

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #7

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JUN 16 10 26 AM '00

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE
Effective Date

NOTICE OF AN EMERGENCY RULE

AGENCY: State Tax Department TITLE NUMBER: 110

CITE AUTHORITY W. Va. Code §§ 11-10-5, 11-17-10 and 60-9-5

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: 17

TITLE OF RULE BEING FILED AS AN EMERGENCY: Cigarette Excise Tax

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS: See attached statement



Robin C. Capehart, Secretary, Tax & Revenue

DATE: June 14, 2000

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Joseph M. Palmer, State Tax Commissioner

EMERGENCY RULE TITLE: Cigarette Excise Tax

1. Date of filing: June 14, 2000
2. Statutory authority for promulgating emergency rule:
W. Va. Code § 11-10-5
3. Date of filing of proposed legislative rule: June 14, 2000
4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule?
The rule is a completely new rule.
5. Has the same or similar emergency rule previously been filed and expired?
No.
6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.
Please see attached Statement of Emergency.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

N/A

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

N/A

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CIGARETTE EXCISE TAX
STATEMENT OF EMERGENCY

On March 11, 2000, the Legislature enacted Senate Bill 475, effective June 9, 2000, which placed certain dual enforcement responsibilities upon both the State Tax Commissioner and the Alcohol Beverage Control Administrator relative to the sale of imported cigarettes and cigarettes produced for export. In order to satisfy those responsibilities, the Tax Commissioner is authorized to share tax information with the Alcohol Beverage Control Commissioner and other agencies as necessary. Additionally, West Virginia Code § 16-9B-2(j), implementing the Tobacco Master Settlement Agreement, requires the Tax Commissioner to promulgate legislative rules as necessary to determine the amount of state excise tax paid on cigarettes, and units sold of cigarettes or tobacco products for purposes of the Tobacco Master Settlement Agreement.

This rule discusses the administration of the cigarette excise tax imposed by West Virginia Code § 11-17-1 et seq., and addresses information sharing authorized by West Virginia Code § 60-9-8. Also, this rule in part addresses the collection of information to assure compliance with the Master Tobacco Settlement Agreement, and the exchange of cigarette tax information and related information for use by the Attorney General in administering and implementing the Tobacco Master Settlement Agreement under West Virginia Code § 16-9B-1 et seq. The Attorney General is designated a materially interested party for the receipt of information necessary to fulfill the due diligence requirements imposed on the Attorney General under the Tobacco Master Settlement Agreement.

Because the Senate Bill 475 is effective June 9, 2000, and the compliance enforcement activities must commence at that time, it is necessary for the Tax Department and the Alcohol Beverage Control Commission to share applicable information to fulfill the mandates of the statute which address public health and welfare.

Implementing legislation for the Tobacco Master Settlement Agreement was effective upon passage on March 12, 1999. Because West Virginia Code § 16-9B-3 requires that certain deposits be made by certain cigarette manufacturers by April 15, 2000, and annually thereafter for a period of years. The Attorney General was required to undertake enforcement of these provisions on or about that date. Information from the cigarette excise tax records of the Tax Department is crucial in identifying manufacturers subject to this requirement, for verifying amounts required to be deposited, and for collection of vital information such as names, addresses and units of tobacco products sold in West Virginia.

Promulgation of a non-emergency legislative rule can be accomplished at the earliest by approximately March of the year 2001. Failure of the Attorney General to enforce the requirements of West Virginia Code § 16-9B-3 pursuant to the statutorily

prescribed time constraints could place the Attorney General in violation of the due diligence requirements of the Tobacco Master Settlement Agreement, and could jeopardize the State's compliance with the Agreement.

Thus, it is necessary to implement an emergency rule, designating the Attorney General as a person having a material interest in tax information within the meaning of West Virginia Code §11-10-5d(f), allowing immediate exchange of cigarette tax and related information between the Tax Department and the Attorney General.

As a result of the foregoing, it is necessary for the legislative rule to become effective on an emergency basis.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Cigarette Excise Tax

Type of Rule: ☒ Legislative ☐ Interpretive ☐ Procedural

Agency: State Tax Department

Address: P.O. Box 1005
Charleston, WV 25324-1005

1. Effect of Proposed Rule

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<u>ESTIMATED TOTAL COST</u>	\$	\$	\$	\$	\$
PERSONAL SERVICES	0	0	0	0	0
CURRENT EXPENSE	0	0	0	0	0
REPAIRS & ALTERNATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER	0	0	0	0	0

2. Explanation of above estimates:

The Tax Department does not anticipate any change in its expenditures.

Rule Title: Cigarette Excise Tax

3. Objectives of these rules:

The rule establishes the policies and operating procedures for administering the Cigarette Excise Tax.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

This rule should not have an economic impact in State Government.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

This rule should have no economic impact on political subdivisions, specific industries, or specific citizen groups.

