

STATE OF MICHIGAN JUDICIAL DISTRICT Court of Claims JUDICIAL CIRCUIT COUNTY PROBATE	SUMMONS AND COMPLAINT	CASE NO. <b>17-000071-MM</b>
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Court address  
925 W. Ottawa St., P.O. Box 30185, Lansing, MI 48909

**Boonstra** Court telephone no.  
(517) 373-0807

Plaintiff's name(s), address(es), and telephone no(s).

Associated Food & Petroleum Dealers, Inc.  
5779 W. Maple Road  
West Bloomfield, MI 48322  
800-666-6233

Plaintiff's attorney, bar no., address, and telephone no.

Daniel J. McCarthy (P59457)  
Lippitt O'Keefe Gornbein, PLLC  
370 E. Maple Road, 3rd Floor  
Birmingham, MI 48009  
248-646-8292

v

Defendant's name(s), address(es), and telephone no(s).

State of Michigan  
Office of Regulatory Reinvention,  
Michigan Liquor Control Commission  
G. Mennen Williams Building, 7th Floor  
525 W. Ottawa St.  
P.O. Box 30212  
Lansing, MI 48909  
(517) 373-1110

**SUMMONS NOTICE TO THE DEFENDANT:** In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. **YOU HAVE 21 DAYS** after receiving this summons to **file a written answer with the court** and serve a copy on the other party **or take other lawful action with the court** (28 days if you were served by mail or you were served outside this state). (MCR 2.111[C])
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.

Issued <b>3-22-2017</b>	This summons expires <b>6-21-2017</b>	Court Clerk <b>Jerome W. Zimmer Jr.</b>
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\*This summons is invalid unless served on or before its expiration date. This document must be sealed by the seal of the court.

**COMPLAINT** *Instruction: The following is information that is required to be in the caption of every complaint and is to be completed by the plaintiff. Actual allegations and the claim for relief must be stated on additional complaint pages and attached to this form.*

☐ This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035.

**Family Division Cases**

☐ There is no other pending or resolved action within the jurisdiction of the family division of circuit court involving the family or family members of the parties.

☐ An action within the jurisdiction of the family division of the circuit court involving the family or family members of the parties has been previously filed in \_\_\_\_\_ Court.

The action ☐ remains ☐ is no longer pending. The docket number and the judge assigned to the action are:

Docket no.	Judge	Bar no.
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**General Civil Cases**

☒ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.

☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in \_\_\_\_\_ Court.

The action ☐ remains ☐ is no longer pending. The docket number and the judge assigned to the action are:

Docket no.	Judge	Bar no.
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**VENUE**

Plaintiff(s) residence (include city, township, or village) Oakland County, Michigan	Defendant(s) residence (include city, township, or village) Lansing, MI
Place where action arose or business State of Michigan	

**3-22-17**  
Date

*[Signature]*  
Signature of attorney/plaintiff

If you require special accommodations because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, contact the court immediately to make arrangements.

STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

Associated Food & Petroleum Dealers, Inc,  
a Michigan Non-Profit Trade Association,

Plaintiff

v

State of Michigan,  
Office of Regulatory Reinvention,  
Michigan Liquor Control Commission

Case No. 17-000071-MM  
Hon. Boonstra

Defendants

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LIPPITT O'KEEFE GORNBEIN, PLLC  
Norman L. Lippitt (P16716)  
Daniel J. McCarthy (P59457)  
Mark K. Shaye (P20309)  
Counsel for Plaintiff  
370 East Maple Rd, 3<sup>rd</sup> Floor  
Birmingham, MI 48009  
(248)646-8292

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There is no other pending or resolved civil action arising out of the transaction or  
occurrence alleged in this Complaint.

**PLAINTIFF ASSOCIATED FOOD & PETROLEUM DEALERS, INC's  
VERIFIED COMPLAINT FOR A DECLARATORY JUDGMENT,  
PRELIMINARY INJUNCTION, AND EX-PARTE REQUEST FOR A  
TEMPORARY RESTRAINING ORDER**

**\*\*\*EMERGENCY\*\*\***

Defendants violated the APA notice and public comment procedures  
when they rescinded R 436.1133 (the "half-mile rule"), a rule in existence  
since 1979, which takes effect on Thursday, March 23, 2017. Immediate  
TRO relief is requested to allow this Court sufficient time to address the  
merits of the complaint outlined below.

## INTRODUCTION

Plaintiff Associated Food and Petroleum Dealers, Inc, (“Plaintiff” or “Associated Dealers”), on behalf of itself and all of its members, which number in the thousands, asserts that a temporary restraining order and preliminary injunction is mandated and that this Court should and must declare that the collective defendants violated the Administrative Procedures Act (“APA”) by rescinding a long-standing rule, R 436.1133 (in existence since 1979), under the guise of MCL 24.244 (which does not have notice and public comments provisions), as opposed to MCL 24.241 and MCL 24.242 (which has notice of public hearing and publication requirements).

