STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WALMART INC. AND WAL-MART STORES EAST, L.P.,

Petitioner,

vs. Case No. 19-4688RP

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,

Respondent,

and

ABC FINE WINE AND SPIRITS, FLORIDA INDEPENDENT SPIRITS ASSOCIATION, AND PUBLIX SUPERMARKETS,

Intervenors.
_____/

TARGET CORPORATION,

Petitioner,

vs. Case No. 19-4913RP

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,

Respondent.
_____/

FINAL ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (DOAH) conducted the final

hearing in this cause on October 29, 2019, in Tallahassee, Florida.

APPEARANCES

For Petitioners, Walmart Inc. (Walmart) and Wal-Mart Stores East, L.P., (Wal-Mart East):

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For Petitioner, Target Corporation (Target):

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For Respondent, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (Division):

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For Intervenors, ABC Fine Wine and Spirits (ABC), Florida Independent Spirits Association (FISA), and Publix Supermarkets (Publix):

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STATEMENT OF THE ISSUES

A. Does Petitioner, Target, have standing to challenge proposed rule 61A-3.055, Items Customarily Sold in a Restaurant

(proposed rule or proposed restaurant rule), (Case No. 19-4913RP)?

B. Does Petitioner, Walmart, have standing to challenge the proposed restaurant rule (Case No. 19-4688RP)?

C. Does Intervenor, ABC, have standing to participate in these challenges to the proposed rule?

D. Does Intervenor, FISA, have standing to participate in these challenges to the proposed rule?

E. Does Intervenor, Publix, have standing to participate in these challenges to the proposed rule?

F. Is the proposed restaurant rule an invalid exercise of delegated legislative authority as defined in section 120.52(8), Florida Statutes (2019)?[1/]

PRELIMINARY STATEMENT

Target, Walmart, and Wal-Mart East challenge the validity of the Division's proposed restaurant rule under the authority of section 120.56(1). The proposed rule explicates the Division's position on what "items customarily sold in a restaurant," as used in section 565.045, means. Intervenors support the proposed rule's validity.

These challenges to the proposed rule follow a 2018 challenge to the Division's existing rule 61A-3.055, which also implemented section 565.045, Florida Statutes (Walmart I). The Final Order in Target Corporation, et al v. Dep't Bus. and Prof.

Reg., DOAH Case No. 18-5116RX declared the existing rule not valid. An appeal from that Order pends before the First District Court of Appeal. Dep't Bus. and Prof. Reg. v. Target Corporation et al, Case No. 1D18-5311 (Fla. 1st DCA). This case varies significantly from the challenge to the existing rule. It has a different record.[2/] Different burdens of proof and legal standards also apply. Compare § 120.56(3)(petitioner has the burden of proving existing rule invalid) and § 120.56(2)(agency bears the burden of proving proposed rule is not invalid), Fla. Stat.

Walmart and Wal-Mart East filed their challenge to the proposed rule on September 5, 2019. Walmart, Wal-Mart East, and the Division waived the time limits of section 120.56(1)(c). The undersigned set the hearing for October 29, 2019. ABC, Publix, and FISA were granted leave to intervene, subject to proving standing in the final hearing.

Target brought a separate challenge to the validity of the proposed rule in Case No. 19-4913RP. It was consolidated with Case No. 19-4688RP. The undersigned conducted the final hearing as scheduled.

Counsel worked professionally and courteously together to streamline presentation of evidence and permit witnesses to testify just once rather than testifying once for one party and being called back to testify for another party. Consequently,

the convention of identifying witnesses as produced by one party or another does not fit.

The following witnesses testified: Monesia Brown, Walmart Director of Public Affairs and Legislation; Christopher Carson, Chief of Field Services, Division of Hotels and Restaurants, Department of Business and Professional Regulation; Matt Colson, Chief of Bureau of Food Inspection, Division of Food Safety, Florida Department of Agriculture and Consumer Services; John J. Harris, former Director of the Division; Megan Lerch, Director of Licensing and Real Estate Tax, Target; Daniel J. McGinn, Deputy Director of the Division; and Cynthia Ross, Deputy Chief of Sanitation and Safety Inspections, Division of Hotels and Restaurants, Department of Business and Professional Regulation. Also, the exhibits include many depositions and a hearing transcript.

Joint Exhibits 1 through 41 were admitted. Petitioners' Exhibits 42 and 45 through 50 were admitted. Division Exhibits 64 through 76, 78 through 94, and 96 through 106 were admitted. Intervenors offered no exhibits.

The court reporter filed the Transcript on November 25, 2019. The parties timely filed Proposed Final Orders. They have been considered in preparation of this Order.

FINDINGS OF FACT

Parties

Division

1. The Legislature has charged the Division with administration of Florida's Alcoholic Beverage and Tobacco Laws, including Chapters 562 through 568, Florida Statutes, known collectively as the "Beverage Law." 561.01(6), Fla. Stat. This charge includes licensing and regulation, as well as enforcement of the governing laws and rules.

2. Title XXIV of the Florida Statutes governs sale of alcoholic beverages and tobacco. It includes chapters regulating beer (chapter 563), wine (chapter 564), and liquor (chapter 565). Among other things, these similarly structured chapters impose license fees, with the amounts determined by the population size of the county where the business is located. Section 565.02 creates fee categories for "vendors who are permitted to sell any alcoholic beverages regardless of alcoholic content." Section 565.02(1)(b)-(f) establishes the license fees based upon county population for licenses for places of business where consumption on premises is permitted. These are referred to as "COP" licenses. A number preceding COP, such as 4COP, indicates the county population range and therefore license fee amount for a particular license holder. Section 565.045, Florida Statutes, also permits COP license holders to sell sealed containers of

alcoholic beverages for consumption off the premises (packaged goods).

Walmart

3. Walmart is a multinational corporation. It owns subsidiaries that own and operate retail stores, warehouse clubs, and an e-commerce website operated under the "Walmart" brand. Walmart does not own or operate stores. It holds them through wholly owned subsidiaries. For instance, Walmart is the parent company of its wholly owned subsidiary Wal-Mart East.

4. Stores of Walmart subsidiaries have three primary formats. They are Supercenters, Discount Stores, and Neighborhood Markets.

5. The record is silent about the nature and degree of day-to-day control, policy control, and marketing control that Walmart exercises or has authority to exercise over the subsidiaries. It is also silent about the nature and structure of the fiscal relationship between Walmart and its wholly owned subsidiaries.

6. Walmart does not have a license issued by the Division pursuant to section 565.02(1)(b)-(f). Walmart has not applied for a license from the Division issued under section 565.02(1)(b)-(f). The record does not prove that Walmart intends to apply for a COP license.

