, subd. 15. Manufacturers and wholesalers and their respective employees shall not sell or

deliver alcoholic beverages to any person, club, or business establishment unless the purchaser is licensed or authorized to sell the respective beverages at retail. A sale to an unlicensed retailer shall be a violation subject to penalties provided by law or ~~regulations~~ rules.

~~(b)~~ B. Written invoices. Manufacturers and wholesalers shall furnish a written invoice to each retailer for the alcoholic beverages sold and delivered to said retailers; the invoice shall clearly identify seller and purchaser, date, quantity, and brand names of products sold and the prices. When there are joint purchases as provided for in Minn. ~~St.~~ Stat. 340.408 manufacturers and wholesalers shall, in addition to the above, itemize on the invoice each such retailer purchasing jointly or in lieu thereof shall invoice joint purchases to each retailer separately.

~~(c)~~ C. Malt beverage invoices. All brewery and wholesalers' invoices of sale for malt beverages containing more than 3.2 percent of alcohol by weight shall have affixed thereto the signature of the retail dealer purchasing said beverages and also the number of the Retailer's Identification Card issued by the Commissioner for the current year. In addition thereto, such sales invoices shall designate the date of sale, the quantity sold, and the brand names. The failure of producers or wholesale distributors to comply with the provisions of this subsection shall be deemed a violation.

(d) Was transferred to the Commissioner of Revenue pursuant to the transfer of functions effected by Laws 1976, Chapter 5, and is therefore deleted from the Liquor Control Rules.

~~(e)~~ D. Financial interest forbidden. No manufacturer or wholesale distributor shall directly or indirectly or through any affiliate

require by agreement or induce any licensed retail dealer to purchase intoxicating liquor from themselves to the exclusion in whole or in part of other manufacturers or wholesale distributors if the direct effect from such agreement or inducement is to prevent, hinder or restrict any other manufacturer or wholesale distributor from selling or offering for sale intoxicating liquor to any such licensed retail dealer. Manufacturers and wholesalers in respect to retail dealers are forbidden:

1. to acquire or hold any direct or indirect interest in any retail license or proprietory interest in the business of a retail dealer; or
2. to acquire any interest in real or personal property owned, occupied or used by any retail dealer in the conduct of his business; or
3. to furnish, give, rent, lend or sell to a retail dealer any equipment, fixtures, supplies, money, service or other thing of value, except to the extent permitted by statute; or
4. to pay or credit a retail dealer for any retailer's advertising, display, or distributing service, except to the extent permitted by statute; or
5. to guarantee any loan or repayment of any financial obligation of the retail dealer; or
6. to extend a retail dealer credit for a period in excess of the credit period usual and customary in the industry or in excess of the credit period permitted by law; or
7. to require the retail dealer to purchase and sell a specified

quantity of any such products; or

8. to offer or pay a commercial bribe; or

9. to offer or make any gifts or to pay compensation to any proprietor, officer, employee or representative of a retail store; or

10. to coerce a retailer through threat of criminal prosecution, license discipline or denial; or

11. to sell, offer to sell, or contract to sell any licensed retail dealer any intoxicating liquor on consignment or under conditional sale or with the privilege of return on any basis otherwise than a bona fide sale. This subsection shall not apply to transactions involving solely the bona fide return of the product for ordinary and usual commercial reasons arising after the product has been sold.

~~(f). Filing wholesale catalogs.--Minnesota manufacturers and wholesale distributors of distilled spirits and wines shall file with the Commissioner a catalog or list of all such products which they offer for sale in this state showing brand names and 1 case wholesale prices before such products are sold to the retail dealers.--Such catalogs or lists shall remain permanent until amended by the wholesaler.--Any amendments to the permanent catalog or list shall be filed on the 10th day of each month.--Note:---Catalogs or lists will be used as a correlation between the permanent filed 1 case price and the filed "Varying Volume Price" (discount) schedule as provided for by Minn. St. 340.983.~~

~~(g)~~ E. ~~Price-Posting-"Varying-Volume-Prices"-(discounts)-and-amendments.~~ Filing of Wholesale Price Schedules and Amendments.

~~(1)~~ 1. ~~Each-manufacturer-or-wholesaler-who-sells-or-distributes-distilled-liquor-or-wine-in-this-state-to-retailers-shall-file-and maintain-with-the-department-in-quadruple-and-in-such-form-as-the department-shall-prescribe,-a-written-price-schedule-showing-the "Varying-Volume-Prices"-(discount)-offered-by-such-persons-to retail-licensees-within-the-state.~~ No brand owner or wholesaler of distilled liquor or wine shall sell, offer for sale, or solicit any order for distilled liquor or wine unless a schedule of wholesale prices for all distilled liquor and wine offered for sale by the brand owner or wholesaler is filed with the department, in such form as the department shall prescribe. No sale shall be made except in accordance with such price schedules.

~~(2)~~ 2. ~~Such-schedules-shall-be-filed-by-eligible-licensees-at-the-time their-license-is-issued-and-before-any-sales-are-made,-and-shall be-effective-immediately-upon-filing-with-the-department.--When a-manufacturer-wholesaler-license-is-transferred-from-one-legal entity-to-another,-new-one-case-price-schedules-and-any-"Varying Volume-Price"-(discount)-schedules-shall-be-submitted-by-the new-license-entity-before-any-sales-are-made.--Such-schedules shall-become-effective-immediately-upon-filing-with-the-department.~~ All wholesale price schedules shall be filed with the department not later than the first day of each month, and shall be effective from the first day of that month until the first day of the next month, provided that any filing may be amended within five business days after the first day of the month.

~~(3)~~ 3. ~~"All-Varying-Volume-Price"-(discount)-schedules-shall-be-filed with-the-department-on-the-tenth-day-of-each-month;-and-the schedule-shall-be-effective-from-that-day-until-the-tenth-day-of the-next-month,-provided-that-any-filing-may-be-amended-within five-days-after-its-filing.~~ All price schedules must be filed on Form PS 9024 or in such other format which must be approved by the Commissioner in advance of filing. All price schedules must indicate the one-case wholesale price of each brand of distilled liquor or wine being offered to retail licensees, together with all allowances, discounts (including varying volume discounts) or terms of any nature (including promptness of payment terms) which affect the wholesale price of such distilled liquor or wine to the retailer in any manner.

~~(4)~~ 4. ~~Amendments-to-"Varying-Volume-Price"-(discount)-schedules may-be-deposited-in-the-United-States-Mail,-addressed-to-the department-or-placed-on-file-with-the-department-after-the-tenth day-of-the-month-however-on-or-before-the-fifteenth-day-of-the month-to-become-effective-on-the-sixteenth-day-of-the-month-and to-remain-so-until-the-tenth-of-the-following-month.~~ After expiration of the five-day period for amendment of the wholesale price schedules, as provided for in subsection 2 herein, any brand owner or wholesaler can meet the competitive price of the same or similar distilled spirits or wine offered for sale to retailers by any other brand owner or wholesaler by filing at any time an amendment to its effective price schedule which lowers its net price for that particular brand, type and size container to or above the net price offered for sale to retailers by its competitor. Such amendment shall also designate the offeror,

the product, and the competitive price which the amendment is intended to meet. For the purposes of this section, "net price" shall mean the wholesale price, including all allowances, discounts (including varying volume discounts) or terms of any nature (including promptness of payment terms) which affect the wholesale price in any manner.

~~(5)~~ 5. ~~For any month for which amendments are not filed by the deadline, the "Varying Volume Price" (discount) schedule previously filed shall remain in effect. For any month for which a "Varying Volume Price" (discount) schedule is not filed by the deadline the last such filed schedule shall remain in effect.~~ All price schedules and amendments thereto shall be effective upon receipt by the department.

~~(6)~~ 6. ~~The word "brand" as used herein means "brand, trade mark, label, or name". And if an additional secondary name or different form of label is used each will be considered to be a separate brand.~~ All wholesale price schedules and amendments thereto must be understandable and enforceable by the department. If the department finds any such filing or amendment to be not understandable or not enforceable, or contrary to any statute or rule, it shall be rejected, setting forth the reason for such rejection.

7. No wholesale price schedule or amendment thereto shall list brands of distilled liquor or wine which are not in stock or on bona fide order at the time such schedule is filed with the department.

~~(7)~~ 8. For purposes of this ~~regulation~~ rule, purchasers who are licensed as common carriers and military units qualified as government instrumentalities are not to be deemed "Retailers".

~~(8) No wholesaler of distilled spirits or wine shall file a catalog or list of one case prices, "Varying Volume Price" (discount)~~

~~schedule or an amended "Varying Volume Price" (discount) schedule on which is shown a selling price per case at less than the cost thereof to such wholesaler. Cost shall include FOB price from importer, freight, state and federal taxes and duty on imported merchandise.~~

~~(9) An amended "Varying Volume Price" (discount) may be filed at below the wholesalers cost, and when such prices are filed to meet, in good faith, prices filed with the department on similar distilled spirits and wine by a competing wholesaler.~~

~~(10) Any manufacturer or wholesaler can meet competitive prices on the same or similar distilled spirits and wine by mailing or filing with the department on or before the fifteenth day of any calendar month, an amendment to his effective "Varying Volume Price" (discount) schedule which lowers his price or prices per case or increases his quantity discounts. Such amended price schedule shall become effective at the same time the competitive price for the same or similar item of the same or competitive brand shall become effective, or immediately if such competitive price schedule shall have become effective.~~

~~A quantity discount filed to meet competition may not be filed in an amount that would reduce the net price of the brand, type or size container below the net price of the competitive brand for the same quantity.~~

~~(11)~~ 9. Wine or other commodities may not be offered on original or assorted cases with distilled spirits or vice versa, and any quantity discount may not exceed 300 bottles of quarts or smaller bottles, or the equivalent of any authorized standard of fill

not to exceed 25 cases. In addition, no manufacturer, wholesaler or importer of distilled spirits or wine may sell or offer to sell to any retailer any brand or brands of intoxicating liquor under circumstances wherein the purchase of any quantity thereof entitles the retailer to a discount on the purchase price of any other brand or brands of intoxicating liquor.

~~(12). All permanent prices, "Varying Volume Prices" (discount) and amended "Varying Volume Prices" (discount) are public record.~~

~~(13). All "Varying Volume Prices" (discounts) and or their filed amendments must be understandable and enforceable by the department. If the department find such filings to be not understandable and not enforceable, they will be rejected by the sixteenth day of the month, setting forth the reason for the rejection.~~

~~(14).~~ 10. Any filing licensee who publishes, mails, delivers, distributes, advertises or in any other way directly or indirectly, disseminates distilled spirits and or wine information on ~~one case permanent prices, "Varying Volume Price" (discounts) or amended "Varying Volume Price" (discounts) for any brand, to retailers served by him,~~ its wholesale price schedule or amendments thereto, shall, in any such material, include all such ~~discounts filed by him for such brand, and shall disseminate such information to all retailers served by him.~~ allowances, discounts or terms, and shall disseminate such information to all retailers served by it.

~~(15).~~ 11. The publication, mailing or delivering of any written material containing less than all of the ~~"Varying Volume Price" (discounts)~~ wholesale price schedule posted for any brand by a filing licensee shall be deemed a violation of this ~~regulation~~ rule.

(16)--~~The mailing or delivering of written lists of "Varying Volume Price" (discounts) to selective retailers rather than to all retailers served by the filing licensee shall be deemed a violation of the regulation.~~

~~(17).~~ 12. The publication of ~~one case permanent prices and all "Varying Volume Prices" (discounts)~~ all wholesale price schedules filed with the department by a filing licensee, on or before the effective date thereof, in any trade journal or industry price book of general circulation among retailers, shall be deemed sufficient compliance with the provisions of subparagraphs ~~(14), (15), (16),~~ 10 and 11 of paragraph ~~(g).~~ E.

~~(18).--This regulation does not apply to a licensees salesman who has in his possession a "Varying Volume Price" (discount) schedule, and from which he orally informs a retailer as to "Varying Volume Price" (discounts) filed with the department.~~

~~(19).~~ 13. Any ~~manufacturer~~ brand owner or wholesaler may at any time file with the department written price schedules showing the one-case price ~~and the "Varying Volume Price" (discount) offered on any new brand, to become effective immediately.~~ together with all allowances, discounts (including varying volume discounts) or terms of any nature (including promptness of payment terms) offered on any new brand being introduced into the state, to become effective immediately.

~~(20).~~ 14. Whenever the ~~tenth~~ first day of the month ~~or the fifteenth day of the month~~ falls on a Saturday, Sunday or a legal holiday, the distilled spirits and wine schedules required to be filed with the department shall be received by the department not later than

the close of the next business day.; ~~Consequently, this will extend the one case price and the amended filing five days from the first business day when the one case price and the "Varying Volume Prices" (discounts) are received in this office,~~ however, the next month's filing will be filed on schedule as provided for by Statute and ~~Regulations.~~ rules.

~~(21).~~ 15. Pursuant to an order issued by the department any price filings may be changed at any time to reflect changes in Federal or State Excise Taxes on distilled spirits and wine, or to comply with the requirements of any order issued by the Federal Government relating to price control.

~~(22).~~ 16. ~~All manufacturers and wholesalers sales to retailers, whether it be individual or joint sales, shall ship every such sale in the full amount at one time during the month of that sale.~~ All brand owners and wholesalers shall ship every sale to a retailer, whether such sales are individual or joint sales, in the full amount at one time during the month of that sale.

~~(23).~~ 17. ~~Manufacturers or wholesalers close out sales.~~ Any ~~manufacturer~~ brand owner or wholesaler who desires to close out a brand or type of distilled spirits or wine below his cost for such products, shall apply to the Commissioner to do so. Permission will be granted at the discretion of the Commissioner, when the merchandise has been owned and possessed for a period of at least six months. All such authorized close outs shall be so noted as close outs on the filed ~~"Varying Volume Price" (discount)~~ wholesale price schedule. Any ~~manufacturer~~ brand owner or wholesaler who closes out a brand or type of spirits or wine may not restock such product for a period of twelve months.

(24). ~~If any paragraph, sentence, clause or phrase of this regulation is for any reason declared invalid, such decision shall not affect the validity of the remaining provisions of this regulation.~~

~~(h)~~ F. Gifts forbidden. No manufacturer, importer, or wholesale distributor of distilled spirits, wines, or malt beverages containing more than 3.2 percent of alcohol by weight, shall, directly or indirectly, or through any officer, agent or employee, offer or grant discounts, rebates, free goods, allowances or other concessions in wholesale prices unless the same terms are offered uniformly to each retailer in the wholesaler's or manufacturer's trade territory at the same time and for the same period, and any and all such discounts, rebates, free goods, allowances or other concessions made because of quantity purchases or for any other reason shall be specifically noted on the invoice of each and every retailer to whom such concessions are granted.

~~(i)~~ G. Sales discrimination forbidden. Minnesota manufacturers and wholesale distributors shall not discriminate in the sale of their products to retail dealers except that manufacturers or wholesale distributors may refuse to sell intoxicating liquor or non-intoxicating malt liquor to a retail dealer who may have violated any law, ~~commissioner's regulation~~ rule or municipal ordinance relating to the sale of such liquor at retail, or who has breached a contract for sale with the manufacturer or wholesaler. Upon notice from the Commissioner, manufacturers and wholesale distributors shall not sell intoxicating liquor or non-intoxicating malt liquor to any "on-sale" or "off-sale" licensee who refuses to sell or serve alcoholic

beverages to any person because of race, color, national origin, or who discriminates in the selection of its membership on the basis of race, color, or national origin.

~~(j)~~ H. Peddling forbidden. No manufacturer or wholesale distributor of distilled spirits and wine or their employees shall transport such products in vehicles for the purpose of soliciting orders from retail dealers and filling such orders from stocks transported in such vehicles.

~~(k)~~ I. Container limitation. No manufacturer or wholesale distributor shall sell distilled spirits to retailers in containers holding more than 64 ounces nor less than 8 ounces, or their metric equivalents, except wine may be sold in containers holding 1/20 gallon (6 2/5 oz.), or its metric equivalent, to on and off sale licensees.

~~(1)~~ 1. Miniature containers shall be sold only to licensed common carriers for dining facilities, licensees who have approved dispensing devices and pharmacists having a permit to sell medicinal liquors on prescription for dispensing to patients in hospitals and nursing homes.

~~(2)~~ 2. No containers of distilled spirits holding less than one-fifth of a gallon, or 750 milliliters, shall be sold to retail "on-sale" dealers.

~~(3)~~. 3. Still wines--case sales. Still wines shall be sold by Minnesota manufacturers and wholesalers to retail liquor dealers only in case lots. The cases shall be filled with wines of only one tax class, that is, wines of 14 percent or less of alcohol by volume shall not be combined in a case with wines of more than 14 percent of alcohol by volume.

~~(l)--Identification-cards-required.--Minnesota-licensed-manufacturers, wineŗs,-brewers,-wholesale-distributors,-and-out-of-state-manufacturers, wholesale-distributors-and-brewers-who-import-their-products-into Minnesota-shall-obtain-a-permit-from-the-Commissioner-for-each employee-acting-in-the-capacity-of-salesman-or-sales-representative. Such-salesman-or-representative-shall-not-solicit-or-accept-orders from-retail-dealers-unless-the-dealers-exhibit-a-current-Retailer's Identification-Card.~~

~~(m)~~ J. Sale or delivery prohibited in certain municipalities. No manufacturer or wholesale distributor shall sell or deliver distilled spirits, wine, ethyl alcohol or intoxicating malt beverages in any municipality prohibiting the sale thereof. However, intoxicating liquors and ethyl alcohol may be sold in such municipalities to persons who are holders of permits to sell such products for industrial or medicinal purposes, or for sacramental use.

~~(n)~~ K. Transfer of business and license. Any manufacturer, wholesale distributor or brewer may transfer his business and his license with the approval of the Commissioner. When contemplating transfer the licensee shall submit his license to the Commissioner and all permits issued in connection therewith, together with a complete notarized inventory of alcoholic beverages on hand, giving the brand names, the size and number of containers. The request for transfer shall be accompanied by the license application and bond of the proposed purchaser.

NOTE: Any application for transfer of a license shall be accompanied by a transfer fee of $10.00.

~~(e)~~ L. Branch establishments. Manufacturers and wholesale distributors of distilled spirits, wine and malt beverages licensed by the Commissioner may maintain branch establishments provided that such establishments are directly owned and managed by said manufacturers and wholesale distributors, and that all employees of such establishments are paid only fixed salaries and/or commissions. No branch license shall be granted to holders of wholesale non-intoxicating malt liquor licenses.

~~(p)~~ M. Withdrawal of distilled spirits and wine from wholesalers by their employees and distillers or winers representative. No persons employed by importers, distillers, rectifiers, winers, Minnesota licensed manufacturers or wholesalers, shall withdraw distilled spirits or wine from the premises of manufacturers or wholesalers unless such requisition has been approved by the Commissioner on a form prescribed by him.

Paragraph #2 was transferred to the Commissioner of Revenue pursuant to the transfer of functions effected by Laws 1976, Chapter 5, and is therefore deleted from the Liquor Control Rules.

Liq 39 SALES TO WHOLESALERS AND MANUFACTURERS.

A. All importers, including manufacturers and wholesalers licensed pursuant to Chapter 340, are required to offer for sale to all Minnesota wholesalers and manufacturers all intoxicating liquor (except wines and malt beverages) brought into Minnesota. If such intoxicating liquor is further distilled, refined, rectified, blended, bottled, labeled or prepared in any manner subsequent to

its importation into Minnesota, such importers are required to offer for sale to all Minnesota wholesalers and manufacturers the finished product. All such offers shall be made on an equal basis to all such wholesalers and manufacturers.

B. No importer shall offer any intoxicating liquor for sale to any Minnesota wholesaler or manufacturer without first filing with the department, on a form approved by the Commissioner, an itemized list specifying the price, brand, type, container size, proof and age of the liquor so offered. These prices must be filed on the 15th of the month and shall become effective on the first day of the month next succeeding the first full month after the date of filing and shall remain in effect for a period of not less than 30 days and until changed by a subsequent price filing which shall take effect in like manner.

C. All prices filed shall be the lowest prices, as contemplated by Minn. Stat. 340.114, subd. 3, at which such liquor is contemporaneously being sold by such importer in any other state or in the District of Columbia. All such liquor shall be offered for sale to all Minnesota wholesalers and manufacturers on an equal basis, and at the applicable filed price.

Liq ~~39 and~~ 40 Reserved for Future Use.

CHAPTER FIVE is renumbered to CHAPTER FOUR.

CHAPTER SIX is renumbered to CHAPTER FIVE.

Liq 56 "On-sale" Dealers.

~~(a)~~ A. Containers---minimum quantities~~.~~; minimum proof of distilled spirits. No "on-sale" dealer shall purchase or possess distilled spirits in containers of less than one-fifth gallon or its metric

equivalent. Containers of less than one-fifth of a gallon, or its metric equivalent, shall be subject to confiscation provided, miniatures containing not more than two ounces, or their metric equivalent, may be purchased for dispensing devices, the use of which has been specifically approved by the Commissioner. In addition, no "on-sale" dealer shall purchase distilled spirits other than cordials, liqueurs, or specialty items which are less than eighty (80) proof.

~~(b)~~ B. Liquor to be consumed on premises. "On-sale" liquor licenses shall sell intoxicating liquor to lawful consumers by the drink for consumption on the premises only. For purposes of this regulation the sale of miniatures in approved dispensing devices shall be considered sale by the drink in guest rooms of hotels as defined in Minn. ~~St.~~ Stat. 340.07, subd. 12.

~~(c)~~ C. Display forbidden. No "on-sale" liquor establishment shall display any intoxicating liquor when open to the public during hours when the sale of such liquor is prohibited by law, except as provided by Minn. ~~St.~~ Stat. 340.119.

~~(d)~~ D. Dilution or changing containers. No "on-sale" dealers, or ~~his~~ their employees, shall remove intoxicating liquor from the original containers and place said liquor in any other container, nor shall such persons dilute or in any manner tamper with the original contents thereof as provided by Minn. ~~St.~~ Stat. 340.141 to 340.143 inclusive, except that wine may be withdrawn from tax paid containers and placed in decanters for service bar purposes.

~~(e)~~ E. Containers subject to seizure. Intoxicating liquors in open containers which upon inspection indicate dilution, tampering, refilling or impurities shall be subject to seizure by Liquor Control Inspectors.

~~(f)~~ F. Containers must be visible to public. All containers from which alcoholic beverages are sold or dispensed shall be clearly visible to the consuming public, except that malt beverages may be dispensed by tap from the keg when the keg itself is not in sight, and miniatures may be dispensed by approved mechanical devices, provided that the brand label appears on the tap handle or device. No container of intoxicating or malt liquor shall be dispensed from any mechanical or coin operated device, unless said device can be operated in full compliance with all provisions of state law and the ~~regulations~~ rules of the Commissioner and has been specifically approved for operation by the Commissioner. The Commissioner may impose such conditions as he deems necessary for any such approval and the failure to meet said conditions or the violation thereof shall terminate any approval.

CHAPTER SEVEN is renumbered to CHAPTER SIX.

Liq 67 Statements or Acts Prohibited.

All local advertising shall also be subject to the provisions of this chapter as hereinafter stated.

~~(a)~~ A. No advertisement of alcoholic beverages shall contain:

~~(1).~~ 1. Any illustration of a female which is not dignified, modest, or in good taste, or depicts a female in provocative dress or consuming a drink. Any family scene in which is portrayed a child or objects (such as toys) suggestive of the presence of a child, or in any manner portrays the likeness of a child, or contains any matter to appeal to immature persons.

~~(2).~~ 2. Any statement that is false or misleading in any manner.

~~(3)~~ 3. Any statement, design, device or representation which is obscene or indecent.

~~(4)~~ 4. Any statement concerning a brand of intoxicating liquor that is inconsistent with any statement on the labeling thereof.

~~(5)~~ 5. Any statement, design, device, or representation relating to any guaranty unless such guaranty is enforceable.

~~(6)~~ 6. Any statement describing such liquor to be beneficial and healthful.

~~(7)~~ 7. Any statement or display relating to the price of such liquor except in windows and premises of licensed establishments.

~~(8)~~ 8. Any statement, design, or device relating to biblical characters or to any public official, agency or branch of the Federal, state or local governments, including former presidents of the United States.

~~(9)~~ 9. Any statement, design, device or pictorial representation capable of being construed as relating to the armed forces of the United States, or the American Flag, or any emblem, seal, insignia or decoration associated with such flag or armed force.

~~(10)~~ 10. Any statement relating to the giving away of alcoholic beverages, premiums or novelties in connection with the sale of any alcoholic beverages.

~~(b)~~ B. Restrictions:

~~(1)~~ 1. No alcoholic beverages, prizes, or premiums shall be given away in connection with the sale of alcoholic beverages, except that consumer's advertising specialties, such as ash trays, bottle or can openers, corkscrews, paper shopping bags, matches, printed

recipes, wine lists, leaflets, blotters, post cards, pencils, stirrers, glassware, calendars, notebooks, playing cards, greeting cards, folding knives, or any similar articles which bear advertising matter may be furnished or given to consumers. The distribution of such advertising specialities shall be limited to the licensed premises only. Such advertising specialties shall be submitted to and approved by the Commissioner before distribution.

~~(2).~~ 2. No advertisement or display of intoxicating or malt liquor shall contain any statement or illustration of or reference to a bank, bank deposit book, money, gambling, or quotations such as ~~"Saving," "Economy," "Better Buys," "Will Not Be Undersold," "Cash and Carry," "Free Delivery," "Today's Feature,"~~ "Moving," "Going Out of Business," "Reduction of Stock," "Sale of Damaged Stock," "School or College Athletics," or "Pay Checks," ~~or similar illustrations or references~~ in any form of advertising. However, such references may be included in or on show windows in or on licensed premises.

~~(3).~~ 3. No display of any intoxicating liquor shall be made in any place except the licensed premises.

