

**WEST VIRGINIA  
SECRETARY OF STATE  
JOE MANCHIN, III  
ADMINISTRATIVE LAW DIVISION**

Form #6

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**FILED**

2002 APR -4 P 2:26

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE  
AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.**

AGENCY: State Tax Department TITLE NUMBER: 110

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 17

TITLE OF RULE BEING AMENDED: Tobacco Products Excise Tax

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: \_\_\_\_\_

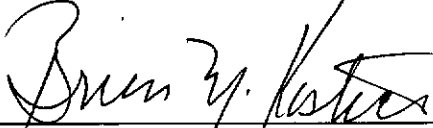
TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) SB 397

SECTION 64-7-1(d), PASSED ON March 9, 2002

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON  
THE FOLLOWING DATE: May 1, 2002

  
\_\_\_\_\_  
Brian M. Kastick

**SCANNED**

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TITLE 110  
LEGISLATIVE RULE  
STATE TAX DEPARTMENT

SERIES 17  
TOBACCO PRODUCTS EXCISE TAX

FILED

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OFFICE WEST VIRGINIA  
SECRETARY OF STATE

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**§ 110-17-1. General**

1.1. **Scope** - This rule establishes policies and operating procedures for administering the Tobacco Products 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 have the meaning ascribed in this section.

2.1. **"Authorized wholesaler"** is a wholesale dealer of cigarettes or other tobacco products authorized to do business in this State and who has received a valid West Virginia business registration certificate prior to the sale or delivery of any tobacco product to any retail dealer or subjobber in this State.

2.2. **"Business Registration Certificate"** means the West Virginia Business Registration Certificate required by West Virginia Code § 11-12-4a.

2.3. **"Cigarette"** means:

2.3.1. 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.

2.3.2. 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.

2.4. **"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.

2.5. **"Code"** means the Code of West Virginia of one thousand nine hundred thirty-three, as amended.

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

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

2.8. "**Counterfeit stamp**" means any stamp, label or print, indicium or character, that evidences or purports to evidence the payment of any tax levied under West Virginia Code § 11-17-1 et seq., and

2.8.1. has not been printed, manufactured or made by authority of the Commissioner, and

2.8.2. has not been issued, sold, or circulated by the Commissioner.

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

2.10. "**Importer**" means:

2.10.1. 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;

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

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

2.11. "**Manufacturer**" means a person who manufactures or produces a tobacco product but does not include a tobacco grower.

2.12. "**Other tobacco products**" or "**tobacco products other than cigarettes**" means snuff and chewing tobacco and any other tobacco product that is intended by the seller to be consumed by means other than smoking and any cigar, pipe tobacco or other tobacco product other than cigarettes.

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

2.14. "**Person**" means any individual, firm, association, company, partnership, corporation, limited liability company, joint-stock company, club, agency, syndicate, other legal entity, 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., means and includes officers, directors, trustees or members of any firm, copartnership, association, corporation, limited liability company, trust or any other unit acting as a group.

2.15. "**Place of business**" means a place where a tobacco product is sold or where a tobacco product is brought or kept for the purpose of sale or consumption, including a vessel, airplane, train or vending machine; Provided, That "place of business" does not include a farmers market or a tobacco auction house unless tobacco products are sold at the location.

2.16. "**Retail dealer**" means every person in this State, other than a wholesaler or sub-jobber, engaged in the business of selling tobacco products at retail to a consumer or to any person for any purpose other than resale but does not include a tobacco grower when selling tobacco to a manufacturer.

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

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

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

2.20. "**Stamp**" or "**Meter impression**" means any cigarette stamp, whether applied by hand, or any meter or ink impression or other indicia, or by heat, and authorized by the Tax Commissioner to serve as a stamp, and shall be of the design and color as prescribed by the Commissioner.

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

2.22. "**Sub-jobber**" or "**sub-jobber dealer**" means and includes any person engaged in this State in the business of purchasing tax-paid tobacco products from another person who had purchased from the manufacturer or importer and who purchases the tax-paid tobacco products solely for the purpose of bona fide resale to retail dealers.

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

2.24. "**Tax-not-paid tobacco product**" means a tobacco product upon which the excise tax has not been paid.

2.25. "**Tax-paid tobacco product**" means a tobacco product upon which the excise tax has been paid.

2.26. "**Tobacco grower**" means a person who has a direct financial interest in planting, cultivating and harvesting tobacco for sale. "Tobacco grower" includes a person who possesses a quota to market tobacco as administered by the United States Department of Agriculture.