Wal-Mart East

7. Wal-Mart East owns and operates "Walmart" branded stores at approximately 337 Florida locations. They include approximately 231 "Supercenters," nine "Discount Stores," and 97 "Neighborhood Markets." All of these stores sell food items. Depending on the store category, the items may include baked goods, deli sandwiches, hot meals, party trays, and to-go food items, such as buckets of fried chicken and pre-made salads. The areas adjacent to the departments of Wal-Mart East that sell food do not have seats and tables for diners. There are some benches, but not tables, scattered around inside the stores.

8. None of the stores holds a license from the Florida Division of Hotels and Restaurants or the Florida Department of Health. They hold "retail food store" or "food establishment" licenses from the Florida Department of Agriculture and Consumer Services.

9. In his deposition, Tyler Abrehamsen, assistant manager for Wal-Mart East Store #705 in Mt. Dora (Store 705), aptly described Walmart as "more than just a store." Walmart sells "anything you can think of from sporting goods to deli to candy." A Supercenter sells, among other things, general merchandise, golf balls, fishing gear, socks, motor oil, ammunition, groceries, deli goods, electronics, home furnishings, groceries, and hot food. Supercenters may house specialty shops such as

banks, hair and nail salons, restaurants, or vision centers. Walmart Supercenters offer 142,000 items for sale. Many house McDonalds or Subway restaurants.

10. Discount Stores are smaller than Supercenters. They sell electronics, clothing, toys, home furnishings, health and beauty aids, hardware, and more. Discount Stores offer about 120,000 items.

11. A Neighborhood Market is smaller than a Discount Store. Neighborhood Markets sell fresh produce, meat and dairy products, bakery and deli items, household supplies, health and beauty aids and pharmacy products. Walmart Neighborhood Markets offer about 29,000 items.

12. Store 705 is a Supercenter. The store holds a food permit issued by the Florida Department of Agriculture and Consumer Services under Chapter 500 to operate as a retail food store or food establishment. There are four picnic tables with seating in a pavilion outside the store. Some benches, but not tables, are scattered around the store.

13. Store 705 holds a 2APS license permitting beer and wine package sales only. Wal-Mart East applied to the Division to change the license to a COP license. The Division processed the application and issued Store 705 a temporary license on May 13, 2019. Two days later the Division advised Store 705 that it issued the temporary license erroneously and that the license was

void. Shortly afterwards a Division employee recovered the license from Store 705. On June 7, 2019, the Division issued its Notice of Intent to Deny License, relying in part on section 565.045.[3/] Section 565.045, which the proposed rule implements, prohibits issuing a COP license to a place of business that sells items not "customarily sold in a restaurant."

14. The floor plan Store 705 provided with its COP license application does not delineate an area for serving and consuming alcoholic beverages. When asked about plans to serve alcohol by the drink, the Wal-Mart East representative testified, "However, I'm not suggesting that in the future at some point we wouldn't be interested in selling drinks by the glass at Store 705." The witness went on to say, "What I'm saying today is I don't know if there are future plans and I don't think that we're prepared to say one way or another whether this would be our plan for this location for eternity." (TR. Vol. 1, p. 161) Wal-Mart East only plans to sell alcohol by the container at Store 705. If issued a COP license, however, it would be permitted to sell alcohol by the drink.

15. Lake County Property Appraiser records identify the land use of Store 705 as "Warehouse Store." There is no evidence about the significance of this, how the categorization is determined, or what purpose it serves.

16. Several credit card companies categorize Wal-Mart East stores as "grocery stores" and "supermarkets" or discount stores. There is no evidence about the significance of these categorizations, their meaning, how the categorization is determined, or for what purpose the categorizations are applied. The lack of relevant information about how and why the property appraiser and credit card companies determine these categorizations make them meaningless for any determination of whether Wal-Mart East stores are restaurants.

17. Wal-Mart East leases space within Store 705 to a separate entity doing business as Wayback Burgers. Wayback Burgers has a kitchen, a service counter, a fountain drink dispenser, and seats and tables for dining. The Division of Hotels and Restaurants issued the owner of Wayback Burgers, under the authority of Chapter 509, a license titled "Seating Food Service License." The definitions section of Chapter 509 does not contain a definition for "Seating Food Service." The license does not identify the physical area covered by the license, although it refers to 22 seats. The Division of Hotels and Restaurants inspects only the area identified by signage, seating, food preparation area, and service area when inspecting Wayback Burgers. The Division of Hotels and Restaurants does not license the rest of Store 705 or any other Wal-Mart East store in Florida.

18. The Department of Agriculture and Consumer Services issued Store 705 an Annual Food Permit denominated as for Food Entity Number: 33995. The license does not describe the physical area to which it applies. A January 4, 2019, document titled Food Safety Inspection Report for Store 705 lists "111/Supermarket" in a field of the report titled Food Entity Type/Description. The record does not explain the designation.

19. The Department of Agriculture, Bureau of Food Inspection, Division of Food Safety, maintains a food inspection data base of permitted entities. That list identifies Store 705 as a supermarket.

20. The Department of Agriculture often must decide whether it should license an establishment serving food or if the Division of Hotels and Restaurants should issue the license. The Department regulates food establishments and retail food stores. It does not have authority over food service establishments. Sometimes the Department consults with the Division of Hotels and Restaurants to determine what a business should be licensed as.

21. When a vendor like McDonald's or Subway is located in a Walmart store the agriculture department bases its licensing category decision on ownership. If the store owns the McDonald's or Subway, the Department will license it. If a separate entity owns and operates the McDonald's or Subway, the department looks to the Division of Hotels and Restaurants to license it.

Target

22. The parties stipulated that Target is an upscale discount retailer that provides high quality, on-trend merchandise at attractive prices in clean, spacious, and guest-friendly stores. Target owns and operates approximately 126 general merchandise stores in Florida.

23. Target does not hold a license issued by the Division under section 565.02(1)(b)-(f).

24. The Florida Department of Agriculture and Consumer Services licenses all Target locations in Florida as retail food stores or food establishments under chapter 500. The licenses are for the entire store, including the food service portions discussed below. No Target store holds a license from the Florida Division of Hotels and Restaurants. The Florida Department of Health does not license any Target stores as food service establishments.

25. Target sells beer and wine by the container in 124 of its Florida stores. At three store locations, Target sells beer, wine, and liquor from a separate liquor store with a separate entrance.

