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OFFICE WEST VIRGINIA
SECRETARY OF STATE

Office of the Secretary of State
Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, West Virginia 25305

Natalie E. Tennant
Secretary of State
State of West Virginia

Telephone: (304) 558-6000
Toll Free: 1-866-SOS-VOTE
Fax: (304) 558-0900
www.wvsos.com

March 2, 2012

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Lottery Commission

RULE: Amendment, 179CSR1, State Lottery Rule

DATE FILED AS FIRST AMENDMENT EMERGENCY RULE: May 11, 2012

ORIGINALLY FILED AS EMERGENCY RULE: February 27, 2012

DECISION NO. 5-12

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **approved**. A copy of the complete decision with required findings is available from this office.

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 5-12)

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- par. 1 The Lottery Commission (Commission) has filed the above amendments to an existing rule as an emergency rule.
- par. 2 W. Va. Code §29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The Commission filed this emergency rule with supporting documents with the Secretary of State May 11, 2012 and with the LRMRC May 11, 2012.
- par. 7 It is the determination of the Secretary of State that the Commission has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority -- W. Va. Code §29-22-5 reads:

§29-22-5. State lottery commission; powers and duties; cooperation of other agencies.
(a) The commission has the authority to:
(1) Promulgate rules in accordance with chapter twenty-nine-a of this code: Provided, That those rules promulgated by the commission that are necessary to begin the lottery games selected shall be exempted from the provisions of chapter twenty-nine-a of this code in order that the selected games may commence as soon as possible;

- (2) Establish rules for conducting lottery games, a manner of selecting the winning tickets and manner of payment of prizes to the holders of winning tickets;*
- (3) Select the type and number of public gaming systems or games, to be played in accordance with the provisions of this article;*
- (4) Contract, if deemed desirable, with the educational broadcasting authority to provide services through its microwave interconnection system to make available to public broadcasting stations servicing this state and, at no charge, for rebroadcast to commercial broadcasting stations within this state, any public gaming system or games drawing;*
- (5) Enter into interstate and international lottery agreements with other states or foreign countries, or any combination of one or more states and one or more foreign countries;*
- (6) Adopt an official seal;*
- (7) Maintain a principal office and, if necessary, regional suboffices at locations properly designated or provided;*
- (8) Prescribe a schedule of fees and charges;*
- (9) Sue and be sued;*
- (10) Lease, rent, acquire, purchase, own, hold, construct, equip, maintain, operate, sell, encumber and assign rights of any property, real or personal, consistent with the objectives of the commission as set forth in this article;*
- (11) Designate one of the deputy directors to serve as acting director during the absence of the director;*
- (12) Hold hearings on any matter of concern to the commission relating to the lottery, subpoena witnesses, administer oaths, take testimony, require the production of evidence and documentary evidence and designate hearing examiners and employees to so act; and*
- (13) To make and enter into all agreements and do all acts necessary or incidental to the performance of its duties and the exercise of its powers under this article.*
- (b) Departments, boards, commissions or other agencies of this state shall provide assistance to the state lottery office upon the request of the director.*
- (c) Upon the request of the deputy director for the security and licensing division in conjunction with the director, the attorney general, department of public safety and all other law-enforcement agencies shall furnish to the director and the deputy director such information as may tend to assure the security, honesty, fairness and integrity in the operation and administration of the lottery as they may have in their possession, including, but not limited to, manual or computerized information and data. The director is to designate such employees of the security and licensing division as may be necessary to act as enforcement agents. Such agents are authorized to investigate complaints made to the commission or the state lottery office concerning possible violation of the provisions of this article and determine whether to recommend criminal prosecution. If it is determined that action is necessary, an agent, after approval of the director, is to make such recommendation to the prosecuting attorney in the county wherein the violation occurred or to any appropriate law-enforcement agency.*

par. 9 It is the determination of the Secretary of State that the Commission has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- W. Va. Code §29A-3-15(f) defines "emergency" as follows:

(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

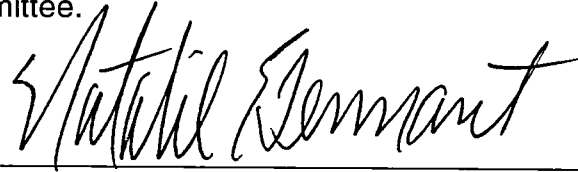
par. 12 The facts and circumstances as presented by the Commission are as follows:

The West Virginia Lottery has been granted the statutory authority to conduct background investigations of employees, vendors, and Commissioners. However, the current language of its statutes, while adequate for an investigation, does not contain the specific language required by the FBI before it will issue a national criminal background report when the fingerprints are submitted to the State Police and FBI by the Lottery. The FBI had previously authorized the issuance of national criminal background reports under the authority of a single Lottery statute. After a recent review and audit by the FBI the FBI is now requiring additional language before the Lottery may submit national criminal background requests for prospective employees, Commissioners, and vendors. Because of the change in the FBI's practice, the Lottery is unable to hire new employees or new vendors without this emergency amendment to the emergency rule which includes the FBI's required language. The statutory and rule language for licensing purposes only has been deemed adequate by the FBI, but the FBI-required language which is the subject of this rule is not present in existing code or rule for employees and vendors. All Lottery employees, vendors, and Commissioners are required to pass a background investigation before working for the Lottery to determine whether these groups of people have any disqualifying offenses. In the past, Lottery has never had any issues with the FBI regarding the authority to fingerprint for background checks, and Lottery was only recently notified of the FBI's required granting language to continue fingerprinting and obtaining necessary background reports as Lottery is authorized by State law to do. Therefore, this emergency amendment to the emergency rule is necessary to contract with new vendors and to hire new employees that are vital to Lottery operations. The Lottery's hiring process has effectively come to a standstill.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "immediate preservation of public peace, health, safety or welfare" and "prevent substantial harm to the public interest"

par. 14

This decision shall be cited as Emergency Rule Decision 5-12 or ERD 5-12 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Lottery Commission, the Attorney General and the Legislative Rule Making Review Committee.



NATALIE E. TENNANT
Secretary of State

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