2.27. "**Tobacco products**" includes cigarettes, and other tobacco products that have been manufactured by a manufacturer, but does not include planted or cultivated tobacco or harvested tobacco that has not completed the manufacturing activity.

2.28. "**Transporter**" means a person importing or transporting into this State a tobacco product obtained from a source located outside this State, or transporting within this State tobacco products belonging to another person.

2.29. "**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.

2.30. "**Vending machine operator**" means any person engaged in this State in the business of operating one or more vending machines for the sale of any tobacco products.

2.31. **"Wholesale price"** means the gross invoice price, including all federal excise taxes, at which the manufacturer of the tobacco product sells the tobacco product to unaffiliated distributors, excluding all trade discounts and other reductions in the manufacturer price. If the taxpayer buys from a person who is not the manufacturer of the tobacco product, "wholesale price" means the gross invoice price at which the taxpayer purchases the tobacco product, including all federal excise taxes and excluding all trade discounts and other similar reductions in price.

2.32. **"Wholesaler"** or **"wholesale dealer"** means and includes any person engaged in this State in the business of purchasing tax-not-paid tobacco products directly from a manufacturer, or any other person as may be approved by the Tax Commissioner. Any distributor, dealer, subjobber, subjobber dealer, retailer or any other person that imports or transports tax-not-paid tobacco products into this state, or that causes tax-not-paid tobacco products to be imported or transported into this state is liable for the Excise Tax. No wholesaler or person may purchase tax-not-paid tobacco products from any seller not approved by the Tax Commissioner.

### **§ 110-17-3. Tobacco Products 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 tax-paid tobacco products in this State shall 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 tax-paid tobacco products and cigarette wrappers. Application for the Business Registration Certificate and license shall be made on the forms provided by the Tax Commissioner.

3.1.1. A wholesaler may not sell tax-paid tobacco products to any person in this State other than another wholesaler, a sub-jobber or a retail dealer, and a person in this State other than a wholesaler or sub-jobber may not sell tax-paid tobacco products to a retail dealer.

3.1.2. The use or application of any kind or type of West Virginia tax 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 they have been previously affixed, each wholesaler in this State shall affix the required West Virginia tax stamps 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 tax-paid tobacco products 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 tobacco products and cigarette wrappers. Application shall be made on forms prescribed and furnished by the Tax Commissioner.

**3.3. Tobacco products or cigarette wrapper 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 tobacco products and cigarette wrappers before selling or offering for sale any tax-paid tobacco products or cigarette wrappers through a vending machine. Whenever any cigarette vending machine operator purchases tax-not-paid tobacco products directly from the manufacturer, the operator is considered to be a wholesaler and is liable for both the payment of the proper amount of excise tax and affixing the required stamps.

3.3.1. Although tobacco product vending machine operators, like wholesalers, purchase tax-not-paid tobacco products directly from the manufacturer, the sale of tobacco products 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 person responsible for stocking the machine and collecting the money from sales shall obtain the Business Registration Certificate for the operation of a tobacco products vending machine.

3.3.2.a. If the vending machine is owned by a person who leases the machine to another person who then places the machine at a business location and the lessee assures the machine is stocked and collects the money from the sales, the lessee shall obtain 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 person 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 shall obtain 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 tobacco products vending machine operator in this State shall for each shipment of tobacco products 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 the invoice is subject to inspection by the Tax Commissioner. The operator shall file a monthly report showing total purchases of tax-paid and of tax-not-paid tobacco products and sales of tobacco products, and any other information the Tax Commissioner may require on forms provided by the Tax Commissioner.

3.3.4. Records of tobacco product vending machine operators are subject to audit by the Tax Commissioner and the vending machine operators shall make records available at any time during regular business hours for that purpose.

3.3.5. If tax-not-paid tobacco products are found in any vending machine, both the tobacco products and the vending machine are 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 tobacco product vending machines shall be placed in operation within this State that is not constructed to display at least one package of tobacco product in each column. All cigarettes shall be placed in the machines in such a manner that when they are displayed, the stamps affixed to the package are clearly visible.

3.4. A tobacco grower is considered to not be a manufacturer, wholesaler, subjobber, retailer or vending machine operator and therefore is not subject to the licensing required by West Virginia Code § 11-12-4a unless the tobacco grower is actually performing the activities of a manufacturer, wholesaler, subjobber, retailer or vending machine operator.

#### **§ 110-17-4. Cigarette Tax-paid Stamps and taxing other tobacco products**

4.1. **General** - West Virginia Code § 11-17-1 et seq. authorizes the use of stamps to evidence payment of the excise tax on cigarettes. All stamps shall conform to the contract entered into between the State of West Virginia and the manufacturer of the stamps.