26. Target operates Starbucks and Pizza Hut facilities under licensing agreements within 118 of its stores. Coffee, espresso, banana bread, chocolate chip cookies, ham and cheese croissants, oatmeal, and biscotti are representative examples of

food sold at Target Starbucks. Target Pizza Huts typically sell carbonated drinks, smoothies, pretzels, popcorn, hot dogs, pizzas, chicken wings, and french fries. Some Target stores also have a Target Café selling limited food and beverage items.

27. Target stores also sell items such as packaged, pre-made salads, fruit, and frozen meals. "Super Target" stores have delis, which sell cooked items like chicken fingers and rotisserie chicken.

28. The cafés, Starbucks, and Pizza Huts occupy separate areas within the larger Target stores. They have their own cash registers. Customers may pay for retail items from the store at those cash registers.

29. The inventory of all Target stores is subject to daily change. Location, geography, supply, and other factors affect a store's inventory. Target stores sell a gamut of items. They include groceries, frozen foods, furniture, rugs, garden tools, clothing, toys, sporting goods, health products, beauty products, electronics, office supplies, kitchen appliances, diapers, pet food, cell phones, and luggage.

30. A Target store in Delray Beach has applied to the Division to change its beer and wine package license to a COP license. Target seeks the COP license in order to make package sales of liquor. Like the Walmart representative, Target's representative refused to state whether Target planned to offer

alcohol by the drink at any of its stores. If it held a COP license, the store would be permitted to sell alcohol by the drink.

ABC

31. ABC stores retail alcoholic beverages in Florida. The stores hold a number of alcoholic beverage licenses issued by the Division. ABC holds 25 4COP licenses issued by the Division. In his deposition, the ABC corporate representative testified that he "would not be able to answer" if the proposed rule would have any impact on ABC. His testimony, however, proved that ABC stores seek clear guidance about what they can and cannot sell. Also, the proposed rule imposes limits upon what ABC stores can sell that the invalidated rule and the statute alone do not impose.

FISA

32. FISA is an independent association of alcoholic beverage retailers. It has 206 members. The Division licenses and regulates FISA's members. ABC is a FISA member. Including ABC, FISA members hold 61 4COP licenses. There is no evidence proving that any FISA member intends to apply for a COP license. Only the FISA members holding COP licenses would be affected by the proposed rule. This is not a substantial number of members. The other 145 members hold 3PS licenses (package sales) which the proposed rule does not affect.

33. Neither the officers, the governing board, nor the members of FISA voted or took any other official action to authorize FISA to intervene in this proceeding. The evidence does not prove that the association is acting as a representative of its members in this proceeding. There is also no evidence, such as the FISA articles of incorporation, by-laws, or other association formation documents, proving the association's general scope of interest and activity or the authority of its President to act on its behalf. The evidence does not prove that participating in this proceeding is within the authority of the President or FISA.

34. FISA President, Chris Knightly, testified in deposition that any change in where liquor could be sold could have an extreme financial impact on small family-owned businesses. But FISA offered no evidence to show the impact on its members or, for that matter, that any FISA members were actually small, family-owned businesses. The President also testified that the impact of the rule on FISA members would be minimal because the non-alcoholic items the stores sold were just conveniences for customers, not significant revenue sources. In light of the President's statement about minimal impact on FISA members and the number of members who hold COP licenses, the record does not prove that the proposed rule would have a substantial effect on FISA or a substantial number of its members.

Publix

35. Publix is a supermarket chain in Florida. It also operates a number of liquor stores throughout Florida. Publix holds two 4COP licenses and ten 2COP licenses (beer and wine only) issued by the Division.[4/] The proposed rule imposes limits upon what Publix can sell at its 4COP licensed stores that the invalidated rule and the statute alone do not impose.

Rulemaking

36. The Division seeks to implement section 565.045. The pertinent parts of the statute provide:

> (1) Vendors licensed under s. 565.02(1)(b)-(f) shall provide seats for the use of their customers. Such vendors may sell alcoholic beverages by the drink or in sealed containers for consumption on or off the premises where sold.
>
> (2)(a) There shall not be sold at such places of business anything other than the beverages permitted, home bar and party supplies and equipment (including but not limited to glassware and party-type foods), cigarettes, and what is customarily sold in a restaurant.

37. The Division, both in the invalid rule and in the proposed rule, seeks to provide clarity about the meaning of "customarily sold in a restaurant" as it is used in the statute. That desire was the reason it adopted the original rule, now invalidated, in 1994. The review by the Joint Administrative Procedures Committee (JAPC) back then observed, "Absent

explanatory criteria, use of the word 'customarily' vests unbridled discretion in the department."

38. The Division responded: "As mentioned in our meeting, all of proposed rule 61A-3.055 [1994 version] is, in itself, the division's attempt to define the admittedly vague phrase 'items customarily sold in a restaurant', as used in s. 565.045."

39. The invalidated rule provided:

> 61A-3.055 Items Customarily Sold in a Restaurant.
>
> (1) As used in Section 565.045, F.S., items customarily sold in a restaurant shall only include the following:
>
> (a) Ready to eat appetizer items; or
> (b) Ready to eat salad items; or
> (c) Ready to eat entree items; or
> (d) Ready to eat vegetable items; or
> (e) Ready to eat dessert items; or
> (f) Ready to eat fruit items; or
> (g) Hot or cold beverages.
>
> (2) A licensee may petition the division for permission to sell products other than those listed, provided the licensee can show the item is customarily sold in a restaurant. This petition shall be submitted to the director of the division at Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, 2601 Blair Stone Road, Tallahassee, Florida 32399-1020, and must be approved prior to selling or offering the item for sale.
>
> (3) For the purpose of consumption on premises regulations set forth in Section 565.045, F.S., items customarily sold in a restaurant shall include services or sales authorized in the "Florida Public Lottery Act", Section 24.122(4), F.S.

40. The Final Order invalidating the earlier rule concluded:

> 41. A rule is arbitrary if it is not supported by logic or necessary facts and is capricious if irrational. Dep't of Health v. Bayfront Med. Ctr., Inc., 134 So. 3d 1017 (Fla. 1st DCA 2012). Despite the Division representative's best efforts at deposition to avoid answering direct questions, the record proved that restaurants customarily sell at least T-Shirts and branded souvenirs. The Division, through the deposition testimony of its representative, acknowledged this.
>
> 42. The record offers no explanation why subsection (1) of the Restaurant Rule does not include these items. Excluding an item that the Division acknowledges is customarily sold in restaurants from a list of items customarily sold in restaurants is illogical. Rule 61A-3.055 is arbitrary and capricious.

41. In 2018, while the challenge to the existing rule in Case No. 18-5116RX was underway, the Division began proceeding to amend rule 61A-3.055. This was a response to the challenges to the existing rule.