To be clear, this case does not seek a declaratory ruling that the MLCC is forbidden from rescinding a rule. To the contrary, this case seeks a ruling that the MLCC and ORR must follow the notice, publication, and public comment provisions of the APA to properly rescind the rule.

Since 1979, Plaintiff and its members have received the benefits and privileges of R 436.1133, which prohibits the approval of a specially designated distributor license if an existing specially designated distributor license is located within 2,640 feet of the proposed site. This rule, enacted for almost 40 years, has offered licensed retailers of liquor, security form an already-saturated market. The rule has protected communities from having liquor retailers on every busy corner in the State of Michigan.

Under R 436.1133, the existing licenses can be relocated anywhere within a county, except within a half-mile of another license. The half-mile rule provides

current licensees security to operate under a strict regulatory scheme and much-regulated market. The sudden and swift abolishment of this long-standing rule—accomplished in direct violation of the APA, MCL 24.241 and MCL 24.242, now allows a new licensee to literally set up shop next door to an existing licensee.

Indeed, on or about Friday, February 3, 2017, Defendant Michigan Liquor Control Commission (MLCC) filed a Request for Rulemaking (RFR), which requested Defendant Office of Regulatory Reinvention (ORR) to approve an expedited rescission of R 436.1133 and by-pass the notice, publication, and public comment procedures mandated under MCL 24.241 and MCL 24.242. (See RFR, Exhibit A). Merely four days later (which included the Saturday/Sunday weekend), the ORR approved the rescission of the rule. Rescission of the rule takes effect on Thursday, March 23, 2017. (See Exhibit B, Department of Licensing and Regulatory Affairs, Liquor Control Commission, Licensing Qualifications, Filed with the Secretary of State on March 16, 2017, effective 7 days after filing with the Secretary of State, which is March 23, 2017).

Defendants deliberately, arbitrarily and capriciously violated the long-standing publication and public comment due process provisions of MCL 24.241 and MCL 24.242, and expedited their lightning-fast rescission of R436.1133 under the guise of MCL 24.244, which provides in part:

(1) Sections 41 and 42 do not apply to an amendment or rescission of a rule that is **obsolete or superseded, or that is required to make obviously needed corrections to make the rule conform to an amended or new statute or to accomplish any other solely formal purpose, if a statement to that effect is included in the legislative service bureau certificate of approval of the rule.**

MCL 24.244 has very limited application and it never before had been cited as a basis to suddenly rescind a long-standing rule, which thousands and thousands of licensees have relied on since 1979. By invoking MCL 24.244 as a basis to arbitrarily and capriciously rescind the rule, the Defendants denied Associated Dealers and its thousands of members (over 3000 members in Michigan), the opportunity to express their views in the regulatory process and express how rescission of R 436.1133 undermines the Michigan Three-Tiered system for liquor licensing. Transparency—which is protected under MCL 24.241 and 242—was denied.

In the RFR, approved by ORR, the MLCC asserted the following demonstrably-false reasons to by-pass the ordinary and customary notice, publication, and public-comment provisions of Sections 41 and 42 to rescind R 436.1133 (again in existence since 1979):

- R 436.1133 was “obsolete” and conflicted with MCL 436.1533;
- R 436.1133 was “superseded” by MCL 436.1533 (whereby MCL 436.1533 provides for a specially designated distributor license if two requirements are shown: (i) quota requirement; and (ii) waiver thereof based on no such existing licensees being located within 2 miles);
- R 436.1133 improperly discriminated against “an otherwise qualified applicant based solely on the distance requirement from an existing licensee” and that R436.1133’s distance requirement is “only applicable to off-premise applicants and licensees, and not also to on-premise applicants and licensees”;
- R 436.1133 improperly exceeded the statutory authority for rulemaking in that it conflicted with MCL 436.1533 and it allegedly further imposed restrictions not contained in MCL 436.1533.

The reasons cited above, to reiterate, are demonstrably false. First, R 436.1133 is not “obsolete” and it does not “conflict” with MCL 436.1533. The rule was first enacted in 1979 and thousands and thousands of Plaintiff Associated Dealers’ members have abided by and benefited from the rule.

The language of MCL 436.1533 under paragraph (4) is:

“in cities, incorporated villages, or townships, the commission shall issue only 1 specially designated distributor license for each 3,000 of population, or fraction of 3,000. The commission may waive the quota requirement under this subsection if there is no existing specially designated distributor licensee within 2 miles of the applicant, measured along the nearest traffic route.”