4.2. **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 shall 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 any alternative designs that may be appropriate.

4.3. **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 any alternative designs that may be appropriate.

4.4. **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 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 shall 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 shall indicate that the tax has been paid on twenty (20) cigarettes or (25) twenty-five, which shall 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 any alternative designs that may be appropriate.

**4.5. Purchase of Cigarette Tax-paid Stamps** - Stamps may be purchased only from the Tax Commissioner. The Tax commissioner shall sell stamps only upon receipt of the prescribed requisition form and, unless the purchaser has secured a Cigarette Tax Credit Purchase Bond, the proper remittance.

4.5.1. A wholesaler may obtain a continuous Cigarette Tax Credit Purchase Bond 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 the 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.

4.5.2. The Tax Commissioner shall not ship any stamps prior to receipt of proper remittance if terms of credit are not followed.

4.5.3. West Virginia Code § 11-17-3 sets a tax at a specified rate for each twenty cigarettes or in like ratio on any part thereof. (For example, 17 cents for each 20 cigarettes.) The Tax commissioner shall allow a discount of four per cent for the purchase of stamps or meter impression as an allowance for affixing stamps and /or meter impression and prepaying the excise tax imposed on cigarettes.

4.5.4. Cigarette tax stamps are intended for the use of the authorized purchaser and are not transferable. If the wholesaler ceases business or stops

stamping, the wholesaler shall return any unused stamps shall be returned to the Tax Commissioner for refund.

4.5.5. The Tax Commissioner shall 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 or her representative. The credit or refund shall be ninety-five per cent of the face value of the stamps, less any discounts allowed on the purchase of the stamps. Each request for redeeming or refunding shall be verified to the satisfaction of the Tax Commissioner.

4.5.6. 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.

4.5.7. 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.

4.5.8. The Tax Commissioner shall not allow refunds to users of metering machines for loss of impressions.

**4.6. Purchase of other tobacco products.** – The excise tax is imposed on the sale or use of other tobacco products at the statutory rate as a specified percentage of the wholesale price of each article or item of the other tobacco product sold or used by a wholesaler or subjobber dealer. (For example, 7% of the wholesale price of each article or item of the other tobacco product.)

4.6.1. The excise tax imposed on other tobacco products shall be paid by the invoice method. This means the correct amount of tax shall be separately stated on the invoice when the products are sold by the wholesaler. The wholesaler shall pay the correct amount of excise tax on any other tobacco product that is sold in West Virginia,

or removed from inventory for any purpose other than to return the other tobacco product to the manufacturer or be exported to another state.

4.6.2. Payment of the excise tax to the Tax Department shall be by cash, money order, bank draft, certified check, non-certified check or electronic funds transfer. If a non-certified check is returned unpaid by the bank, the payment is considered to not have been made; as a result, the Excise Tax remains due and owing.

4.6.3. Failure by a retail dealer or subjobber to provide evidence of the payment of excise tax on other tobacco products found in his or her place of business is considered to demonstrate that the other tobacco products are retained at that place of business in violation of West Virginia Code § 11-17-1 et seq. Other tobacco products retained in violation of West Virginia Code § 11-17-1 et seq. are 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.

4.6.4. Upon the return of tobacco products other than cigarettes upon which the excise tax was paid, a wholesaler may file an application with an attached affidavit claiming either a credit or a refund of ninety-five percent of the tax that was paid on those other tobacco products, less any discount allowed on the original remittance of the Excise Tax.

4.6.5. Every taxpayer that pays the excise tax on tobacco products shall be allowed a discount of 4 percent on all tax due.

#### **4.7. Effect of change of Excise Tax rate.**

4.7.1. The effective date for imposition of the excise tax on other tobacco products is January 1, 2002.

4.7.2. All tobacco products on hand or in inventory on the effective date of a change in the applicable tax rate are considered to have been purchased or received on that effective date.

4.7.3. Every wholesaler, subjobber, subjobber dealer, retail dealer and vending machine operator that, on the effective date of any excise tax rate change has, on hand or in inventory, any tobacco products upon which any portion of the excise tax has been paid shall take a physical inventory on that date and file the required report with payment of any additional tax due under the increased tax rate. The required report and payment shall be filed within 30 days after the inventory was made.

Imposition of the excise tax on tobacco products other than cigarettes is considered to be a change in the rate of tax for purposes of this provision.