42. The Division conducted six public hearings to receive public comment on various proposed amendments to the rule and to solicit input from the public. Petitioners did not participate in the hearings. There is no evidence that Petitioners suggested rule language, such as items to be listed as "customarily sold in a restaurant" or identifying characteristics of items "customarily sold in a restaurant" to the Division.

43. Representatives of Intervenors attended each of the public hearings. There is no evidence that they suggested language for the rule either.

44. During the May 6, 2019, rule development hearing, a representative of the Florida Restaurant and Lodging Association suggested that the Division conduct an investigation, study, or survey to determine what merchandise or services restaurants customarily provide. During the rule development proceedings, the Division did not conduct any investigation, study, or survey to determine what is customarily sold in a restaurant. The Division did not examine a sampling of establishments that it considered restaurants to determine what is customarily sold in restaurants.

45. The Division did not use any of the data collected in 50,000 inspections each year to perform any studies, surveys, or analyses of what is customarily sold in restaurants or by COP license holders. It only sought comment from the restaurant industry and Division licensees through the public hearing process.[5/]

46. As required by law, the Division submitted various iterations of the proposed rule to JAPC for review. For each version of the proposed rule that it reviewed, JAPC observed that the rule appeared to be overly restrictive and that it may be arbitrary and capricious.

47. On August 16, 2019, the Division published the final version of the proposed amended rule in Volume 45, Issue Number 160 of the Florida Administrative Register. It states:

> 61A-3.055 Items Customarily Sold in a Restaurant.
>
> (1) As used in section 565.045, Florida Statutes, items customarily sold in a restaurant shall only include the following:
>
> (a) Food cooked or prepared on the licensed premises; or
>
> (b) Hot or cold beverages; or
>
> (c) Souvenirs bearing the name, logo, trade name, trademark, or location of the licensed vendor operating the licensed premises; or
>
> (d) Gift cards or certificates pertaining to the licensed premises.
>
> (2) For the purpose of consumption on premises regulations set forth in section 565.045, Florida Statutes, items customarily sold in a restaurant shall include services or sales authorized in the "Florida Public Lottery Act", section 24.122(4), Florida Statutes.

48. The Division explains the wording of section (1)(c) of the proposed rule as being based on the conclusion "the record proved that restaurants customarily sell at least T-Shirts and branded souvenirs" in the Final Order invalidating the original rule. It also removed from the original rule language permitting a licensee to petition the Division to show an unlisted item is customarily sold at a

restaurant. This change is also a reaction to the Final Order.

49. As of the day of the hearing, the Division, in the person of its Deputy Director, could not state what a "restaurant" was. The Deputy Director testified: "The Department [Division] doesn't take a position on what is or isn't a restaurant in this instance [applying the proposed rule]. We didn't define it, so we don't have a position." (Tr. Vol. 1, p. 45). As of the hearing date, the Deputy Director for the Division could not state whether Walmart is a restaurant. (Tr. Vol. I, p. 84). On October 26, 2018, testifying in the earlier rule challenge, Thomas Philpot, the then Director of the Division and acting Deputy Secretary for the Department of Business and Professional Regulation, similarly said that the Division had no formal policy or procedure for deciding if a business was a restaurant. (Ex. 30, p.48).

50. A clear definition of "restaurant" is the necessary predicate to determining what is customarily sold in a restaurant. Throughout the rule development and through the hearing, the Division did not have a clear definition of restaurant. The Division's representative testified that "[t]he Division does not have a definition

that it can cite to either in statute or in rule for the term restaurant." (Ex. 20, p. 62).

51. The Division's Proposed Final Order seems to take the position that a "restaurant" is either a public food service establishment licensed by the Florida Division of Hotels and Restaurants or a restaurant as defined in authoritative dictionaries.

52. None of the parties, including the Division, offered results from any survey, study, or investigation, of either a statistically significant random sample or survey of all "restaurants," however they may be delineated, to determine what "restaurants" customarily sell.[6/]

53. Much of the evidence revolved around the theory advanced by Target and Wal-Mart East that because they offer areas where customers can purchase prepared food; because vendors like McDonalds, Pizza Hut, or Starbucks sell food in sections where the consumer can pay for the food and sit down to consume it; or because the stores sell deli and baked goods that could be consumed at the store; that Target stores and Walmart stores are restaurants. From that, Wal-Mart East and Target reason that everything they sell including toys, clothes, stereos, cleaning supplies, pet food, electronics, books, and sporting goods are items commonly sold at restaurants. The Division concentrated its presentation on countering that theory.

54. The Division of Hotels and Restaurants licenses approximately 56,000 businesses as "public food service establishments." It refers to these businesses as "restaurants." Assuming the 463 Walmart-East and Target stores are also considered restaurants, adding them to 56,000 results in approximately 56,463 "restaurants" in the State of Florida. The combined Target and Walmart facilities would be .82 percent of the total number of Florida "restaurants." This does not establish that what Wal-Mart East stores and Target stores sell is what restaurants customarily sell.

55. Wal-Mart East offered the testimony of John Harris, who worked 28 years for the Division. He served as Director of the Division and served as Secretary of the Department of Business and Professional Regulation. At the direction of counsel for Walmart and Wal-Mart East, Mr. Harris visited nine Florida establishments to view the premises and identify items sold at the establishments. Eight of the establishments hold current COP licenses. One is a Cracker Barrel restaurant. Mr. Harris' testimony proved that the items listed below were for sale at the selected establishments identified. None are listed as customarily sold at a restaurant in the proposed rule:

a. Biltmore Hotel (holds a 4COP license): clothing, jewelry, sports attire, golf clubs, over-the-counter medications,

art, golf clubs, golf club bags, tennis equipment, and skin treatments.

b. Buster's Beer & Bait (holds a 4COP License): cigars and fish bait.

c. CMX movie theater in Tallahassee, Florida (holds a 4COP license): movie tickets.

d. Cracker Barrel (does not hold a COP license): apparel, hats, toys, stuffed animals, audio books, books, musical instruments, rocking chairs, hand lotions, jewelry, quilts, small tools, and cooking utensils.

e. Neiman Marcus department store in Coral Gables, Florida (holds a 4COP license): jewelry, watches, sunglasses, handbags, clothing, shoes, wallets, pens, luggage, and fine china.

f. Nordstrom department store in Coral Gables, Florida (holds a 4COP license): items similar to those for sale in the Neiman Marcus department store, makeup, grills, record players, and baby strollers.

g. PGA National Hotel and Golf Resort (holds a 4COP license): clothing, shoes, cosmetics, spa services, haircuts, golf clubs, and golf attire.

h. Saks Fifth Avenue (holds a 4COP license): items similar to those sold at the Neiman Marcus department store.

i. Slater's Goods & Provisions (holds a 4COP license): razor blades, lip balm, prepackaged food items, cleaning supplies, aluminum foil, canned goods, and batteries.

j. Daytona Speedway (holds a 4COP license issued for this location to Americrown Services): golf clubs, T-shirts, other clothing items, key chains, tires, specialized motorcycle mufflers, and event tickets.