No conflict exists because R 436.1133 does not address the notion of quotas. MCL 436.1533 introduces the notion of quotas based upon population and provides how the quota may be waived, tying it to distance. In contrast, the approval of an applicant under R 436.1133 represents a logical order to the licensing process based strictly on distance. This is not exceeding statutory authority.

Again, no conflict exists because MCL 436.1533 is premised upon population. R 436.1133—on the other hand—is based on distance between existing licensees. R 436.1133, in actuality, compliments and is in direct harmony with MCL 436.1533 to prevent a consequence that may not be beneficial. Assuming that a sufficient population exists to support four licensees, the location of the licensees, under MCL 436.1533, could be congested within a small geographic area. The economic consequences are not promising. On the other hand, assuming that the quota contained in MCL 436.1533 is waived in keeping with the two-mile criteria, a

licensee could be granted a license only to struggle within a sparsely populated area.

R 436.1133, as designed, alleviates the logical balance that could follow if all that remained was MCL 436.1533. As such, the sudden, arbitrary and capricious rescission of R 436.1133 actually causes and creates additional conflict.

Regardless of the merits supporting the very many reasons for the continuation of R 436.1133, the rule was not superseded by MCL 436.1533 and no conflict exists between the two provisions. The Defendants completely violated the APA by preventing these important distinctions to be highlighted in a public forum or through an administrative comment procedure.

By no means can one objectively argue that conflict is created between the rule and the recent amendment to the Act. The language of the amendment does not support the claim that this rule represents a breach of rulemaking authority. To suggest a disregard for rulemaking authority flies in the face of the clear meaning of the inherent language of both the rule and the amendment. To suggest, in a cavalier manner, that MCL 24.232(7) is compromised, in any way, by R 436.1133 requires a hearing on the merits rather than the baseless conclusion reached in the RFR.

Defendants' assertion that R 436.1133 is discriminatory is faulty as well. The State has multiple reasons to support licensing of different establishments in different ways. A number of unique characteristics exist between on-premise and off-premise licenses by their nature—differences that existed since the repeal of

prohibition. If there is any truth to the supposition that qualified applicants are being unduly denied licensing, it is imperative that statistical support and other objective facts should be elicited. This has not been the case with the RFR, and this outcome can only be achieved through a proper rulemaking procedure

Defendant's assertion that R 436.1133 exceeds the statutory authority for rulemaking is specious. The MLCC has general rulemaking authority under MCL 436.1215(1). R 436.1133, enacted almost 40 years ago, was certainly authorized under MCL 436.1215(1). The Rule does not conflict or otherwise usurp the rulemaking authority of the MLCC.

As this Court knows, the Legislature enacted the APA with the intention to "provide procedural protection where a personal right, duty or privilege is at stake." *Midland Twp v State Boundary Comm*, 401 Mich. 641, 671; 259 N.W.2d 326 (1977); *State Emples Ass'n v Liquor Control Comm'n*, 232 Mich App 456, 466; 591 NW2d 353 (1998). In this regard, the MCLL and ORR completely and improperly bypassed and disregarded the notice, publication and public comment provisions of MCL 24. 241 and MCL 24.242, which provide respectively:

(1) Except as provided in section 44, before the adoption of a rule, an agency, or the office of regulatory reform, ***shall give notice of a public hearing and offer a person an opportunity to present data, views, questions, and arguments.*** The notice shall be given within the time prescribed by any applicable statute, or if none, in the manner prescribed in section 42(1).

(2) The notice described in subsection (1) shall include all of the following:

(a) A reference to the statutory authority under which the action is proposed.



(b) The time and place of the public hearing and a statement of the manner in which data, views, questions, and arguments may be submitted by a person to the agency at other times.

(c) A statement of the terms or substance of the proposed rule, a description of the subjects and issues involved, and the proposed effective date of the rule.

\* \* \* [*Id.* (emphasis added)].

MCL 24.242 likewise provides:

(1) Except as provided in section 44, **at a minimum**, an agency, or the office of regulatory reform acting on behalf of the agency, **shall publish the notice of public hearing** as prescribed in any applicable statute or, if none, the agency, or the office of regulatory reform acting on behalf of the agency, shall publish the notice not less than 10 days and not more than 60 days before the date of the public hearing in at least 3 newspapers of general circulation in different parts of the state, 1 of which shall be in the Upper Peninsula.

\* \* \* [*Id.* (emphasis added)].

As will be further explained below, Plaintiff seeks a declaration that the Defendants violated the APA by by-passing the notice, publication, and public comments procedures mandated under MCL 24.241 and MCL 24.242. And given that the rescission of R 436-1133 purportedly takes effect on Thursday, March 23, 2017, Plaintiff further seeks a TRO and preliminary injunction of the purported rescission until this Court has a full opportunity to address the merits of the complaint.

To reiterate and to be clear, Plaintiff is not asserting that Defendants do not have the right to rescind R436.1133; to the contrary, Defendants must utilize the APA rescission procedures as mandated under MCL 24.241 and MCL 24.242.