4.7.4. Every taxpayer that pays excise tax on tobacco products shall be allowed a discount of 4 per cent on all tax due.

**§ 110-17-5. Affixing Stamps.**

5.1. **Wholesalers** - Wholesalers shall affix the required 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 stamp 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 tax-paid tobacco products for resale. Whenever any package of cigarettes is found in the place of business of a retail dealer without the required stamps affixed, or other tobacco products are found in the place of business of a retailer and there is no evidence of payment of the excise tax imposed on the tobacco products, there shall be a presumption that the tobacco products are kept in violation of West Virginia Code § 11-17-1 et seq. Tobacco products kept in violation of West Virginia Code § 11-17-1 et seq. are 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.

**§ 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 Machines** - Registered wholesalers may, upon application, secure authority from the Tax Commissioner to use 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 is 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. The Tax Commissioner shall furnish forms for application for authority to use heat applied stamps and machines. 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 is required where these heat-applied stamps are used as evidence of payment of tax.

**§ 110-17-7. Sales Of Cigarettes On Railways, Boats And Buses.** - Common carriers operating club or dining cars, boats or other cars, vehicles or conveyances in which cigarettes and other tobacco products are sold are not 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. The common carriers shall file monthly reports with and pay to the Tax Commissioner the proper amount of 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 tobacco products sold for use or resale in an institution operated by this State shall be tax-paid tobacco products and in the case of cigarettes shall have the required stamps affixed to each package.

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

9.1. The Tax Commissioner may deny a wholesaler that maintains metering machines that fail to produce legible impressions authority to purchase additional metering machines until such time as the situation has been satisfactorily corrected.

9.2. The Tax Commissioner may revoke the authority of a wholesaler to use a metering machine that continues to produce illegible impressions.

**§ 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 a required stamp to each package of cigarettes, neither the Tax Commissioner nor this State is a party to any contract for the purchase or lease of 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 may not transfer unstamped cigarettes or other tobacco products upon which the excise tax has not been paid to another person or stamp 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.

11.1.1. A wholesale dealer may sell tax-paid tobacco products only to another wholesaler or a retail dealer or subjobber in this State. No wholesaler or other person may purchase tax-not-paid tobacco products from any seller not approved by the Tax Commissioner.

11.2 Neither the wholesaler, the wholesaler's employees nor any other parties may remove unstamped cigarettes or any other tobacco products from stock for any purpose other than affixing a stamp to the cigarettes or returning the tobacco products to the manufacturer. Neither the wholesaler, the wholesaler's employees or any other parties may consume unstamped cigarettes or tobacco products upon which the excise tax has not been paid. The wholesaler shall account for each and every package of tobacco products disposed of by a record available for inspection.

11.3. A wholesaler or retailer may not sell or distribute to consumers in this State, or acquire, hold, own, possess, import or transport into this State for sale or distribution in this State any tobacco products if the package of tobacco product bears any statement, label, stamp, sticker, or notice indicating that the manufacturer did not intend the tobacco products 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. A wholesaler or retailer may not sell or distribute to consumers in this State, or acquire, hold, own, possess, import or transport into this State for sale or distribution in this State any tobacco products 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.

11.5. A wholesaler or retailer may not sell or distribute tobacco products to consumers in this State, or acquire, hold, own, possess, import or transport into this State for sale or distribution in this State any cigarettes if any of the tobacco products

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. A wholesaler or retailer may not sell or distribute tobacco products to consumers in this State, or acquire, hold, own, possess, import or transport into this State for sale or distribution in this State tobacco products that the wholesaler or retailer knows or has reason to know were not intended by the manufacturer to be sold, distributed or used in the United States.

11.7. A wholesaler or retailer may not sell or distribute to consumers in this State, or acquire, hold, own, possess, import or transport into this State for sale or distribution in this State tobacco products for which 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 the tobacco products as required by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1355a;

11.8. A wholesaler or retailer may not alter any package of tobacco products 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 wholesaler may affix any stamp required by West Virginia Code § 11-17-1 et seq. to any package of cigarettes described in Subsection 11.3 of this Section and no wholesaler may alter any package of tobacco products in violation of Subsection 11.8 of this Section.

11.10. Misdemeanor offenses related to the excise tax are set forth in West Virginia Code § 11-17-9a. Felony offenses related to the excise tax are set forth in West Virginia Code § 11-17-19b.

#### **§ 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 the 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.

12.1.1. Unless otherwise permitted in writing by the Tax Commissioner, each delivery ticket or invoice for each purchase or sale of cigarettes and other tobacco products shall be recorded upon a serially numbered invoice showing the name and address of the seller and the purchaser, point of delivery, the date of delivery, quantity, and price of the tobacco product delivered in this State. The tax shall be set out separately, or the invoice shall indicate that the tax is included in the total price. The ticket or invoice shall include any 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 excise tax returns for tobacco products. The wholesaler shall indicate the exact date the tobacco products were received into stock. Each invoice shall reflect any shortage in the shipment in order to account for only those tobacco products that are of a salable quality.