~~(4).~~ 4. No advertisement or display of malt beverages containing more than ½ of 1% of alcohol by weight shall contain any reference to price of malt beverages, except within windows and premises of licensed establishments.

CHAPTER EIGHT is renumbered to CHAPTER SEVEN.

Liq 71 Brand Label Approval.

~~Minn. St. Section 340.62 provides that no~~ No brand of distilled spirits, wines, or fermented malt beverages containing more than one-half of one

percent of alcohol by volume shall be imported into or sold within the State of Minnesota unless the brand label is approved by the Commissioner and registered in the manner provided.

A. For sample purposes only. A licensed importer or wholesaler may, with the prior approval of the Commissioner, import without registration reasonable amounts of alcoholic beverages to be used for sample purposes only. However, all such sample shipments must be manifested, as provided in Liq 83.

~~(a)~~ B. Any alcoholic beverages whose brand label is not approved and registered ~~as provided by Minn. St. 340.62 and Chapter Eight hereof and not located on a Minnesota licensed wholesaler's premises~~ shall be confiscated.

~~Liq 72 BRAND LABEL OWNERSHIP.~~

~~The brand label will not be registered unless it is ascertained that the proposed registrant is the owner of the label, or has been assigned the brand label registration permission in writing by the brand owner pursuant to Federal and state laws.~~

Liq ~~73~~ 72 Registration.

A written request for registration of a brand label shall be filed with the Commissioner, accompanied by the following items:

~~(a)~~ A. A ~~certified~~ check payable to ~~"Liquor Control Commissioner"~~ "Director of Liquor Control" in the amount of $10, for payment of the registration fee for each brand and for each type of product.

~~(b)~~ B. A ~~duplicate~~ set of front and back labels, and any other labels to be affixed to the containers. In the case of imported ~~wines and distilled spirits,~~ alcoholic beverages, the name and address of the importer must be shown on the label.

~~(c)~~ C. A ~~duplicate~~ set of photostatic copies of beer cans and lids.

~~(d)~~ D. If requested by the Commissioner, ~~Two~~ two labeled and sealed containers of malt beverages for analysis. ~~by the Commissioner.~~

~~(e)~~ E. If requested by the Commissioner, ~~A~~ a complete, signed chemical analysis of the product and a verified statement that the product to be sold under the label will correspond in all respects to the sample and analysis.

~~(f) A verified statement by the brand owner or his authorized representative declaring ownership of the label and identifying the United States distributer, if other than the brand owner.~~

Liq ~~74~~ 73 Commissioner to Approve Change.

Any change of ownership or of contents of alcoholic beverages and the labeling in connection therewith from the original registration of such contents and labels shall be promptly submitted to the Commissioner for approval before the importation or sale of such beverages in the state.

Liq ~~75~~ 74 Abandonment.

Any brand of alcoholic beverage for which Minnesota importation has been discontinued for two years or which has been abandoned shall not be imported in this state unless the brand label is re-registered in the manner provided in Liq ~~73~~ 72. ~~In the case of fermented malt beverages, it is required that the brand label registrant submit a letter to this office each month of each year indicating the brands of beer shipped into and/or sold in the State of Minnesota.~~

Liq ~~76~~ 75 Importers to Ascertain Registration.

Minnesota manufacturers and wholesale distributors shall ascertain before the importation of any alcoholic product into the state that said product has been registered and the analysis of the brand submitted to and approved by the Commissioner.

Liq ~~77~~ 76 Stock Transfer Shall be Arranged Before Change in Distributors.

When there is a change in distributorship of the brand, the brand owner shall arrange for the transfer of the stock on hand to the new distributor or for shipment to the producer of the brand 5 days before the change is made. This shall not apply if the brand is distributed by more than one wholesaler in this state.

Liq ~~78~~ 77 Bulk Containers.

Distilled spirits and wine may be imported and sold to manufacturers in bulk containers without brand label registration.

Liq 78-79 Reserved for Future Use.

CHAPTER NINE is renumbered to CHAPTER EIGHT.

Liq 83 Manifest or Invoice.

Minn. ~~St.~~ Stat. ~~Section~~ 340.485, Subd. 3 provides that importers of distilled spirits, wines, ethyl alcohol or sacramental wine shall prepare a manifest in ~~quadruplicate~~ duplicate on forms prescribed by the Commissioner for each shipment into Minnesota, and shall forward the manifest to the Commissioner prior to the time of shipment.

~~(a)~~ A. The manifest shall represent only the shipment of each single conveyance.

~~(b)~~ B. The manifest shall designate the consignee and consignor, the date of shipment, name of common carrier, brand name, brand label registration number, the number of packages and the number of containers in each package, the size of each container, the proof of the product and the total gallonage~~,-and-shall-state-whether-or-not-Minnesota-certification-labels-are-affixed~~.

~~(c)-The-shipment-will-not-be-released-to-the-consignee-unless-the-manifests-are-received-by-the-Commissioner-one-or-more-days-prior-to-the-arrival-of-the-shipment.~~

Liq 84 Transportation.

Only common carriers or duly licensed Minnesota manufacturers or wholesale distributors shall transport distilled spirits, wine, ethyl alcohol or malt beverages into this state.

~~(a)~~ A. All common carriers except railroads, their motor affiliates and public water transportation carriers, shall obtain a permit as provided in Liq ~~35-(d),~~ 25 (D), for each vehicle used to transport alcoholic beverages into Minnesota.

~~(b) Common carriers may store shipments of alcoholic beverages in warehouses pending release by the Commissioner. Alcoholic beverages so stored shall be deemed to be in the carrier's possession.~~

CHAPTER TEN is renumbered to CHAPTER NINE

Liq 92 Standards of Fill for Distilled Spirits.

½ gallon	4/5 pint
1 quart	½ pint
4/5 quart	Miniatures containing no
1 pint	more than 2 ounces

or the metric equivalent of any of the above.

Tolerance in the herein-described standards of fill may be allowed by the Commissioner for distilled spirits ~~imported from foreign countries and for domestic cordials.~~ upon prior application.

The regulations adopted by the Secretary of the Treasury pursuant to the Federal Alcohol Administration Act governing standards of fill shall be followed in all bottling or selling of distilled spirits in the State of Minnesota.

Liq 95 Standards of Fill for Wine.

Gallon	128 ounces
½ Gallon	64 ounces
Quart	32 ounces
Fifth	25-3/5 ounces
Pint	16 ounces

Tenth . . . . . 12-4/5 ounces
½ Pint . . . . . 8 ounces
Twentieth . . . . . 6-2/5 ounces
or the metric equivalent of any of the above.

Tolerance in the herein-described standards of fill may be allowed by the Commissioner ~~for wines imported from foreign countries, or for domestic sparkling wine.~~ upon prior application.

The requlations adopted by the Secretary of the Treasury pursuant to the Federal Alcohol Administration Act governing standards of fill shall be followed in all bottling or selling of wine in the State of Minnesota.

Liq 98 Labeling Requirements and Alcoholic Content.

~~The~~ For any product that contains more than 3.2% of alcohol by weight, the alcoholic content shall be stated and the product labeled as follows:--- "contains more than 3.2% of alcohol by weight" or "strong beer," "strong ale," "strong porter," "strong stout," etc.

~~(a)~~ A. ~~The~~ For any product that is sold in cans, the word "strong" shall appear on one end of each can ~~in waterproof ink or paint~~ in a permanent medium. For cone type cans, however, such indication shall by placed on the side. The same indication of type shall also appear on cans of malt beverages containing not more than 3.2% of alcohol by weight and the alcoholic content shall be stated as provided for in ~~(b)~~ B. of this ~~section~~ rule.

~~(b)~~ B. ~~The~~ For any product that contains more than ½ of 1 per centum of alcohol by volume and not more than 3.2% by weight, the alcoholic content shall be stated and the product labeled as follows: "contains not more than 3.2% of alcohol by weight" or similar expression of like meaning.

~~(c)~~ C. In place of submitting can containers for malt beverages, duplicate photostatic copies of each can shall be submitted for

both "3.2%" and "strong" and such copies shall clearly show the label and the alcoholic content.

~~(d)~~ D. The alcoholic content shall be stated if the product contains less than ½ of 1 per centum of alcohol by volume and shall be labeled "contains less than ½ of 1 per centum of alcohol by volume."

E. Any product not labeled in accordance with this rule shall be subject to confiscation by the Commissioner.

Liq 99 Alcoholic Contents to be Indicated on Containers.

Kegs or barrels sold in Minnesota shall have the contents identified by paper stickers or stencils affixed on the same surface as the brewer's identification stating either "strong beer" or "3.2 beer" or similar words which are appropriate to the content, or as an alternative the alcoholic contents of kegs or barrels may be identified with distinctive symbols which have been submitted to and approved by the Commissioner.

~~(a)~~ A. Non-returnable and sealed cases of bottles or cans shall have imprinted in ink on the top or one side of the case either "strong beer" or "3.2 beer" or similar words which are appropriate to the content, or by the use of distinctive symbols which have been submitted to and approved by the Commissioner. This provision shall apply to the shipping case and need not apply to smaller cartons which may be contained therein. Each brewer and importer shall notify the Commissioner whether identification will appear on the top or side of the case.

~~(b)~~ B. Unsealed returnable cases of bottles need no external marking to identify alcoholic content, if opening without breaking furnishes direct view of bottle which identify the alcoholic content pursuant to this ~~regulation~~ rule.

C. Any product not labeled in accordance with this rule shall be subject to confiscation by the Commissioner.

Liq 100 Standards of Fill for Malt Beverages.

The standards of fill for malt beverages in containers, whether domestically manufactured or imported for sale within the State of Minnesota, shall be as hereinafter provided:

1 Barrel

½ barrel	25-3/5 ounce container
¼ barrel	24 ounce container
1/8 barrel	16 ounce container
288 ounce container	12 ounce container
144 ounce container	10 ounce container
128 ounce container	8 ounce container
64 ounce container	7 ounce container
32 ounce container	6 ounce container

or the metric equivalent of any of the above.

Tolerance in the herein-described standards of fill may be allowed by the Commissioner ~~for-malt-beverages-imported-from-foreign-countries,~~ upon prior application. The regulations adopted by the Secretary of the Treasury pursuant to the Federal Alcohol Administration Act governing standards of fill shall be followed in all bottling or selling of malt beverages in the State of Minnesota.

CHAPTER ELEVEN is renumbered to CHAPTER TEN.

CHAPTER TWELVE is renumbered to CHAPTER ELEVEN.

CHAPTER THIRTEEN is renumbered to CHAPTER TWELVE.

Liq 123 Permit Holder's Report.

Permit holders shall report on Form No. 27 all purchases of ethyl alcohol, the amount used, and the balance at the end of the ~~month~~ year, ~~provided-that-this-section-shall-not-apply-if-the-amount-of-ethyl-alcohol used-is-less-than-one-gallon-per-month,-wherein-an-affidavit-to-that effect-shall-be-submitted-to-the-Commissioner-when-application-is-made~~

~~for-the-renewal-permit.~~ Manufacturers and wholesale distributors shall report the purchase and sales of ethyl alcohol on Form No. 29.

(Following is the proposed Form PS 9024, governing the format for brand owner or wholesaler price schedules. See Liq 38 E.)

PS 9024 MINNESOTA WHOLESALE PRICE FILING

Page No. _____

WHOLESALER _____

FOR MONTH OF _____ 19 _____

BRAND AND PROOF	SIZE	CASE LIST	CASE DISC.	CREDIT TERMS	CASE NET

STATE OF MINNESOTA

COUNTY OF RAMSEY

BEFORE EDWARD G. NOVAK

COMMISSIONER OF PUBLIC SAFETY

In the Matter of the Proposed Adoption of Rules of the State Department of Public Safety Relating to Standards for Administration of the Intoxicating Liquor Act.

NOTICE OF SUBMISSION OF HEARING RECORD TO THE ATTORNEY GENERAL

Pursuant to Minn. Stat. § 15.0412, Subd. 4 (1977 Supp.), you are hereby notified that the Hearing Record and proposed Liq 39A, former Liq 72 and proposed Liq 71-77 of the Rules of the State Department of Public Safety Governing Standards for Administration of the Intoxicating Liquor Act were submitted to the Attorney General on May 10, 1978. Former Liq 72 will be numbered Liq 72 and proposed Liq 72-77 will be renumbered Liq 73-78 respectively.

The Department's Adopted Rules; Order Adopting Rules; and Findings of Fact, Conclusions and Decision are available for public inspection at:

Department of Public Safety
Room 210 Transportation Building
John Ireland Boulevard
St. Paul, MN 55155

Copies of such documents may be obtained at:

Office of the Hearing Examiner
Suite 300
1745 University Avenue
St. Paul, MN 55104

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC SAFETY

Edward G. Novak
COMMISSIONER OF PUBLIC SAFETY

Dated: May 10, 1978

STATE OF MINNESOTA

COUNTY OF RAMSEY

BEFORE EDWARD G. NOVAK

COMMISSIONER OF PUBLIC SAFETY

In the Matter of the Proposed Adoption of Rules of the State Department of Public Safety Governing Standards for Administration of the Intoxicating Liquor Act.

ORDER ADOPTING PROPOSED LIQ 39A AND PROPOSED LIQ 71-77 AND RETAINING FORMER LIQ 72 AND FORMER LIQ 73(f)

The above-entitled matter came on for hearing before William Seltzer, Hearing Examiner, on the twenty-fourth day of August, 1977, at 9:00 a.m., in the Auditorium, State Office Building, Saint Paul, Minnesota, after proper notice required by Minn. Stat. § 15.0412 (1977 Supp.) was served upon all persons, associations and other interested groups registered with the Secretary of State for that purpose.

By order dated February 28, 1978, the rules identified as the Rules of the State Department of Public Safety Governing Standards for Administration of the Intoxicating Liquor Act, with the exception of proposed Liq 39A, former Liq 72 and proposed Liq 71-77, were adopted as final rules.

After affording interested persons an opportunity to present written and oral data, statements and arguments, having considered all the evidence adduced and upon the records, files and proceedings herein, and applicable statutory standards or criteria, and having considered the findings of fact and recommendations of the Hearing Examiner,

NOW, THEREFORE, IT IS ORDERED that proposed Liq 39A and proposed Liq 71-77 be adopted, and that former Liq 72 and former Liq 73(f) be retained, pursuant to the authority vested in me by Minn. Stat. § 299A.02, Subd. 3 (1976).

IT IS FURTHER ORDERED that former Liq 72 be designated as Liq 72 and that proposed Liq 72-77 be renumbered Liq 73-78 respectively.

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC SAFETY

Dated: May 4, 1978.

Edward G. Novak
EDWARD G. NOVAK
Commissioner of Public Safety

STATE OF MINNESOTA

COUNTY OF RAMSEY

BEFORE EDWARD G. NOVAK

COMMISSIONER OF PUBLIC SAFETY

In the Matter of the Proposed Adoption of Rules of the State Department of Public Safety Governing Standards for Administration of the Intoxicating Liquor Act.

FINDINGS OF FACT, CONCLUSIONS AND DECISION WITH RESPECT TO PROPOSED LIQ 39A, FORMER LIQ 72, AND PROPOSED LIQ 71-77

The above-entitled matter came on for hearing before William Seltzer, Hearing Examiner, on the twenty-fourth day of August, 1977, at 9:00 a.m. in the Auditorium, State Office Building, Saint Paul, Minnesota, after proper notice required by Minn. Stat. § 15.0412 (1977 Supp.) was served upon all persons, associations and other interested groups registered with the Secretary of State for that purpose.

After affording interested persons an opportunity to present written and oral data, statements and arguments, having heard all of the testimony, having considered all the evidence adduced and upon the records, files and proceedings herein, the Hearing Examiner has filed his report. Upon review of the Hearing Examiner's report and the evidence, statements, records and files herein, I find the following:

Liq 39A

FINDINGS OF FACT

1. An information hearing on draft proposed rules was held on February 17, 1977, to obtain information and opinions from outside the Department of Public Safety. All interested persons registered with the Secretary of State received notice of such information hearing, and were afforded an opportunity to present written and oral data, statements and arguments with respect to any of the draft proposed rules.

2. On July 13, 1977, the Commissioner of Public Safety filed the following documents with the Chief Hearing Examiner:

(a) a copy of the proposed rules;

(b) a proposed Order for Hearing;

(c) a proposed Notice of Hearing;

(d) a statement of the estimated length and number of people attending the hearing.

On July 18, 1977, a Notice of Hearing and a copy of the proposed rules were published at 2 State Register 96, et seq.

On July 21, 1977, the Department of Public Safety mailed Notice of Hearing to all persons and associations who had registered their names with the Secretary of State for the purpose of receiving such Notice.

On July 29, 1977, the proposed documents filed were accepted by the Minnesota Office of Hearing Examiners as proper and correct as to form and content. Thus, on July 29, 1977, the Department of Public Safety filed the following documents:

(a) Order for Hearing;

(b) Notice of Hearing;

(c) Affidavit of Receipt of the Secretary of State's list;

(d) Affidavit of Mailing;

(e) Secretary of State's Certificate and list;

(f) Statement of Need; and

(g) Statement of Evidence, including the names of witnesses to be called and Department personnel to represent the agency.

The documents were available for inspection at the Office of Hearing Examiners from the date of filing to the date of hearing.

3. All other relevant, substantive and procedural requirements of statute or rule have been complied with for the purpose of establishing jurisdiction of the subject matter to proceed to public hearing pursuant to law.

4. Minn. Stat. § 299A.02, subd. 2 (1976) grants the Commissioner the authority to administer and enforce the provisions of chapter 340 except for those provisions thereof for which administration and enforcement are reserved to the Commissioner of the Minnesota Department of Revenue. Pursuant to subdivision 3 of Minn. Stat. § 299A.02, the Commissioner has the power to make all reasonable rules to effect the object of chapter 340. The administrative rulemaking process of the proceeding is subject to the Minnesota Administrative Procedures Act.

5. Minn. Stat. § 340.114 (1976) provides as follows:

> Subdivision 1. All licensed importers shall offer for sale on an equal basis to all licensed wholesalers and manufacturers all intoxicating liquor brought into the State of Minnesota.
>
> Subd. 2. Without limiting subdivision 1, the following shall be deemed failures to offer intoxicating liquor for sale on an equal basis and are unlawful:
>
> (a) A refusal to sell any intoxicating liquor to a wholesaler or manufacturer, which is offered for sale to any other wholesaler or manufacturer, except when a wholesaler or manufacturer is in arrears on payments for past purchases from the importer who refuses to sell.

(b) A sale of any intoxicating liquor to any wholesaler or manufacturer at a price different from that offered to any other wholesaler or manufacturer, exclusive of shipping costs, except that quantity discounts based upon actual cost savings may be uniformly offered to all wholesalers and manufacturers.

(c) A sale of any intoxicating liquor to any wholesaler or manufacturer on terms of purchase different from those offered any other wholesaler or manufacturer, except that when the importer reasonably believes that a wholesaler or manufacturer will be unable to comply with the existing terms of credit, then other terms may be employed, including denial of credit.

(d) Any discrimination among wholesalers and manufacturers in satisfying their respective demands for any intoxicating liquor.

(e) A sale conditioned upon an agreement which restricts the wholesaler or manufacturer with respect to customers, area for distribution, or resale price, or which otherwise restrains the wholesaler or manufacturer from competing in trade and commerce.

(f) For purposes of this subdivision and subdivision 1 only, the term "intoxicating liquor" shall not include "pop wines" as the same are defined by regulation of the Commissioner.

Subd. 3. No licensed importer or manufacturer shall offer or sell to any licensed wholesaler any intoxicating liquor at a bottle or case price which is higher than the lowest price at which such item of liquor is contemporaneously being sold by such importer or manufacturer to any wholesaler anywhere in any other state of the United States or in the District of Columbia or to any state or state agency which owns and operates retail liquor stores.

In determining the lowest price for which any item of liquor is being sold in any other state or in the District of Columbia, or to any state or state agency which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler, state, or state agency purchasing such item in such

other state or in the District of Columbia; provided that nothing contained herein shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery. As used in this subdivision, the term "state taxes or fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia based upon a gallon of liquor.

Sub. 4. Nothing in this section shall apply to any wines or malt beverages regardless of alcoholic content.

6. The purpose of Liq 39A is to implement the mandate of section 340.114 to place all Minnesota wholesalers and manufacturers on an equal basis with respect to their ability to purchase liquor products brought into Minnesota. Liq 39A is necessary in order to remove any uncertainty in the liquor industry concerning section 340.114 and to give full effect to that statute's provisions. (Transcript ("T.") 222-223, 308-311; DPS Exhibit 4 at 18-19.)

7. Liq 39A properly implements the mandate of section 340.114 and does not exceed the authority of that statute. Under Liq 39A, importers, whether based in or out of Minnesota, must either refrain from bringing liquor products into Minnesota or offer all such liquor products for sale to all Minnesota wholesalers and manufacturers on an equal basis.

8. The requirements of Liq 39A apply both to intoxicating liquor brought into Minnesota as a finished product and intoxicating liquor which is further distilled, refined, rectified, blended, bottled, labeled or prepared in any manner subsequent to its importation into Minnesota.

9. The term "importers," as used in Liq 39A and Minn. Stat. § 340.114 (1976) includes manufacturers and wholesalers licensed pursuant to chapter 340. See Federal Distillers, Inc. v. State of Minnesota, 304 Minn. 28, 229 N.W.2d 144 (1975), appeal dismissed, 423 U.S. 908, 96 S.C. 209, 210 (1975).

10. All Minnesota wholesalers and manufacturers are licensed importers and as such are required by Liq 39A to offer liquor for sale on an equal basis to all Minnesota wholesalers whether such liquor is distilled, refined, rectified, blended, bottled, labeled or otherwise prepared within or without the state. See Federal Distillers, Inc. v. State of Minnesota, supra; DPS Exhibit 4 (Judge Schultz's Findings of Fact, Conclusions of Law and Order for Judgment).

11. Section 340.114 does not distinguish between Minnesota-based importers and importers based outside of Minnesota in imposing upon them its requirements. Liq 39A is consistent with the statute in that it does not treat Minnesota-based importers differently from those importers based outside Minnesota. (T. 223; DPS Exhibit 4 at 19.)

12. Liq 39A, consistent with section 340.114, does not require or compel any licensed importer to offer any intoxicating liquor products in Minnesota.

13. Liq 39A does not require any person to sell anything which that person does not own or control. Thus, where an importer owns the bottled liquor but not the brand label, an equal offer under the rule would require the importer to offer only the

bottled liquor equally to all buyers, but not the brand label. If the importer owns both the liquor and the brand label, Liq 39A requires an offer of the labeled product. (T. 294-95; T. 230.)

14. Neither section 340.114 nor Liq 39A exempts from its application importers which further process intoxicating liquor brought into Minnesota or importers which own brand labels.

15. Wine and malt beverages are excluded from the requirements of Liq 39A pursuant to Minn. Stat. § 340.114, subd. 4 (1976).

16. Liq 39A is reasonable and necessary to implement section 340.114 as enacted by the legislature and interpreted by the Minnesota Supreme Court.

CONCLUSIONS

1. The Minnesota Department of Public Safety has jurisdiction over the proceedings considered herein.

2. All relevant substantive and procedural requirements of law and rule have been complied with fully for the purpose of adopting Liq 39A.

3. The Department of Public Safety has demonstrated the need for and reasonableness of Liq 39A with an affirmative presentation of facts.

4. The Department of Public Safety is authorized by statute to adopt Liq 39A.

5. Liq 39A is constitutional in all respects.

6. Any finding of fact above which is conclusory in nature is hereby made a conclusion.

Liq 71-78

1. The Report of the Hearing Examiner with respect to former Liq 72 and proposed Liq 71-77 is hereby adopted as the findings of fact, conclusions and decision of the Commissioner of Public Safety.

2. Due to the addition of former Liq 72 to the proposed rules, former Liq 72 will be designated as Liq 72 and proposed Liq 72-77 will be renumbered Liq 73-78 respectively.

Dated: May 4, 1978.

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC SAFETY

Edward G. Novak

EDWARD G. NOVAK
Commissioner of Public Safety

STATEMENT OF COMPLIANCE WITH

MANUAL OF RULE MAKING PROCEDURES

I, Special Assistant Attorney General Stephen P. Kilgriff, do hereby declare that I have examined the proposed rules and all related documents and that, based on them and my personal familiarity with the applicable procedures, the Manual of Rule Making Procedures has been followed.

Stephen P. Kilgriff

Special Assistant Attorney General

Dated: May 10, 1978.

LARKIN, HOFFMAN, DALY & LINDGREN, LTD.
ATTORNEYS AT LAW
1500 NORTHWESTERN FINANCIAL CENTER
7900 XERXES AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55431
TELEPHONE (612) 835-3800

RECEIVED
MAY 18 1978
ATTORNEY GENERAL
132 STATE CAPITOL
ST. PAUL, MINN. 55155

JAMES P. LARKIN
ROBERT L. HOFFMAN
JACK F. DALY
D. KENNETH LINDGREN
ROBERT B. WHITLOCK
ALLAN E. 'PAT' MULLIGAN
ROBERT J. HENNESSEY
RONALD R. FLETCHER
JAMES C. ERICKSON
EDWARD J. DRISCOLL
ARTHUR MACK
JAMES P. MILEY
GENE N. FULLER
ROBERT W. JUNGHANS
JOSEPH W. ANTHONY

DAVID C. SELLERGREN
JOHN D. FULLMER
ROBERT E. BOYLE
FRANK I. HARVEY
FRANCIS E. GIBERSON
JAMES E. STROTHER
EMBER D. REICHGOTT
CHARLES S. MODELL
RICHARD A. FORSCHLER
LINDA A. FISHER
THOMAS P. 'TIM' STOLTMAN
STEVEN G. LEVIN

OF COUNSEL
JOSEPH GITIS

called 5/31

ATTORNEY GENERAL
SOLICITOR GENERAL
RECEIVED
MAY 18 1978
A.M. 7 8 9 10 11 12 1 2 3 4 5 6 7 P.M.