Plaintiff's complaint is as follows:

### **Parties, Jurisdiction and Venue**

1. Plaintiff Associated Food and Petroleum Dealers, Inc, is a Michigan Non-Profit 501(C)6 trade association, which has over 3000 members located in the State of Michigan. Plaintiff's registered office is located on Oakland County, Michigan.

2. Defendants are political entities; the Michigan Liquor Control Commission is a political subdivision of the State of Michigan; and the Office of Regulatory Reinvention is a political subdivision of the State of Michigan.

3. Venue and jurisdiction is properly vested in this Court under the Court of Claims Act, MCL 600.6419 *et seq.*

### **FACTUAL ALLEGATIONS**

4. Plaintiff re-alleges the foregoing allegations, including the facts, statements, arguments, and authorities stated above.

5. On or about February 3, 2017, the MLCC filed an improper RFR with the ORR. (Exhibit A).

6. The RFR sought to rescind R 436.1133, a long-standing rule that was properly promulgated since 1979.

7. Under the guise of MCL 24.244, the MLCC sought to by-pass the mandatory notice, publication, and comment requirements as required and provided under MCL 24.241 and MCL 24.242 to swiftly rescind the rule and deprive Plaintiff, its members, and the public from receiving a public hearing and the ability to comment on the proposed rescission.

8. Defendants' cited reasons for invoking MCL 24.244 are demonstrably false and untrue, as the enactment of R 436.1133 did not conflict with MCL 436.1533, was not obsolete, did not exceed rulemaking authority, and was not discriminatory as stated and provided above.

9. Instead, Defendants were required under the APA to provide notice, publication, and provide for public comment regarding the proposed rescission of R 436.1133, as required under MCL 24.241 and MCL 24.242.

10. On February 7, 2017, merely four days after receiving the application the previous Friday, the ORR approved rescission of the rule. (Exhibit A).

11. The rescission of R 436.1133 takes effect on Thursday, March 23, 2017. (Exhibit B).

12. Plaintiff and its members will suffer irreparable harm by if this Court does not issue a TRO to prevent the rescission of the rule without utilizing the notice, publication, and comments provisions. As stated below, the violation of a law, in and of itself, establishes the requisite irreparable harm necessary to obtain injunctive relief.

### **COUNT I—Declaratory Ruling**

13. Plaintiff re-asserts all of the foregoing paragraphs, statements, authorities, and arguments, as if they were restated herein.

14. The MLCC's attempt to rescind R 436.1133 under MCL 24.244 violated the APA as stated above.

15. The ORR's approval of the RFR is invalid for the same reasons.

16. This Court must declare that the ORR's approval of the RFR violated the APA, that it was done in an arbitrary and capricious manner, and that the limited exception of MCL 24.244 does not and did not apply to the attempted rescission of R 436.1133.

17. As such, this Court must declare the rescission of R 436.1133 is and was invalid.

Wherefore, under MCR 2.605, Plaintiff respectfully requests that this Court order a speedy hearing and declare that Defendants' rescission of R 436.1133 is invalid and that any desire to rescind the rule must be filed and administered under the directives provided under MCL 24.241 and MCL 24.242.

#### **COUNT II: TRO and Request for Preliminary Injunction**

18. Plaintiff re-alleges and asserts the foregoing statements, allegations, arguments, authorities, and paragraphs as if they were fully restated herein.

19. This Court has the authority and discretion to grant a preliminary injunction. *Campo v McMath*, 185 Mich App 724, 728-29; 463 NW2d 186 (1990). The Michigan Supreme Court established four-factors to consider in determining whether an injunction should be issued:

(1) The likelihood that the party seeking the injunction will prevail on the merits;

(2) The danger that the party seeking the injunction will suffer irreparable injury if the injunction is not issued;

(3) The risk that the party seeking the injunction would be hurt more by the lack of an injunction than the opposing party would be by the granting of the injunction; and

(4) Whether the public interest will be served by the injunction; *Michigan State Employees Association v Dept of Mental Health*, 421 Mich 152, 157-58; 365 NW2d 93 (1994); *Campo, supra*, at 728-29. See also *Overstreet v Lexington-Fayette Urban County Government*, 305 F 3d 566, 573 (CA 6, 2002).

20. Plaintiff and its members are likely to prevail on the merits of its instant complaint and motion to seek declaratory and injunctive relief. Indeed, Defendants were required to rescind R 436.1133 under the procedures mandated by MCL 24.241 and MCL 24.242.

21. The limited exception to the notice, publication, and public comment requirements as stated in MCL 24.244 do not apply. R 436.1133 does not conflict and is not superseded by MCL 436.1533 because both provisions pertain to different topics. R 436.1133 governs a distance requirement and MCL 436.1533, on the other hand, pertains to waivers based by a population quota. As further explained above, R 436.1133 compliments MCL 436.1533 and it was properly enacted.