56. For each of the identified COP licensees, the identified items were for sale in areas for which there was free passage to and from areas where alcohol is stored or sold.

57. Mr. Harris did not use his experience and expertise to identify the establishments as representative of COP license holders. Mr. Harris was not attempting to inspect a random, representative sample of Florida restaurants. A party's attorney selected the locations. There was no expert testimony establishing the validity of Mr. Harris' ad hoc survey. Mr. Harris also did not know which parts of the premises the COP licenses of the places that he visited covered. The evidence did not prove that the establishments were a representative sample of anything.

58. In addition, Mr. Harris is not an objective or impartial witness. Mr. Harris is an advocate for Walmart and Target. He wants the proposed rule to be invalidated. Mr. Harris also represents Target as a lobbyist.

59. There is no evidence that the sample size of nine is significant or representative of all COP license holders. All the exercise proves is that the Division has allowed establishments that contain areas holding COP licenses to sell a variety of items that the Division's proposed rule and the invalidated rule would not permit. The small number of establishments, the witness's allegiance, and the fact that the establishments were selected for use in this proceeding make the evidence wholly unpersuasive.

CONCLUSIONS OF LAW

60. Sections 120.56, 120.569 and 120.57(1) grant DOAH jurisdiction over the parties and the subject matter of this proceeding.

61. Walmart, Wal-Mart East, and Target maintain that the proposed rule is an invalid exercise of delegated legislative authority. Section 120.52(8), defines invalid exercise of delegated legislative authority. In pertinent part, it provides:

> "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> * * *
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational.

62. Petitioners challenge the validity of the proposed restaurant rule on the grounds identified above.

63. Section 120.56 creates the procedures for challenging rules of all sorts. Section 120.56(2) creates a two stage process for deciding whether a proposed rule is invalid. First challengers must prove by a preponderance of the evidence that they would be substantially affected by the proposed rule. If they do, then the agency "has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised." § 120.56(2)(a), Fla. Stat.

Stage I and Standing

64. Section 120.56(1)(a) provides:

> Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

65. This is the same standard as imposed by stage I of the procedure for challenging a proposed rule.

66. A party's substantial interests are determined if: (1) the party will suffer injury in fact that is of sufficient immediacy to entitle it to a section 120.57 hearing, and (2) the injury is within the zone of interest to be regulated or protected. Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005).

Walmart and Wal-Mart East

67. The parties agree that as an applicant for a COP license Wal-Mart East has standing.

68. Walmart relies upon the determination that it had standing in Walmart I as a basis for standing in this proceeding. This is a different case with a different record. Footnote 3 of the Final Order in Walmart I noted there was no dispute about the intent of Walmart to obtain a license. In this case, the Division contests standing.

69. The evidence does not show that Walmart has applied for a COP license, holds a COP license, or genuinely intends to apply for a COP license. Thus, it is not at risk for an immediate injury and is not within the zone of interest to be regulated. Speculation that a party may take action in the future that would subject the party to a rule is not sufficient to establish standing. See Fla. Home Builders Ass'n v. City of Tallahassee, 15 So. 3d 612, 613 (Fla. 1st DCA 2009) and Fla. Soc'y. of Ophthalmology v. State Bd. of Optometry, 532 So. 2d 1279 (Fla. 1st

DCA 1988)(speculative injury does not satisfy the "immediacy" requirement).

70. Walmart cannot rely upon the fact that Wal-Mart East is a wholly owned subsidiary to establish standing. The record contains no evidence about their relationship other than the bare fact of its existence. The relationship alone does not infuse Walmart with Wal-Mart East's standing. See Sanchez v. Suntrust Bank, 179 So. 3d 538, 542 (Fla. 4th DCA 2015) (wholly owned subsidiary's standing to foreclose does not automatically establish parent's standing); Am. Int'l Grp., Inc. v. Cornerstone Bus., Inc., 872 So. 2d 333, 336 (Fla. 2d DCA 2004)(parent corporation and wholly-owned subsidiary are separate and distinct legal entities). Walmart does not have standing.

Target

71. Target has applied for a COP license for a store in Delray Beach. If the proposed rule takes effect, Target must satisfy its requirements to obtain the license. These facts place Target squarely in the zone of interest regulated by the proposed rule. Target sells items such as electronics and clothing that the rule does not identify as customarily sold by restaurants. Because Target sells these items, adoption of the proposed rule is likely to cause Target an injury in fact -- denial of its COP application, just as the application for Store 705 was denied. Target has standing.

ABC and Publix

72. ABC and Publix hold COP licenses that will be affected by the rule. The existing (invalidated) rule allows a licensee to obtain permission to sell items other than those listed in the rule. The proposed rule removes that right. The statute does not impose an absolute limitation upon what may be considered "customarily sold in a restaurant." The proposed rule imposes an absolute limitation. The proposed rule causes an injury to ABC and Publix that will take effect immediately if the proposed rule takes effect. As COP license holders, ABC and Publix are also within the zone of interest regulated by the proposed rule.

73. This differs from Walmart I. The difference in the records, the effects of the rules, and the issues in the two cases are the reason that ABC and Publix have standing here where they did not have standing in Walmart I. In Walmart I, a determination that the existing rule was invalid would have removed rule restrictions on what ABC and Publix could sell. Hence it would have not caused an injury in fact, which is required to establish standing. All Risk Corp. v. State, Dep't of Labor & Emp't Secur., Div. of Workers' Comp., 413 So. 2d 1200, 1202 (Fla. 1st DCA 1982). See also Office of Ins. Reg. v. Aiu Ins. Co., 926 So. 2d 479, 480 (Fla. 1st DCA 2006)(Even though within the "zone of interests" rule challenger must demonstrate rule application "will result in a real and sufficiently immediate injury in fact"). A

determination here that the proposed rule is valid will increase restrictions on ABC and Publix by eliminating the right to seek approval to sell unlisted items. ABC and Publix have standing.