May 16, 1978

Attorney General Warren Spannaus
State Capitol
St. Paul, Minnesota

Re: In the Matter of the Proposed Adoption of Rules of the State Department of Public Safety Governing Standards for Administration of the Intoxicating Liquor Act.

Dear Attorney General Spannaus:

This office represents three Minnesota licensed liquor wholesalers and has appeared on their behalf at hearings with respect to the promulgation of the above referenced rules. It is our understanding that on May 10, 1978 you received from the Department of Public Safety the Findings of Fact, Conclusions and Decision with respect to proposed Liq 39A, former Liq 72, and proposed Liq 71-77. We further understand that under AttyGen 305(c), any person or association wishing to question the legality of the rules must so advise the Attorney General within ten days of the receipt of the rules.

Our clients, Old Peoria Company, Inc., Griggs, Cooper & Company and Johnson Brothers Wholesale Liquor Company wish to be recorded as supporting both the policy and legality of the rules as approved by the Hearing Examiner and adopted by the Commissioner of Public Safety. In the event that any person or association advises the Attorney General that it wishes to submit a brief or make oral argument in this matter questioning the legality of the rules, we do hereby request that we be so notified and that we be permitted to submit a further brief or make oral argument, whichever the Attorney General deems appropriate. We would submit such a brief or take part in such oral argument on behalf of the legality of the rules.

Would you please notify this office in the event you are advised of such a challenge and grant us the above requested opportunity to respond.

Sincerely,

James P. Miley

James P. Miley, for
LARKIN, HOFFMAN, DALY & LINDGREN, Ltd.

James C. Erickson, for
LARKIN, HOFFMAN, DALY & LINDGREN, Ltd.

cp

ADOPTED RULES

MINNESOTA DEPARTMENT OF PUBLIC SAFETY

LIQUOR CONTROL DIVISION

Liq 39 SALES TO WHOLESALERS AND MANUFACTURERS.

A. All importers, including manufacturers and wholesalers licensed pursuant to Chapter 340, are required to offer for sale to all Minnesota wholesalers and manufacturers all intoxicating liquor (except wines and malt beverages) brought into Minnesota. If such intoxicating liquor is further distilled, refined, rectified, blended, bottled, labeled or prepared in any manner subsequent to its importation into Minnesota, such importers are required to offer for sale to all Minnesota wholesalers and manufacturers the finished product. All such offers shall be made on an equal basis to all such wholesalers and manufacturers.

LARKIN, HOFFMAN, DALY & LINDGREN, LTD.
1500 NORTHWESTERN FINANCIAL CENTER
7900 XERXES AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55431



Attorney General Warren Spannaus
State Capitol
St. Paul, Minnesota 55155



MINNESOTA DEPARTMENT OF PUBLIC SAFETY

LIQUOR CONTROL DIVISION

Liq 71 Brand Label Approval.

~~Minn.-St.-Section-340.62-provides-that-no~~ No brand of distilled spirits, wines, or fermented malt beverages containing more than one-half of one percent of alcohol by volume shall be imported into or sold within the State of Minnesota unless the brand label is approved by the Commissioner and registered in the manner provided.

A. For sample purposes only. A licensed importer or wholesaler may, with the prior approval of the Commissioner, import without registration reasonable amounts of alcoholic beverages to be used for sample purposes only. However, all such sample shipments must be manifested, as provided in Liq 83.

~~(a)~~ B. Any alcoholic beverages whose brand label is not approved and registered ~~as-provided-by-Minn.-St.-340.62-and-Chapter Eight-hereof-and-not-located-on-a-Minnesota-licensed-wholesaler's-premises~~ shall be confiscated.

Liq 72 BRAND LABEL OWNERSHIP.

The brand label will not be registered unless it is ascertained that the proposed registrant is the owner of the label, or has been assigned the brand label registration permission in writing by the brand owner pursuant to Federal and state laws.

Liq 73 Registration.

A written request for registration of a brand label shall be filed with the Commissioner, accompanied by the following items:

~~(a)~~ A. A ~~certified~~ check payable to ~~"Liquor-Control-Commissioner"~~ "Director of Liquor Control" in the amount of $10, for payment of the registration fee for each brand and for each type of product.

~~(b)~~ B. A ~~duplicate~~ set of front and back labels, and any other labels to be affixed to the containers. In the case of imported ~~wines and distilled spirits,~~ alcoholic beverages, the name and address of the importer must be shown on the label.

~~(c)~~ C. A ~~duplicate~~ set of photostatic copies of beer cans and lids.

~~(d)~~ D. If requested by the Commissioner, ~~Two~~ two labeled and sealed containers of malt beverages for analysis. ~~by the Commissioner.~~

~~(e)~~ E. If requested by the Commissioner, ~~A~~ a complete, signed chemical analysis of the product and a verified statement that the product to be sold under the label will correspond in all respects to the sample and analysis.

~~(f)~~ F. A verified statement by the brand owner or his authorized representative declaring ownership of the label and identifying the United States distributer, if other than the brand owner.

Liq 74 Commissioner to Approve Change.

Any change of ownership or of contents of alcoholic beverages and the labeling in connection therewith from the original registration of such contents and labels shall be promptly submitted to the Commissioner for approval before the importation or sale of such beverages in the state.

Liq 75 Abandonment.

Any brand of alcoholic beverage for which Minnesota importation has been discontinued for two years or which has been abandoned shall not be imported in this state unless the brand label is re-registered in the manner provided in Liq ~~73~~ 72. ~~In the case of fermented malt beverages, it is required that the brand label registrant submit a~~

~~letter-to-this-office-each-month-of-each-year-indicating-the brands-of-beer-shipped-into-and/or-sold-in-the-State-of-Minnesota.~~

Liq 76 Importers to Ascertain Registration.

Minnesota manufacturers and wholesale distributors shall ascertain before the importation of any alcoholic product into the state that said product has been registered and the analysis of the brand submitted to and approved by the Commissioner.

Liq 77 Stock Transfer Shall be Arranged Before Change in Distributors.

When there is a change in distributorship of the brand, the brand owner shall arrange for the transfer of the stock on hand to the new distributor or for shipment to the producer of the brand 5 days before the change is made. This shall not apply if the brand is distributed by more than one wholesaler in this state.

Liq 78 Bulk Containers.

Distilled spirits and wine may be imported and sold to manufacturers in bulk containers without brand label registration.

APPROVED AS TO FORM AND LEGALITY

MAY 31 1978

_____ 19____

WARREN SPANNAUS, ATTORNEY GENERAL

BY /s/ Michael B. Miller

SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
MAY 31 1978
Joan Anderson Growe
Secretary of State

12:30 P.M.

ADOPTED RULES

DEPARTMENT OF PUBLIC SAFETY

LIQUOR CONTROL DIVISION

The following rules published at State Register Vol. 1, No. 2, Page 96, July 18, 1977 (2SR96) are adopted and are identical in every respect to their proposed form:

Liquor 1, 2, 3

Transfer of former Chapter Two

Liquor 24

Repeal of former Liquor 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

Liquor 25A, B, C, D, E

Liquor 38A, B, C

Transfer of former Liquor 38(d)

Liquor 38D

Repeal of former Liquor 38(f)

Liquor 38E1, 2, 3, 5, 6, 8

Repeal of former Liquor 38(g)(10), (12), (13)

Liquor 38E11

Repeal of former Liquor 38(g)(16)

Liquor 38E12

Repeal of former Liquor 38(g)(18)

Liquor 38E13, 14, 15, 16, 17

Repeal of former Liquor 38(g)(24)

Liquor 38F, G, H, I

Repeal of former Liquor 38(l)

Liquor 38J, K, L, M

Transfer of Paragraph #2 of former Liquor 38(p)

Liquor 39C

Liquor 56

Liquor 67A2, 3, 4, 5, 6, 7, 8, 9, 10

Liquor 67B

Liquor 83, 84, 92, 95, 98, 99, 100, 123

All renumbering of Chapters

Five typographical errors appeared in the proposed rules as published in 2SR96, July 18, 1977. The corrections are as follows:

1. On Page 100, in Liquor 38A, the third line states, "in accordance with the privileges...". The second "with" should be deleted.
2. On Page 101, in Liquor 38 E 3, the middle portion of that paragraph that begins, "all price schedules must indicate the one case wholesale price of each...", the next word is misspelled as "branc", but should be "brand".
3. On Page 102, Liquor 38 E(16), the bracket there begins to the left of the word "the". It should begin to the left of the number 16.
4. On Page 104, in Liquor 38 J, the third sentence begins "However, intoxicating liquors..." The phrase "and ethyl alcohol" should be inserted after "liquors".
5. On Page 104 in Liquor 56, "on sale", the word "sale" is printed with a capital S and should be a small s.

The following rules are adopted with amendments as shown:

Liquor 25. Any person engaged in the purchase, sale or use for any purpose other than personal consumption <u>of intoxicating alcoholic beverages or ethyl alcohol</u>, or any vehicle used to transport intoxicating alcoholic beverages or ethyl alcohol shall obtain the appropriate regulatory permit and identification card from the Commissioner as provided

in this rule. The regulatory fee for each permit is $5.00 and shall be submitted together with the appropriate application form provided by the Commissioner. All identification cards and permits shall expire on December 31st of the year issued and are not transferable. The authority to engage in the purchase, sale, use or transport ~~order, sell, purchase, solicit or deliver~~ granted by the card or permit in this section may be revoked by the Commissioner upon evidence of a violation by the holder of such a card or permit of any of the provisions of Minn. Stat. ch. 340, or any rule of the Commissioner made pursuant to law.

Liquor 38 E 4. ~~After expiration of the five-day period for amendment of the wholesale price schedules, as provided for in subsection 2 herein, any brand owner or wholesaler can meet the competitive price of the same or similar distilled spirits or wine offered for sale to retailers by any other brand owner or wholesaler by filing at any time an amendment to its effective price schedule which lowers its net price for that particular brand, type and size container to or above the net price offered for sale to retailers by its competitor. Such amendments shall also designate the offeror, the product, and the competitive price which the amendment is intended to meet.~~ If any brand owner or wholesaler elects to file amended prices during the five-day period as provided for in subparagraph 2, he may not file a new price that is lower than the lowest net price filed on the first of the month for the same or similar product by any wholesaler. For the purposes of this section "net price" shall mean the wholesale price, including all allowances, discounts (including varying volume discounts) or terms of any nature (including promptness of payment terms) which affect the wholesale price in any manner. A credit term filed to meet competition may not be filed on a basis more favorable than

the terms of the competitive schedule or reduce the net price of the brand, type or size container below the net price of the competitive schedule for the same quantity.

Liquor 38 E 7. No wholesale price schedule or amendment thereto shall list brands of distilled liquor or wine which are not in stock or on ~~bona-fide~~ accepted order at the time such schedule is filed with the department.

Liquor 38 E 9 (former paragraph (8)). No wholesaler of distilled spirits or wine shall file a wholesale price schedule or an amendment on which is shown a selling price per case at less than the cost thereof to such wholesaler. Cost shall include FOB price from importer, freight, state and federal taxes and duty on imported merchandise.

Liquor 38 E 10 (former paragraph (9)). An amended wholesale price schedule may be filed at below the wholesaler's cost when such prices are filed to meet, in good faith, prices filed with the department on similar distilled spirits and wine by a competing wholesaler.

Liquor 38 E ~~9~~. 11. Wine or other commodities may not be offered on original or assorted cases with distilled spirits or vice versa, and any quantity discount may not exceed 300 bottles of quarts or smaller bottles, or the equivalent of any authorized standard of fill not to exceed 25 cases. ~~In addition, no manufacturer, wholesaler or importer of distilled spirits or wine may sell or offer to sell to any retailer any brand or brands of intoxicating liquor under circumstances where in the purchase of any quantity thereof entitles the retailer to a discount on the purchase price of any other brand or brands of intoxicating liquor.~~

Liquor 38 E ~~10.~~ 12. Any filing licensee who publishes, mails, delivers, distributes, advertises or in any other way directly or indirectly, disseminates written price information for distilled spirits and or wine ~~information~~ on its wholesale price schedule or amendments thereto, shall, in any such material, include all such allowances, discounts or terms, and shall disseminate such information to all retailers served by it.

Renumber Liquor 38E 11 through 17 to Liquor 38E 13 through 19, respectively.

Liquor 39B. No importer shall offer any intoxicating liquor for sale to any Minnesota wholesaler or maufacturer without first filing with the department and mailing a copy of such itemized price list to all Minnesota manufacturers and wholesalers, on a form approved by the Commissioner, an itemized list specifying the price, brand, type, container size, proof and age of the liquor so offered. These prices must be filed on the ~~15th~~ first day of the month and shall become effective on the first day of the next calendar month ~~next succeeding the first full month after the date of filing~~ and shall remain in effect ~~for a period of not less than 30 days and~~ until changed by a subsequent price filing which shall take effect in like manner.

Liquor 67 A 1. Any illustration of a ~~female~~ person which is not dignified, modest, or in good taste, or depicts a ~~female~~ person in provocative dress or consuming a drink. Any family scene in which is portrayed a child or objects (such as toys) suggestive of the presence of a child, or in any manner portrays the likeness of a child, or contains any matter to appeal to immature persons.

The following proposed rules are not being adopted at this time: Liq 39A, Former Liq 72, Liq 71-77.

STATE OF MINNESOTA

COUNTY OF RAMSEY

BEFORE EDWARD G. NOVAK

COMMISSIONER OF PUBLIC SAFETY

In the Matter of the Proposed Adoption of Rules of the State Department of Public Safety Governing Standards for Administration of the Intoxicating Liquor Act.

FINDINGS OF FACT, CONCLUSIONS AND DECISION WITH RESPECT TO PROPOSED LIQ 39A, FORMER LIQ 72, AND PROPOSED LIQ 71-77

The above-entitled matter came on for hearing before William Seltzer, Hearing Examiner, on the twenty-fourth day of August, 1977, at 9:00 a.m. in the Auditorium, State Office Building, Saint Paul, Minnesota, after proper notice required by Minn. Stat. § 15.0412 (1977 Supp.) was served upon all persons, associations and other interested groups registered with the Secretary of State for that purpose.

After affording interested persons an opportunity to present written and oral data, statements and arguments, having heard all of the testimony, having considered all the evidence adduced and upon the records, files and proceedings herein, the Hearing Examiner has filed his report. Upon review of the Hearing Examiner's report and the evidence, statements, records and files herein, I find the following:

Liq 39A

FINDINGS OF FACT

1. An information hearing on draft proposed rules was held on February 17, 1977, to obtain information and opinions from outside the Department of Public Safety. All interested persons registered with the Secretary of State received notice of such information hearing, and were afforded an opportunity to present written and oral data, statements and arguments with respect to any of the draft proposed rules.

2. On July 13, 1977, the Commissioner of Public Safety filed the following documents with the Chief Hearing Examiner:

(a) a copy of the proposed rules;

(b) a proposed Order for Hearing;

(c) a proposed Notice of Hearing;

(d) a statement of the estimated length and number of people attending the hearing.

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(b) Notice of Hearing;

(c) Affidavit of Receipt of the Secretary of State's list;

(d) Affidavit of Mailing;

(e) Secretary of State's Certificate and list;

(f) Statement of Need; and

(g) Statement of Evidence, including the names of witnesses to be called and Department personnel to represent the agency.

The documents were available for inspection at the Office of Hearing Examiners from the date of filing to the date of hearing.

3. All other relevant, substantive and procedural requirements of statute or rule have been complied with for the purpose of establishing jurisdiction of the subject matter to proceed to public hearing pursuant to law.

4. Minn. Stat. § 299A.02, subd. 2 (1976) grants the Commissioner the authority to administer and enforce the provisions of chapter 340 except for those provisions thereof for which administration and enforcement are reserved to the Commissioner of the Minnesota Department of Revenue. Pursuant to subdivision 3 of Minn. Stat. § 299A.02, the Commissioner has the power to make all reasonable rules to effect the object of chapter 340. The administrative rulemaking process of the proceeding is subject to the Minnesota Administrative Procedures Act.

5. Minn. Stat. § 340.114 (1976) provides as follows:

> Subdivision 1. All licensed importers shall offer for sale on an equal basis to all licensed wholesalers and manufacturers all intoxicating liquor brought into the State of Minnesota.
>
> Subd. 2. Without limiting subdivision 1, the following shall be deemed failures to offer intoxicating liquor for sale on an equal basis and are unlawful:
>
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(b) A sale of any intoxicating liquor to any wholesaler or manufacturer at a price different from that offered to any other wholesaler or manufacturer, exclusive of shipping costs, except that quantity discounts based upon actual cost savings may be uniformly offered to all wholesalers and manufacturers.

(c) A sale of any intoxicating liquor to any wholesaler or manufacturer on terms of purchase different from those offered any other wholesaler or manufacturer, except that when the importer reasonably believes that a wholesaler or manufacturer will be unable to comply with the existing terms of credit, then other terms may be employed, including denial of credit.

(d) Any discrimination among wholesalers and manufacturers in satisfying their respective demands for any intoxicating liquor.

(e) A sale conditioned upon an agreement which restricts the wholesaler or manufacturer with respect to customers, area for distribution, or resale price, or which otherwise restrains the wholesaler or manufacturer from competing in trade and commerce.

(f) For purposes of this subdivision and subdivision 1 only, the term "intoxicating liquor" shall not include "pop wines" as the same are defined by regulation of the Commissioner.

Subd. 3. No licensed importer or manufacturer shall offer or sell to any licensed wholesaler any intoxicating liquor at a bottle or case price which is higher than the lowest price at which such item of liquor is contemporaneously being sold by such importer or manufacturer to any wholesaler anywhere in any other state of the United States or in the District of Columbia or to any state or state agency which owns and operates retail liquor stores.

In determining the lowest price for which any item of liquor is being sold in any other state or in the District of Columbia, or to any state or state agency which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler, state, or state agency purchasing such item in such

other state or in the District of Columbia; provided that nothing contained herein shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery. As used in this subdivision, the term "state taxes or fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia based upon a gallon of liquor.

Sub. 4. Nothing in this section shall apply to any wines or malt beverages regardless of alcoholic content.

6. The purpose of Liq 39A is to implement the mandate of section 340.114 to place all Minnesota wholesalers and manufacturers on an equal basis with respect to their ability to purchase liquor products brought into Minnesota. Liq 39A is necessary in order to remove any uncertainty in the liquor industry concerning section 340.114 and to give full effect to that statute's provisions. (Transcript ("T.") 222-223, 308-311; DPS Exhibit 4 at 18-19.)

7. Liq 39A properly implements the mandate of section 340.114 and does not exceed the authority of that statute. Under Liq 39A, importers, whether based in or out of Minnesota, must either refrain from bringing liquor products into Minnesota or offer all such liquor products for sale to all Minnesota wholesalers and manufacturers on an equal basis.

8. The requirements of Liq 39A apply both to intoxicating liquor brought into Minnesota as a finished product and intoxicating liquor which is further distilled, refined, rectified, blended, bottled, labeled or prepared in any manner subsequent to its importation into Minnesota.

9. The term "importers," as used in Liq 39A and Minn. Stat. § 340.114 (1976) includes manufacturers and wholesalers licensed pursuant to chapter 340. See Federal Distillers, Inc. v. State of Minnesota, 304 Minn. 28, 229 N.W.2d 144 (1975), appeal dismissed, 423 U.S. 908, 96 S.C. 209, 210 (1975).

10. All Minnesota wholesalers and manufacturers are licensed importers and as such are required by Liq 39A to offer liquor for sale on an equal basis to all Minnesota wholesalers whether such liquor is distilled, refined, rectified, blended, bottled, labeled or otherwise prepared within or without the state. See Federal Distillers, Inc. v. State of Minnesota, supra; DPS Exhibit 4 (Judge Schultz's Findings of Fact, Conclusions of Law and Order for Judgment).

11. Section 340.114 does not distinguish between Minnesota-based importers and importers based outside of Minnesota in imposing upon them its requirements. Liq 39A is consistent with the statute in that it does not treat Minnesota-based importers differently from those importers based outside Minnesota. (T. 223; DPS Exhibit 4 at 19.)

12. Liq 39A, consistent with section 340.114, does not require or compel any licensed importer to offer any intoxicating liquor products in Minnesota.

13. Liq 39A does not require any person to sell anything which that person does not own or control. Thus, where an importer owns the bottled liquor but not the brand label, an equal offer under the rule would require the importer to offer only the

bottled liquor equally to all buyers, but not the brand label. If the importer owns both the liquor and the brand label, Liq 39A requires an offer of the labeled product. (T. 294-95; T. 230.)

14. Neither section 340.114 nor Liq 39A exempts from its application importers which further process intoxicating liquor brought into Minnesota or importers which own brand labels.

15. Wine and malt beverages are excluded from the requirements of Liq 39A pursuant to Minn. Stat. § 340.114, subd. 4 (1976).

16. Liq 39A is reasonable and necessary to implement section 340.114 as enacted by the legislature and interpreted by the Minnesota Supreme Court.

CONCLUSIONS

1. The Minnesota Department of Public Safety has jurisdiction over the proceedings considered herein.

2. All relevant substantive and procedural requirements of law and rule have been complied with fully for the purpose of adopting Liq 39A.

3. The Department of Public Safety has demonstrated the need for and reasonableness of Liq 39A with an affirmative presentation of facts.

4. The Department of Public Safety is authorized by statute to adopt Liq 39A.

5. Liq 39A is constitutional in all respects.

6. Any finding of fact above which is conclusory in nature is hereby made a conclusion.

Liq 71-78

1. The Report of the Hearing Examiner with respect to former Liq 72 and proposed Liq 71-77 is hereby adopted as the findings of fact, conclusions and decision of the Commissioner of Public Safety.

2. Due to the addition of former Liq 72 to the proposed rules, former Liq 72 will be designated as Liq 72 and proposed Liq 72-77 will be renumbered Liq 73-78 respectively.

Dated: May 4, 1978.

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC SAFETY

Edward G Novak

EDWARD G. NOVAK
Commissioner of Public Safety

RECEIVED
JUL 29 1977
OFFICE OF HEARING
EXAMINERS

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC SAFETY
LIQUOR CONTROL DIVISION

In the Matter of the Proposed
Adoption of Rules of the
State Department of Public Safety
Governing Standards for
Administration of the
Intoxicating Liquor Act.

STATEMENT OF
EVIDENCE

The above-captioned proposed rules are amendments to existing rules of the Department of Public Safety, Liquor Control Division. These rules are proposed for the purpose of effectively implementing Chapter 340 of the Minnesota Statutes.

This Statement of Evidence is submitted pursuant to the requirements of Minn. Reg. HE 103. All documents required to be filed with the Office of Hearing Examiners, Room 300, 1745 University Avenue, St. Paul, Minnesota, 55104, are on file at said Office and are available for public inspection.

Included among these materials, pursuant to Minn. Reg. He 103 (g); are a "Correction of Notice of Hearing and Notice of Intent to Solicit Outside Information or Opinion," dated January 20, 1977, together with a transcript of the information hearing and all materials received by the Department regarding or subsequent to the hearing. Included in these materials are the following documents:

1. February 9, 1977, letter from Stanford Robins to Alan Maclin, Edward Novak and Joseph Novak.
2. February 15, 1977, letter from James Pederson to Stanford Robins.
3. February 17, 1977, statement of the Distilled Spirits Council of the United States, Inc.

DPS EXHIBIT 3
DATE 8/24/77
DPS #3

4. February 23, 1977, letter from James H. Olson to Diane Hamilton.

5. February 23, 1977, letter from Stephen P. Larson to Diane Hamilton.

6. April 22, 1977, letter with attachment from Si Weisman to Alan Maclin, and letter to Joseph Novak.

7. May 19, 1977, letter from Robert Latz to Joseph Novak.

8. Document entitled "Uniformity of Prices and Terms," submitted by Solly Robins to Joseph Novak on or about July 14, 1977.

The Department of Public Safety intends to rely upon the Statement of Need, together with all exhibits filed with the Office of Hearing Examiners, which are available for inspection at that Office, in support of the proposed rules. Statutes and laws cited in the Statement of Need include the following:

Minn. Stat. § 340.081 (1976)

Minn. Stat. § 298.02, subd. 2 (1976)

Minn. Stat. ch. 340 (1976)

Minn. Laws 1977, ch. 443. sec. 2, subd. 3

Minn. Stat. § 340.114 (1976)

Minn. Stat. § 340.983 (1976)

Minn. Stat. § 299A.02 (1976)

Minn. Stat. § 340.081 (1976)

Minn. Stat. § 340.113 (1976)

Minn. Stat. § 340.11 (1976)

Minn. Stat. § 216A.01 (1976)

Minn. Laws 1967, ch. 864

Minn. Stat. § 325.04 (1976)

27 U.S.C. § 205 (b) (3)

Minn. Stat. § 325.49 (1976)

Minn. Stat. § 340.15, subd. 1 (1976)

15 U.S.C. § 205a-k (1976)

Cases cited in the Statement of Need include the following:

1. The decision of Judge Harold W. Schultz of the Ramsey County District Court in the following cases consolidated for trial:

> Federal Distillers, Inc., et al. v. Joseph Novak, et al.
>
> Ed. Phillips & Sons Company, Griggs, Cooper & Company, Inc., and Raymond Distribution Company, Inc., Intervenors, Heaven Hill Distilleries, Inc., v. Joseph V. Novak; Old Peoria Company, Inc. v. Joseph V. Novak; National Distillers & Chemical Corporation v. Joseph V. Novak

A copy of Judge Schultz's Findings of Fact, Conclusions of Law and Order for Judgment has been submitted as an exhibit.

2. The decision of the Minnesota Supreme Court in Federal Distillers, Inc., et al. v. State of Minnesota and Joseph Novak, 304 Minn. 28, 229 N.W.2d 144 (1975), appeal dismissed, 423 U.S. 908, 96 S. Ct. 209, 210 (1975). A copy of the decision has been submitted as an exhibit.