22. As such, Plaintiff will likely prevail on the merits because it “has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.” *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F3d 393, 402 (6th Cir. 1997).

23. Plaintiff and its members will suffer immediate and irreparable injury, loss, and damage given that the effect of Defendants’ rescission of R 436.1133 takes effect on March 23, 2017. There is no other adequate remedy at law. See *Thermatool v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998).

24. Indeed, Plaintiff's instant complaint and motion seeks to prevent a violation of the APA, and as such, a violation of the law establishes irreparable injury. See *Michigan Coalition of State Employee Unions v Civil Service Comm*, 236 Mich App 96, 106; 600 NW2d 362 (1999).

25. Moreover, irreparable harm would occur if a preliminary injunction is not granted as thousands of retailers who have invested their life savings into their businesses and have lived and abided under R 436.1133 will risk losing their livelihood for which no amount of damages could compensate. Undoubtedly, if this Court does not enter a TRO and preliminary injunction, hundreds of new applicants will receive licenses and immediately jeopardize, annul, and nullify the value and benefit that existing licensees have enjoyed.

26. Irreparable harm further occurs because Defendants' actions will directly compromise and harm the public trust and ability to comment on a matter of wide-spread public concern.

27. Plaintiff and its members will be harmed far worse if a TRO/preliminary injunction is not granted than Defendants would be harmed.

28. The public interest would be best served by the issuance of a preliminary injunction, especially given that MCL 24.241 and MCL 24.242 require notice to the public, publication, and public commentary. This is especially so here, where R 436.1133 had been promulgated and followed decades ago since 1979.

29. Given that rescission of R 436.1133 takes effect on March 23, 2017, and given that thousands of Plaintiff's members will be placed in immediately

jeopardy, an ex parte TRO preventing the rescission of R 436.1133 is critical, as it will properly preserve the status quo. Again, R 436.1133 had been in existence for almost 40 years. What is the harm to Defendants in granting a TRO and affording this Court the opportunity to determine whether a preliminary injunction should enter? Nothing, other than the passage of time. Certainly, Defendants have the statutory and administrative right to rescind the rule; they must do so, however, under the procedural notice, publication, and public comment procedures of the APA.

30. MCR 3.310(b) states that this court is allowed grant Defendant's motion for an ex-parte temporary restraining order under the following circumstances:

- (a) it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant from the delay required to effect notice or from the risk that notice will itself precipitate adverse action before an order can be issued;
- (b) the applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required; and
- (c) a permanent record or memorandum is made of any nonwritten evidence, argument, or other representations made in support of the application.

31. Plaintiff respectfully submits that it has shown and demonstrated every requirement necessary under MCR 3.310(b).

32. Plaintiff's proposed TRO and Order to Show Cause is attached as Exhibit C.

Wherefore, Plaintiff Associated Food & Petroleum Dealers, Inc respectfully request that this Court grant its ex parte motion for a TRO to prevent the effective rescission of R 436.1133, and to enter a preliminary injunction preventing Defendants from rescinding R 436.1133 in violation of the APA, MCL 24.241 and MCL 24.242.

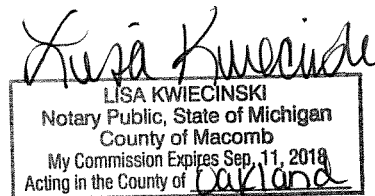
Verification:

I declare and assert that the facts asserted in this Complaint are true, accurate, and correct to the best of my knowledge, information, and belief.

Associated Food & Petroleum Dealers, Inc

By: Auday Ahalo

Its: President & CEO



Respectfully submitted,

[Signature]  
Norman L. Lippit (P16716)  
Daniel J. McCarthy (P59457)  
Marc K. Shaye (P20309)  
Lippitt O'Keefe Gornbein, PLLC  
Attorneys for Plaintiff

Dated: March 22, 2017

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State Budget Office  
**Office of Regulatory Reinvention**  
111 S. Capitol Avenue; 8th Floor, Romney Building  
Lansing, MI 48933  
Phone: (517) 335-8658 FAX: (517) 335-9512

**REQUEST FOR RULEMAKING (RFR)**

In accordance with MCL 24.239(1): "Before initiating any changes or additions to rules, an agency shall file with the Office of Regulatory Reinvention (ORR) a request for rulemaking." The agency will complete this form and send an electronic copy to the ORR at [orr@michigan.gov](mailto:orr@michigan.gov). The ORR will review the request for rulemaking and send its response to the agency (see last page).

The ORR is "not required to approve a request for rule-making and shall do so only after it has indicated in its response to the request for rule-making submitted by an agency that there are appropriate and necessary policy and legal bases for approving the request for rule-making." MCL 24.239(3).