FISA

74. FISA must prove its standing under the standards applying to associations. To establish standing in a rule challenge, an association must prove that the challenged rule is within its general scope of interest and activity. It must prove that the relief it seeks is appropriate for a trade association to receive on behalf of its members. An association must also prove that a substantial number of its members are "substantially affected" by the challenged rule. Fla. Home Builders Assoc. v. Dep't of Labor & Emp't Sec., 412 So. 2d 351 (Fla. 1982); See SCF, Inc. v. Fla. Thoroughbred Breeders' Ass'n, 227 So. 3d 770 (Fla. 1st DCA 2017) (Florida Thoroughbred Breeders' & Owners' Association, with legal authority to promote Florida's thoroughbred industry, had standing.) FISA's Petition to Intervene demonstrates that it is aware of these standards. It alleges: "One of FISA's primary purposes is to act on behalf of its members by representing their common interests before various governmental entities of the State of Florida, including the Department." FISA did not prove what it alleged.

75. FISA did not prove the scope of its authority or interests. It did not even prove that the President had authority to participate in the proceeding on behalf of FISA.

76. Although the FISA president talked in generalities about economic injury, FISA produced no persuasive evidence of it. The president even described financial impacts as minimal. FISA's Petition to Intervene also did not allege economic injury from the proposed rule. FISA did not prove standing.

77. In sum, Wal-Mart East and Target have standing to challenge the proposed rule. ABC and Publix have standing to intervene. Walmart does not have standing to challenge the proposed rule. FISA does not have standing to intervene. The challenges of Wal-Mart East and Target move on to Stage II.

Stage II -- Proof of Validity

General Principles and History

78. The proposed rule and the invalidated rule are the Division's efforts to implement or carry out the statute's directive with more detail. SW. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000). The Division is attempting to fulfill its duty to "flesh out" the broad legislative requirements with specifics. Brewster Phosphates et al v. Dep't of Envtl. Reg., 444 So. 2d 483, 485 (Fla. 1st DCA 1984). Section 120.56, however, constrains and guides the Division as it adds details and specifics.

79. Wal-Mart East and Target maintain that the proposed rule (1) enlarges, modifies, or contravenes specific provisions of section 565.045; (2) is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; and (3) is arbitrary and capricious. [7/]

80. The Division must prove "by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised." § 120.56(2)(a), Fla. Stat. In order to meet this statutorily imposed burden, the Division must prove that restaurants customarily only sell food cooked or prepared on the premises; hot or cold beverages; souvenirs bearing the name, logo, trade name, trademark, or location of the licensed vendor; or gift cards or certificates. The meaning of "restaurant" and "customarily" are central to resolving the issues here.

81. Evaluating the Division's efforts to meet its burden and Petitioners' objections requires some review of the rule being amended and the Order finding it not valid. The rule adopted in 1994, albeit currently invalidated, that the Division seeks to amend reads:

> 61A-3.055 Items Customarily Sold in a Restaurant.
>
> (1) As used in Section 565.045, F.S., items customarily sold in a restaurant shall only include the following:

(a) Ready to eat appetizer items; or
(b) Ready to eat salad items; or
(c) Ready to eat entree items; or
(d) Ready to eat vegetable items; or
(e) Ready to eat dessert items; or
(f) Ready to eat fruit items; or
(g) Hot or cold beverages.

(2) A licensee may petition the division for permission to sell products other than those listed, provided the licensee can show the item is customarily sold in a restaurant. This petition shall be submitted to the director of the division at Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, 2601 Blair Stone Road, Tallahassee, Florida 32399-1020, and must be approved prior to selling or offering the item for sale.

(3) For the purpose of consumption on premises regulations set forth in Section 565.045, F.S., items customarily sold in a restaurant shall include services or sales authorized in the "Florida Public Lottery Act", Section 24.122(4), F.S.

82. As the Division proposes to amend it, the rule would read (deletions stricken through and additions underlined) as follows:

61A-3.055 Items Customarily Sold in a Restaurant.

(1) As used in Section 565.045, ~~F.S.~~ Florida Statutes, items customarily sold in a restaurant shall only include the following:

(a) ~~Ready to eat appetizer items~~ Food cooked or prepared on the licensed premises; or
(b) ~~Ready to eat salad items~~ Hot or cold beverages; or
(c) ~~Ready to eat entree items~~ Souvenirs bearing the name, logo, trade name, trademark

or location of the licensed vendor operating the licensed premises; or
(d) ~~Ready to eat vegetable items~~ Gift cards or certificates pertaining to the licensed premises; ~~or~~
~~(e) Ready to eat dessert items; or~~
~~(f) Ready to eat fruit items; or~~
~~(g) Hot or cold beverages.~~

~~(2) A licensee may petition the division for permission to sell products other than those listed, provided the licensee can show the item is customarily sold in a restaurant. This petition shall be submitted to the director of the division at Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, 2601 Blair Stone Road, Tallahassee, Florida 32399-1020, and must be approved prior to selling or offering the item for sale.~~

~~(3)~~(2) For the purpose of consumption on premises regulations set forth in Section 565.045, F.S., items customarily sold in a restaurant shall include services or sales authorized in the "Florida Public Lottery Act", Section 24.122(4), F.S.

83. The petitioners in Walmart I had to prove the 1994 version of the rule was invalid. The Final Order in Walmart I held that the rule was invalid as arbitrary and capricious, because it excluded items (T-Shirts and branded souvenirs) that the division acknowledged were customarily sold in restaurants. Finding 19 of the Final Order, upon which the holding is based, says: "Restaurants customarily sell items other than those listed in the Restaurant Rule. At a minimum, they sell T-Shirts and branded souvenir items." The finding says "[a]t a minimum." It does not say restaurants customarily "only" sell T-Shirts and

branded souvenir items. The finding and the holding are also based upon a different record than the record in this case. The Final Order in Walmart I did not determine a complete list of all items customarily sold in a restaurant. For instance, the Walmart I record included evidence of several items other than T-shirts and souvenirs customarily sold in restaurants. (Ex. 30, pp. 86 - 87, 102, and 108).

Meaning of Restaurant

84. Axiomatically, one cannot determine what is customarily sold in a "restaurant" until one establishes the meaning of "restaurant." During the rulemaking process and during the hearing in this matter, the Division did not take a position on the meaning of "restaurant." In its proposed order, the Division argues that "restaurant" means "public food service establishment" as defined in section 509.013(5). The proposed rule and the Beverage Law do not define "restaurant." Section 561.01(15) refers to "restaurant" in the definition of "bottle club by," excluding "bona fide restaurants licensed by the Division of Hotels and Restaurants . . . whose primary business is the service of full course meals . . . ." The definition does not apply broadly to the Beverage Law or specifically to section 565.045. Florida statutes do not offer a definition of "restaurant," leaving the Division and parties subject to section 565.045 to

determine what "restaurant" means. An examination of the history of "restaurant" in statutes offers some illumination.