3. The decision of Judge Sidney P. Abramson in Minnesota Distillers, Inc. v. Joseph Novak, Liquor Control Commissioner of Minnesota, Ramsey County District Court, Court File No. 410233, (April 27, 1977), appeal pending, Minn. S. Ct. File No. 47770. A copy of Judge Abramson's Memorandum Order has been submitted as an exhibit.

4. The temporary order entered by Judge Harold W. Schultz in Johnson Brothers Wholesale Liquor Company v. Joseph V. Novak, Ramsey County District Court, Court File No. 396724 (April 3, 1974). A copy of Judge Schultz's Order has been submitted as an exhibit.

5. State of Minnesota v. Twin City Wine Company, Ramsey County District Court, Court File No. 419147. Copies of the complaint, motion, memorandum, answer and order have been submitted as an exhibit.

Additionally, a wholesale price survey has been compiled by the Liquor Control Division of the Department of

Public Safety, in conjunction with the Minnesota Department of Revenue. A copy of such information is submitted as an exhibit and may be relied upon by the Department in support of the proposed rules.

The following persons participated substantially in the development of the proposed rules and will be available to testify in support of the need for and reasonableness of the proposed rules:

Joseph V. Novak
Director, Liquor Control Division
Minnesota Department of Public Safety

John Muer
Assistant Director, Liquor Control Division
Minnesota Department of Public Safety

James L. Pederson
Assistant Commissioner
Minnesota Department of Public Safety

The Department does not intend to call any other witnesses in support of the proposed rules. However, in the event that questions are raised which are not within the knowledge of the above-named individuals, the Department will attempt to obtain answers to such questions from other available sources, including other persons and written materials.

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC SAFETY

Edward G. Novak
EDWARD G. NOVAK
Commissioner of Public Safety

7-28-77
DATE

DPS EXHIBIT 4
K. A. K. DATE 8/24/77

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STATE OF MINNESOTA
DEPARTMENT OF PUBLIC SAFETY
LIQUOR CONTROL DIVISION

In the Matter of the Proposed Adoption of Rules of the State Department of Public Safety Governing Standards for Administration of the Intoxicating Liquor Act.

STATEMENT OF NEED

The above-captioned rules are amendments to existing rules of the Department of Public Safety, Liquor Control Division. The last time these rules were amended was March 29, 1974.

AUTHORITY FOR THE RULES

By authority of Minn. Stat. § 340.081 (1976), the office of Liquor Control Commissioner was abolished and all powers and duties vested in the Liquor Control Commissioner were transferred to the Commissioner of Public Safety, except for certain specified duties which were transferred to the Commissioner of Revenue.[1/] Minn. Stat. § 299A.02, subd. 2 (1976), grants the Commissioner of Public Safety the power to administer and enforce the provisions of Chapter 340 of the Minnesota Statutes. Minn. Stat. § 299A.02, subd. 3 (1976) grants the Commissioner the power to "make all reasonable rules to effect the object of Chapter 340." In addition, Minn. Laws 1977, ch. 443, sec. 2, subd. 3, empowers state agencies to adopt procedural rules related to the administration of official agency duties. These proposed rules are offered by the Commissioner as reasonable and necessary provisions to further the objectives of Chapter 340 and to set forth administrative procedures.

1/ Powers were also transferred pursuant to Department of Administration Reorganization Order No. 52, effective January 1, 1975.

DPS#4

THE GENERAL NEED FOR THE AMENDED RULES

There are a number of factors which have necessitated the amendment of the existing rules. First, certain provisions of the Intoxicating Liquor Act have been amended and new sections have been added to the Act. Among these amendments and additions are the following:

1. Minn. Stat. § 340.114 (1976)[2/]. This provision requires all licensed importers to offer for sale all intoxicating liquor brought into the state to all licensed wholesalers and manufacturers on an equal basis.

2. Minn. Stat. § 340.983 (1976). This provision makes changes in the price filing requirements applicable to all brand owners or wholesalers of distilled liquor or wine.

3. Minn. Stat. §§ 299A.02 and 340.081 (1976). As noted above, these sections abolished the office of Liquor Control Commissioner and transferred certain powers and duties to the Commissioners of Public Safety and Revenue.

Second, court decisions have been issued with respect to certain provisions of Chapter 340. Among these court decisions are the following:

2/ Section 340.114 was enacted in 1973 (Minn. Laws 1973, Chapter 664, Subd. 2); however, during the pendency of certain court challenges and appeals, the Liquor Control Division was enjoined from enforcing its provisions. All such court challenges and appeals have now been decided or terminated.

1. The decision of Judge Harold W. Schultz of the Ramsey County District Court in the following cases consolidated for trial:

> Federal Distillers, Inc., et al. v. Joseph Novak, et al.
>
> Ed. Phillips & Sons Company, Griggs, Cooper & Company, Inc., and Raymond Distribution Company, Inc., Intervenors, Heaven Hill Distilleries, Inc. v. Joseph V. Novak; Old Peoria Company, Inc. v. Joseph V. Novak; National Distillers & Chemical Corporation v. Joseph V. Novak.

A copy of Judge Schultz's Findings of Fact, Conclusions of Law and Order for Judgment has been submitted as an exhibit.

2. The decision of the Minnesota Supreme Court in Federal Distillers, Inc., et al. v. State of Minnesota and Joseph Novak, 304 Minn. 28, 229 N.W.2d 144 (1975), appeal dismissed, 423 U.S. 908, 96 S. Ct. 209, 210 (1975). A copy of the decision has been submitted as an exhibit.

3. The decision of Judge Sidney P. Abramson in Minnesota Distillers, Inc. v. Joseph Novak, Liquor Control Commissioner of Minnesota, Ramsey County District Court, Court File No. 410233, (April 27, 1977), appeal pending, Minn. S. Ct. File No. 47770. A copy of Judge Abramson's Memorandum Order has been submitted as an exhibit.

4. The temporary order entered by Judge Harold W. Schultz in Johnson Brothers Wholesale Liquor Company

v. Joseph V. Novak, Ramsey County District Court, Court File No. 396724 (April 3, 1974). A copy of Judge Schultz's Order has been submitted as an exhibit.

5. State of Minnesota v. Twin City Wine Company, Ramsey County District Court, Court File No. 419147. Copies of the complaint, motion, memorandum, answer and order have been submitted as an exhibit.

The proposed rules also contain a number of deletions of the prior regulatory provisions. Many of these deletions merely eliminate language which is duplicative of clear and concise statutory language.[3/] Other rules are deleted because they are merely repetitious or duplicative of other laws, both state and federal. The Department believes there is no justification or reason to include such duplicative provisions in its own regulations.

Some rules formerly enforced by the Liquor Control Commissioner have been deleted and transferred to the Department of Revenue because the enforcement authority has been transferred to the Commissioner of Revenue. Other amendments are designed to clarify and simplify the information required to be filed with the Division in order to make such information more meaningful for those who need access to it and to reduce the burden upon persons required to file information.

3/ See, Minn. Laws 1977, ch. 443, § 2, subd. 1, which provides that agencies generally should not adopt a rule which duplicates statutory language.

Other amendments are needed to increase the efficiency of brand label registration. Amendments are also added in order to conform the rules to the changeover to metric measurements in the liquor industry.

The Department submits that the proposed amended rules as a whole are necessary and reasonable for the above reasons and for such other reasons as are hereinafter set forth. Each substantive change in the original rules is explained and justified rule-by-rule in the paragraphs that follow.

Nonsubstantive changes, such as the reordering of items under a rule by different number, letter or letterstyle in the alphabet, are not explained or justified. Such changes in reordering have occurred to make numerical, alphabetical or grammatical sense, or so as to conform with the rules of the State Register.

Changes that are considered to be strictly technical in nature and which do not alter the meaning of the rules are not deemed substantive. Therefore, there is no explanation for this type of amendment either.

The reasons that each proposed amended rule is reasonable and necessary are as follows:

CHAPTER ONE

Introduction

Liq 1G The definition of "importer" is amended to make clear that the term applies to persons located within the state as well as those located outside the state. This amendment

brings the definition into conformity with the statutes and is consistent with the Minnesota Supreme Court's decision in Federal Distillers, Inc., et al. v. State of Minnesota, supra.

The right to import intoxicating liquor into the State of Minnesota is conferred either by a license under Minn. Stat. § 340.113 (1976) (importers of intoxicating liquors) or under Minn. Stat. § 340.11, subd. 2 (1976) (wholesalers and manufacturers licenses). Any person who is licensed as a manufacturer-wholesaler under section 340.11 is also licensed to import liquor into the state. Any person who wishes to import liquor into Minnesota, but who is not licensed as a manufacturer or wholesaler, may do so by obtaining a license pursuant to Minn. Stat. § 340.113 (1976).

References to "brewer" and "beer" have been eliminated because this definition is used only in connection with rules pertaining to distilled spirits and wine.

Liq 2 This provision adds to the rules the definitions of "Commissioner", "Department", and "Office" or "this office." All three definitions are necessary in order to conform the proposed rules to Minn. Stat. § 340.081 (1976), which abolished the Office of Liquor Control Commissioner and transferred certain powers and duties thereof to the Commissioner of Public Safety.

CHAPTER TWO

[Formerly Chapter Three]

Statutory License Fees and Regulatory Permit Fees

Chapter Two of the prior rules, Excise and Surtaxes, has been deleted because the subject matter has now been transferred to the Commissioner of Revenue pursuant to Minn. Stat. § 340.081 (1976). Since former Chapter Two has been completely deleted, Chapter Three of the prior rules, beginning with Liq 24, is redesignated as Chapter Two.

Liq 24 Permits and Fees. This amendment clarifies and adds language providing information governing applications for licenses and permits required by Chapter 340. The amendment also eliminates language from the prior rule which was merely repetitious of the statutory language.

Liq 25 through 34 These ten regulations were merely repetitious of language contained in statutory provisions, and are deleted pursuant to Minn. Laws 1977, ch. 443, § 2, subd. 1.

Liq 25 [formerly Liq 35] Regulatory Permits and Fees. The heading and introductory paragraph of this amendment contain certain stylistic and grammatical changes which are not intended to alter the substance of the rule.

Subdivision A of this provision has been amended so that any distiller, rectifier, winer, or wholesale distributor, whether located within the State of Minnesota or in another state, will be required to have its representative obtain an identification card. The Department believes that all such representatives should possess proper identification for regulatory purposes.

Subdivision A is also amended to prohibit any distiller or winer representative from giving any financial inducements to wholesaler's salesmen to promote sales to retailers. This provision is necessary to prevent unfair competition and to insure that any discounts or savings be passed directly to the wholesaler in the form of lower prices, resulting in the possibility of lower retail prices to the consumer. Winer representatives are added because the above rationale applies equally to the sale of wine as to distilled spirits.

In addition, the Department believes it necessary to amend this provision to eliminate language which allowed the same person to represent simultaneously both a producer and a wholesaler. Under Minn. Stat. § 340.114 (1976), all licensed importers are required to offer for sale on an equal basis to all licensed wholesalers and manufacturers all intoxicating liquor brought into the State of Minnesota. If a representative were able to represent simultaneously both a producer and a wholesaler, a conflict would necessarily arise between his duty to the producer and his duty to the wholesaler, and the statutory purpose of § 340.114 might be frustrated.

"Railroad and Warehouse Commission" is deleted in subparagraph D because that Commission has been abolished and common carriers are presently licensed by the Department of Public Service. See Minn. Stat. § 216A.01 (1976) and Minn. Laws 1967, ch. 864.

CHAPTER THREE

[Formerly Chapter Four]

Manufacturers, Wholesale Distributors, and Importers -- Duties and Restrictions

No substantive changes are made in Liq 38A, B, C or D.

Former Liq 38(d) This provision was deleted entirely from the proposed rules because the authority for it has been transferred to the Commissioner of Revenue pursuant to Minn. Stat. § 340.081 (1976). Other subparagraphs in Liq 38 are redesignated accordingly.

Former Liq 38(f) Filing wholesale catalogs. This provision has been deleted entirely because the price filing requirements are duplicative of those otherwise required in the rules. See proposed Liq 38E. This deletion will reduce the price filing burden of wholesalers with no decrease in information available to the public and the agency.

Liq 38E [Formerly Liq 38(g)] Filing of Wholesale Price Schedules and Amendments. Liq 38E sets forth the procedures for the price filing requirements of Minn. Stat. § 340.983 (1976). This proposed rule contains substantive and procedural amendments which are necessary to implement the new requirements of the statute and also to clarify the nature of the prices to be filed with the Department.

For background information regarding the price filing system, see Minnesota Distillers, Inc. v. Novak, supra, and State of Minnesota v. Twin City Wine Company, supra.

The Department proposes to delete entirely certain provisions of former Liq 38(g) which were thought to be either repetitious or a hindrance to free and open competition among wholesalers. The following provisions were entirely deleted:

Former Liq 38(g)(6) - This provision is deleted as unnecessary in view of the fact that "brand" is a commonly understood term in the industry. However, this deletion is not intended to change the requirement that a wholesale price schedule be filed for each brand which a wholesaler sells.

Former Liq 38(g)(8) - This prohibition against sales below cost is deleted because it is duplicative of both federal and state laws. For example, the Bureau of Alcohol, Tobacco and Firearms of the U. S. Department of the Treasury prohibits sales below cost in the liquor industry. See ATF ruling 76-16 and 27 U.S.C. § 205(b)(3). Moreover, Minn. Stat. § 325.04 (1976) prohibits sales below cost in the State of Minnesota. Any person aggrieved by a sales below cost violation has a private right of action under the Minnesota law. See Minn. Stat. § 325.49 (1976). The Department therefore does not believe a need exists to include additional sanctions against such below cost pricing in its rules.

Former Liq 38(g)(9) - This provision also dealt with below cost pricing, setting forth the defense

that a below cost price can be charged to meet the price of a competitor. This provision is considered unnecessary because of the deletion of the prohibition against below cost sales in these proposed rules.

Former Liq 38(g)(12) - The assurance that all price filings are public record is considered duplicative and unnecessary, since the price filings are required to be kept as public records under Minn. Stat. § 340.983 (1976).

Former Liq 38(g)(16) - This provision is deleted because it is duplicative of Liq 38(g)(14), which was included in the amended rules as Liq 38E10.

Former Liq 38(g)(18) - Since the proposed rules relating to nondiscriminatory distribution of wholesale price lists refer only to written price information, this provision has been deleted as unnecessary. This deletion is not intended to affect the ability of a salesman to inform a retailer orally of wholesale prices.

Liq 38E1 [Formerly Liq 38(g)(1)] This is the basic provision which sets forth the requirement of Minn. Stat. § 340.983 (1976) that brand owners and wholesalers must file a wholesale price schedule for all distilled spirits and wine before offering such products for sale. This subparagraph, although similar to the statutory language, is necessary to place the price filing procedures set forth in Liq 38E in the proper context.

The section makes clear the statutory requirement that no sale of distilled spirits or wine can be made except in accordance with the prices filed with the Department. References to "varying volume prices (discounts)" are deleted since such discounts are only one factor in the actual price charged to the retailer, and the intent of the statute and rules is to include in the price filing all factors considered relevant to the actual price paid by the retailer.

Liq 38E2 [Formerly Liq 38(g)(2), (3) and (4)] This provision implements the statutory requirement that a price schedule shall be filed on the first day of each month and may be amended within five business days thereafter. The change of the price filing date from the tenth day to the first day of each month is necessary to conform the rules to the 1975 amendment to the statute.

Liq 38E3 [Formerly part of Liq 38(g)(1)] This provision requires that all price schedules must be filed on Form PS 9024 or in such other format which must be approved by the Commissioner in advance of the filing. Under Minn. Stat. § 340.983 (1976), the Commissioner is authorized to prescribe a form to be used for the filing of wholesale price schedules. Such form is necessary to render the price filings understandable to the public and enforceable by the Department. See also Minnesota Distillers, Inc. v. Novak, supra.

This provision also sets forth the procedure in which the prices must be filed in order to fully inform the retailer of the actual selling price of the product. The elements considered by the Department to be necessary to fully inform the retailer

of the actual selling price of the goods include all allowances, discounts (including varying volume discounts) and credit terms of any nature (including promptness of payment terms) which affect the wholesale price of the liquor or wine to the retailer. It is necessary that all these factors be contained in the price filing in order to satisfy the purpose of the statute that retailers be fully informed of the prices being offered by all wholesalers for distilled spirits and wine.

Liq 38E4 [Formerly Liq 38(g)(10)] The proposed rules delete the requirement that any amendment to a wholesaler's price filing within the five day period must not go below the lowest price originally filed for that product by any wholesaler. Such a provision tends to hinder price competition among wholesalers by setting an artificial floor price under which a wholesaler may not price a particular product. The Commissioner, therefore, considers it necessary and in the public interest to delete this requirement from the rules. See also, Minnesota Distillers, Inc. v. Novak, supra, and State of Minnesota v. Twin City Wine Company, supra.

Under the proposed rules, a wholesaler can amend its price within the first five business days to any level--- without regard to the prices filed on the first of the month by it or any other wholesaler. The deletion of the "floor price" provision raises the possibility that wholesalers could be "locked in" at high, noncompetitive prices for the remainder of the month. The "locking-in" of a wholesaler at a noncompetitive price leaves the wholesaler with two alternatives: (1) to offer

products at noncompetitive prices for the remainder of the month, resulting in a loss of sales; or (2) to violate the requirements of the rule and statute that no wholesaler shall sell or offer products at prices other than those filed with the Department.

The Department believes that this problem is resolved under the proposed rules by permitting a wholesaler to change its prices at any time after the initial five-day period to meet the competitive prices of another wholesaler, so long as it files its price and the price of the competitor which it intends to meet. In this manner, the Department will be able to determine which wholesaler is charging the low price being met, and whether or not that price has been filed with the Department. The requirement of filing these further amendments will also facilitate the ability of retailers to be kept fully informed at all times of the prices of each wholesaler.

Therefore, under the proposed rules, a wholesaler must file its prices by the first day of the month, can amend without limit for the first five business days, and thereafter can amend only to meet the competitive price of another wholesaler for the same or similar products, and only then by designating the offeror, the product, and the competitive price.

Liq 38E5 [Formerly Liq 38(g)(5)] The language deleted from this provision could have been construed to permit a wholesaler not to file a price each month, thereby causing confusion as to the price offered by a wholesaler and violating the requirements of Minn. Stat. § 340.983 (1976). Thus, under § 340.983 and the proposed rules, if a wholesaler does not file

prices for a particular month, it is not entitled to sell until such prices are on file. The requirement that the prices filed are not in effect until received by the Department is necessary so as to alert retailers, the Department, and wholesalers as to actual prices being offered to retailers at any given time.

Liq 38E6 [Formerly Liq 38(g)(13)] This amendment is necessary to make clear that the Department has the authority to reject a price filing if it is not in conformance with the statute or the agency's rules. Former Liq 38(g)(13) expressly allowed rejection of a price filing only if the filing was not deemed enforceable or understandable. Although the rejection of a price filing based upon a violation of any statute or rule was implicitly authorized by the former rules, the Department deems it necessary and in the public interest to establish this as a separate ground for the rejection of a price filing.

Liq 38E7 This provision prohibits the filing of prices by a wholesaler on any brand of distilled liquor or wine which is not in stock or on bona fide order at the time of the price filing. This prohibition is necessary to prevent wholesalers from offering deceptively low prices on products they neither sell nor intend to sell, thereby creating confusion as to the actual prevailing prices for such products.

Liq 38E8 [Formerly Liq 38(g)(7)] No change.

Liq 38E9 [Formerly Liq 38(g)(11)] The purpose of this provision is to implement the intent of Minn. Stat. § 340.983 (1976) by eliminating the possibility of confusion with respect to the

actual price for a product through the combination of distilled liquor or wine prices with other products. The phrase "or other commodities" is added to prevent a wholesaler from combining other products with distilled spirits and thereby shielding a discount for the entire package.

New language is also added to prevent the manufacturer, importer or wholesaler from selling brands of intoxicating liquor under circumstances wherein the purchase of any quantity of a particular brand entitles the retailer to a discount on the purchase price of any other brand of intoxicating liquor. Such arrangements prevent the Department and retailers from being able to determine the actual price of a product. Discounts given in connection with combinations of products render it impossible to determine the actual price of the individual brands, thus frustrating the objective of Minn. Stat. § 340.983 (1976).

Liq 38E10, 11, 12 and 13 [Formerly Liq 38(g)(14), (15), (16) and (19)] The amendments to these rules are solely for the purpose of conforming certain terms to the language of the proposed amended rules.

Liq 38E14 [Formerly Liq 38(g)(20)] The changes in this provision are to conform with the 1975 amendment of Minn. Stat. § 340.983 (1976).

Liq 38E15 [Formerly Liq 38(g)(21)] No change.

Liq 38E16 and 17 [Formerly Liq 38(g)(22) and (23)] Grammatical changes are made to conform to the language used in the proposed rules and in Minn. Stat. § 340.983 (1976).

Liq 38F [Formerly Liq 38(h)] Gifts forbidden. This provision is amended by including "importer" to insure that the rule applies alike to all firms eligible to sell products to retailers. No rational basis exists for excluding importers so long as they are allowed to sell to retailers. The provision is also amended by adding the phrase "directly or indirectly through any officer, agent or employee." This change is necessary to make clear that the prohibitions of this rule are not to be circumvented through indirect means.

Liq 38G [Formerly Liq 38(i)] Sales discrimination forbidden. This provision is amended by placing "Minnesota" before manufacturer, since only Minnesota manufacturers and wholesale distributors are permitted to sell directly to retailers. See Liq 25.

Liq 38I [Formerly Liq 38(k)] The amendments to this provision are designed to authorize the changeover to metric measurements in the liquor industry. It is anticipated that liquor manufacturers will be changing over to metric containers.

Former Liq 38(l) This provision of the existing rules, which required manufacturers, winers, brewers and wholesalers to obtain a permit for each employee acting in the capacity of salesman in the State of Minnesota, is deleted because it is duplicative of Liq 25A of the proposed rules.

Liq 38M [Formerly Liq 38(p)] The second paragraph of this provision has been deleted since the authorizing power for that section was transferred to the Commissioner of Revenue pursuant to Minn. Stat. § 340.081 (1976).

Liq 39 This rule implements the provisions of Minn. Stat. § 340.114 (1976). In Federal Distillers, Inc., et al. v. State of Minnesota and Joseph Novak, 304 Minn. 28, 42, 229 N.W.2d 144, 156 (1975), appeal dismissed, 423 U.S. 908, 96 S. Ct. 209, 210 (1975), the Minnesota Supreme Court noted that new regulations would have to be issued to enforce that statute.

Certain requirements of subdivisions 1 and 2 of the statute are set forth in subparagraph A of the proposed rule, which requires all importers, including manufacturers and wholesalers, to offer for sale to all Minnesota wholesalers and manufacturers on an equal basis all intoxicating liquor brought into Minnesota. Wines and malt beverages are excluded pursuant to Minn. Stat. § 340.114, subd. 4 (1976). The rule includes both intoxicating liquor brought into Minnesota as a finished product ready to be placed upon retailers' shelves and intoxicating liquor which is further distilled, refined, rectified, blended, bottled, labeled or prepared by the importer in any manner subsequent to the importation.

The need for this provision is to implement the mandate of the statute to place all wholesalers on an equal basis with respect to purchases of all liquor products from importers. At present, the Department understands that some intoxicating liquor brought into the state by certain Minnesota-based importers (who are also wholesalers) is offered for sale by them to Minnesota retailers, but not to other Minnesota wholesalers and manufacturers. In order to remove any uncertainty concerning the statute and to give full effect to its provisions, it is necessary to make clear

that the requirement to offer for sale to all wholesalers and manufacturers on an equal basis extends to Minnesota-based importers, including manufacturers and wholesalers, with respect to all such liquor sold by them within the State of Minnesota.

Thus, all importers, including manufacturers and wholesalers, must offer for sale to all Minnesota manufacturers and wholesalers all final products, complete with labels, offered for sale to any person within the State of Minnesota. This will assure that all wholesalers and manufacturers are able to purchase on an equal basis all intoxicating liquor products made available to Minnesota retailers. Since all wholesalers and manufacturers will then be able to purchase and resell all brands of liquor, the Department believes that intrabrand competition may increase.

The Department believes the intent of the statute is to include all importers of intoxicating liquor regardless of location. Thus, those Minnesota-based importers who import intoxicating liquor should be treated no differently than those who are based outside the state.

Subdivision 3 of the statute also requires that any sale by an importer to a Minnesota wholesaler shall be at the lowest price at which the product is being sold contemporaneously by the importer in any other state or in the District of Columbia. Subparagraphs B and C of the rule set forth this requirement and the procedures to be followed so that the Department can enforce the statute.

Before selling intoxicating liquor to a Minnesota wholesaler

or manufacturer, all importers must first file with the Department an itemized list specifying the price, brand, type, container size, proof and age of the liquor so offered. These prices are to be filed on the 15th of the month and should become effective on the first day of the month next succeeding the first full month after the date of filing, and shall remain in effect for a period of not less than 30 days and until changed by subsequent price filing which shall take effect in like manner. The price filings are necessary so that the Department can make the proper price comparisons and other reviews necessary to ascertain whether the liquor prices charged to Minnesota wholesalers and manufacturers comply with the requirements of the statute.

CHAPTER FOUR

[Formerly Chapter Five]

Retail Licenses, Eligibility of Licensees
Business Combinations, Duties of Municipal Clerks

There are no proposed changes in this chapter.

CHAPTER FIVE

[Formerly Chapter Six]

Retail Licensees and Municipal Liquor Stores

Liq 56A This provision relating to the size of the containers from which on-sale dealers sell liquor is changed to authorize "the metric equivalent" of existing measurements. The addition of metric equivalents is necessary to permit the adoption of this form of measurement in the liquor industry.