Department or agency	LARA
Bureau/Division	Michigan Liquor Control Commission (LCC)
Address	525 W. Allegan, Lansing, MI 48909
Contact person	Teri L. Quimby
Telephone	517-388-2121
Email	<a href="mailto:quimbyt@michigan.gov">quimbyt@michigan.gov</a>

**1. Title of proposed rule(s) or rule set:**

Liquor Control Commission - Licensing Qualifications

**2. Rule number(s) or rule set range of numbers:**

R 436.1117 Retail license; participating agreement.

R 436.1133 SDD License; prohibited issuance or transfer.

**3. Estimated timetable for completion, or statutory deadline, if applicable:**

May 31, 2017

**4. Describe the general goal/purpose of these rules. Include a discussion of the problem(s) the rule rescissions, additions, or amendments intend to address:**

**R 436.1117**

The rescission of R 436.1117 remedies a conflict and duplication with amended R 436.1041 of the LCC General Rules, effective December 13, 2016. R 436.1117 concerns a participation agreement, which is now addressed in the LCC General Rules under R 436.1041. Consequently, this rule is being rescinded because it is duplicative and is no longer needed.

**R 436.1133**

The rescission of R 436.1133 will remedy a statutory conflict with MCL 436.1533 of the Michigan Liquor Control Code of 1998 and MCL 24.232(2) of the Administrative Procedures Act (APA). R 436.1133 prohibits the approval of a specially designated distributor license if there is an existing specially designated distributor license located within 2,640 feet of the proposed site. Further, the rule allows for a waiver of this prohibition for certain reasons.

**5. Please cite the specific promulgation authority for these rules (i.e. department director, commission, board, etc.), listing all applicable statutory references. Are these rules mandated by any applicable constitutional or statutory provision? If so, please explain.**

**R 436.1117**

The LCC has general rulemaking authority under MCL 436.1215(1) Michigan Liquor Control Code which provides for the carrying out of the Code and establishes the duties and responsibilities of licensees in the proper conduct and management of their licensed places.

**R 436.1133**

MCL 24.238 of the APA allows any person to request the promulgation of a rule. The LCC received a request under this section of the APA to rescind R 436.1133. The LCC has general rulemaking authority under MCL 436.1215(1) Code which provides for the carrying out of the Code and establishes the duties and responsibilities of licensees in the proper conduct and management of their licensed places.

**6. Please describe the extent to which the rules conflict with or duplicate similar rules or regulations adopted by the state or federal government [include statutory references and public acts, as applicable]:**

**R 436.1117**

The rescission of R 436.1117 remedies a conflict and duplication with amended R 436.1041 in the LCC General Rules which took effect on December 13, 2016. R 436.1117 concerns a participation agreement, which now is addressed in the LCC General Rules under R 436.1041. Consequently, this rule is being rescinded because it is duplicative and is no longer needed.

**R 436.1133**

The rule conflicts with the MCL 436.1533 of the Code, which contains the only statutory requirement for the issuance of specially designated distributor licenses. The statute sets forth the quota for these licenses based on population, and allows for the waiver of this quota requirement if there is no existing specially designated distributor licensee within 2

miles of the applicant, measured along the nearest traffic route.

**7. Is the subject matter of these rules currently contained in any guideline, handbook, manual, instructional bulletin, form with instructions, or operational memoranda?**

No.

**8. Are these rules listed on the department's annual regulatory plan as rules to be processed for the current year?**

No.

**9. Will these proposed rules be promulgated under Sections 44 or 48 of the Administrative Procedures Act, 1969 PA 306, as amended, being MCL 24.244 or 24.248? Please explain. Or, will these rules be promulgated under the full rulemaking process?**

Both R 436.1117 and R 436.1133 are being rescinded under Section 44(1) of the APA, for reasons discussed below.

**R 436.1117**

R 436.1117 is obsolete and superseded by the latest amendments to R 436.1041 in the General Rules, which took effect December 13, 2016.

**R 436.1133**

R 436.1133 is obsolete given the conflict with MCL 436.1533 of the Code and MCL 24.232(2) and the APA.

R 436.1133 is also superseded by the latest statutory amendments to MCL 436.1533 of the Code in 2016, reiterating that the only two requirements for the granting of a specially designated distributor license are the quota requirement and the waiver thereof based on no such existing licensees being located within 2 miles.

R 436.1133 conflicts with MCL 24.232(2) of the APA which provides that a rule shall not discriminate in favor of or against any person. R 436.1133 discriminates against an otherwise qualified applicant based solely on the distance requirement from an existing licensee. Further, the distance requirement in R 436.1133 is only applicable to off-premise applicants and licensees, and not also to on-premise applicants and licensees.