12.1.4. All equipment, books, papers, invoices and records of any manufacturer, importer, wholesaler, sub-jobber, vending machine operator or retail dealer in this State, showing sales, receipts and purchases of cigarettes and other tobacco products 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 may investigate and examine the stock of cigarettes and other tobacco products in and upon any premises where they are placed, stored or sold, for the purpose of determining compliance with West Virginia Code § 11-17-1 et seq. and this rule. The Tax Commissioner, under the authority of West Virginia Code § 11-17-1 et seq., may also examine witnesses under oath in order to obtain and inspect the records, books and papers of any person required to file a report.

## 12.2. Reports.

12.2.1. 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 manufacturers, importers and common carriers to file a monthly report reflecting information the Tax Commissioner considers necessary to assure the proper assessment and payment of the excise tax. The Tax Commissioner may also require retail dealers to furnish similar reports. The report to be filed by wholesalers, subjobbers, vending machine operators and retailers, 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. A monthly inventory taken at the close of business on the last business day of the reporting period of all stamped cigarettes, all unstamped cigarettes and all other tobacco products;

12.2.1.b. Total purchases of tobacco products from all sources, supported by copies of invoices from each source of supply;

12.2.1.c. Total sales of stamped and unstamped tobacco products supported by sales slips or invoices issued to each customer and or records of sales through vending machines;

12.2.1.d. Total sales of tobacco products outside West Virginia. Separate records shall be maintained for each state into which tobacco products are shipped. Complete records shall 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 shall show:

12.2.1.d.1. The number of stamps and meter impressions on hand the last day of the previous reporting period;

12.2.1.d.2. The number of stamps and meter impressions purchased during the reporting period;

12.2.1.d.3. The number of stamps and the total number of meter impressions affixed during the reporting period; and

12.2.1.d.4. The number of stamps and meter impressions on hand at close of business on the last business day of the reporting period.

12.2.2. 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 file the report with the Tax Commissioner on or before the fifteenth day of each month immediately following the reporting period. The excise tax shown due on the monthly report shall be remitted on or before the due date of the monthly report. The due date shall be determined without regard to any authorized extension of time for filing the monthly report. 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. The Tax Commissioner shall assess a penalty of \$25.00 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 on stamp or meter impression purchases. The Tax Commissioner may suspend, revoke or cancel the Business Registration Certificate of the delinquent taxpayer to deal in cigarettes and other tobacco products following the second offense. Repeated infractions shall result in a cancellation of the authorization to deal in cigarettes and other tobacco products.

12.2.3. The taxpayer shall maintain a complete record is to be maintained by the taxpayer 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.

12.2.4. 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.

12.2.5. 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 § 16-9B-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 considers 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.

12.2.5.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 or 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 and allowing the importer to import the cigarettes. A copy of the permit shall 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, officer, agent, employee or representative of the authorized wholesaler or distributor 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 subdivision shall not be construed to prohibit disclosure of the information to the Attorney general pursuant to subdivision 12.2.4 of this rule;

12.3.4. A statement signed by the individual, officer, agent, employee or representative of the authorized wholesaler or distributor 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 shall file the Federal Cigarette Labeling and Advertising Act compliance statement with the United States Department of Health and Human Services and the Tax Commissioner on an annual basis and when the ingredients of the cigarettes change or there is a change in the warning requirements. Additionally, cigarettes shall not be released from the United States Customs Services without the appropriate labeling.

12.3.5.a.1. Any cigarettes found without either the mandated stamps or labeling are 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. and 60-9-3 impose on tobacco product manufacturers, as defined in West Virginia Code § 16-9B-3, the requirement to be either a participating manufacturer and fulfill financial obligations under the master settlement agreement or to place certain amounts of moneys in a qualified escrow fund. Because the status of the manufacturer is monitored to assure satisfaction of financial obligations, the manufacturer or importer shall include with its West Virginia tobacco excise tax 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. The Tax Commissioner may issue an assessment whenever an audit reveals a material discrepancy, tax liability, underpayment or other amount due.

**§ 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. Tobacco products 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. The tobacco products 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, 11-10-5s and other applicable 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 territory, possession, protectorate or any other state or subdivision thereof, or agencies or governmental subdivisions of this State. Specifically, the Tax Commissioner may 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.