C. Economic Impact on Citizens/Public at Large.

This rule should have no economic impact on the public at large.

Date: JUNE 16, 2000

Signature of Agency Head or Authorized Representative



Joseph M. Palmer
State Tax Commissioner

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CIGARETTE EXCISE TAX

SUMMARY OF RULE

West Virginia Code § 16-9B-2(j) states that the Tax Commissioner shall propose legislative rules as are necessary to ascertain the amount of excise tax paid on cigarettes. Additionally, West Virginia Code § 60-9-5 authorizes the Tax Commissioner to revoke or suspend the authorization to affix cigarette excise tax stamps for violation of any legislative rule related to West Virginia Code § 60-9-1 et seq.

In order to accomplish the foregoing, this rule defines the following terms: "business registration certificate"; "cigarette"; "cigarette wrappers"; "Tax Commissioner"; "consumer"; "excise tax"; "importer"; "manufacturer"; "non-tax paid tobacco"; "package"; "person"; "retail dealer"; "sale"; "sale at retail"; "sale by wholesaler"; "stamp"; "stamped cigarettes"; "sub-jobber"; "this State"; "tobacco products"; "unstamped cigarettes"; "vending machine operator"; and "wholesaler." The rule also discusses: licensing of cigarette dealers (wholesalers and sub-jobbers, retail dealers, and cigarette vending machine operators); cigarette tax paid stamps; affixing stamps; authority and permit for use of metering devices and heat applied stamp machines; sales of cigarettes on railways and buses; State institutions and the excise tax; metering machines; contractual obligations of meter users and stamp machine users; prohibitions; records and reports; imported cigarettes; audits; administrative sanctions; and general enforcement provisions.

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CIGARETTE EXCISE TAX

STATEMENT OF CIRCUMSTANCES

West Virginia Code § 16-9B-2(j) states that the Tax Commissioner shall propose legislative rules as are necessary to ascertain the amount of excise tax paid on cigarettes. Additionally, West Virginia Code § 60-9-5 authorizes the Tax Commissioner to revoke or suspend the authorization to affix cigarette excise tax stamps for violation of any legislative rule related to West Virginia Code § 60-9-1 et seq. This rule establishes the procedures for authorizing the use of cigarette excise tax stamps and the necessary means to enforce West Virginia Code §§ 60-9-1 et seq and 16-9B-1 et seq. as it relates to the use of those stamps.

TITLE 110
EMERGENCY LEGISLATIVE RULE
STATE TAX DEPARTMENT

SERIES 17
CIGARETTE EXCISE TAX

FILED

JUN 15 10 26 AM '00

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

§ 110-17-1. General

1.1. **Scope** - This rule establishes policies and operating procedures for administering the Cigarette Excise Tax.

1.2. **Authority** - W. Va. Code §§ 11-10-5, 11-17-10 and 60-9-5.

1.3. **Effective Date** -

1.4. **Filing Date** -

§ 110-17-2. Definitions. When used in this rule and unless the context clearly requires a different meaning, the following terms shall have the meaning ascribed herein.

2.1. **"Business Registration Certificate"** means the West Virginia Business Registration Certificate required by West Virginia Code § 11-17-1 et seq.

2.2. **"Cigarette"** means:

2.2.1. Any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and whether or not such tobacco is flavored, adulterated or mixed with any ingredient, the wrapping or cover of which is made of paper or any substance or material, except tobacco.

2.2.2. Any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packing and labeling, is likely to be offered to, or purchased by, consumers as a cigarette.

2.3. **"Cigarette wrappers"** means paper, or any other material except tobacco, prepared for use or that is likely to be used by consumers to make cigarettes.

2.4. **"Commissioner"** or **"Tax Commissioner"** means the West Virginia Tax Commissioner, or his or her delegate.

2.5. **"Consumer"** means a person who receives or in any way comes into possession of cigarettes for the purpose of consuming or giving them away or disposing of them in any way other than by sale, barter or exchange.

2.6. **"Excise tax"** or **"cigarette tax"** means the tax imposed by West Virginia Code § 11-17-1 et seq.

2.7. **"Importer"** means any person in the United States to whom non-tax paid tobacco products or cigarette papers or tubes manufactured in a foreign country, Puerto Rico, the Virgin Islands, or a possession of the United States are shipped or consigned;

2.7.1. Any person who removes cigars or cigarettes for sale or consumption in the United States from a customs bonded manufacturing warehouse; and

2.7.2. Any person who smuggles or otherwise unlawfully brings tobacco products or cigarette papers or tubes into the United States.

2.8. **"Manufacturer"** means a person engaged in an activity where tangible personal property is transformed or converted by physical, chemical or other means into products subject to the excise tax.

2.9. **"Non-tax paid tobacco"** means tobacco upon which the excise tax has not been paid.

2.10. **"Package"** means the individual package, box or other container in or from which retail sales of cigarettes are normally made or intended to be made.