R 436.1133 exceeds the statutory authority for rulemaking. MCL 24.232(7) of the APA provides that a rule shall not exceed the rulemaking delegation contained in the statute authorizing the rulemaking. The LCC has general rulemaking authority under MCL 436.1215(1) of the Code which governs the carrying out of the Code and the duties and responsibilities of licensees in the proper conduct and management of their licensed places. R 436.1133 does not provide further instruction on carrying out the act, but rather creates conflict with the applicable provisions of the Code, specifically MCL 436.1533.

Further, R 436.1133 concerns the prohibition of a license to otherwise qualified applicants based solely on location, where no such criteria is included in statute. R 436.1133 does not contain any provisions related to “duties and responsibilities of licensees in the proper conduct and management of their licensed places.” For these reasons, R 436.1133 exceeds the rulemaking delegation contained in the authorizing statute and, consequently, is being rescinded.

**Note:** If this request for rulemaking applies to rules that will be promulgated pursuant to Sections 44 or 48 of the Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.244 or 24.248, you do not have to answer questions 10 to 15.

**10. Please describe the extent to which the rules exceed national or regional compliance requirements or other standards:**

N/A

**11. Do these rules incorporate the recommendations of any Advisory Rules Committee formed pursuant to Executive Order 2011-5? If yes, please explain.**

N/A

**12. Do these rules incorporate the recommendations received by the public regarding any complaints or comments regarding the rules? If yes, please explain.**

N/A

**13. If amending an existing rule set, please provide the date of the last evaluation of the rules and the degree, if any, to which technology, economic conditions or other factors have changed the regulatory activity covered by the rules since the last evaluation.**

N/A

**14. Are there any changes or developments since implementation that demonstrate there is no continued need for the rules, or any portion of the rules?**

N/A

**15. Is there an applicable decision record (as defined in MCL 24.203(6) and required by MCL 24.239(2))? If so, please attach the decision record.**

N/A

**16. Reviewed by the following Departmental Regulatory Affairs Officer (RAO):**

Liz Arasim  
Department of Licensing and Regulatory Affairs

↓ To be completed by the ORR ↓

Date RFR received:

2-3-2017

☒ Based on the information provided in this RFR, the ORR concludes that there are sufficient policy and legal bases for approving the RFR.

ORR assigned rule set number:	2017-005 LR
Date of approval: 2/07/2017	Explanation: <i>This Request for Rulemaking satisfies the requirements of the Administrative Procedures Act, 1969 PA 306, MCL 24.201 et seq., and Executive Order 2011-5.</i>

☐ Based on the information provided in this RFR, the ORR is not approving the RFR at this time.

Date of disapproval:	Explanation:
More information needed:	Explanation:

DEPARTMENT OF ~~ENERGY, LABOR, AND ECONOMIC GROWTH~~

LICENSING AND REGULATORY AFFAIRS

LIQUOR CONTROL COMMISSION

LICENSING QUALIFICATIONS

Filed with the Secretary of State on

These rules become effective immediately upon filing with the Secretary of State unless adopted under section 33, 44, or 45a(6) of 1969 PA 306. Rules adopted under these sections become effective 7 days after filing with the Secretary of State.

(By authority conferred on the liquor control commission by section 215(1) of 1998 PA 58, MCL 436.1215(1))

R 436.1117 and R436.1133 of the Michigan Administrative Code are rescinded, as follows:

~~R 436.1117-Retail license; participating agreement. Rescinded.~~

~~-Rule 17. (1) An applicant for a retail license or a retail licensee shall not enter into a participating agreement, except in either of the following situations:~~

~~-(a) If the commission approves the participating agreement after a showing of good cause by the applicant.~~

~~-(b) If the nonlicensee receives not more than 10% of the gross sales of the licensed business.~~

~~-(2) The compensation included in a participating agreement shall not be computed on the gross or net profits of the licensed business.~~

~~-(3) The participating agreement shall be in writing and available for review by the commission.~~

~~R 436.1133 SDD license; prohibited issuance or transfer. Rescinded.~~

~~-Rule 33. An application for a new specially designated distributor license or for the transfer of location of an existing specially designated distributor license shall not be approved by the commission if there is an existing specially designated distributor license located within 2,640 feet of the proposed site. The method of measurement shall be as prescribed in section 503 of 1998 PA 58, MCL 436.1503. This rule may be waived by the commission for any of the following reasons:~~

~~-(a) If the existing specially designated distributor has purchased less than \$10,000.00 in spirits from the commission during the last full calendar year.~~

~~-(b) If the existing specially designated distributor has a B hotel or A hotel license.~~

December 7, 2016

~~-(c) If the proposed location and the existing specially designated distributor's licensed establishment are separated by a major thoroughfare of not less than 4 lanes of traffic.~~