85. In 1935, when the Legislature enacted section 565.045, the Laws of Florida contained a definition of "restaurant." Chapter 16042, Laws of Florida (1933) created the Hotel Commission in the State of Florida as an executive department of the state government. Section 3 of the law mandated the commission to "carry out and execute all" provisions of law "relating to the inspection or regulation of hotels, apartment houses, rooming houses or restaurants." Section 8 of the law required every person or entity in "the business of conducting a hotel, . . . or restaurant" to obtain an annual license to operate.

86. Section 7 of Chapter 16042 provided a lengthy definition of "restaurant." It said:

> Every building or other structure and all outbuildings in connection and any room or rooms within any building or other structure or any place or location kept, used, maintained as, advertised as, or held out to the public to be a place where meals, lunches or sandwiches are prepared or served, either gratuitously or for pay, shall, for purpose of this Act, be defined to be a restaurant, . . . and whenever the word "restaurant" shall occur in this Act, it shall be construed to mean every such structure described in this Section. [8/]

87. The definition of "restaurant" remained materially unchanged until 1955. Chapter 29821, § 6, Laws of Florida (1955), codified at section 509.241, Fla. Stat. (1955), replaced

"restaurant" with the term "public food service establishment." It defined a "public food service establishment" as "[e]very building, vehicle, or other structure . . . , or any rooms or divisions in a building, vehicle, or other structure . . . , or any place whatsoever, that is maintained and operated as a place where food is regularly prepared and sold for immediate consumption on or in the vicinity of the premises." Id. In adopting the new term "public food service establishment," the Legislature declared, "Any reference to a restaurant in the laws of Florida shall be construed to mean a public food service establishment as herein defined unless a different intent is clearly evident." Id.

88. This language equating a "restaurant" to a "public food service establishment" remained until 1979. That year the Legislature removed the language in section 509.241(2)(a) that stated that any reference to "restaurant" shall be construed to mean a "public food service establishment." § 18, Ch. 79-240, Laws of Florida; § 509.013(2)(a), Fla. Stat. (1979).

89. Language dropped from a statute is repealed and no longer in effect. Dockery v. Hood, 922 So. 2d 258, 260 (Fla. 1st DCA 2006)(Dropped language deemed repealed even if removed as part of the statutory revision process).

90. In 1999, the Legislature amended the Beverage Law to add a reference to "locations that are licensed as restaurants . . .

pursuant to chapter 509." See Ch. 99-156, § 2, Laws of Fla. (1999), codified at § 562.45(2)(a), Fla. Stat. (1999). Chapter 509, however, does not provide for licensing "restaurants." It provides for licensing "public lodging establishments" and "food service establishments."

91. Presently, Florida law defines a "public food service establishment" as "any building, vehicle, place, or structure, or any room or division in a building, vehicle, place, or structure where food is prepared, served, or sold for immediate consumption on or in the vicinity of the premises; called for or taken out by customers; or prepared prior to being delivered to another location for consumption." § 509.13(5)(a), Fla. Stat. (2018). The definition excludes "[a]ny place of business issued a permit or inspected by the Department of Agriculture and Consumer Services under s. 500.12." § 509.13(5)(b)6., Fla. Stat. Section 500.12 provides for permitting operators of a food establishment or retail food store. The Department decides whether to issue a permit for a food establishment or retail food store based upon who owns the facility, not upon what it serves or how. (Finding of Fact 21).

92. This history of the word "restaurant" in the Florida Statutes exposes omissions and oversights in the amendments over the years that leave no legislative declaration of what "restaurant" means when used in statutes. The history establishes

that since 1979, when the Legislature repealed the law equating "restaurants" with "public food service establishments," it has not chosen to define "restaurant" as "public food service establishment" or anything else. The Deputy Director of the Division recognized this when he observed during the rulemaking hearing conducted May 6, 2019, that "we recognize that the industry grows and we're trying to do what we can in order to . . . help the industry evolve. Things aren't the same as they were in 1994." (Ex. 37, p. 24).

93. The First District Court of Appeal addressed the issue of the meaning of "restaurant" when a statute refers to the word but does not define it in State, Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco v. Salvation, Ltd., 452 So. 2d 65 (Fla. 1st DCA 1984). The opinion addressed the fact that a statute provided for a "special restaurant beverage license" but did not define "restaurant." The statute enumerated four criteria for obtaining the license. The enumerated four included an ability to serve 150 persons full-course meals at one time. Since the statute did not define "restaurant" or "serve," the court concluded: "They should, therefore, be given their plain and ordinary meaning. [citations omitted]." Id at 67.

94. The court rejected the argument that the Division advances here that the definition of "public food service establishment" in section 509.013(5)(a) should be substituted for

the plain and ordinary meaning of "restaurant." The court turned to the dictionary. "'Restaurant' is defined as 'a public eating place.' Webster's New Collegiate Dictionary, p. 979 (1979)." State, Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco v. Salvation, Ltd., 452 So. 2d 65, 67 (Fla. 1st DCA 1984). The dictionary definition did not include a requirement that food be prepared and cooked on the premises. So the court concluded that the rule adding that criterion to the meaning of "restaurant" rendered the rule invalid and affirmed the DOAH hearing officer. The plain and ordinary meaning of "restaurant" also applies here.

95. A more contemporary dictionary definition of "restaurant" is similar to the 1979 definition. "Definition of restaurant: a business establishment where meals or refreshments may be purchased." https://www.merriam-webster.com/dictionary/restaurant (last visited Dec. 16, 2019).

Customarily

96. To create an exclusive list of items customarily sold in a restaurant, the Division must determine what is customary. The proposed rule and the statute it implements do not define "customarily." The word should be given its plain and ordinary meaning. As with "restaurant," courts refer to dictionary definitions to ascertain the plain and ordinary meaning of words. Sch. Bd. v. Survivors Charter Sch., Inc., 3 So. 3d 1220 (Fla. 2009). The online Merriam-Webster dictionary defines

"customarily" as "by or according to custom or established practice." https://www.merriam-webster.com/dictionary/customarily (last visited Dec. 16, 2019). Other dictionary definitions are similar. https://www.dictionary.com/browse/customarily?s=t, (last visited Dec. 16, 2019) ("in accordance with custom or habitual practice; usual; habitual"); Webster's Seventh New Collegiate Dictionary (1970)("1: based on or established by custom, 2: commonly practiced, used, or observed."). Custom is the root of "customarily."

