

WEST VIRGINIA  
SECRETARY OF STATE  
KEN HECHLER  
ADMINISTRATIVE LAW DIVISION

Form #7

Do Not Mark In This Box  
Filing Date

FILED  
1991 JUL -3 10 4 23  
STATE OF WEST VIRGINIA  
ADMINISTRATIVE LAW DIVISION

Effective Date

July 15, 1991 *Jc*

NOTICE OF AN EMERGENCY RULE

AGENCY: ALCOHOL BEVERAGE CONTROL COMMISSIONER TITLE NUMBER: 175

CITE AUTHORITY: W. VA. CODE §§ 60-2-16 AND 60-8-23

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 4

TITLE OF RULE BEING AMENDED RETAIL SALE OF WINE IN GROCERY STORES,  
WINE SPECIALTY SHOPS AND PRIVATE WINE RESTAURANTS

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

TITLE OF RULE BEING FILED AS AN EMERGENCY: \_\_\_\_\_

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 35TH DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:  
W. VA. CODE § 60-8-2 SPECIFICALLY EXCLUDES FORTIFIED WINE FROM THE DEFINITION OF WINE: THE RULE IS NOT EQUALLY CLEAR. SECTION 60-8-4 STATES THAT THE WINE LITER TAX IS IMPOSED ON SALES BY SUPPLIERS TO DISTRIBUTORS. 175 C.S.R. 4, § 7.2.1 DOES NOT COMPLY WITH THAT REQUIREMENT. OTHER AREAS NEED TECHNICAL CORRECTIONS. ALSO, AN IMPROVED HEARING PROCEDURE IS NECESSARY TO PROVIDE APPROPRIATE PROCEDURAL PROTECTIONS. BECAUSE OF THE DIFFERENCES WHICH EXIST BETWEEN THE CODE AND THE RULE, CONFUSION CURRENTLY EXIST. AN EMERGENCY FILING IS NECESSARY TO PROTECT THE PUBLIC WELFARE.

L. FREDERICK WILLIAMS, JR.  
SECRETARY, TAX AND REVENUE

*L. Frederick Williams, Jr.*  
Signature



**State of West Virginia**  
**Department of Tax and Revenue**

**GASTON CAPERTON**  
GOVERNOR

Charleston 25305

**L. FREDERICK WILLIAMS, JR.**  
SECRETARY

STATEMENT OF CIRCUMSTANCE

The definition of "wine" is subject to different interpretations. Also, the wine liter tax is not collected from the retailer as indicated in the rule. Additionally, procedures for hearings are being up-dated.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Retail Sale Of Wine In Grocery Stores, Wine Specialty Shops  
And Private Wine Restaurants

Type of Rule:  X  Legislative   Interpretive   Procedural

Agency: Alcohol Beverage Control Commission Address: 322 70th Street, S.E.  
Charleston, WV 25304

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$	\$	\$	\$	\$
Personal Services	-0-	-0-	-0-	-0-	-0-
Current Expense	-0-	-0-	-0-	-0-	-0-
Repairs and Alterations	-0-	-0-	-0-	-0-	-0-
Equipment	-0-	-0-	-0-	-0-	-0-
Other	-0-	-0-	-0-	-0-	-0-

2. Explanation of above estimates:

There should be no fiscal impact on Departmental expenses.

3. Objectives of these rules:

The rules explain and clarify the licensing of wine suppliers, distributors, retailers, wine specialty shops and private wine restaurants, and the sale of wine by those persons. The amendments clarify the definition of "wine," collection of the wine liter tax and refund claims.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

There should be no economic impact.

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

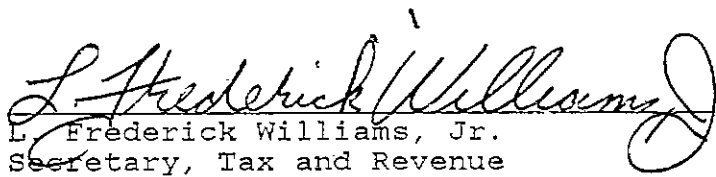
There should be no economic impact.