2.11. **"Person"** means any individual, firm, association, company, partnership, corporation, limited liability company, joint-stock company, club, agency, syndicate, municipal corporation or other political subdivision of this State, trust, receiver, trustee, fiduciary or conservator, and when used in connection with any penalties imposed by West Virginia Code § 11-17-1 et seq., includes officers, directors, trustees or members of any firm, copartnership, association, corporation, limited liability company, trust or any other unit acting as a group.

2.12. **"Retail dealer"** means every person in this State, other than a wholesaler or sub-jobber, engaged in the business of selling cigarettes at retail to a consumer or to any person for any purpose other than resale.

2.13. **"Sale"** means selling, exchange, transfer of title, barter, gift, offer for sale or distribution or disposition of.

2.14. **"Sale at retail" or "retail sale"** means a sale to a consumer or to any person for any purpose other than resale.

2.15. **"Sale by wholesaler"** means any bona fide transfer of title to cigarettes by a wholesaler for a valuable consideration, made in the ordinary course of trade or in the usual conduct of the wholesaler's business.

2.16. **"Stamp"** means any cigarette stamp, whether applied by hand, meter or ink impression, or by heat, and authorized by the Tax Commissioner.

2.17. **"Stamped cigarettes"** means that the stamp as required by West Virginia Code § 11-17-1 et seq. has been affixed to the bottom of the package of cigarettes.

2.18. **"Sub-jobber"** means any person engaged in this State in the business of purchasing stamped cigarettes from another person who had purchased from the manufacturer when such other person is located in any state that levies an excise tax on cigarettes and who purchases such cigarettes solely for the purpose of bona fide resale to retail dealers.

2.19. **"This State"** means the State of West Virginia.

2.20. **"Tobacco products"** means cigarettes, cigars, smokeless tobacco, pipe tobacco, or roll-your-own tobacco.

2.21. **"Unstamped cigarettes"** means that the stamp as required by West Virginia Code § 11-17-1 et seq. has not been affixed to the bottom of the package of cigarettes.

2.22. **"Vending machine operator"** means any person engaged in this State in the business of operating one or more cigarette vending machines.

2.23. **"Wholesaler"** means any person engaged in this State in the business of purchasing unstamped cigarettes directly from a manufacturer or importer for resale.

§ 110-17-3. Cigarette Dealer Requirements

3.1. **Wholesalers and Sub-jobbers** – Every wholesaler or sub-jobber, whether a resident or non-resident of this State, engaging in the business of selling cigarettes in this State is required to first apply for and obtain a Business Registration Certificate and the license required by West Virginia Code § 11-12-4a for the purpose of selling cigarettes, other tobacco products and cigarette wrappers. Application for the Business

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Registration Certificate and license shall be made on the forms provided by the Tax Commissioner.

3.1.1. No wholesaler may sell cigarettes to any person in this State other than another wholesaler, a sub-jobber or a retail dealer, and no person in this State other than a wholesaler or sub-jobber may sell cigarettes to a retail dealer.

3.1.2. The use or application of any kind or type of stamp other than those authorized by the Tax Commissioner shall be considered a violation of this rule and subject to the penalties provided in West Virginia Code § 11-17-1 et seq.

3.1.3. Unless stamps have been previously affixed, they shall be affixed by each wholesaler in this State prior to delivery of any cigarettes to any person in this State.

3.2. **Retail Dealers** - No retail dealer may offer for sale or sell any cigarettes in West Virginia without first having applied for and obtained a Business Registration Certificate and the license required by West Virginia Code § 11-12-4a for the purpose of selling cigarettes, other tobacco products and cigarette wrappers. Application shall be made on forms prescribed and furnished by the Tax Commissioner.

3.3. **Cigarette Vending Machine operators** - Each vending machine operator shall apply for and obtain a Business Registration Certificate and the license required by West Virginia Code § 11-12-4a for the purpose of selling cigarettes, other tobacco products and cigarette wrappers before selling or offering for sale any cigarettes through a vending machine. Whenever any cigarette vending machine operator purchases cigarettes directly from the manufacturer, the operator shall be deemed to be a wholesaler and shall be liable for both the excise tax and affixing the required stamps.

3.3.1. Although cigarette vending machine operators, like wholesalers, purchase unstamped cigarettes directly from the manufacturer, the sale of cigarettes through vending machines is construed as a sale at retail. Therefore, vending machine operators shall also be classified as retail dealers.

3.3.2. It is the location of the vending machine and not the vending machine that is subject to Business Registration. The liability for obtaining the Business Registration Certificate for the operation of a cigarette vending machine shall be on the person responsible for stocking the machine and collecting the money from sales.

3.3.2.a. If the vending machine is owned by a person who leases the machine to another who then places the machine at a business location and the

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lessee assures the machine is stocked and collects the money from the sales, the lessee is responsible for obtaining a Business Registration Certificate for the location.