97. "Custom" means "a usage or practice common to many or to a particular place or class." https://www.merriam-webster.com/dictionary/custom (last visited Dec. 16, 2019). Therefore, to prove that something is "customarily" sold in a "restaurant," the evidence must prove that many restaurants commonly sell the item. The proposed rule's absolute position that only a few specific items are customarily sold in restaurants then requires proof that these items are the only items sold by many restaurants. [9/]

Enlarge, Modify, or Contravene the Statute

98. The statute permits COP license holders to sell items customarily sold in a restaurant. Unless the proposed rule's exclusive list of what is customarily sold in a restaurant is correct, the rule contravenes or modifies the statute. The

Division bears the burden of proving the exclusive list is correct.

99. The proposed rule says that the only consumable items customarily sold at a restaurant are food cooked or prepared on the licensed premises or hot or cold beverages. The common definitions of restaurant provide more broadly that a "restaurant" is a public eating place or a place where meals or refreshments may be purchased. The definitions make no mention of where the food is cooked or prepared. They also make no mention of licensing. The holding of State, Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco v. Salvation, Ltd., supra, rejects the argument that the meaning of "restaurant" includes a requirement that food be cooked or prepared on premises. The holding applies here.

100. The Division offered no persuasive evidence about the meaning of "restaurant." It relied on the incorrect legal theory that a "restaurant" is a licensed "public eating establishment." Consequently, the proposed rule's restriction limiting consumables "customarily sold in a restaurant" to only food cooked or prepared on the licensed premises and hot or cold beverages modifies or contravenes section 565.045. Dep't of Health v. Bayfront Med. Ctr., Inc., 134 So. 3d 1017, 1020 (Fla. 1st DCA 2012) (Rule that does not implement statute to be implemented contravenes the statute.)

Vague, Inadequate Standards or Unbridled Discretion

101. Wal-Mart East and Target argue that the proposed rule is vague, fails to establish adequate standards, and vests unbridled discretion in the Division. A rule is impermissibly vague if persons of common intelligence must necessarily guess at its meaning. State, Dep't of Health & Rehab. Servs. v. Health Care & Ret. Corp., 593 So. 2d 539, 541 (Fla. 1st DCA 1992). The proposed rule is far from vague. It is quite specific in listing what is customarily sold in a restaurant. The standards it imposes are clear. It confers no discretion on the Division.

102. Petitioner's complaints that "souvenirs" is impermissibly vague are unpersuasive. Like "restaurant," "souvenir" is a commonly used word with a commonly accepted meaning. It is "something kept as a reminder (as of a place one has visited)." https://www.merriam-webster.com/dictionary/souvenir (last visited Dec. 16, 2019). The proposed rule provides further clarity by saying souvenirs bearing the name, logo, trade name, trademark, or location of the vendor. The proposed rule does not impose inadequate standards or vest unbridled discretion in the Division.

Arbitrary or Capricious

103. A rule is arbitrary if it is not supported by logic or necessary facts and is capricious if irrational. Dep't of Health v. Bayfront Med. Ctr., Inc., 134 So. 3d 1017 (Fla. 1st DCA 2012).

A proposed rule is arbitrary if it is not supported by fact or logic. A proposed rule is capricious if it is taken without thought or reason. Dravo Basic Materials Co. v. State, 602 So. 2d 632, 635 (Fla. 2d DCA 1992) (correctly stating standards but rendered before the Legislature placed the burden of proving validity on the agency.) The Division bears the burden of presenting facts proving the rule is not arbitrary and capricious.

104. In rulemaking and at the hearing, the Division declared its list of what was customarily sold in a restaurant without first determining what a restaurant was. This is illogical and irrational. A list of items customarily sold in a restaurant resting on an incorrect or non-existent definition of restaurant is illogical and irrational from the beginning.

105. The Division compounded the illogic and irrationality by creating a list of items that is not based upon any factual examination or evidence about what restaurants, whatever the definition, actually customarily sell. The Division did not prove that the items listed in the proposed rule are the only items "customarily sold in a restaurant." It incorrectly relied upon the Order in Walmart I which decided a different issue and rested upon a different record.

106. The record of rulemaking and the record of the final hearing do not show logic, facts, or rationale to support the proposed rule's limited list of items customarily sold in

restaurants. The Division did not prove that the proposed rule was not arbitrary and capricious.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

A. The Petition to Intervene of Florida Independent Spirits Association is Dismissed.

B. Proposed Florida Administrative Code Rule 61A-3.055, Florida Administrative Register, Volume 45, Number 160, August 16, 2019, is an invalid exercise of delegated legislative authority.

C. Jurisdiction is retained for the purpose of determining entitlement to attorney's fees and costs, and the amount, if appropriate.

DONE AND ORDERED this 18th day of December, 2019, in Tallahassee, Leon County, Florida.

JOHN D. C. NEWTON, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of December, 2019.

ENDNOTES

[1/] All citations to the Florida Statutes are to the 2019 compilation unless otherwise noted.

[2/] For instance, endnote three of the Final Order notes "that there is no dispute about the intent of Target and Walmart to obtain a license. Due to the stipulation to this fact, this is not a case where the evidence demonstrates that a petitioner's interest in a rule's validity is speculative, academic, or conjectural." Here there is a dispute.

[3/] Failure to provide a complete and detailed sketch of the premises to be licensed was the other reason. The Division cites sections 561.01(11), 561.18, and 562.06, Florida Statutes, for this requirement.

[4/] Although the Publix representative testified at her deposition (Ex. 21) that Publix did not hold COP licenses, the parties stipulated to the number stated.

[5/] The Deputy Director for the Division of Alcoholic Beverages and Tobacco testified as follows:
Q – "So the Department [Division] did not engage some independent third party or even some in-house people to do any investigation, study, or survey of what is customarily sold in a restaurant; correct?
A – "Other than ask the restaurant industry and its licensees for comment, no."

[6/] The examination of a few locations selected by Walmart's counsel conducted by a Walmart Consultant does not amount to a valid or credible investigation, study, or survey, as discussed later. The party wanting to admit and rely upon survey evidence has the burden of establishing its trustworthiness. See Wuv's Int'l, Inc. v. Love's Enters., Case No. 78-F-107, 1980 U.S. Dist. LEXIS 16512 (D. Colo. Nov. 4, 1980) (listing seven principles with which survey methodology should comply).

[7/] Petitioners' proposed final orders do not question the Division's authority to adopt the proposed rule.

[8/] The law went on to require a variety of health and safety features such as heating, plumbing, water closets (when a waterworks system is available), fire escapes, fire extinguishers, and clean bedding.

[9/] The argument of Wal-Mart East and Target that if an item is routinely sold in a single restaurant it is customarily sold in a single restaurant, is not persuasive and contrary to the established meaning of "customary."

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.