This rule is also amended by adding a prohibition against the purchase by on-sale dealers of certain spirits which are less than 80 proof for sale to the public. The Department believes this provision is necessary to safeguard the consumer and to prevent deception in the dispensing of liquor by the drink.

Since on-sale consumers frequently are unaware of the brand or alcoholic content of liquor dispensed by on-sale dealers, the Department believes that consumers should be able to expect certain minimum standards with respect to alcoholic beverages they order. The Department proposes to adopt a minimum content of 80 proof in view of the ordinary and customary business practices of on-sale dealers to that effect.

CHAPTER SIX

[Formerly Chapter Seven]

Advertising

Liq 67B2 Certain words and phrases are deleted from this provision prohibiting the inclusion of certain terms in any advertisement or display of intoxicating or malt liquor. The Department believes the deleted words may be useful to retailers in order to better inform consumers of their business policies and practices. See Minn. Stat. § 340.15, subd. 1 (1976).

CHAPTER SEVEN

[Formerly Chapter Eight]

Registration of Brand Labels and Analysis of Alcoholic Beverages

Minn. Stat. § 340.62 (1976) requires the Commissioner to register and approve brand labels. Chapter Seven sets forth the procedures to be followed for brand label registration and approval. State funding for Department activities related to registration was curtailed by the legislature in the budget for fiscal year 1978. Accordingly, certain provisions are amended or deleted in part to reduce the administrative burden on the Department, while still maintaining sufficient information to enforce the statutory requirements.

Liq 71 Brand label approval. This provision requires that all brand labels be approved and registered by the Commissioner before the distilled spirits, wine or malt beverages may be sold in the State of Minnesota. A new subparagraph A is added to the rule to allow the importation of samples without registration in order to relieve importers and wholesalers from the expense and inconvenience of registering products which they bring into the state solely for sample purposes to determine whether to carry such products on a regular basis. Subparagraph B makes clear that any alcoholic beverages whose brand label has not been approved and registered will be confiscated by the Department.

Former Liq 72 The brand label ownership provision of the existing rules is deleted entirely from the proposed rules.

Formerly, only the owner of the brand label or his assignee could register the label. Under the proposed rules, any person duly licensed to import alcoholic beverages is entitled to seek approval and registration of the brand.

The Department has taken into consideration in this proposal the anticompetitive effect of allowing only the brand owner to register its brand. Such a requirement allows the brand owner to control the states in which its product can be sold. This deprives Minnesota consumers of choices of alcoholic beverages which are available in other states and also may restrain free and open competition in the sale of liquor.

Once the brand label is registered in the state, the Department believes that any wholesaler or importer may import such products. Any brand label which is imported into the state without prior registration and approval will be confiscated pursuant to Liq 71B.

Liq 72 [Formerly Liq 73] Registration. In order to simplify the registration requirements for brand label approval, the following changes are made:

A. The check in the amount of $10 will no longer be required to be certified.

B. Only one set of front and back labels and other labels need be submitted, rather than two.

C. Only one set of photostatic copies of beer cans and lids need be submitted, rather than two.

D. Containers of malt beverages need be submitted for analysis only when requested by the Commissioner.

E. Assigned chemical analysis of the product and a verified statement that the product will correspond in all respects to the sample and analysis need be submitted only when requested by the Commissioner.

Former (f) is deleted because brand ownership of a label is not required for its registration under the proposed rules.

Liq 74 [Formerly Liq 75] Abandonment. The requirement that the brand label registrant for malt beverages submit a letter to the Department each month of each year indicating the brands of beer shipped into or sold in the State of Minnesota is deleted. The deletion will alleviate the burden of filing information which is not essential for the Department's duties.

CHAPTER EIGHT

[Formerly Chapter Nine]

The Importation and Release of Distilled Spirits, Wine, Malt Beverages and Sacramental Wine

Liq 83 Manifest or Invoice. The Department's rules dealing with the manifest or invoice for liquor shipped into Minnesota are simplified. Only two copies, rather than four, are required to be submitted in order to eliminate unnecessary paper work for importers and the Department. The reference to ceritification labels in Liq 83B is deleted since the Department does not deem such information necessary to discharge its duties.

Former Liq 83(c), prohibiting the release of unmanifested shipments to consignees, is deleted entirely because the

Department believes it unduly penalized the consignee of liquors for the possible failure of the consignor to forward the manifest to the Department in a timely fashion.

Former Liq 84(b) In view of the deletion of former Liq 83(c) prohibiting the release of unmanifested shipments to consignees, this rule authorizing carriers to store such shipments pending their release is obsolete and is therefore also deleted from the proposed rules.

CHAPTER NINE

[Formerly Chapter Ten]

Standards of Identity, Labeling Requirements and Standards of Fill

Liq 92 Standards of Fill for Distilled Spirits. The standards of fill for distilled spirits have been amended to authorize the importation and sale of metric equivalent containers. It is anticipated that liquor manufacturers, as manufacturers in other areas of the economy, will be changing over to metric containers. This provision authorizes such changeover. See Metric Conversion Act of 1975, 15 U.S.C. § 205a-k (1976).

Liq 95 Standards of Fill for Wine. The standards of fill for wine are also changed to authorize the importation and sale of metric equivalent containers.

Liq 98A Labeling Requirements and Alcoholic Content. The term "strong" for any malt beverage product sold in cans is permitted to be placed on the can in any permanent medium. This amendment will allow the beer producer more latitude in using new processes for the permanent identification of strong and 3.2 beer.

Liq 98E A new provision is added to clarify the Department's authority to confiscate any product not labeled in accordance with Liq 98. The Department believes it is important to set forth the penalty for not properly labeling intoxicating liquor, because the requirement that the brand owner be the registrant of the brand label is deleted from the proposed rules. Since brand labels may be registered by any duly licensed importer who wishes to sell the liquor within the State of Minnesota, the Department desires to make clear that such importer will be expected to comply with all labeling requirements contained in the rules.

Liq 99C A new provision is added to Liq 99 to make clear the Department's authority to confiscate any product not labeled in accordance with Liq 99. The necessity and purpose of this change are the same as that stated for Liq 98E.

Liq 100 Standards of Fill for Malt Beverages. This provision is amended to authorize the importation and sale of metric equivalent containers for malt beverages. The necessity and purpose of this change are the same as that stated for Liq 92.

CHAPTER TWELVE

[Formerly Chapter Eleven]

Liq 123 Permit Holder's Report. The permit holder is required to file only an annual report instead of monthly reports. This will result in a reduction of the burden of filing and will render more efficient the Department's administration of this section without reducing necessary information.

STATE OF MINNESOTA

COUNTY OF RAMSEY

In the matter of the Proposed Adoption of Rules of the State Department of Public Safety Governing Standards for Administration of the Intoxicating Liquor Act.

AFFIDAVIT OF MAILING

Beverly Zollars, being first duly sworn, deposes and says:

That on the 21st day of July, 1977, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the attached Notice of Hearing by depositing in the United States mail at said City of St. Paul, a true and correct copy thereof, properly enveloped, with postage prepaid, to all persons and associations at the addresses listed on the attached Certificate of the Secretary of State.

Beverly A. Zollars

Subscribed and sworn to before me this 21st day of July, 1977.

ROY W. PETERSON
Notary Public, Ramsey County, Minn.
MY COMMISSION EXPIRES
June 8. 1979

Roy W. Peterson

STATE OF MINNESOTA

COUNTY OF RAMSEY

In the matter of the Proposed Adoption of Rules of the State Department of Public Safety Governing Standards for Administration of the Intoxicating Liquor Act.

AFFIDAVIT OF RECEIPT OF SECRETARY OF STATE'S LIST

Beverly Zollars, being duly sworn on oath deposes and says:

1) That she is an employee of the Department of Public Safety of the State of Minnesota.

2) That on the 20th day of July 1977, she went to the Secretary of State's office of the State of Minnesota and requested a current list of all representatives of associations or other interested groups or persons who had registered their names with the Secretary of State for the purpose of obtaining notices of public hearings relating to the promulgation of rules pursuant to Minn. Stat. 15.0412 (1976).

3) That on the 20th day of July, 1977 in response to the above request, the Secretary of State provided her with such a list, a copy of which is attached hereto and incorporated by reference.

Beverly L. Zollars

Subscribed and sworn to before me

this 21st day of July 1977.

ROY W. PETERSON
Notary Public, Ramsey County, Minn.
MY COMMISSION EXPIRES
June 8, 1979

STATE OF MINNESOTA

COUNTY OF RAMSEY

In the matter of the Proposed Adoption of Rules of the State Department of Public Safety Governing Standards for Administration of the Intoxicating Liquor Act.

CERTIFICATE

I hereby certify that the enclosed 505 general labels and Public Safety list constitute the complete list of persons, associations and other interested groups who as of 9:20 o'clock A. m., this 20th day of July, 1977, have requested pursuant to Minn. Stat. 15.0412, subd. 4 (1974), that their names be placed on file with the Secretary of State for the purpose of receiving notice of public hearing on proposed rules on the subject captioned above.

SECRETARY OF STATE

JOAN ANDERSON GROWE

Joan Anderson Growe

By Randall W. Sayers

STATE OF MINNESOTA

COUNTY OF RAMSEY

BEFORE EDWARD G. NOVAK

COMMISSIONER OF PUBLIC SAFETY

In the Matter of the Proposed Adoption of Rules of the State Department of Public Safety Relating to Standards for Administration of the Intoxicating Liquor Act.

ORDER FOR HEARING

To effectively implement Minn. Stat. Chapter 340 (1976) the Minnesota Commissioner of Public Safety deems it necessary to consider adoption of the proposed rules captioned above pursuant to the authority vested in me by Minn. Stat. § 299A.02 subd. 3 (1976).

NOW, THEREFORE, IT IS ORDERED this 24th day of June, 1977, that a public hearing on the proposed rules captioned above be held in the State Office Building, Room 81, St. Paul, Minnesota, on August 24, 1977, commencing at 9:00 a.m., and continuing until all representatives of associations or other interested groups or persons have had an opportunity to be heard.

IT IS FURTHER ORDERED, that a Notice of Hearing be mailed to all persons or representatives of associations or other interested groups who have registered their names with the Secretary of State for that purpose.

IT IS FURTHER ORDERED, that the Notice of Hearing be published in the State Register.

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC SAFETY

Edward G. Novak

COMMISSIONER OF PUBLIC SAFETY

STATE OF MINNESOTA

BEFORE EDWARD G. NOVAK

COUNTY OF RAMSEY

COMMISSIONER OF PUBLIC SAFETY

In the matter of the Proposed Adoption of Rules of the State Department of Public Safety Relating to Standards for Administration of the Intoxicating Liquor Act.

NOTICE OF HEARING

Notice is hereby given that a public hearing in the above-entitled matter will be held in the State Office Building, Room 81, Saint Paul, Minnesota on August 24, 1977, commencing at 9:00 a.m., and continuing until all persons have had an opportunity to be heard concerning adoption of the proposed rules captioned above.

All interested or affected persons or representatives of groups or organizations will have an opportunity to participate, by submitting either oral or written data, statements, or arguments. Written materials may be submitted by mail to William Seltzer, Office of Hearing Examiners, 1745 University Avenue, St. Paul, MN, either before the hearing or within five business days after the close of the hearing, unless the five day limitation is extended by the hearing examiner.

The Commissioner proposes to adopt rules relating to the transfer of responsibilities to the Department of Revenue, distiller and winer representatives, price filing by manufacturers, wholesalers and importers, sales by importers to wholesalers on an equal basis, price discounts to retailers, minimum proof of distilled spirits, advertising, brand label registration, discontinued brands, and standards of fill for wine, intoxicating liquor and malt beverages.

The Department's authority to promulgate the proposed rules is contained in Minn. Stat. §299A.02, subd. 3 (1976). One free copy of the proposed rules is available and may be obtained by writing to Diane Hamilton, Department of Public Safety, 210 Transportation Building, St. Paul, Minnesota 55155. Additional copies will be available at the door on the date of the hearing.

A Statement of Need explaining the need for and reasonableness of the proposed rules and a Statement of Evidence outlining the testimony the department will be introducing at the hearing will be filed with the Office of Hearing Examiners at least 25 days prior to the hearing and will be available there for public inspection.

Please be advised that Minnesota Statutes, Chapter 10A, requires each lobbyist to register with the Ethical Practices Board within five days after he commences lobbying. Lobbying includes attempting to influence rule making by communicating or urging others to communicate with public officials. A lobbyist is generally any individual who spends more than $250 per year for lobbying or any individual who is engaged for pay or authorized to spend money by another individual or association and who spends more than $250 per year or five hours per month at lobbying. The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, St. Paul, Minnesota 55155, phone (612) 296-5615.

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC SAFETY

Edward J. Novak
COMMISSIONER OF PUBLIC SAFETY

6-27-77
DATE

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SEP 23 1977
OFFICE OF HEARING
EXAMINERS

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC SAFETY
LIQUOR CONTROL DIVISION

In the Matter of the
Proposed Adoption of
Rules of the State
Department of Public Safety
Governing Standards for
Administration of the
Intoxicating Liquor Act.

MEMORANDUM
ON
CONSTITUTIONAL
ISSUES

This Memorandum is submitted on behalf of the Department of Public Safety, Liquor Control Division, in response to the Hearing Examiner's request that all participants in the above-captioned rule making proceeding submit in writing their arguments with respect to any constitutional issues which might be raised in connection with the proposed rules.

I. THE BURDEN OF PROOF

In submitting this Memorandum, the Department finds itself in the difficult position of responding to arguments challenging the constitutionality of certain rules without yet being advised of the substance of those arguments. Under the Administrative Procedure Act the agency has the burden of proving the need for and reasonableness of rules. However, with respect to claims of constitutional infirmity, we submit that the burden of going forward lies with the challenger.

There is no requirement in the Administrative Procedure Act that the agency affirmatively argue the constitutionality of each and every proposed rule. On the contrary, we submit that the burden of proof should be placed on the challenging parties

to show that a certain rule violates a particular constitutional provision. Thus, the proposed rules should enter this process with a cloak of presumed constitutionality.

It is undisputed that a statute bears a presumption of constitutionality. Federal Distillers, Inc. v. State, 304 Minn. 28, 229 N.W.2d 144 (1975); Reicker v. State, 293 Minn. 149, 197 N.W.2d 434 (1972); Head v. Special School Dist. No. 1, 288 Minn. 496, 182 N.W.2d 887 (1970), cert. den. sub. nom Minneapolis Federation of Teachers, Local No. 59 v. Spannaus, 404 U.S. 886, 92 S. Ct. 196, 30 L. Ed.2d 168 (1971); City of Pipestone v. Madsen, 287 Minn. 357, 178 N.W.2d 594 (1970); Minneapolis Federation of Teachers v. Obermeyer, 275 Minn. 347, 147 N.W.2d 358 (1966). According to several lower federal courts, the presumption of constitutionality is particularly strong where the statute concerns the regulation of intoxicating liquors. Felix v. Young, 536 F.2d 1126, 1131 (6th Cir., 1976); Paladino v. City of Omaha, 471 F.2d 812, 814 (8th Cir., 1972); Boscia v. Warren, 359 F. Supp. 900, 901 (E.D. Wis. 1973).

A presumption of constitutionality likewise attaches to formally adopted administrative rules. The Minnesota Supreme Court has acknowledged and followed the "well-established authority which recognizes that it is the duty of courts, regardless of personal views or individual philosophies, to uphold regulations adopted by administrative authorities unless those regulations are clearly arbitrary and unreasonable."

Brown v. Wells, 288 Minn. 468, 181 N.W.2d 708, 711 (1970); Pearson v. Independent School Dist. No. 716, 290 Minn. 400, 188 N.W.2d 776, 779 (1971).

Although the proposed rules are not yet formally adopted, the present hearing process is being undertaken for that purpose. Thus, we submit that the proposed rules should be presumed constitutional unless specifically proven to be otherwise.

Since the burden of proof should be on the challenging parties to demonstrate that a particular rule violates the Constitution, it is the intention of the Department in this Memorandum to set forth only certain basic principles which should be applied to the proposed rules in general. The Department will comment on specific constitutional objections once these objections are made known to the agency.

II. THE POWER OF THE STATE TO REGULATE THE SALE AND DISTRIBUTION OF LIQUOR

A. The Police Power of the State.

Every state possesses the power to legislate for the health, safety and general welfare of its citizens. The Alexander Co. v. City of Owatonna, 222 Minn. 312, 24 N.W.2d 244 (1946). In the exercise of this police power, the legislature has broad authority to regulate private conduct for the benefit of the public. The constitutional limitation on this power is that any exercise of it must be reasonably related to some perceived public need and that the means chosen are

not inconsistent with the meeting of that objective. State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N.W. 770 (1928).

This broad grant of police power clearly includes the authority to regulate economic needs for the public good. See McElhone v. Geror, 207 Minn. 580, 292 N.W. 414 (1940). The United States Supreme Court recently reaffirmed the well-established principle that "states are accorded wide latitude in the regulation of their local economies under their police powers . . ." City of New Orleans v. Dukes, 427 U.S. 297, 95 S. Ct. 390, 395 (1976). It is the legislature which determines the public benefit to be obtained and the best means to obtain it. The courts, therefore, as well as private parties, cannot substitute their judgment for that of the legislature.

> Courts do not pass upon the soundness of social or economic theories in the legislative mind when statutes are enacted in exercise of the police power, nor can courts substitute their judgment for that of the legislature as to the wisdom, expediency, or effectiveness of this type of regulation. . . .

Federal Distillers, Inc. v. State, supra, at 154; see also Nebbia v. New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1930); Lee v. Delmont, 228 Minn. 101, 108 N.W.2d 530 (1949); State v. Edwards, 287 Minn. 83, 177 N.W.2d 40 (1970).

Therefore, the issue in this hearing is not the economic soundness of a decision made by the legislative branch of the government; rather, the sole duty of the Hearing Examiner is to determine whether the agency has carried its burden of demonstrating the need for and reasonableness of the regulation implementing the legislative mind.

B. The Twenty-First Amendment to the Federal Constitution Granted the States Broad Authority Over the Regulation of Liquor Consumption and Traffic.

Courts have uniformly recognized the broad powers granted to the states to regulate liquor traffic pursuant to the Twenty-First Amendment of the United States Constitution. The United States Supreme Court, in California v. LaRue, 409 U.S. 109 (1972), summarized this special interest:

> While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-First Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals.

Id. at 114 (emphasis added).

While the Twenty-First Amendment does not grant the state any power to contravene other individual rights protected by the Constitution, the Supreme Court has recognized the state's broader regulatory power with respect to " . . . the importation of intoxicants, a regulatory area where the state's authority under the Twenty-First Amendment is transparently clear . . . [and] purely economic matters that judicially merit only the mildest review under the Fourteenth Amendment." Craig v. Boren, 92 S. Ct. 451, 462 (1976), reh. den. 97 S. Ct. 1161 (1977). Therefore, the constitutionality of those rules dealing with essentially economic matters or the importation of liquor

is strengthened by the Twenty-First Amendment.

C. The Department of Public Safety Has the Authority to Implement Its Legislative Mandate Through the Promulgation of Rules.

If it is the role of the legislative branch of government to determine the public benefit and the means to obtain that objective, it is the role of the administrative agency to implement the mandate of the legislature. The legislature has granted the Commissioner of Public Safety the power to "make all reasonable rules to effect the object of Chapter 340." Minn. Stat. § 299A.02, subd. 3 (1976). In exercising this authority, the agency is empowered to formulate rules which particularize and make effective the statutory requirements of Chapter 340.

The Minnesota Supreme Court has recognized this agency function. In Welsand v. Railroad and Warehouse Commission, 251 Minn. 504, 88 N.W.2d 834 (1958), the Court summarized the role of an administrative agency in this regard:

> In vesting regulatory power in an administrative agency, the legislature need not expressly delineate with particularity or exactness each and every phase of the power so conferred, but may, in order to give the administrative function reasonable flexibility, leave the exact scope of the rule-making power to reasonable implication and this includes an implied power to formulate necessary classifications and definitions within the designated area of regulation. One of the basic purposes of administrative regulation is to leave preciseness and detail of application to administrators who supposedly will bring an expert's familiarity to bear upon the problems under consideration.

Id at 838 (footnote deleted).

The legislature has left the task of making explicit the statutory mandates of the Intoxicating Liquor Act to the Department of Public Safety. The Department is now using the administrative process to fulfill this function.

III. DUE PROCESS REQUIREMENTS

There is no question that the state may regulate private conduct for public benefit. Moreover, in the field of economic regulation, it is settled that the legislature is free to adopt whatever economic policy it deems will promote the public good. Federal Distillers, Inc. v. State, 304 Minn. 28, 229 N.W.2d 144, 157 (1975); Ferguson v. Skrupa, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed.2d 93 (1963).

Where economic regulation is involved, the Minnesota Supreme Court has summarized the due process requirements in the following manner:

> . . . Where an economic regulation is enacted, the guarantee of due process demands only (1) that the act serve to promote a public purpose; (2) that it not be an unreasonable, arbitrary, or capricious interference; and (3) that the means chosen bear a rational relation to the public purpose sought to be served. . . .

Federal Distillers, Inc. v. State, supra, at 158.

The pertinent inquiry, therefore, with respect to constitutional issues, is whether the proposed rules are reasonably related to the purposes of the Intoxicating Liquor Act. Mouring v. Family Publications, Inc., 411 U.S. 356 (1973); Welsand v. Railroad and Warehouse Commission, supra.

A. Denial of Due Process Must Involve the Deprivation of a Legal Right.

It is axiomatic that a person must have a legal right of which he will be deprived in order to invoke a claim of denial of due process. Jenson v. Olson, 353 F.2d 825 (8th Cir. 1965). It is anticipated that an argument may be raised that certain proposed rules are in violation of due process principles because they deny a person his right to engage in his occupation or business, and such business is a vested property right. However, the Minnesota Supreme Court has expressly denied such an argument with respect to the liquor industry. In George Benz Sons, Inc. v. Ericson, 227 Minn. 1, 34 N.W.2d 725 (1948), the Court stated:

> . . . [N]o one has the absolute right to engage in the business of selling intoxicating liquors; . . . no one, once licensed, can acquire a vested right to continue in the business; . . .

227 Minn. at 11, 34 N.W.2d at 731. Furthermore, the Court has held that no one has a vested right in the continuance of the existing distribution system in the liquor industry. Federal Distillers, Inc. v. State, supra, at 155.

Any due process argument, therefore, that is based on the method of doing business in the liquor industry at the present time lacks the primary prerequisite for a constitutional argument. No liquor wholesaler or retailer has a constitutionally protected property right in the continued ability to be licensed to sell liquor in Minnesota. Moreover, it is the belief of the Department that the proposed rules in no way deprive any person of the ability to engage in the liquor business. The

purpose of the proposed rules is to implement the legislative mandate which regulates the manner in which the liquor business is to be conducted in the State of Minnesota. Again, the proper test for constitutional due process is whether the selected means bears a rational relation to the public purpose sought to be served. Mouring v. Family Publications, Inc., supra; Welsand v. Railroad and Warehouse Commission, supra.

B. Proposed Minn. Reg. Liq 39 Does Not Require the Sale of Products or Labels Not Owned By the Seller.

During the course of the hearings, statements were made to the effect that proposed Minn. Reg. Liq 39 (hereinafter Liq 39), violates due process by requiring a distiller who bottles liquor for a wholesaler owning its own brand to sell such liquor with the wholesaler's brand to all other wholesalers in the State of Minnesota.[1/] The Department categorically denies that such a construction should be placed on the rule.

The key concept of proposed Liq 39 is that the seller cannot be forced to sell that which he does not own. Therefore, although all distilled spirits brought into the State are subject to the equal sale requirement, the meaning of an equal offer for sale will depend in each case upon what the seller is able to offer. For example, where a seller owns the bottled liquor which is offered for sale but does not own or control the brand label which the purchaser requests, the proposed rule would require the seller to offer only the bottled liquor equally to all buyers, not the brand label.

1/ E.g., Transcript pp. 251-253.

However, if a seller owns, controls and sells in Minnesota both the liquor and the brand label, an equal offer would require sale of the labelled product.

This interpretation of Minn. Stat. § 340.114 (1976) is entirely consistent with the Minnesota Supreme Court's holding in Federal Distillers, Inc. v. State, supra. In that case, the court dismissed the argument of Johnson Brothers Wholesale Liquor Company that two of its distiller suppliers, Federal and Mr. Boston, would be required by the Act to sell liquor bottled under brands owned by Johnson to all wholesalers. The court characterized such an argument as speculative and hypothetical and went on to say that "there is no indication that the liquor commissioner is about to construe the statute in such a way as to invade Johnson's right of ownership in its registered private brand labels, and the statute on its face clearly does not require such a construction." Id. at 155.

Proposed Liq 39 has been formulated in conformity with this language and deprives no one of any property right.

C. Any Alleged Right of Refusal to Deal Is Not Absolute and Can Be Regulated By the State For Public Benefit.

It has been recognized that the "freedom to contract with respect to one's property and in the conduct of a lawful business to select the party with whom one chooses to do business is part of the liberty protected by the due process clauses of the State and Federal Constitutions." Federal Distillers, Inc. v. State, supra at 157. However, it has also

been recognized that this right is not absolute and can be regulated by the state for public benefit. In Federal Distillers, Inc. v. State, supra, the Court, granting deference to the broad scope of police power in the realm of economic regulation, held that the guarantee of due process requires only that the act promote a public purpose, that it not be an unreasonable, arbitrary or capricious interference, and that the means chosen bear a rational relation to the public purpose sought to be served. With respect to restricting one's right of refusal to deal, the Court held that:

> . . . [P]rohibiting discrimination by restricting refusals to deal on an equal basis with all wholesalers is not an arbitrary and unreasonable interference with the liquor industry and bears a rational, if not a substantial, relationship to the economic welfare of the public.

Id. at 158.