3.3.2.b. If the vending machine is owned by a person who leases the machine to another who then leases the machines to a business establishment and the business establishment assures the machine is stocked and collects the money from the sales, the machine is covered by the business establishment's Business Registration Certificate.

3.3.2.c. If the vending machine is owned by a person who places it at a business location and assures the machine is stocked and collects the money from the sales, the owner of the machine is responsible for obtaining a Business Registration Certificate for the location.

3.3.2.d. If the vending machine is owned by a person who leases the machine to a business establishment, and the business establishment assures the machine is stocked and collects the money from the sales, the machine is covered by the business establishment's Business Registration Certificate.

3.3.2.e. If the vending machine is owned by the business establishment where it is situated, the machine is covered by the establishment's Business Registration Certificate.

3.3.2.f. If a person has more than one vending machine at a location, only one Business Registration Certificate is required for all of the machines at that location.

3.3.3. Each cigarette vending machine operator in this State shall for each shipment of cigarettes obtain an invoice showing the amount and value of the shipment, the date of receipt of the shipment, and the name of the shipper. The operator shall retain the invoice for a period of three years, and it shall be subject to the inspection of the Tax Commissioner. The operator shall file a monthly report showing total purchases, stamped or unstamped, and sales of cigarettes, and such other information as the Tax Commissioner may require on forms provided by the Tax Commissioner.

3.3.4. Records of cigarette vending machine operators will be subject to auditing by the Tax Commissioner and the vending machine operators shall make records available at any time during regular business hours.

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3.3.5. If unstamped cigarettes are found in any vending machine, both the cigarettes and the vending machine shall be contraband goods and may be seized by the Tax Commissioner, or by any peace officer of the State at the direction of the Tax Commissioner, without a warrant.

3.3.6. No cigarette vending machines shall be placed in operation within this State that is not so constructed as to display at least one package of cigarettes in each column. All cigarettes shall be placed in the machines in such a manner that when they are displayed, the stamps affixed thereto shall be clearly visible.

§ 110-17-4. Cigarette Tax Paid Stamps – West Virginia Code § 11-17-1 et seq. authorizes the use of stamps to evidence payment of the excise tax. All stamps will conform to the contract entered into between the State of West Virginia and the manufacturer of the stamps.

4.1. Form and Description of Hand Applied Cigarette Tax Stamps - The stamps shall measure approximately one-half inch by five-eighths inch in size. The design of the stamps shall be as follows: Across the top part of the stamp shall be the words "State of West Virginia"; in the center part of the stamp will be an outline of the State of West Virginia; inside the outline of the map of West Virginia shall appear the numerals twenty (20) which will indicate that the tax has been paid on twenty (20) cigarettes or twenty-five (25) which will indicate that the tax has been paid on twenty-five (25) cigarettes; and on the lower part of the stamp shall appear the words "Cigarette Tax Stamp". The Commissioner may designate any other marks to be included in the design and layout of the stamps, and in the case of packaging not containing 20 or 25 cigarettes, the Tax Commissioner may prescribe such alternative designs as may be appropriate.

4.2. Form and Description of Cigarette Tax Paid Meter Impressions - The size of the meter impressions shall be approximately five-eighths inch by one and one-quarter inch, and rectangular in shape or design. The form of the meter impressions, made by a metering device, to be placed on the package of cigarettes, shall contain the words "West Virginia Tax Paid Cigarettes". In the center of the meter impression shall be the outline of the map of the State of West Virginia and on both sides of the outline of the map of West Virginia, shall appear numerals which will designate the meter which was used to make the impression. The Commissioner may designate any other marks to be included in the design and layout of the stamps and may prescribe such alternative designs as may be appropriate.

4.3. Form and Description of Cigarette Tax Paid Stamps Heat Applied by Machine - The stamps shall measure approximately one-half inch by one-half inch in

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size. The design of the heat applied stamps shall be as follows: Across the top part of the stamp shall be the words "State of West Virginia"; in the center part of the stamp will be an outline of the map of the State of West Virginia; inside the outline of the map of West Virginia shall appear the numerals (20) twenty which will indicate that the tax has been paid on twenty (20) cigarettes or (25) twenty-five, which will indicate that the tax has been paid on twenty-five; and on the lower part of the stamp shall appear the words "Cigarette Tax Stamp". The Commissioner may designate any other marks to be included in the design and layout of the stamps, and in the case of packaging not containing 20 or 25 cigarettes, the Tax Commissioner may prescribe such alternative designs as may be appropriate.

4.4. Purchase of Cigarette Tax Paid Stamps - Stamps can be purchased only from the Tax Commissioner. The sale of stamps is made only upon receipt of the requisition form prescribed by the Tax Commissioner, accompanied by the proper remittance unless the purchaser has secured a Cigarette Tax Credit Purchase Bond.