~~-(d) If the proposed licensed establishment is located in a neighborhood shopping center which does not have an existing specially designated distributor's licensed establishment and if the proposed licensed establishment is located not less than 1,000 feet from any existing specially designated distributor's licensed establishment. The method of measurement shall be as prescribed in section 503 of 1998 PA 58, MCL 436.1503.~~

~~-(e) If an existing specially designated distributor licensee is located within 2,640 feet of 1 or more existing specially designated distributor licensees and requests a transfer of location, which location is within 2,640 feet of the same existing specially designated distributor licensee or licensees, upon a showing of good cause by the licensee who is requesting the transfer of location.~~







STATE OF MICHIGAN  
RUTH JOHNSON, SECRETARY OF STATE  
DEPARTMENT OF STATE  
LANSING

March 16, 2017

**NOTICE OF FILING**

**ADMINISTRATIVE RULES**

To: Secretary of the Senate  
Clerk of the House of Representatives  
Joint Committee on Administrative Rules  
State Office of Regulatory Reinvention (Administrative Rule #2017-005-LR)  
Legislative Service Bureau (Secretary of State Filing #17-03-05)  
Department of Licensing and Regulatory Affairs

In accordance with the provisions of Section 46(1) of Act 306, Public Acts of 1969, as amended, and Executive Order 1995-6, this is to advise you that the Michigan Department of Technology, Management, and Budget and the State Office of Regulatory Reinvention filed Administrative Rule #2017-005-LR (Secretary of State Filing #17-03-05) on this date at 4:45 P.M. for the Department of Licensing and Regulatory Affairs entitled, "Licensing Qualifications".

These rules become effective immediately upon filing with the Secretary of State unless adopted under sections 33, 44 or 45a(6) of 1969 PA 306. Rules adopted under these sections become effective 7 days after filing with the Secretary of State.

Sincerely,

Ruth Johnson  
Secretary of State

Robin L. Houston, Departmental Supervisor  
Office of the Great Seal

Enclosure

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

LIQUOR CONTROL COMMISSION

LICENSING QUALIFICATIONS

Filed with the Secretary of State on March 16, 2017

These rules become effective immediately upon filing with the Secretary of State unless adopted under section 33, 44, or 45a(6) of 1969 PA 306. Rules adopted under these sections become effective 7 days after filing with the Secretary of State.

(By authority conferred on the liquor control commission by section 215(1) of 1998 PA 58, MCL 436.1215(1))

R 436.1117 and R 436.1133 of the Michigan Administrative Code are rescinded, as follows:

R 436.1117 Rescinded.

R 436.1133 Rescinded.

December 7, 2016



STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

Associated Food & Petroleum Dealers, Inc,  
a Michigan Non-Profit Trade Association,

Plaintiff

v

State of Michigan,  
Office of Regulatory Reinvention,  
Michigan Liquor Control Commission

Case No.  
Hon.

Defendants

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LIPPITT O'KEEFE GORNBEIN, PLLC  
Norman L. Lippitt (P16716)  
Daniel J. McCarthy (P59457)  
Mark Shaye (P20309)  
Counsel for Plaintiff  
370 East Maple Rd, 3<sup>rd</sup> Floor  
Birmingham, MI 48009  
(248)646-8292

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**EX PARTE ORDER TO SHOW CAUSE**

At a session of said court held in the Court of Claims,  
in the State of Michigan,

on \_\_\_\_\_

HON. \_\_\_\_\_  
COURT OF CLAIMS JUDGE

Plaintiff Associated Food & Petroleum Dealers, Inc. ("Plaintiff") having filed its  
Verified Complaint for Declaratory and Injunctive Relief against Defendants State of  
Michigan, Office of Regulatory Reinvention, and the Michigan Liquor Control  
Commission, ("Defendants"); Plaintiff having filed a motion for preliminary injunction

under MCR 3.310; this matter having come before this Honorable Court based on the  
aforementioned filings; oral argument having been heard and this Honorable Court  
being otherwise fully advised in the premises;

**IT IS HEREBY ORDERED** that a Temporary Restraining Order is issued such  
that the rescission of R 436.1133 is hereby temporarily nullified and vacated until this  
Court has a full hearing on the merits.

**IT IS HEREBY ORDERED** Defendants must show cause why a Preliminary  
Injunction should not be granted at a hearing to be held on \_\_\_\_\_, 2017 at  
\_\_\_\_\_ before the Honorable \_\_\_\_\_.

**IT IS FURTHER ORDERED** that service of process of the Verified Complaint,  
Motion For Preliminary Injunction Under MCR 3.310 and this Order To Show Cause  
shall be effectuated no later than \_\_\_\_\_, 2017 at \_\_\_\_\_, upon  
Defendants.

**SO ORDERED.**

Date:

\_\_\_\_\_  
COURT OF CLAIMS JUDGE