If a distiller wishes to bring liquor into the State of Minnesota, he is required to deal with all licensed wholesalers on an equal basis. The legislature has chosen this means to accomplish its goals of increased intrabrand competition, the prevention of monopolies and the promotion of lower prices to consumers. Taking into consideration the police power of the State to legislate for health, safety and welfare of the public, and the mandate of the Twenty-First Amendment, the Court held that such a requirement does not violate the due process standards of either the Federal or State Constitutions.

In addition, mandatory sales have long been held a proper form of judicial or administrative relief, especially as a remedy for violations of the federal antitrust laws. United States v. Glaxo Group, Ltd., 410 U.S. 52, 64 (1973). Moreover, courts have gone even further and required mandatory licensing of patents and trademarks, sometimes even with the stipulation that such licensing be royalty-free. See e.g., United States v. General Motors Corp., 1965 Trade Cas. ¶ 71,624 (E.D. Mich. 1965) (royalty-free licenses on existing patents; reasonable royalties on patents obtained within five years); United States v. International Business Machines Corp., 1965 Trade Cas. ¶ 68,245 (S.D.N.Y. 1956) (partly royalty-free, partly at reasonable royalties, depending on product); United States v. Western Electric Co., 1956 Trade Cas. ¶ 68,246 (D.N.J. 1956) (partly royalty-free, partly at reasonable royalties, depending on identity of patentee).

It should be emphasized that proposed Liq 39 in no way requires any distiller to license any patent or trademark. Rather, the proposed rule, as does the statute on which it is based, requires only that the patented or trademarked product be sold on an equal basis to all wholesalers. The Department submits that proposed Liq 39 implements the reasonable means chosen by the legislature to promote a public benefit and thus is not open to constitutional challenge.

IV. EQUAL PROTECTION REQUIREMENTS

The constitutional guarantee of equal protection of the laws is an assurance of equality of treatment for those similarly situated. However, laws may classify. The standard that a particular classification must meet is one of reasonableness, i.e., the degree to which the law treats those similarly situated in a like manner.

The prohibition against a state denying to any person within its jurisdiction the equal protection of the laws does not limit the police power of the state. Minneapolis and St. L. R. Co. v. Beckwith, 129 U.S. 26, 9 S. Ct. 207, 32 L. Ed. 585 (1889). The courts will not strike down statutory or administrative classifications which are reasonable. The United States Supreme Court has approached the problem in the following manner:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . . The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. . . .

Williamson v. Lee Optical of Oklahoma, 398 U.S. 483, 489, 75 S. Ct. 461, 465 (1955) (Case citations omitted).

To support a claim of denial of equal protection, therefore, a person must demonstrate beyond a reasonable doubt

that any classification created by the proposed rules is invidious or completely devoid of any basis of fact. We submit that there is no evidence on the record at this hearing which could be construed as demonstrating that a particular proposed rule constitutes a denial of equal protection. On the contrary, the evidence shows that any classifications which are created by the legislature and carried out in the proposed rules are within the scope of authority of the legislature and the proper administrative function of the agency.

V. CONCLUSION

In accordance with the requirements of the Minnesota Administrative Procedure Act, the Department is in the process of promulgating new rules for the administration of the Intoxicating Liquor Act. The Department is required to make an affirmative showing of the statutory basis and the need for and reasonableness of the proposals. However, there is no statutory requirement that the agency affirmatively demonstrate the constitutionality of each and every rule. The rules should be presumed constitutional and the burden of going forward with respect to constitutional issues should be placed on the challengers.

The state has traditionally been granted broad authority in the area of economic regulation, and this authority is further strengthened with respect to liquor regulation by the Twenty-First Amendment. The proposed rules are intended to implement the agency's legislative mandate.

The Department submits that the proposed rules are not open to objection either with respect to the due process or equal protection requirements of the State or Federal Constitutions. The rules take no property right away from any person. Due process requires only that the rules promote a public purpose, that they are not unreasonable or arbitrary, and that the means chosen have a rational relation to the public purposes to be achieved. Equal protection requires that the rules treat all those similarly situated in a like manner.

The Department has presented its case on the record and demonstrated the need for and reasonableness of the proposed rules. We submit that this showing also demonstrates the constitutionality of the rules.

Dated: September 23, 1977.

WARREN SPANNAUS
Attorney General
State of Minnesota

RICHARD B. ALLYN
Solicitor General

By Stephen P. Kilgriff
STEPHEN P. KILGRIFF
Special Assistant
Attorney General

515 Transportation Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-2622

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STATE OF MINNESOTA
DEPARTMENT OF PUBLIC SAFETY
LIQUOR CONTROL DIVISION
DPS-78-001-WS

In the Matter of the Proposed Adoption of Rules of the State Department of Public Safety Governing Standards for Administration of the Intoxicating Liquor Act.

POST-HEARING MEMORANDUM OF DEPARTMENT OF PUBLIC SAFETY

I.

INTRODUCTION

This Memorandum is submitted on behalf of the Minnesota Department of Public Safety, Liquor Control Division (hereinafter, "the Department") in support of the adoption of certain rules proposed by the Department.

Pursuant to Minn. Stat. § 15.0411, subd. 4 (1976), a public hearing concerning the rules was held before William Seltzer, Hearing Examiner, on August 24, 25, and 26, 1977. All interested persons were given an opportunity to participate by commenting on the proposed rules and questioning the Department's panel of three witnesses.[1] At this hearing, the Department's jurisdictional documents,[2] proposed rules, statement of evidence and attached documents and statement of need and attached documents were accepted into evidence without objection.[3]

During the course of the hearing, a number of members of the public orally challenged the validity of certain proposed

1/ Joseph V. Novak, Director of the Liquor Control Division of the Department; John A. Muer, Assistant Director; James L. Pederson, Assistant Commissioner of the Department.

2/ Order for hearing, notice of hearing, certificate of Secretary of State, affidavit of receipt of the Secretary of State's list, and affidavit of mailing.

3/ Transcript (hereinafter "T.") 7-12.

rules on constitutional grounds. On September 28, 1977, oral argument was presented by four members of the public and an attorney for the Department with respect to constitutional issues raised by the participants. The Department further relies on its Memorandum on Constitutional Issues and section III., infra, in support of the constitutionality of its proposed rules.

Prior to the instant rule-making hearing, an information hearing on draft rules was held on February 17, 1977, in order to afford an opportunity to obtain outside information and opinions relating to the draft rules, pursuant to Minn. Stat. § 15.0412, subd. 6 (1976). All documents relating to the information hearing, including a transcript of the hearing and all written materials received by the Department concerning the draft rules and rules as proposed, were accepted into evidence as part of DPS Exhibit (hereinafter "Ex.") 3. In accordance with the requirements of this statute, the notice and all written material received by the Department have been made a part of the record of this proceeding.

On a number of occasions at the hearing,[4/] an attorney for Ed. Phillips and Sons Company, indicated his belief that the hearing did not comply with the dictates of Minn. Stat. § 15.0412, subd. 6 (1976). However, it is clear that the Department published notice of its intent to seek outside information or opinions, that all interested persons had the opportunity to submit data or views on the draft rules orally and

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4/ T. 263, 303, 320 (Robins).

in writing[5], and that absolutely all written material[6] submitted to the Department by any person was available for public inspection more than 30 days before the hearing and was admitted as evidence at the hearing[7] - in complete compliance with the statutory requirements. Moreover, counsel was given full opportunity throughout the hearing to question the Department panel about any outside contacts - written or oral - with the Department, and full responses were given by the panel on a number of occasions.

The Department carries the burden of establishing that its proposed regulations are reasonable, necessary and within the scope of its statutory authority.[8] The Department submits that it has fully met this burden in all respects, and urges the Hearing Examiner to so hold in his findings of fact, conclusions, and recommendations.

In support of its affirmative presentation, the Department relies upon the entire record, including its exhibits and attachments, Memorandum on Constitutional Issues, and the transcript. This Memorandum is submitted to summarize and clarify the Department's position on a rule-by-rule basis.

5/ In fact, representatives of Ed. Phillips and Sons Company attended the hearing and submitted oral and written views on the draft rules.

6/ Including the price survey prepared by Robert Turnquist. See DPS Ex. 3 and T. 263-275.

7/ See Statement of Evidence, DPS Ex. 3.

8/ Minn. Stat. § 15.0412, subds. 1, 4 (1976); HE 104(g), 106; T. 13-14.

II.

AUTHORITY AND NEED FOR, AND REASONABLENESS OF, PROPOSED RULES

The Statement of Need[9] and the Department's testimony[10] outline generally the authority[11] and need[12] for the proposed rules. The reasonableness of all of the rules, as well as more specific statutory authority and need for certain rules, is set forth in the remainder of the Statement of Need[13] and at those portions of the transcript where representatives of the Department testify or respond to questions.

Following is a rule-by-rule explication of the Department's affirmative case:

Liq 1G

The definition of "importer" is amended to make clear what persons are covered within the meaning of that term.[14] At the hearing, one person questioned the statutory basis for the definition.[15] The Department indicated the relation of Minn. Stat. §§ 340.11, subd. 2 and 340.113 (1976) to importers, as well as the ruling of Federal Distillers, Inc. v. State of Minnesota, 304 Minn. 28, 229 N.W.2d 144 (1975), appeal dismissed, 423 U.S.

9/ DPS Ex. 4, at pp. 1-5.

10/ T. 25-30 (Novak).

11/ In particular, Minn. Stat. § 299A.02, subd. 3 (1976) grants the Commissioner of the Department the authority to "make all reasonable rules to effect the object of Chapter 340."

12/ Recent statutory changes and judicial decisions, as well as a desire to simplify the rules and avoid repetition, necessitate the adoption of many of the proposed rules.

13/ DPS Ex. 4 at 5-26.

14/ DPS Ex. 4 at 5-6; T. 30 (Novak).

15/ T. 31-32 (Larson).

908, 96 S. Ct. 209, 210 (1975) that persons licensed as manufacturers-wholesalers are importers because they have the right to import.[16/]

One attorney opined that since "brewer" was excluded under the proposed rule, "winer" should also be excluded.[17/] He argued that "the entire proposed rule seems to be bottomed on" section 340.114,[18/] and that since wine and beer were excluded from the operation of that provision, winers and brewers should be treated consistently in the definition of "importer." The Department submits that brewers and winers can be and are distinguishable by virtue of the statutory provisions applicable to each. The Department, naturally, agreed that beer and wine were both excluded from section 340.114.[19/] However, brewers are governed by Minn. Stat. §§ 340.02, 340.032, 340.401, and 340.402 (1976), inter alia,[20/] while winers are licensed pursuant to section 340.113.[21/] Thus, it is clear, as suggested by the Department,[22/] that the term "importer" may apply to winers and not to brewers in certain instances, regardless of the fact that section 340.114 excludes both wine and beer from its scope.

16/ DPS Ex. 4 at 6; T. 30, 32 (Novak, Muer).

17/ T. 32-35 (Robins).

18/ T. 33 (Robins).

19/ T. 34 (Maclin).

20/ T. 33 (Muer).

21/ Section 340.113, subd. 1 states:

> No intoxicating liquor or ethyl alcohol shall be shipped into this state by any . . . winer . . . unless and until such . . . winer . . . has secured a license from the commissioner of public safety permitting him so to do.

Section 340.113, subd. 6 states:

> Nothing in this section includes malt beverages regardless of alcoholic content.

22/ T. 34 (Maclin).

Liq 2

This proposed rule adds three definitions for purposes of clarification and to conform the meanings to Minn. Stat. § 340.081 (1976).[23] No opposition to or comment concerning this rule was made by any member of the public.

Liq 3

This proposed rule merely makes clear the severability of the rules, reserving the Department's right to continue enforcement of all other rules even if a particular rule, or portion thereof, is declared unenforceable for any reason. While one public witness commented upon the manner in which courts view severability provisions,[24] no one voiced particular objections to or impermissible applications of the rule. The Department submits that the rule is one of common use, promotes understanding, and, as such, is reasonable and necessary.[25]

Former Chapter Two

This chapter, relating to Excise and Surtaxes, was deleted and transferred to the Commissioner of Revenue, since that agency now has responsibility for that subject matter, pursuant to Minn. Stat. § 340.081 (1976).[26] An employee of the

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23/ DPS Ex. 4 at p. 6; T. 36 (Novak).

24/ T. 37-38 (Robins).

25/ See T. 37-38 (Maclin).

26/ DPS Ex. 4 at p. 7; T. 39 (Novak).

Department of Revenue supported the change,[27] and no one opposed the proposal.

Liq 24 and Former Liq 25-34

The Department clarifies and deletes repetitious rules by these amendments.[28] No comments or objections were voiced by the public.

Liq 25

This section regarding regulatory permits and fees is amended to cover out-of-state representatives for regulatory purposes and to prohibit certain inducements, in order to give effect to Minn. Stat. § 340.114 (1976).[29] In response to public questions regarding application of the rule,[30] the Department fully satisfied the witnesses' concerns,[31] and no objections were raised as to the objectives or reasonableness of the proposal.

Liq 38

A number of amendments are made in Liquor Rule 38. Since public comments were made with respect to only some of the subsections of proposed Rule 38, the provisions are referred to herein in the same order as at the hearing - beginning with those rules proposed to be deleted and continuing with the proposed rules in numerical order.

27/ T. 39-40 (McClung).

28/ DPS Ex. 4 at p. 7; T. 40-41 (Novak).

29/ DPS Ex. 4 at p. 7-8; T. 42-43 (Novak).

30/ T. 43-45 (Latz, regarding malt beverages); T. 46-47 (Hoene, regarding solicitation).

31/ T. 44-45 (Muer, regarding malt beverages); T. 47-48 (Novak and Kilgriff, regarding solicitation).

No substantive changes are made in Liq 38A, B, C or D, and no public comment was made with respect to these rules.[32]

Liq 38E

This provision, formerly Liq 38(g), relates generally to the filing of wholesale price schedules and amendments and implements the requirements of Minn. Stat. § 340.983 (1976). The price filing system has been the subject of much discussion and litigation, and the Department intends by these amendments to clarify the requirements in a manner that is workable for and meaningful to the industry, the public, and the Department.[33]

Former Liq 38(d) and (f)

No objection to or comment upon these proposed deletions, or the Department's affirmative case therefore,[34] was offered by any member of the public.

Former Liq 38(g)(6)

The definition of "brand" is deleted in order to assist in streamlining the rules where terms are commonly understood. The deletion makes no substantive change in the operation of the rules, and no comment or opposition to the change was offered.[35]

32/ DPS Ex. 4 at p. 9; T. 48 (Novak).

33/ DPS Ex. 4 at pp. 9-10; T. 49-50 (Novak).

34/ DPS Ex. 4 at p. 9; T. 48-49 (Novak).

35/ DPS Ex. 4 at p. 10; T. 50 (Novak).

Former Liq 38(g)(8)-(9)

The Department proposes to delete these rules relating to below cost pricing, since other federal and state laws already prohibit sales below cost in the liquor industry.[36/]

Three industry representatives voiced opposition to the deletion, generally asserting that the below cost prohibition prevents predatory pricing and encourages competition, and that the existing rules, Liq 38(g)(8)-(9), are more effective than the state and federal laws in accomplishing this goal.[37/] One member suggested that the Department's rule was more stringent than the other laws and should therefore be retained since it is not entirely duplicative of such laws.[38/]

While the Department concedes that the existing rules may go beyond Minn. Stat. § 325.04 (1976), 27 U.S.C. § 205(b)(3), and ATF ruling 76-16 in prohibiting certain sales or easing the burden of proof for a complaining party in certain situations, the Department adheres to its position that the existing rules should be deleted as confusing, unnecessary and essentially duplicative of the other laws. The Department certainly has no obligation, as one member suggested,[39/] to demonstrate that its existing rule is exactly duplicative of another law before it can delete a provision which it, as a matter of policy, determines to delete.[40/]

36/ DPS Ex. 4 at pp. 10-11; T. 50-51 (Novak).

37/ T. 53-70 (Erickson, Robins and Larson).

38/ T. 54-58, 61 (Erickson).

39/ T. 66-68 (Erickson).

40/ T. 66-69 (Maclin and Novak).

The Department submitted[41], and the public witness agreed[42], that the purpose of all of the laws and rules in question have a common objective. Moreover, a federal agency is currently engaged in an enforcement proceeding against Minnesota wholesalers for alleged sales below cost, and private parties and government legal agencies can bring court actions under the state law.[43] Although one witness suggested that the Commissioner's authority to suspend a wholesaler's license for a rule violation was quicker and more effective than these other remedies[44], it is clear that contested case hearings of the type suggested are time-consuming burdens upon the Department's limited resources and slower than a private party's right of action in the courts.

The Department made clear that its primary intent in proposing this amendment was to avoid confusion and duplication of other laws[45]. There was no public testimony that anyone would be harmed by the proposed amendment or that the deletion would lead to anticompetitive, predatory pricing. The Department submits that the three existing state and federal laws cited are sufficient to effect the common objective, and that the existing rules are neither mandated nor desirable.

41/ T. 59-61 (Kilgriff).

42/ T. 59-62 (Erickson).

43/ T. 62-66 (Erickson and Maclin).

44/ T. 65-66 (Robins).

45/ See, e.g., T. 61, 66 (Kilgriff and Maclin).

One witness suggested that the Department propose a new rule that would prohibit sales below cost by retailers.[46] The Department presently believes that the adoption of such a rule is unnecessary, unwarranted and would essentially duplicate Minn. Stat. § 325.04 (1976).

Former Liq 38(g)(12) and (18)

No objection or comments to the Department's support for these deletions[46a] were made by the public.

Former Liq 38(g)(16)

See discussion of proposed Liq 38E10, infra.

Liq 38E1, 2, and 3

These provisions implement the wholesale price filing system in accordance with the requirements of Minn. Stat. § 340.983 (1976). No comments or objections to the Department's affirmative showing for these provisions[47] were voiced at the hearing.

46/ T. 83-84 (Newcome).

46a/ DPS Ex. 4 at p. 11; T. 51 (Novak).

47/ DPS Ex. 4 at pp. 11-13; T. 89-91 (Novak).

Liq 38E4

This provision, setting forth the manner and time-table in which price schedules can be amended, was the subject of considerable discussion and testimony at the hearing. Seven public witnesses testified in opposition to the Department's proposal.[48/]

All of the public criticism focused on two contentions: proposed Liq 38E4 was unreasonable because of the paperwork and market confusion involved[49/] or was beyond the statutory authority because it permitted amendments to meet competition after the fifth business day of the month.[50/]

48/ T. 99-105, 179-180 (Erickson); 112-115, 170-172 (McLean); 118-119 (McGuire); 125-154 (Robins); 161-168 (Newcome); 168-169 (Parkin); and 173-178 (Larson).

49/ T. 133-135 (Robins); 102-105 (Erickson); 112-115, 170-172 (McLean); and 168-169 (Parkin).

50/ T. 100-103 (Erickson); 134-135 (Robins).

Having had the opportunity to fully consider the comments of the public, the Department has decided to withdraw the proposed Liq 38E4 discussed at the hearing and to accept the essential terms of the proposal set forth by the industry. In proposing a new Liq 38E4, the Department is continuing the price filing system exactly as it has operated since April 27, 1977, under the terms of Judge Abramson's final order in Minnesota Distillers, Inc. v. Novak.[51/] The Department now proposes that Liq 38E4 read as follows:

> 4. If any brand owner or wholesaler elects to file amended prices during the five-day period as provided for in subparagraph 2, he may not file a net price that is lower than the lowest net price filed on the first of the month for the same or similar product by any wholesaler. For the purposes of this section "net price" shall mean the wholesale price, including all allowances, discounts (including varying volume discounts) or terms of any nature (including promptness of payment terms) which affect the wholesale price in any manner. A credit term filed to meet competition may not be filed on a basis more favorable than the terms of the competitive schedule or reduce the net price of the brand, type or size container below the net price of the competitive schedule for the same quantity.

The Department relies upon its testimony and that of the public, as well as the mandate of section 340.983, in support of this proposal. The new proposal differs from that proposed at the hearing chiefly in that the brand owner or wholesaler cannot amend after the fifth day for any purpose, a provision strenuously objected to by several members of the public and supported by no non-Department witnesses.

51/ DPS Ex. 4 at p. 3, with attached exhibit.

The first sentence of the new proposal maintains a floor price system, under which no wholesaler can amend below the lowest price filed by any competitor, and sets the cut-off date as the first of the month, with amendments permitted until the fifth business day.[52] The Department and the public[53] supported such a floor system to avoid "locking-in" wholesalers at artificially high prices. Moreover, this proposal maintains the system as it has operated under existing (former) Liq 38(g)(10)[54] and Judge Abramson's order.

The second sentence of the new proposal, defining the term "net price," is identical to the third sentence of the former proposal, which was amply supported in the record,[55] and was not the subject of anyone's objection. The new proposal's third sentence merely makes clear the intent of the second sentence, as discussed at the hearing.[56] Neither the second nor the third sentence of the new proposal makes any change to the former proposal.

52/ DPS Ex. 4 at 13-14; T. 91-92 (Novak).

53/ T. 103-104, 106-108 (Erickson); see, generally, n. 48, supra.

54/ Although one witness suggested further defining "same or similar" (T. 96-97, Erickson), neither the public nor the Department has encountered serious problems in understanding the term "same or similar" under existing Liq 38(g)(10). Consequently, the Department does not presently feel strongly about this suggestion and would invite comment or recommendation from the Hearing Examiner. The Department does not feel that such an amendment, if proposed, would merit a second hearing as a substantial change from the original proposal.

55/ T. 99-100, 179 (Erickson); 173-178 (Larson and Kilgriff).

56/ T. 173-178 (Larson and Kilgriff).

The second sentence of the former proposal, requiring the wholesaler to designate the offeror, product and price when filing an amendment, is eliminated in the new proposal. The Department deems such designation unnecessary since the new proposal permits no amendments after the fifth day, and time for enforcement purposes is not so critical as under the former proposal.

The Department thus submits that the new proposal is authorized by section 340.983 and is reasonable and necessary.

Moreover, the Department submits that the Hearing Examiner should find that the new proposed Liq 38E4 is not substantially different from the rule as formerly proposed. HE 108 sets forth factors for the Chief Hearing Examiner to consider in determining whether the proposed final rule is substantially different from that proposed at the public hearing.[57/] When comparing the new and former proposals in light of these factors, it is apparent that the new proposal is substantially similar to the former and that no purpose would be served by requiring the Department to reconvene a new rule hearing to adopt its new proposal.

57/ The Department recognizes that these factors technically are considered after the proposed final rule is submitted to the Chief Hearing Examiner, but believes that these factors may be properly considered at this stage of the proceeding. This is especially true here since the Department is announcing its intent to withdraw its original proposal prior to the close of the record and to substitute a new proposal supported by the industry. On Friday, October 14, 1977, the Department notified or attempted to notify every member of the public who commented upon proposed Liq 38E4 of its intent to accept the industry proposal.

The above discussion of Liq 38E4 makes clear that the new proposal meets all of the objections raised by the public at the hearing. All persons were agreed that the "anti-lock-in" feature and the definition of "net price" should be maintained. The new proposal, in accordance with all of the public's suggestions, permits meeting-competition amendments only to the fifth business day.

All interested persons knew that this subject matter was contemplated in the new rules, as notice to that effect was provided to all such persons at both the information hearing in February and the rule hearing in August. Moreover, the proposed rule merely amends existing Liq 38(g)(10) to conform with section 340.983 and continues the system as it has operated successfully for a number of months under Judge Abramson's order.[58/] A number of public witnesses actively supported following this system as lawful and workable,[59/] and absolutely no one objected to its continuation, as fully contemplated by the new proposal.

Furthermore, the new proposal is less burdensome than the former proposal to the persons it affects, brand owners and wholesalers, since they would not have to designate offeror, product and price under the new proposal.

58/ The order states:

> "If a wholesaler elects to file amended prices pursuant to Minn. Stat. § 340.983, he may not file a price that is lower than the lowest price filed on the first of the month for that product by any wholesaler, and any credit term filed to meet competition may not be filed on a basis more favorable than the terms of the competitive schedule or reduce the net price of the brand, type or size container below the net price of the competitive schedule for the same quantity."

59/ T. 126, 151, 153 (Robins); 174-177 (Larson); 166 (Newcome); 169 (Parkin); and 179 (Erickson).

Since the new proposal goes to exactly the same subject matter as that discussed at length by persons at the hearing, and since it merely accepts the views raised at the hearing without adding any additional matters, it should not be considered substantially different than the originally-proposed Liq 38E4.

Liq 38E5 and 6

No public comment or objection was made to the Department's affirmative showing[60/] for these provisions.

Liq 38E7

The Department proposed this amendment in furtherance of the intent of section 340.983.[61/] Although no objections to this proposal were raised, two public witnesses suggested that the Department substitute the term "accepted" for the term "bona fide."[62/] The Department has considered the reasons advanced by these persons for the suggested change. Since the proposal serves the same purpose as that intended by the Department in proposing Liq 38E7, and since it is insubstantial, unopposed, and clarifying, the Department intends to adopt the suggestion.

Accordingly, the Department now proposes that Liq 38E7 read as follows:

> No wholesale price schedule or amendment thereto shall list brands of distilled liquor or wine which are not in stock or on accepted order at the time such schedule is filed with the department.

60/ DPS Ex. 4 at pp. 14-15; T. 92-93 (Novak).

61/ DPS Ex. 4 at p. 15; T. 93-94 (Novak).

62/ T. 97-98 (Erickson); T. 118-119 (McGuire).

Liq 38E8

No change from existing Liq 38(g)(7).

Liq 38E9

No persons objected to or commented upon the Department's proposal to add the phrase "or other commodities" to the prohibition contained in existing Liq 38(g)(11).[63/]

Much discussion was directed toward the Department's proposal to add a second sentence which would prohibit "combination sales" or "tie-ins" of intoxicating liquor. Combination sales, wherein the retailer receives a discount on the total purchase price by ordering two or more designated brands of intoxicating liquor, are offered by all Minnesota wholesalers.[64/] Two wholesaler representatives[65/] and four retailers[66/] testified in opposition to the proposal.