4.4.1. A continuous Cigarette Tax Credit Purchase Bond may be obtained by wholesalers to allow the purchase of cigarette stamps on credit. The terms of credit shall be payment on the third purchase or within thirty days (whichever comes first) with no more than two requisitions on credit simultaneously. The total amount of tax due on the two requisitions shall be no more than one-half (1/2) the amount of the total bond. After approval of the bond by the Attorney General, an annual notice of renewal is the only requirement. Any surety issuing a bond shall be released and discharged from all liability on such bond after the expiration of sixty days from the date the surety filed, by certified mail, with the Tax Commissioner a written request to cancel the bond. This cancellation does not relieve, release or discharge the surety from liability already accrued, or which accrues before the expiration of the sixty day period. The bond shall be conditioned upon compliance with the provisions of West Virginia Code § 11-17-1 et seq., including the filing of the returns and payment of all applicable taxes.

4.4.2. No stamps may be shipped prior to receipt of proper remittance if terms of credit are not followed.

4.4.3. West Virginia Code § 11-17-3 specifies a tax of seventeen cents for each twenty cigarettes or in like ratio on any part thereof. A discount of four per cent will be allowed for the purchase of stamps or meter impression as an allowance for affixing stamps and /or meter impression and prepaying the cigarette tax.

4.4.4. Cigarette tax stamps are intended for the use of the authorized purchaser and are not transferable. If the wholesaler ceases business or stops stamping, any unused stamps may be returned to the Tax Commissioner for refund.

4.4.5. The Tax Commissioner will redeem any unused or mutilated, but identifiable, stamps that any registered wholesaler may present for redemption. The Tax Commissioner may either issue a credit or a refund for stamps destroyed by fire or flood, on written verified requests made by the purchaser or his representative. The credit or refund shall be ninety-five per cent of the face value of said stamps, less any discounts allowed on the purchase of said stamps. Each request for redeeming or refunding shall be verified to the satisfaction of the Tax Commissioner.

4.4.6. In the event a retail dealer suffers loss of stamped cigarettes as a result of fire or flood, the retail dealer shall file a verified request for refund with the Tax Commissioner in order to obtain a refund. The verified request for refund shall contain the pertinent facts relating to the cause of the loss and the quantity of cigarette packages lost or packages damaged so as to be unsalable. A statement from an agent authorized by the Tax Commissioner may also be attached to the request for refund when the agent has declared certain packages of cigarettes to be unfit for use or sale. The amount of the refund shall be ninety-five per cent of the face value of the stamps, less any discounts allowed on the purchase of the stamps.

4.4.7. Stamps on cigarettes returned to the manufacturers shall be subject to either a credit or a refund upon the wholesaler filing an application and affidavit completed by the manufacturer that evidences the destruction of stamps or meter impressions. The amount of the refund shall be ninety-five per cent of the face value of the stamps, less any discounts allowed on the purchase of the stamps.

4.4.8. No refunds will be allowed to users of metering devices for loss of impressions.

§ 110-17-5. Affixing Stamps.

5.1. **Wholesalers** - Wholesalers shall affix stamps on each package of cigarettes prior to delivery of the cigarettes to any sub-jobber or retail dealer in this State. Except where the Tax Commissioner has issued a written waiver of the requirement, the stamps shall be affixed to the bottom of the package so that when the package is opened for consumption the stamp will not be destroyed but will evidence payment of the tax.

5.2. **Retail Dealers** – Retail dealers, unless also classified as a wholesaler, have no authority to affix stamps; therefore, retail dealers that are not classified as wholesalers may only purchase stamped cigarettes for resale. Whenever any package of cigarettes is found in the place of business of a retail dealer without the stamps

affixed, there shall be a presumption that such cigarettes are kept therein in violation of West Virginia Code § 11-17-1 et seq.

§ 110-17-6. Authority And Permit For Use Of Metering devices And Heat Applied Stamp Machines.

6.1. **Authority and Permit for Use of Metering Devices** - Registered wholesalers may, upon application, secure authority from the Tax Commissioner for use of metering machines for the purpose of imprinting a stamp on each package of cigarettes. A wholesaler electing to use a metering device shall pay the excise tax in advance unless the wholesaler purchases stamps on credit as provided by West Virginia Code § 11-17-1 et seq. When these metering devices are used, no further cancellation will be required as evidence of payment of tax.

6.2. **Authority and Permit to Use Heat Applied Stamp Machine** - Registered wholesalers may, upon application, secure authority from the Tax Commissioner to use heat applied stamps and machines for applying the stamps. Forms for application for authority to use heat applied stamps and machines will be furnished by the Tax Commissioner. A wholesaler electing to use a heat applied stamp machine shall pay the excise tax in advance unless the wholesaler purchases stamps on credit as provided by West Virginia Code § 11-17-1 et seq. No further cancellation will be required where these heat-applied stamps are used as evidence of payment of tax.

§ 110-17-7. Sales Of Cigarettes On Railways And Buses. - Common carriers operating club or dining cars or other cars upon which cigarettes are sold will not be required to affix and cancel stamps on packages of cigarettes in stock, cigarettes that are exposed for sale or cigarettes that will be offered for sale or sold in the State of West Virginia. Monthly reports must be filed and payment made to the Tax Commissioner concerning the applicable excise tax for all sales made within the State of West Virginia. The reports and payments shall be filed and payment made within fifteen days after the end of each calendar month.

§ 110-17-8. State Institutions And The Excise Tax. - All cigarettes sold for use or resale in an institution operated by this State are required to have stamps affixed to the packages.

§ 110-17-9. Metering Machines. - Meter impressions must be clear and easily distinguished. The metering machine shall be maintained in a manner that assures clear stamp impressions are definitively identified.

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10.1. Failure to produce legible impressions may cause the Tax Commissioner to deny the wholesaler authority to purchase additional metering units until such time as the condition has been satisfactorily corrected.

10.2. Continued failure to produce legible impressions may result in revocation of authority to use the metering machine.

§ 110-17-10. Contractual Obligations Of Meter Users And Stamp Machine Users. – While the Tax Commissioner is required to authorize the use of machines for affixing stamps to packages of cigarettes, neither the Tax Commissioner nor this State is a party to any contract for the purchase or lease of such a machine, nor does the Tax Commissioner or this State warrant or guarantee that the machine will function in the authorized manner.

§ 110-17-11. Prohibitions.

11.1. Except as otherwise authorized in writing by the Tax Commissioner, wholesalers are specifically prohibited from transferring unstamped cigarettes to another person or from stamping any cigarettes that they do not own. Wholesalers shall maintain a complete daily stamping record which shall be available for inspection by the Tax Commissioner.

11.2. Neither the wholesaler, the wholesaler's employees nor any other parties may remove unstamped cigarettes from stock or consume unstamped cigarettes. Each and every package of cigarettes disposed of must be accounted for by a record available for inspection.

11.3. No cigarettes may be sold or distributed to consumers in this State, or acquired, held, owned, possessed, imported or transported into this State for sale or distribution in this State if the package bears any statement, label, stamp, sticker, or notice indicating that the manufacturer did not intend the cigarettes to be sold, distributed, or used in the United States, including, but not limited to, labels stating "for export only," "U.S. tax-exempt," "for use outside U.S." or similar wording.

11.4. No cigarettes may be sold or distributed to consumers in this State, or acquired, held, owned, possessed, imported or transported into this State for sale or distribution in this State if the package does not comply with requirements imposed by federal law regarding warnings and other information on packages of cigarettes manufactured, packaged or imported for sale, distribution, or use in the United States, including the precise warning labels specified in the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1333, and all federal trademark and copyright laws.

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11.5. No cigarettes may be sold or distributed to consumers in this State, or acquired, held, owned, possessed, imported or transported into this State for sale or distribution in this State if any of the cigarettes were imported into the United States in violation of 26 U.S.C. 5754 or any other federal law or the implementing federal regulations.

11.6. No cigarettes may be sold or distributed to consumers in this State, or acquired, held, owned, possessed, imported or transported into this State for sale or distribution in this State by a person who knows or has reason to know the manufacturer does not intend for the cigarettes to be sold, distributed or used in the United States.

11.7. No cigarettes may be sold or distributed to consumers in this State, or acquired, held, owned, possessed, imported or transported into this State for sale or distribution in this State if there has not been submitted to the Secretary of the United States Department of Health and Human Services the list of the ingredients added to the tobacco in the manufacture of such cigarettes as required by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1355a;

11.8. No package of any cigarettes may be altered prior to sale or distribution to the ultimate consumer so as to remove, conceal or obscure:

11.8.1. Any statement, label, stamp, sticker or notice described in Subsection 11.3 of this Section; or

11.8.2. Any health warning that is specified in or does conform with the requirements of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1333.

11.9. No stamp required by West Virginia Code § 11-17-1 et seq. may be affixed to any package of cigarettes described in Subsection 11.3 of this Section and no package of cigarettes may be altered in violation of Subsection 11.8 of this Section.

§ 110-17-12. Records And Reports.

12.1. **Records** - Each person required to file a report under West Virginia Code § 11-17-1 et seq. shall make and keep such records as prescribed by the Tax Commissioner that are necessary to substantiate the information on the returns, including, but not limited to, inventories, receipts, disbursements and sales, for a period of time not less than three years.

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12.1.1. Unless otherwise permitted in writing by the Tax Commissioner, each delivery ticket or invoice for each purchase or sale of cigarettes must be recorded upon a serially numbered invoice showing the name and address of the seller and the purchasers, point of delivery, the date of delivery, quantity, and price of the product. The tax must be set out separately, or the invoice must indicate that the tax is included in the total price. The ticket or invoice shall include such other reasonable information as the Tax Commissioner may require.