The Department[67/] grounded this proposal on the requirements of Minn. Stat. § 340.983 (1976) and the meeting-competition amendment contained in Liq 38E4[68/] which implements that statute and was supported by the industry.[69/] Under the price-filing arrangement, wholesalers must file prices for each product and

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63/ See DPS Ex. 4 at pp. 15-16; T. 94 (Novak).

64/ T. 188 (Colburn); 196 (Cameron).

65/ T. 182-186, 196-200, 202 (Robins); 200-201 (Larson).

66/ T. 187, 196 (Cameron); 188 (Colburn); 188-189 (Warren); 190 (Lobber).

67/ DPS Ex. 4 at pp. 15-16; T. 94-95 (Novak); 190-191, 194-195, 201 (Kilgriff); 197-198 (Maclin).

68/ The originally-proposed and newly-proposed Liq 38E4, as well as existing Liq 38(g)(10), contain this provision.

69/ See discussion of Liq 38E4, supra.

cannot amend below the lowest originally filed. If combination sales are permitted, it is impossible for anyone to determine the actual price of individual brands. Thus, wholesalers cannot ascertain which price they are able to meet, and the Department cannot comply with its mandate to enforce section 340.983 and its rules pertaining to price filing.

This was made abundantly clear in the one tie-in example posed by the Department to the retailers.[70/] While one retailer thought the combination sale resulted in a free case of liquor to him and another did not even venture a guess, a third retailer correctly stated that he was getting a discount on the total purchase but was getting nothing free.[71/] This same retailer acknowledged that tie-ins are a problem for the Department because of the impossibility of identifying individual prices, as required by section 340.983.[72/]

Opposition to the proposal centered around the contention that tie-ins are understandable and may result in savings to the retailers.[73/] The Department recognizes that the ultimate price for all products involved in the combination is understandable. Nonetheless, since the statutory and regulatory framework relating to price filing requires a clear identification

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70/ T. 193-194 (Kilgriff, Cameron and Warren).

71/ T. 194 (Cameron).

72/ T. 196 (Cameron).

73/ T. 182-190 (Robins, Cameron, Colburn, Warren and Lobber).

of individual prices, which are not identifiable in tie-ins, combination sales cannot be permitted. Thus, it is no answer to suggest, as one witness did,[74] that proposed Liq 38E6 [existing Liq 38(g)(13)] authorizes the Commissioner to reject filings which are not understandable. Combination sales by their very nature do not meet price-filing requirements, and proposed Liq 38E9 is necessary to make clear that fact.

One witness' argument[75] that this proposal amounts to illegal, unauthorized price fixing by the Commissioner is absurd, irrelevant, and unsupported. This proposal does not in any manner seek to fix or even stabilize prices at any level. As pointed out by the Department,[76] it merely seeks to prohibit a method of distribution which the Department believes violates the letter and intent of section 340.983. Moreover, the same public witness recognized the authority of the legislature to limit quantity discounts to purchases of no more than 300 quarts[77] in a statute[78] which also prohibits one means of marketing (i.e., price discounting on purchases in excess of 300 quarts).

The Department has fully addressed the witness' constitutional arguments[79] in its Memorandum on Constitutional Issues and in section III., infra.

74/ T. 182-183, 200 (Robins).

75/ T. 183-184, 197 (Robins).

76/ T. 197-198 (Maclin).

77/ T. 184 (Robins).

78/ Section 340.983 provides, in pertinent part:

> No volume price filed pursuant to this section shall be for a quantity in excess of 300 quarts.

79/ T. 186 (Robins); Position of Ed Phillips & Sons Co. Regarding the Constitutionality of Certain Proposed Liquor Regulations.

Liq 38E10

The Department stated that the substance of this proposal was in conformance with existing Liq 38(g)(14) and (16).[80] Two witnesses objected that proposed Liq 38E10 does not cover the subject of existing Liq 38(g)(16) and would result in an endorsement of the practice of sales to selected retailers by wholesalers.[81]

A quick comparison of the language of these rules makes clear the correctness of the Department's position[82] that proposed Liq 38E10 covers everything that was included under existing Liq 38(g)(16). Both rules require wholesalers who disseminate such information to one retailer to disseminate that information to all retailers served by it.

Neither rule requires wholesalers to sell to all retailers, as suggested by one witness.[83] That same witness proposed a new rule that would have that effect.[84] The Department has considered that proposal and has determined not to adopt the suggestion at this time.

Liq 38E11-17 and Liq 38F, G, H, I, J, K, L and M

No public comment or opposition to any of the Department's affirmative case[85] with respect to these proposed rules was offered, and the Department relies upon the record for support.

80/ DPS Ex. 4 at pp. 11 and 16; T. 51 and 95 (Novak).

81/ T. 72-73, 204 (Robins and Erickson).

82/ T. 74-75 (Maclin and Muer).

83/ T. 72-76, 78-79 (Robins).

84/ T. 208-209 (Robins); Pub. Ex. 11; DPS Ex. 3 with attached exhibit; T. 76-77 (Maclin).

85/ DPS Ex. 4 at pp. 16-17; T. 95, 205-208 (Novak).

Liq 39A

This rule implements the provisions of Minn. Stat. § 340.114, subdivisions 1 and 2 (1976). The rule requires all importers, including manufacturers and wholesalers, to offer for sale to all Minnesota wholesalers and manufacturers on an equal basis all intoxicating liquor (except wines and malt beverages) brought into Minnesota. The rule includes all intoxicating liquor brought into Minnesota as a finished product ready to be placed upon retailers' shelves as well as any intoxicating liquor which is further distilled, refined, rectified, blended, bottled, labelled or prepared in any manner subsequent to the importation.

The need for this provision is simply to implement the mandate of the statute to place all wholesalers on an equal basis with respect to purchases of all liquor products from importers. The language of the rule makes clear that all importers must offer for sale to all Minnesota manufacturers and wholesalers all final products, complete with labels, offered for sale to any person in the State of Minnesota. The rule is designed to make sure that all wholesalers and manufacturers are able to purchase on an equal basis.[86/]

The Department believes the intent of the statute is to include all importers of intoxicating liquor regardless of

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86/ T. 222-23 (Novak); DPS Ex. 4 at 18-19.

location. Thus, those Minnesota-based importers who import intoxicating liquor should be treated no differently than those who are based outside the State.[87/]

During the course of the hearing, an objection was raised as to the interpretation of the term "importer" by the Department. Counsel for Minnesota Distillers, Inc. argues that Minn. Stat. § 340.114 refers only to "licensed importers," and that the Department has unnecessarily broadened this term to include as well all wholesalers who have the right to import.[88/] The Department submits that counsel's argument is a wooden interpretation of the statute and is directly in conflict with the Minnesota Supreme Court's decision in Federal Distillers, Inc. v. State.[89/] In that case, the Court held that one particular wholesaler, Ed Phillips and Sons Co., was an importer and included within the statute although it did not have a license under section 340.113 (licensed importer), but rather under section 340.11 (licensed wholesaler). The Court reasoned that, since a licensed wholesaler had the right to import, the legislature intended to include a wholesaler as well as an importer within the requirements of the statute:

> The trial court's construction of the statute to include Phillips as a "licensed importer" is reasonable. While Phillips does not hold a license under section 340.113, it does hold a license under section 340.11, which explicitly includes the right to import. 90/

87/ T. 223 (Novak); DPS Ex. 4 at 19.

88/ T. 224-25 (Larson); see also T. 31-32 (Larson).

89/ 304 Minn. 28, 229 N.W.2d 144 (1975), appeal dismissed, 423 U.S. 908, 96 S. Ct. 209 (1975), DPS Ex. 4.

90/ Id. at 156.

During the course of the hearing, counsel for Ed. Phillips and Sons Co. consistently questioned the sufficiency of the Department's showing of need for Liq 39A. However, counsel's characterization of the showing of need by the Department is erroneous, since counsel's objections are based on the false premise that the Department's case rests on a price survey submitted as evidence during the hearing. Counsel repeatedly characterizes the price survey as the sole basis for the Department's formulation of Liq 39A, while in reality the stated need for the rule is clearly set out as the statute itself. The Department has made this clear in its testimony:

> The need for this provision [Liq 39A] is to implement the mandate of the statute to place all wholesalers on an equal basis with respect to purchases of all liquor products from importers. . . . In order to remove any uncertainty concerning the statute and to give full effect to its provisions, it is necessary to make clear that the requirement to offer for sale to all wholesalers and manufacturers on an equal basis extends to Minnesota-based importers, including manufacturers and wholesalers with respect to all such liquor sold by them within the state of Minnesota. 91/

Counsel's misconception of the need for the rule apparently arose from questions he asked Mr. Joseph Novak, Director of the Liquor Control Division, concerning a statement by the Department that it believed Liq 39A would increase "intrabrand competition."

> MR. ROBINS: Mr. Hearing Examiner, may I ask Mr. Novak the factual basis for his stating in his Statement of Need "since all wholesalers and manufacturers will then be able to purchase and resell all brands of liquor, the Department believes that intrabrand competition may increase." What is the factual basis for that, Mr. Novak?

91/ T. 222-23 (Novak); DPS Ex. 4 at 18-19.

. . . .

MR. NOVAK: Well, to answer the question, I suppose I can put it in this manner. We did have what we call the price index from the time that the law went into effect in July or August of 1975 and we found that in our price index a considerable drop in a wholesale liquor price from the time it went into effect in the year 1975 with some increases in '75 and a considerable drop in '76 and maintaining a reasonable level until the last few months in which we have a rise again as far as the wholesale price index is concerned, when we talk about competitiveness of intra-brand. We feel because of the competitiveness that this price index does show and reflect what has happened since the law went into effect. 92/

In further questioning, counsel confuses the Department's answer as to the factual basis for that particular statement with the support for the entire proposed Liq 39A.

MR. ROBINS: Is this your factual basis for the statement that "since all wholesalers and manufacturers will then be able to purchase and resell all brands of liquor, the Department believes that intrabrand competition may increase", is that your factual basis?

MR. NOVAK: I suppose it's one piece of evidence that we have, yes.

MR. ROBINS: What other pieces of evidence?

MR. NOVAK: I suppose if we are going to take the purpose of the statute and, again, I'm going to take legislative intent. The legislative intent, in our opinion, was for the purpose in all the hearings that I have been to dealing with liquor was based primarily on the reduction of price. And this survey, of course, indicates that and no other thing. And I base my findings based upon that conclusion of the price of the commodities did or were reduced.

MR. ROBINS: So that fairly stated the only factual basis you have for the statement in the Statement of Need and the support for the rule is this survey, which is entitled "Minnesota Wholesale Liquor Price Index" which was compiled and published by a different department, is that right, sir? 93/

92/ T. 231-32.

93/ T. 234-35 (emphasis added).

In fact, the price survey was offered in evidence with respect to counsel's original question only, that is, the basis for the Department's belief that intrabrand competition would increase. However, the Department clearly pointed out on several occasions that the need for the particular rule was to "implement the mandate of the statute to place all wholesalers on an equal basis with respect to purchases of all liquor products from importers."[94/] This was clearly brought out in further questioning of Mr. Novak by counsel for the Department:

> MR. KILGRIFF: Mr. Novak, in formulating proposed Liquor 39, did the Department take into consideration any other need or reason for the formulation of the regulation beside the fact that it would increase intrabrand competition?
>
> MR. NOVAK: Yes. The need for this provision, in my estimation, is to implement the mandate of the statute, to place all wholesalers on an equal basis with respect to purchasing all liquor products from importers. 95/

In addition, Mr. Novak correctly pointed out that a further reason for the statement that the Department believes the proposed rule would increase intrabrand competition is the legislative intent exhibited in the passage of section 340.114, the statutory basis for the rule.[96/] Indeed, the Minnesota Supreme Court came to the same conclusion as to the legislative intent behind section 340.114:

94/ T. 222.

95/ T. 298.

96/ T. 234.

> . . . The legislature could readily determine that a distiller's refusal to deal with other than one wholesaler, or a wholesaler's inability to buy from all who bring liquor into the state, effectively controls the availability of various brands of liquor to the retailer and the ultimate consumer; that supply and demand for a particular brand of liquor affects its price; and that such control over distribution necessarily affects the ultimate price to Minnesota consumers. It is hardly debatable that the legislature could thus reasonably conclude, as the Liquor Study Commission did, that exclusive distributorships portend monopolistic practices, inevitably limit intra-brand competition, and ultimately affect the price to consumers. . . . 97/

Therefore, to characterize the price survey compiled by the Department of Revenue as the "sole justification for the need for this rule" is erroneous and misleading. The justification for this rule is primarily to give effect to the statutory requirements of Minn. Stat. § 340.114. This is clearly stated in the Department's testimony and in its Statement of Need which it filed for the purpose of these rules. 98/

The Department submits that it has carried its burden of showing the reasonableness of the proposed rule as well. The rule merely implements the statutory mandate of section 340.114, which has already been held reasonable by the Minnesota Supreme Court. In Federal Distillers, Inc. v. State, supra, the Court held the statute to be both constitutional and reasonable:

> . . . Equally sound, we believe, is our conclusion that prohibiting discrimination by restricting refusals to deal on an equal basis with all wholesalers is not an arbitrary and unreasonable interference with the liquor industry and bears a rational, if not a substantial, relationship to the economic welfare of the public. 99/

97/ Federal Distillers, Inc. v. State, supra, at 158.

98/ See also T. 308-311 (Erickson).

99/ 229 N.W.2d 144, at 158 (1975).

During the course of the hearing, statements were also made that the proposed Liq 39A is contrary to the holding in Federal Distillers, Inc. v. State, supra, and the position taken by the Attorney General and the Department in that case. The Department categorically denies that the proposed rule is in any way contrary to its position taken before the Supreme Court, and submits that the proposed rule is entirely consistent with the Court's opinion in that case.

Apparently counsel for Ed Phillips and Sons, Inc. construes the language of the proposed rule to require a distiller who bottles liquor for a wholesaler owning its own brand to sell such liquor with the wholesaler's brand to all other wholesalers in the State of Minnesota, which could be considered contrary to the Federal Distillers case holding. 100/ In support of this argument, counsel quotes the following passage from the case:

> . . . The argument of plaintiff Johnson that two of its distiller suppliers, Federal and Mr. Boston, are required by the act to sell liquor bottled under brands owned by Johnson to all wholesalers is speculative and hypothetical. There is no indication that the liquor commissioner is about to construe the statute in such a way as to invade Johnson's right of ownership in its registered private-brand labels, and the statute on its face clearly does not require such a construction. 101/

100/ T. 251-53 (Robins).

101/ Federal Distillers, Inc. v. State, supra, at 155; T. 251 (Robins).

To demonstrate that the proposed rule is contrary to the position taken by the Department before the Supreme Court, counsel quotes the following passage from the State's Brief before the Supreme Court:

> As we pointed out earlier, Johnson has adopted the masochistic habit of construing the Act in a fashion which then gives it reason to complain. Its suggestion that Chapter 664 requires that two of Johnson's suppliers (Federal and Mr. Boston) must sell "Johnson Brand" spirits to all wholesalers typifies this habit. Respondents have not suggested that the Act will be enforced in the manner which Johnson fears. To the contrary, respondents suggest, for reason hereinafter set forth, that the Act does not require the alleged forced sale of which Johnson complains. Until actual enforcement or threatened enforcement occurs, Johnson and its suppliers are merely manufacturing hypothetical issues which this Court need not and should not decide. 102/

The Department has consistently denied that proposed Liq 39A contravenes the above quotes. A seller cannot be forced to sell that which he does not own. Therefore, although all distilled spirits brought into the State are subject to the equal sale requirement, the meaning of an equal offer for sale will depend in each case upon what the seller is able to offer. For example, where the seller owns the bottled liquor which is offered for sale but does not own or control the brand label which the purchaser requests, the proposed rule would require the seller to offer only the bottled liquor equally to all buyers, not the brand label. However, if a seller owns both the liquor and the brand label, an equal offer would require sale of the labelled product.

102/ Brief of respondent State, p. 22; T. 252-53 (Robins) (footnote omitted).

The Department also testified to this effect at the hearing:

> MR. KILGRIFF: . . . Mr. Novak, does the proposed regulation [Liq 39A], as written, require Federal and Mr. Boston to sell liquor bottled under brands owned by Johnson to all wholesalers in the state of Minnesota?
>
> MR. NOVAK: No.
>
> MR. KILGRIFF: Who is required to sell the liquor imported under a brand owned by Johnson?
>
> MR. NOVAK: Johnson Brothers.
>
> MR. KILGRIFF: Does the proposed regulation require any importer to sell to all wholesalers in the state of Minnesota anything that it does not own?
>
> MR. NOVAK: No. 103/

The Department can only repeat that proposed Liq 39A in no way requires the sale of anything that is not owned by the seller. It does require the sale on an equal basis to all wholesalers of that which is owned by the importer. However, in this sense it treats all importers equally, since all importers will be under the same requirement. The Department submits this is the plain and simple meaning of the statutory language.

It should also be noted that early in the hearing a particular phrase in the Department's Statement of Need with respect to Liq 39A was erroneously characterized by a Department witness. The witness was asked whether the term "person" in the following sentence was intended to include only wholesalers:

103/ T. 294-95; see also, T. 230 (Maclin).

Thus, all importers, including manufacturers and wholesalers, must offer for sale to all Minnesota manufacturers and wholesalers all final products, complete with labels, offered for sale to any person within the state of Minnesota.

The initial answer of the Department was that the word "person" meant wholesalers.[104] However, in later testimony, the same witness corrected this error by indicating that the term "person" included retailers as well as wholesalers:

MR. KILGRIFF: Thank you. Now, Mr. Novak, also with respect to this morning's testimony on page 19 of the Statement of Need, you were asked questions concerning the meaning of "person" in the Statement of Need. Just to clarify the record, I believe at that time you mentioned that wholesalers were included in the term "person". Is the term "person" also intended to include more than the term "wholesaler"?

MR. ROBINS: Object to that as leading this witness. He is testifying and coaching him and I think the testimony is clear this morning.

MR. KILGRIFF: Mr. Examiner --

MR. SELTZER: The record is going to speak for itself. I will allow the witness to answer the question.

MR. NOVAK: Well, the term "persons" in our estimation, besides wholesaler, is a retailer or any licensed establishment. [105]

Liq 39B

Minn. Stat. § 340.114, subd. 3, requires that any sale by an importer to a Minnesota wholesaler shall be at the lowest price at which the product is being sold contemporaneously by the importer in any other state or in the District of Columbia.

104/ T. 242-43.

105/ T. 298-99.

Liq 39B sets forth filing procedures to enable the Department to enforce this provision of the statute. Before being able to sell intoxicating liquor to a Minnesota wholesaler or manufacturer, an importer must first file with the Department an itemized list specifying the price, brand, type, container size, proof and age of the liquor so offered.

There were no comments offered in opposition to this provision during the course of the hearing; however, two proposals were made by members of the industry concerning this price filing requirement. The first proposal, offered by a representative of a number of wholesalers, is to insert an added requirement in the provision that the importer mail a copy of its itemized price list filed with the Department to each holder of a wholesale liquor license in the State of Minnesota.[106/] The Department adopts this proposal as a sound idea, assisting in the efficient dissemination of pricing information to Minnesota wholesalers and adding only a very small burden on importers. Thus, the first sentence of proposed Liq 39B will read:

> No importer shall offer any intoxicating liquor for sale to any Minnesota wholesaler or manufacturer without first filing with the department and mailing a copy of such itemized price list to all Minnesota manufacturers and wholesalers, on a form approved by the Commissioner, an itemized list specifying the price, brand, type, container size, proof and age of the liquor so offered. . . .

106/ T. 365-68 (Erickson).

The second proposal with respect to Liq 39B, offered by a representative of the Distilled Spirits Council of the United States, is a change in the time period for the price filing required from the importer.[107/] The rule proposed by the Department requires that the prices be filed on the fifteenth day of the month and shall become effective on the first day of the next calendar month, and shall remain in effect until changed by a subsequent price filing. The proposal of the Distilled Spirits Council is to require the price filing on the first day of the month which would become effective on the first day of the next calendar month. Testimony was offered that this would be more acceptable to the distilled spirits industry, and there was no objection offered by any of the wholesalers represented at the hearing. The Department will accept this proposed change and agrees to its insertion into the proposed rules. Thus, the second sentence of proposed Liq 39B will read as follows:

> These prices must be filed on the first day of the month and shall become effective on the first day of the next calendar month, and shall remain in effect until changed by a subsequent price filing which shall take effect in like manner.

107/ T. 382-83 (Hoene).

The Department considers these insubstantial changes, since the original proposals were properly noticed, and the proposed amendments, relating to the same subject matter, were presented and discussed at the hearing. There were no objections from representatives of any segment of the industry. We therefore believe that these amendments should be termed insubstantial.

Liq 39C

This provision implements the statutory requirement of section 340.114, subd. 3, by requiring that the prices filed with the Department be the lowest prices at which the products are being sold contemporaneously by the importer in any other state or in the District of Columbia. These price filings are necessary so that the Department can make the proper price comparisons and other reviews to ascertain whether the liquor prices charged to Minnesota wholesalers and manufacturers comply with the requirements of the statute. There were no objections raised to this provision at the hearing, and therefore, we submit that the rule should be adopted for the reasons stated.

A further proposal was offered at the hearing for an additional subdivision D to Liquor 39. A representative of three wholesalers suggested that language should be included to prohibit the trade practice of certain brand owners or importers of designating exclusive agents for providing special sales, signs and display materials to retailers. The language proposed is the following:

No manufacturer or importer shall appoint a wholesaler as its exclusive agent for the production and distribution of retail sign or display materials. 108/

In connection with this language, a further problem of the allocation of Christmas wrap was discussed. It is alleged that certain suppliers have allocated the amount of Christmas wrapped product on an unequal basis to wholesalers in the State of Minnesota.

The Department agrees that these particular trade practices may cause certain problems in the industry. However, the Department believes that at this time it does not have enough information concerning these practices to make a judgment as to the desirability of the proposed rule. Moreover, as counsel for two other wholesalers pointed out, the adoption of this rule at this time may raise both substantive and procedural questions. 109/ On balance, the Department rejects this proposal on the basis of insufficient evidence of the need for its adoption. We would, of course, receive further comments and a request to adopt such a rule at a later time.

Chapters Five and Six

Chapters Five and Six of the rules, dealing with retail licensees, municipal liquor stores and advertising, contained only three changes in the proposed rules: Liq 56A, Liq 67A1, and Liq 67B2. There were no comments or opposition to these changes, and the Department submits that they should be approved for the reasons set forth by the agency. 109a/

108/ T. 370-71 (Erickson).

109/ T. 375-77 (Robins); T. 377 (Larson).

109a/ DPS Ex. 4 at pp. 20-21; T. 17-18, 383-85 (Novak).

Liq 71-77

Chapter Seven of the proposed rules deals with brand label registration and analysis of alcoholic beverages. Most of the changes in this chapter were the result of a re-examination of the Department's role in the task of brand label registration due to the fact that the legislature eliminated most of the funds for these activities for fiscal year 1978.[110/] The deletion of funds, however, was not followed by an elimination of the statutory requirements imposed on the Department with respect to these activities.[111/] Therefore, the Department is under a continuing obligation to enforce statutory requirements in this area, but at a severely reduced funding level.

Given the fact of funding cuts and the apparent intent of at least some legislators to eliminate brand label registration altogether, the Department undertook a two-fold approach to the rules in proposed Chapter Seven. First, it was determined that all the rules dealing with brand label registration should be examined for ways to economize due to the reduced funding level. Second, given the apparent intention of the legislature to eliminate or at least reduce brand label registration, a decision was made to re-examine the statutory requirements and to enforce only those minimum requirements clearly set forth in the applicable statutes. Thus, the combination of reduced funding levels and apparent legislative intent to

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110/ T. 438-40 (Pederson).

111/ See, Minn. Stat. § 340.62 (1976).

eliminate brand label registration were the two major factors in reconsidering the former rules. These two factors served as a primary basis for the following rule changes:

Liq 71

A new subparagraph was added to this rule regarding brand label approval to allow the importation of samples without registration. The proposal is intended to relieve importers and wholesalers from the expense and inconvenience of registering products which they bring into the State solely for sample purposes to determine whether to carry such products on a regular basis. There was no opposition to the changes proposed for Liq 71, and the Department submits that the rule should be adopted for the reasons stated.[112/]

Former Liq 72

Former Liq 72 required that only the owner of the brand label or his assignee could register the brand label. This provision was entirely deleted from the proposed rules, thus permitting any person duly licensed to seek approval and registration of a brand label under the proposed rules.

112/ DPS Ex. 4 at p. 22; T. 386-87 (Novak).

The Department considers the former requirement of brand label registration by the owner to have been a policy decision made by the Department within the scope of its rule-making power. There is no explicit statutory requirement that the brand label be registered solely by the owner or its assignee. The statutory language requires only that the brand label be registered, but is silent as to who must register it. The pertinent statute states as follows:

> No licensed manufacturer or wholesaler shall manufacture or import for sale within the state, any brand of intoxicating liquor such as distilled spirits and wine, or any distilled or vinous liquor designated as a specialty, wherein such liquor is ready for sale for beverage purposes without further processing, unless the label of such brand has been registered with and approved by the commissioner. . . . 113/

After curtailment of funds for brand label registration, the Department determined that it would perform only those functions required by the statute in this area. First, it was determined that the curtailment of funds required a reduction in the administrative burden placed upon the agency in this area. Second, since the legislature, or at least certain of its members, indicated an intention to eliminate brand label registration, it was determined that the Department would enforce only the minimum requirements of the statute. Since

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113/ Minn. Stat. § 340.62 (1976).

the statute in question requires only that brand labels be registered, the Department decided to delete former Liq 72 as a requirement.