12.1.2. Each wholesaler, sub-jobber, retail dealer and vending machine operator in this State and each out-of-State wholesaler, sub-jobber and vending machine operator authorized to do business in this State shall obtain invoices showing the amount and value of each shipment received, the date of receipt, and the name of the shipper. All invoices shall be retained for a period of at least three years and are subject to inspection by the Tax Commissioner.

12.1.3. The manufacturers shall furnish information as required by the Tax Commissioner to aid in auditing of the cigarette tax returns. The wholesaler shall indicate the exact date the cigarettes were received into stock. Invoice shall reflect any shortage in the shipment in order to account for only those cigarettes of a salable nature.

12.1.4. All books, papers, invoices and records of any wholesaler, sub-jobber or retail dealer in this State, showing sales, receipts and purchases of cigarettes shall, at all times during the usual business hours of the day, be open for the inspection of the Tax Commissioner, and the Tax Commissioner shall have power to investigate and examine the stock of cigarettes in and upon any premises where the same are placed, stored or sold, for the purpose of determining compliance with West Virginia Code § 11-17-1 et seq. and these rules.

12.2. **Reports** - Each wholesaler, sub-jobber and vending machine operator in this State and each out-of-state wholesaler, sub-jobber and vending machine operator authorized to do business in this State shall each month file a Monthly Report For Distributors and/or Wholesalers of Cigarettes, including all required schedules and other information, with the Tax Commissioner. Additionally, the Tax Commissioner may require retail dealers to furnish similar reports. The report, which may from time to time be amended by the Tax commissioner so as to require additional information, shall disclose the following information:

12.2.1. A monthly inventory taken at the close of business on the last business day of the reporting period of all stamped cigarettes and all unstamped cigarettes.

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12.2.2. Total purchases of cigarettes from all sources, supported by copies of invoices from each source of supply.

12.2.3. Total sales of stamped and unstamped cigarettes supported by sales slips or invoices issued to each customer and or records of sales through vending machines.

12.2.4. Total sales of cigarettes outside West Virginia. Separate records are to be maintained for each state into which cigarettes are shipped. Complete records must be maintained for any sales or transactions for which tax exemption is to be claimed. A stamp or meter account shall be maintained. The record must show:

12.2.4.a. The number of stamps and meter impressions on hand the last day of the previous reporting period.

12.2.4.b. The number of stamps and meter impressions purchased during the reporting period.

12.2.4.c. The number of stamps and the total number of meter impressions affixed during the reporting period.

12.2.4.d. The number of stamps and meter impressions on hand at close of business on the last business day of the reporting period.

12.2.5. A complete record is to be maintained showing the date a requisition for stamps was submitted to the Commissioner, the serial numbers, the date and quantity of stamps received, and the quantity of stamps affixed daily.

12.2.6. Each dealer using a metering device shall maintain a complete record at all times, showing the exact usage of the machine. This record should be maintained daily and available at all times for inspection by the Tax Commissioner.

12.2.7. The report shall be filed with the Tax Commissioner on or before the fifteenth day of each month immediately following the reporting period. Incorrect or incomplete reports will be returned by the Tax Commissioner or an amended report will be requested. Whenever a dealer fails to file a report within fifteen days after formal notification by the Tax Commissioner or fails to submit additional evidence or records required by the Tax Commissioner, the dealer shall be classified as delinquent. A penalty of \$25.00 will be assessed for each month or part of a month that a return is late. In addition to the monetary penalty, the Tax Commissioner may deny the discount

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on stamp or meter impression purchases. The Tax Commissioner may suspend the Business Registration Certificate to deal in cigarettes following the second offense. Repeated infractions will result in a cancellation of the authorization to deal in cigarettes.

12.2.8. Because administration of the registration and tax administration functions of the Tax commissioner will be facilitated by the exchange of information with the Attorney General relating to trade, transport, possession, transfer and sales of cigarettes and tobacco products and related products in this State and elsewhere, and because there is a material interest of the Attorney General in the enforcement and administration of West Virginia Code § 16-9D-1 et seq, the Tax Commissioner is authorized to enter into an exchange of information agreement with the West Virginia Attorney General and provide to that Office any information the Tax Commissioner deems to be relevant relating to trade, transport, possession, transfer and sales of cigarette and tobacco products, and related products, including but not limited to cigarette tax returns and information. For this purpose, the term "cigarette" has the following meaning.

12.2.8.a. "Cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains: (1) Any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (2) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (3) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette as that term is herein described. The term "cigarette" includes "roll-your-own" tobacco, which means any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes. For purposes of this definition of the term "cigarette," 0.09 ounces of "roll-your-own" tobacco shall constitute one individual cigarette or the equivalent of one cigarette.

12.3. **Imported Cigarettes.** Each authorized Wholesaler/Distributor that affixes stamps to cigarettes imported into the United States shall file the following information with each Monthly Report For Distributors and/or Wholesalers of Cigarettes on or before the fifteenth day of each month covering the transactions of the preceding month.

12.3.1. A copy of the permit issued pursuant to the Internal Revenue Code, 26 U.S.C. § 5713, to the importer importing the cigarettes into the United States

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and allowing the importer to import the cigarettes. A copy of the permit need only be filed once a year at the time determined by the Tax Commissioner, but the permit number shall be annotated on the Monthly Report.

12.3.2. A copy of the customs form containing, with respect to the imported cigarettes, the Internal Revenue Service tax information required by the U.S. Bureau of Alcohol, Tobacco and Firearms.

12.3.3. A statement, signed by an individual under penalty of perjury, that shall be treated as confidential tax information under West Virginia code § 11-10-5d, and exempt from disclosure under the Freedom of Information Act, West Virginia Code § 29B-1-1 et seq., identifying the brand and brand styles of all the imported cigarettes, the quantity of each brand style of the imported cigarettes, and the supplier of the imported cigarettes. This section shall not be construed to prohibit disclosure of such information to the Attorney general pursuant to section 12.2.8 of this rule.

12.3.4. A statement signed by the person under penalty of perjury, which shall not be treated as confidential or exempt from disclosure, that separately identifies the brands and brand styles of the imported cigarettes; and

12.3.5. A statement signed by an officer of the manufacturer or importer under penalty of perjury, certifying that the manufacturer or importer has complied with the package health warning and ingredient reporting requirements of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1333 and 1335a, with respect to the imported cigarettes and certifying whether the manufacturer is, or is not, a participating tobacco manufacturer within the meaning of West Virginia Code § 16-9B-1 et seq.

12.3.5.a. The manufacturer or importer is required to file the Federal Cigarette Labeling and Advertising Act compliance statement with the United States Department of Health and Human Services on an annual basis and when the ingredients of their cigarettes change or there is a change in the warning requirements. Additionally, cigarettes will not be released from the United States Customs Services without the appropriate labeling. Therefore, the statement need only be filed with the Tax Commissioner annually at a time established by the Tax Commissioner and at any other time the statement is required to be filed with the federal government.

12.3.5.a.1. Any cigarettes found without either the appropriate stamps or labeling shall be contraband goods and may be seized by the Tax Commissioner, or by any peace officer of the State at the direction of the Tax Commissioner, without a warrant.

12.3.5.b. The provisions of West Virginia Code § 16-9B-1 et seq., impose on tobacco product manufacturers the requirement to be either a participating manufacturer and fulfill financial obligations under the master settlement agreement or place certain amounts of moneys in a qualified escrow fund. Because the status of the manufacturer must be monitored to assure satisfaction of financial obligations, the manufacturer or importer is required to include with its filings a statement indicating whether the manufacturer is, or is not, a participating tobacco manufacturer within the meaning of that statute.

§ 110-17-13. Audits. - The Tax Commissioner may make periodic audits of accounts of all wholesalers, sub-jobbers, vending machine operators and retail dealers in this State and of out-of-state wholesalers, sub-jobbers and vending machine operators doing business in the State. All records shall be made available during the conduct of audits of the accounts.

13.1. Whenever an audit made by the Tax Commissioner reveals a material discrepancy, tax liability, underpayment or other amount due, an assessment will be made.

§ 110-17-14. Administrative Sanctions.

14.1. If a violation of West Virginia Code § 60-9-1 et seq. occurs, the State Tax Commissioner may revoke or suspend the violator's authorization to affix the tax stamps.

14.2. Cigarettes acquired, held, owned, possessed, transported, imported into, or sold or distributed in this State in violation of either West Virginia Code § 11-17-1 et seq. or West Virginia Code § 60-9-1 et seq. are considered contraband under West Virginia Code § 11-17-1 et seq., and are subject to seizure and forfeiture as provided therein. Such cigarettes are considered contraband whether the violation is knowing or otherwise.

14.3. The State Tax Commissioner may assess any tax, interest and penalty on any product acquired, possessed, sold, or offered for sale in violation of either West Virginia Code § 11-17-1 et seq. or West Virginia Code § 60-9-1 et seq.

§ 110-17-15. General Enforcement Provisions.

15.1. In order to assist in the enforcement of the excise tax, the State Tax Commissioner may request information from any state agency, constitutional officer or local agency. Additionally, pursuant to the provisions of West Virginia Code § 11-10-5d,

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11-10-5s or any other provisions of the West Virginia Code, the Tax Commissioner may enter into an exchange of information agreement with federal agencies, the District of Columbia, any other state or subdivision thereof, or agencies or governmental subdivisions of this State. Specifically, the Tax Commissioner is authorized to enter into an exchange of information agreement with the Alcohol Beverage Control Administration to facilitate the enforcement of West Virginia Code § 60-9-1 et seq.