Another factor that was considered by the Department in the determination to delete this provision was the anti-competitive effect of allowing only the brand owner to register its brand. Such a requirement allows the brand owner to control the states in which its product can be sold. This deprives Minnesota consumers of choices of alcoholic beverages which are available in other states. Moreover, such a restriction may restrain free and open competition in the sale of particular liquor products.

Counsel for Adolph Coors Co. objected to the characterization of the deletion of this rule as pro-competitive.[114/] Counsel apparently argues that the deletion would be anti-competitive, since Coors beer would be sold in the State at an excessive price, and may also be sold in an "off" condition.[115/]

The Department submits that the proposed deletion is pro-competitive because it allows the importation into the state of brands of liquor and malt beverages which are not now freely available to Minnesota consumers. The Department notes that there is certainly no requirement that consumers purchase these goods; but to deprive the consumer of any choice at all

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114/ T. 404-5 (Kaplan).

115/ Id.

is not pro-competitive. Counsel's arguments indicate a certain strain of "paternalism" whereby the state is urged to take away choices from the consumer in order to protect him.

Coors apparently wants to protect the Minnesota consumer by refusing to give the consumer a choice. An analogy could be made to the recent Supreme Court decision in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,[116] 425 U.S. 728, 96 S. Ct. 1817 (1976), in which the Court struck down as violative of the First Amendment certain statutory bans on advertising of prescription drug prices. In reaching its decision, the Court discussed many of the dangers of advertising, and held that the consumer should be allowed a freedom of choice. It held that ". . . on close inspection it is seen that the state's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance."[117] The Court went on to confirm its faith in the ability of consumers to discern their best choices:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . [118]

116/ 425 U.S. 788, 96 S. Ct. 1817 (1976).

117/ Id. at 1829.

118/ Id.

Thus, the Department believes that the choice of products should be left to the consumer. The Department submits that any increase in the products available to the consumer will, in the long run, be pro-competitive. Within the regulatory framework, the Department is taking the position which is least restrictive to the functioning of free market forces.

If restraints on distribution, such as those espoused by Adolph Coors Company, are reasonable, Coors would have the ability to fashion its distribution system to its liking. In a recent Supreme Court case, Continental TV v. GTE Sylvania[119/], the Court specifically overruled United States v. Arnold, Schwinn & Co.[120/], by holding that all non-price vertical restraints be examined under the rule of reason. Shortly thereafter, in Adolph Coors Co. v. A. & S. Wholesalers, Inc.[121/], the Tenth Circuit Court of Appeals held that certain territorial vertical restraints imposed by Coors should be examined in light of the rule of reason. Thus, if the vertical restraints imposed by Coors are deemed to be reasonable under proper antitrust criteria, Coors has a satisfactory remedy for restricting its distribution. If, upon further examination, the restrictive practices of Coors are considered to be unreasonable, then those restrictions will be in restraint of trade and a violation of federal antitrust laws, and should not be supported by the rules of the Department.

119/ ___ U.S. ___, 97 S. Ct. 2549 (1977).

120/ 388 U.S. 365 (1967).

121/ 1977-2 Trade Cases ¶61,565 (CA 10th Cir. 1977).

It should be pointed out that the deletion of former Liq 72 in no way is aimed at or concerned only with Adolph Coors Co. Rather, the deletion will affect not only malt beverages, but also distilled spirits and wine. Many of these other products are not subject to the quality restrictions that Coors thinks necessary to preserve its products, and therefore should not be subject to the restrictions imposed by that company.

Counsel for the Wine Institute also appeared in opposition to the deletion of former Liq 72. Counsel argued that wines require strict quality control which can only be implemented by State-required registration by the owner.[122/] Counsel argues that wine that had been rendered inferior by improper storage, heat, or light, could be purchased in other states and then brought into Minnesota to be sold. However, counsel fails to indicate why the Department could not require a chemical analysis of that wine, and why it could not be excluded from the state. Under proposed Liq 72E, the Commissioner can require a chemical analysis of any intoxicating liquor brought into the State of Minnesota. Moreover, if such a chemical analysis cannot be given, the Commissioner has the authority to exclude the liquor from the State.

Furthermore, arguments concerning the protection of quality of goods fail to recognize the wholesaler's and retailer's interest in protecting their own reputations. This fact was brought out by a representative of one of the licensed

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122/ T. 415-19 (Ciaravino).

wholesalers in the State.[123] Counsel for Minnesota Distillers, Inc., expressed that firm's concern with its own reputation in distributing intoxicating beverages:

> . . . I don't think there is any wholesaler in this state that wants to see impure products sold to retailers, or to consumers. It's just pure and simple bad business.
>
> If we could obtain Coors beer under the proposal we would be out of our minds to sell it when it's flat, or skunky, or whatever other references were made to it. There is no quicker way to ruin your own business than to sell bad product. [124]

Buttressing the interests of the wholesaler in protecting his own business reputation is the power of the state to license wholesale distributors. If it is brought to the attention of the Department that a particular wholesale distributor is selling adulterated products, such a distributor would be subject to disciplinary action.

The Department, therefore, submits that, although there may be some concerns about the quality of products, the remedies available to the producer and the state licensing authority, as well as the business reputation of the wholesaler and retailer, are sufficient to protect the consumer. Moreover, it must be remembered that the consumer also is being afforded a choice under the proposed system which may not be available under the existing system. We therefore submit that the Department has shown sufficient reason to delete former Liq 72.

123/ T. 494-499 (Larson).

124/ T. 496 (Larson).

Liq 72-77

The remaining changes in Chapter Seven were not opposed by any participant in the public hearing, and therefore we submit that these rules should be adopted for the reasons set forth in the Statement of Need and the testimony of the Department.[125/]

Liq 83-84

There was no opposition at the hearing to any of the proposed changes in Chapter Eight dealing with the importation and release of distilled spirits, wine, malt beverages and sacramental wine. The Department therefore submits that the rules should be adopted for the reasons given by the Department in the Statement of Need and its testimony.[126/]

Liq 92-100

There was no opposition to the proposed changes in Chapter Nine dealing with standards of identity, labeling requirements and standards of fill. With respect to Liq 92 and Liq 95, there was a suggestion that any tolerance granted by the Department should be noticed to the industry.[127/] The Department does not believe this further requirement to be necessary. It should be noted that all such applications would be public records available for inspection at the office of the Liquor Control Division. Moreover, by placing more formal requirements and a regulatory time period upon this rule, the Department believes that a certain flexibility in the industry would be lost. The Department further sees no disadvantage to the industry in the proposed system.

125/ DPS Ex. 4, pp. 23-24; T. 502-505 (Novak).
126/ DPS Ex. 4, pp. 24-25; T. 505-507 (Novak).
127/ T. 507-8 (Erickson).

Liq 123

The requirement that a permit holder under Liq 123 file monthly reports was amended to allow the filing of an annual report. There was no opposition to the change proposed, and therefore the Department submits that the rule should be adopted for the reasons stated by the agency.[128/]

III.

CONSTITUTIONAL ISSUES

Three of the rules proposed by the Department are alleged to violate the constitutional rights of certain Minnesota licensed importers or distributors. The proposed rules are Liq 38E9, 39A, and 72. The participants contend generally that these rules violate their right to equal protection and due process guaranteed to them under the state and federal constitutions. The Department denies that the proposed rules violate any constitutional provisions and submit that they are well within the clearly defined police powers of the State to regulate the sale of liquor and the mandate of the legislature for the Department to prescribe rules to that end.

Burden of Proof

The Department hereby incorporates by reference its statement on burden of proof contained in its Memorandum on Constitutional Issues filed in this matter prior to the hearing of September 28, 1977. The burden to challenge established and approved administrative regulations rests on the challenging

128/ DPS Ex. 4, p. 26; T. 511 (Novak).

party.[129] With respect to proposed rules, the Department has the burden only of making "an affirmative presentation of facts establishing the need for and reasonableness of the rule proposed for adoption . . . ." Minn. Stat. § 15.0412, subd. 4 (1976). The need for and reasonableness of the proposed rules have been presented in section II., supra.

State Regulatory Power

The participants before the Hearing Examiner cannot contend that the State is without power to regulate the liquor industry. The Twenty-First Amendment to the United States Constitution prohibits the transportation or importation into any state of intoxicating liquors unless state laws allow it. Indeed, under the authority vested in the State pursuant to its general police power, Minnesota is entitled to legislate the activities of the liquor industry without the Twenty-First Amendment. This Amendment, however, is considered so broad as to confer upon the State of Minnesota "something more than the normal state authority over public health, welfare, and morals."[130] Notwithstanding this broad investiture of authority, the Department is mindful of its duty to simultaneously safeguard the constitutional rights of the participants guaranteed to them under equally significant constitutional provisions.[131]

129/ Brown v. Wells, 288 Minn. 468, 181 N.W.2d 708, 711 (1970); Pearson v. Independent School Dist. No. 716, 290 Minn. 400, 188 N.W.2d 776, 779 (1971).

130/ California v. LaRue, 93 S. Ct. 390, 395 (1972).

131/ See Vintage Imports, Ltd. v. Joseph E. Leagram & Sons, Inc., 409 F. Supp. 497 (D. Va. 1976).

The legislature enacted the Minnesota Intoxicating Liquor Act, Minn. Stat. § 340.069 et seq. (1976) to regulate the transportation and importation of intoxicating liquor pursuant to its authority under the general police power and the Twenty-First Amendment. The Department, in proposing regulations to effectuate the purposes of the Intoxicating Liquor Act, is governed by the Administrative Procedure Act, which imposes on the Department the duty to make an affirmative showing of fact establishing the need for and reasonableness of the proposed rules. The Department has no interest in regulating the industry beyond that which is within its power to do.

Essentially, the participants contend the Department has proposed rules which overreach the constitutional limits of its authority to regulate.[132/] However, the law does not contemplate that the administrative agency should construct rules that merely reiterate a legislative enactment. Rather, the agency is given a wide scope of discretion in determining the means by which to implement legislative policy. The Minnesota Supreme Court has stated this principle in the following fashion:

132/ The standard imposed on the legislature in enacting the Intoxicating Liquor Act is whether the law is reasonably related to some perceived public need and whether the means chosen are consistent with that objective. State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N.W. 770 (1928). The standard imposed on the Department in proposing regulations is whether it has shown a need for the regulation and whether the proposal is a reasonable implementation of the legislative intent. Minn. Stat. § 15.0412 (1976).

> In vesting regulatory power in an administrative agency, the legislature need not expressly delineate with particularity or exactness each and every phase of the power so conferred, but may, in order to give the administrative function reasonable flexibility, leave the exact scope of the rule-making power to reasonable implication and this includes an implied power to formulate necessary classifications and definitions within the designated area of regulation. One of the basic purposes of administrative regulation is to leave preciseness and detail of application to administrators who supposedly will bring an expert's familiarity to bear upon the problems under consideration. 133/

Thus, there is no question that the State has the constitutional authority to regulate the liquor industry. Moreover, the Department submits that its regulations are reasonably related to the valid objectives of the Intoxicating Liquor Act.

Liq 38E9

Liq 38E9 is challenged primarily by Phillips as an arbitrary state interference with its right to acquire and dispose of property. The portion of Liq 38E9 that is challenged provides:

> In addition, no manufacturer, wholesaler or importer of distilled spirits or wine may sell or offer to sell to any retailer any brand or brands of intoxicating liquor under circumstances wherein the purchase of any quantity thereof entitles the retailer to a discount on the purchase price of any other brand or brands of intoxicating liquor.

133/ Welsand v. Railroad and Warehouse Commission, 251 Minn. 504, 88 N.W.2d 834, 838 (1958) (footnote omitted).

This proposed amendment prohibits so-called "combination sales," which could provide liquor wholesalers with a means by which they could circumvent and frustrate the intent of Minn. Stat. § 340.983 (1976). That section requires wholesalers and brand owners to file a schedule of wholesale prices each month, and to sell only at the prices filed. The Department has determined that if wholesalers and brand owners are allowed to sell a brand of intoxicating liquor under circumstances whereby the purchase of a certain quantity entitles the purchaser to a discount on the price on another brand, the actual sales price for each brand would be difficult for the Department to determine. Indeed, it would render Minn. Stat. § 340.983 virtually meaningless without such a regulation.[134/]

In George Benz Sons v. Ericson,[135/] the Court stated that "'the equal protection clause does not take from a State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary; and that one who assails the classification must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.'"[136/] What has been stated, supra, about the need and reasonableness of Liq 38E9 refutes any argument that it is "without any reasonable basis and . . . is purely arbitrary." Under the standard recognized in Minnesota, the Department submits that Liq 38E9 does not violate the equal protection clause.

134/ See discussion in section II., supra.
135/ 227 Minn. 1, 34 N.W.2d 725 (1948).
136/ Id. at 731 (emphasis in the original).

Phillips also argues that Liq 38E9 violates the state and federal constitutions by appropriating its property without due process.[137] However, engaging in the business of selling intoxicating liquors is wholly a privilege subject to the police power of the state.

> "No one can acquire a vested right to continue, when once licensed, in a business, trade, or occupation which is subject to legislative control and regulation under the police power of the state. The rights and liberty of the citizen are all held in subordination to such reasonable regulations and restrictions as the legislature may prescribe from time to time." [138]

Moreover, Liq 38E9 in no way takes away property; it merely restricts one method of distribution for intoxicating liquor. There is no vested right in the continuance of an existing distribution system in the liquor industry.[138a]

It is clear the legislature of Minnesota could prohibit the manufacture or importation of distilled spirits into the State if it so determined.[139] A fortiori, the legislature is entitled to enact legislation imposing significant restraints on the liquor industry. A state having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants may permit those things only under definitely prescribed conditions, since the greater power includes the lesser.[140] Reasonableness of regulation proposed to implement the intent of the legislation is all the law requires to be found constitutional.[141]

137/ T. 575 (Robins).

138/ George Benz Sons v. Ericson, supra at 730.

138a/ Federal Distillers, Inc. v. State, supra, at 155.

139/ U. S. Constitution Amendment XXI.

140/ Ziffrin, Inc. v. Reeves, 60 S. Ct. 163 (1939).

141/ Nebbia v. New York, 54 S. Ct. 505, 510 (1934); George Benz Sons v. Ericson, supra.

The Department submits that it has established before the Hearing Examiner both the necessity and reasonableness of Liq 38E9 and urges a declaration that the proposed rule is constitutional.

Liq 39A

Liq 39A requires all importers, including manufacturers and wholesalers, to offer for sale to all Minnesota wholesalers and manufacturers on an equal basis all intoxicating liquor brought into the State of Minnesota. It is claimed this proposal constitutes an invidious discrimination between Minnesota wholesalers.

Counsel for Minnesota Distillers suggested the following example to illustrate how Liq 39A would deny wholesalers equal protection: Wholesaler A, which owns a brand label, sells its brand label in Minnesota and North Dakota at a price of $50. Wholesaler B in Minnesota, which has a similar brand label, sells only in the State of Minnesota at a price of $50. Under the proposed regulation, Wholesaler A is required to sell its brand label to Wholesaler B and is required to affirm the price at $50; namely, the price at which it sells that brand label in another state (North Dakota). Wholesaler B is also required under the proposed regulation to sell its product to Wholesaler A. However, B does not have to affirm a price. B can sell its product to A at $50 if it chooses, but it is alleged that it will sell it to A at an inordinately high price. 142/

142/ T. 553-54.

Setting aside the fact that this argument is more an attack on Liq 39C (price affirmation required by Minn. Stat. § 340.114, subd. 3) than on Liq 39A, the illustration fails to recognize fundamental principles of constitutional law. The constitutional guarantee of equal protection is an assurance of equality of treatment for those similarly situated. The power of the State to classify is not in violation of the equal protection clause unless the classification results in an invidious discrimination.[143/] Indeed, in State Board of Equalization of California v. Young's Market Co.,[144/] the U. S. Supreme Court stated that "[a] classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth."[145/]

Even if one importer is required to sell to all others at an affirmed price while another importer is not, Liq 39 does not work an invidious discrimination on importers. The facts that justify the classification, if indeed a classification exists, are that one class of importers sells only within the State of Minnesota while the other class goes further and sells both within and outside the State.

143/ Craig v. Boren, 97 S. Ct. 451 (1976).

144/ 57 S. Ct. 77 (1936).

145/ Id. at 79. But cf.: Craig v. Boren, supra, at 462 n. 21, in which the Court noted that this statement has not been relied upon in recent cases that have considered Fourteenth Amendment challenges to state liquor regulation.

One who is not similarly situated cannot claim a violation of equal protection if he is treated differently from another.

Minnesota Distiller's example fails to accurately illustrate the probable facts in another way. Wholesaler B, if it wishes to sell its product outside Minnesota, is also required to affirm a price at which it must sell to other wholesalers, but it has chosen not to do so. Wholesaler A is required to do so because it sells in North Dakota; however, sale of products outside the State is an endeavor Wholesaler A presumably entered into voluntarily. This additional activity may subject Wholesaler A to additional restrictions; it may also entitle Wholesaler A to additional benefits. The one thing the activity clearly does is to make Wholesaler A not similarly situated to Wholesaler B. Furthermore, it is not proposed Liq 39A which would require either wholesaler in the example to affirm its price, but rather Minn. Stat. § 340.114 (1976).

Phillips contends that subsection c of the official syllabus, of the Court's opinion in Federal Distillers, Inc. v. State, supra, prohibits the Department from adopting Liq 39A. Subsection c states:

> c. The claim by plaintiff Johnson Brothers Wholesaler Liquor Company that the act requires the sale to all other wholesalers of liquor bottled under registered, private brands owned by it is hypothetical, for

there is no threatened construction or enforcement which would invade such ownership and the act on its face does not require such construction. 147/

The pertinent portion of the opinion, upon which the conclusion contained in the syllabus is based, states:

> The argument of plaintiff Johnson that two of its distiller suppliers, Federal and Mr. Boston, are required by the act to sell liquor bottled under brands owned by Johnson to all wholesalers is speculative and hypothetical. There is no indication that the liquor commissioner is about to construe the statute in such a way as to invade Johnson's right of ownership in its registered private-brand labels, and the statute on its face clearly does not require such a construction. 148/

The Department contends this portion of the Federal Distillers opinion instructs that the Department might violate Johnson's right to due process if it adopted a regulation requiring its distiller-suppliers, Federal and Mr. Boston, to sell to other Minnesota wholesalers "liquor bottled under brands owned by Johnson . . ."

147/ The Department does not concede that a statement in the syllabus is a part of the opinion of the court that may be quoted as authority. Minn. Stat. § 480.06 requires that such headnotes be filed by the court with its decision so that the clerk may furnish the headnotes to daily newspapers. A syllabus similar to that quoted by Phillips, although prepared by the Reporter of Decisions, constitutes no part of the opinions of the U. S. Supreme Court. See United States v. Detroit Timber & Lumber Co., 26 S. Ct. 282.

148/ This illustrates the difficulty in construing the syllabus as the actual holding of the court. While the syllabus is not necessarily contrary to the statement in the opinion, the opinion must be consulted to ascertain the intent of the court in its statements contained in the syllabus.

This is the clear reading of the relevant portion of the opinion and must control over any ambiguous, contrary interpretation possible under the syllabus.

Liq 39 does not purport to require Johnson's distiller-suppliers to sell liquor bottled under brands owned by them to all other Minnesota wholesalers. Liq 39 would require Johnson to offer to all other Minnesota wholesalers distilled liquor imported into the State bottled under brands owned by it. It would not require distiller-suppliers "to sell liquor bottled under brands owned by Johnson [or any other wholesaler] to all wholesalers . . . ," which is the only example warned against by the Court in Federal Distillers.

Phillips also contends that since it sells some products only to retailers, those products are exempt from the effect of Minn. Stat. § 340.114, which provides in part:

> Subdivision 1. All licensed importers shall offer for sale on an equal basis to all licensed wholesalers and manufacturers all intoxicating liquor brought into the state of Minnesota.

Counsel for Phillips stated: "We don't sell to any other wholesaler. The act is clear. It says if you sell to one wholesaler you have got to sell to all on an equal basis."[149/] The refutation of this argument lies in the clear wording of the statute itself. Contrary to the statement by Phillips, Minn. Stat. § 340.114 does not say, "if you sell to one wholesaler you must sell to all." Phillips is a licensed importer.[150/]

149/ T. 604 (Robins).

150/ Federal Distillers, Inc. v. State, supra at 156.

It admittedly imports intoxicating liquor into the State and rectifies it into a final product.[151] Thus, section 340.114 is applicable to Phillips since it is an importer and brings liquor into the State.

The intent of the legislature was to abolish brand monopolies and encourage intrabrand competition. Phillips' interpretation of § 340.114 would tend to foster brand monopolies and eliminate intrabrand competition. Accordingly, it is necessary to interpret § 340.114 as advanced by the Department. Such an interpretation not only makes Liq 39A necessary and reasonable, but also constitutional.

The representative of Phillips asks: "[W]hat is so inherently wrong about Phillips giving bottom price to the retailer in dealing directly with its own salesmen with its own private brand label? What is so important to the State that they would require Phillips to sell that to their competitors for their competitors to deal with as they might?"[152] Phillips' queries go to the wisdom of § 340.114 which is a legislative determination, and which has already been upheld as constitutional.[153] Phillips should take such arguments to the legislature; the issue before the Hearing Examiner is the reasonableness and necessity of the regulations, not whether the statute is the wisest or most expedient course.

151/ "All licensed importers shall offer for sale on an equal basis to all licensed wholesalers and manufacturers all intoxicating liquor brought into the state of Minnesota."

152/ T. 568 (Robins).

153/ See Federal Distillers, Inc. v. State, supra.

Former Liq 72

The deletion of former Liq 72 is challenged by Minnesota Beer Wholesalers Association, and existing Liq 72 is challenged by Minnesota Distillers, Inc. Liq 72 presently provides:

> The brand label will not be requested unless it is ascertained that the proposed registrant is the owner of the label, or has been assigned the brand label registration permission in writing by the brand owner pursuant to Federal and state laws.

The deletion of Liq 72 eliminates the requirement that registration of a brand label be made only by the owner. It is the position of the Department that neither Liq 72 as it now exists nor its deletion is violative of any constitutional provision.

Minnesota Distillers opposes existing Liq 72, which requires registration by brand owners only, contending that it denies it equal protection because it gives the owner of the label sole discretion whether that product will be sold within the State and denies that right to one who has legitimately purchased the product and desires to do business in the State.[154/] Counsel argues that the only interest the State has in requiring registration is to ascertain the quality of the product and to assure that a particular label does not mislead consumers.

154/ T. 550 et seq. (Larson).

The short answer to this argument is that if the object of the legislation is an appropriate subject of the state police power, one who becomes subject to restrictions imposed pursuant thereto cannot complain because he disagrees with the means chosen to implement the legislative objective.[155/] A purchaser of an intoxicating beverage who wishes to do business in the State has no absolute right to do so.[156/]

In Minnesota, the State has allowed the sale of liquor. The legislature legitimately has sought to ensure the quality of the products sold and to assure that consumers are not misled by labels. A rational means of pursuing that objective is to require owners to register the labels. One who has no original entitlement to engage in the business of selling liquor in the State cannot complain because the State has chosen a rational means to implement a legitimate state objective that results in his exclusion from engaging in such a business. Owners of brand labels and non-owners simply are not similarly situated so as to give rise to equal protection considerations.

155/ Federal Distillers, Inc. v. State, supra at 154.

156/ Ziffrin, Inc. v. Reeves, 60 S. Ct. 163 (1939).

The Minnesota Beer Wholesalers Association contends that the deletion of former Liq 72 interferes with the brand label owner's "freedom to contract with respect to one's property in the conduct of lawful business to select a party with whom one chooses to do business."[157/] It need not be determined by the Hearing Examiner if a brand label owner has a right of freedom to contract with whomever he wishes to resolve the question whether the deletion of Liq 72 violates that right.

Proposed Liq 72 allows both owners and non-owners to register brand labels. Either means of approaching the problem is well within the legislative intent; either means can be adopted under the statute. To be invalid, the rule must be unreasonable or plainly and palpably inconsistent with law.[158/] Neither Liq 72 as it now exists nor its deletion is unreasonable or plainly and palpably inconsistent with the law.

Counsel for the beer wholesalers states that "[t]o withstand the due process attack a legislative enactment, a law passed by the legislature, must promote a public purpose. We would suggest that there is no public purpose served by the repeal of Liquor Rule 72."[159/] Although the Department strongly asserts there is public purpose in the deletion of Liq 72, counsel fails to appreciate the

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157/ T. 542 (Latz).

158/ Boske v. Comingore, 20 S. Ct. 701 (1900).

159/ T. 543 (Latz).

distinction between the constitutional standards applicable to statutes as opposed to standards applicable to regulations designed to implement those statutes. It is accurate to state that a statute must promote a public purpose.[160/] However, to be constitutional, a regulation promulgated to implement the intent of the statute must be necessary and reasonable. It is not required that the Department adopt the most reasonable means of implementing the statute; only if the means proposed are clearly unreasonable should the Hearing Examiner declare any of the proposed rules unconstitutional. The Department has the burden to show that the proposed rules are necessary and reasonable; it is the burden of the participants to show the proposed rules are clearly unreasonable. This, the Department submits, they have failed to do.

IV.

CONCLUSION

The Department is required by the Administrative Procedure Act to show the statutory authority and need and reasonableness of the proposed rules. If the Hearing Examiner finds that the proposed rules are necessary and reasonable, any constitutional inquiry should cease. The Department submits

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160/ See Minnesota Distillers, Inc. v. State, supra at 158.

that it has fulfilled its statutory duty with respect to all the proposed rules and urges the Hearing Examiner to issue a report accordingly.

Dated: October 18, 1977.

LIQUOR CONTROL DIVISION
MINNESOTA DEPARTMENT OF
PUBLIC SAFETY

By Alan H. Maclin
ALAN H. MACLIN

And Stephen P. Kilgriff
STEPHEN P. KILGRIFF

And Mark M. Suby
MARK M. SUBY

Special Assistant
Attorneys General
515 Transportation Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-2961

Attorneys for the Department