C. Economic Impact on Citizens/Public at Large.

There should be no economic impact.

Date: July 3, 1991

Signature of Agency Head or Authorized Representative

  
L. Frederick Williams, Jr.  
Secretary, Tax and Revenue

DATE: JULY 3, 1991

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: ALCOHOL BEVERAGE CONTROL COMMISSIONER

EMERGENCY RULE TITLE: RETAIL SALES OF WINE IN GROCERY STORES, WINE SPECIALTY SHOPS AND PRIVATE WINE RESTAURANTS

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1. Date of filing: July 3, 1991
2. Statutory authority for promulgating the emergency rule: W. Va. Code § 60-2-16 and
3. Date of filing of proposed legislative rule: July 3, 1991
4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?  
Yes
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.  
Confusion exists because of differences between the Code and the rule about the definition of wine and collection of the wine liter tax. An emergency filing is necessary to assure statutory compliance and assure preservation of the public welfare.
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



State of West Virginia  
Department of Tax and Revenue

Charleston 25305

GASTON CAPERTON  
GOVERNOR

FILED  
1991 JUL -8 PM 4:28  
OFFICE OF WEST VIRGINIA  
SECRETARY OF TAX AND REVENUE  
L. FREDERICK WILLIAMS, JR.  
SECRETARY

CONSENT TO FILE RULE

July 3, 1991

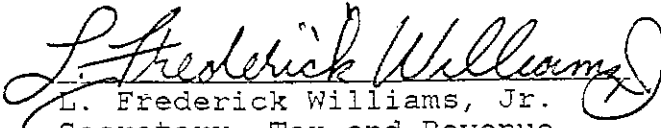
To Whom It May Concern:

Title of Rule: Retail Sale Of Wine Grocery Stores, Wine  
Specialty Shops And Private Wine Restaurants  
Title Number: 175  
Series Number: 4

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Pursuant to West Virginia Code § 5F-2-2(a), the undersigned hereby consents to the filing of the foregoing rule.

Signed this third day of July, 1991.

  
L. Frederick Williams, Jr.  
Secretary, Tax and Revenue

FILED

EMERGENCY  
WEST VIRGINIA LEGISLATIVE REGULATIONS JUL 2 PM 4:25  
ALCOHOL BEVERAGE CONTROL COMMISSIONER  
DEPARTMENT OF TAX AND REVENUE OFFICE OF WEST VIRGINIA  
TITLE 175 SECRETARY OF STATE  
SERIES 4  
1991

RETAIL SALE OF WINE IN GROCERY STORES,  
WINE SPECIALTY SHOPS AND PRIVATE WINE RESTAURANTS

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§ 175-4-1. General.

1.1 **Type of Regulation.** - These regulations are legislative regulations as defined in West Virginia Code § 29A-3-1 et seq.

1.2 **Scope.** - These legislative regulations repeal and replace 175 C.S.R. 4 and establish the procedure for the supply, distribution and retail sale of wine in the State of West Virginia by grocery stores, wine specialty shops, private wine restaurants and restaurants specially licensed to sell West Virginia wines.

1.3 **Authority.** - These legislative regulations are promulgated under the authority of West Virginia Code §§ 60-2-16, 60-8-23 and 29A-3-1 et seq.

1.4 **Filing Date.** -

1.5 **Effective Date.** -

1.6 **Citation.** - These legislative regulations may be cited as 175 C.S.R. 4, § \_\_\_\_\_ (1991).

§ 175-4-2. Definitions.

2.1 **Definition of terms used.** - As used in these regulations, unless the context clearly requires otherwise, the following terms shall have the meaning ascribed herein, and shall apply in the singular and in the plural.

2.1.1 "Advertisement" means any advertisement of alcoholic liquors through the medium of billboards, newspapers, magazines, or similar publications, and display materials or equipment except that such term shall not include: (1) any label affixed to any container of alcoholic liquors or wine, or any individual covering, carton or other wrapper of such container; or (2) any editorial or other reading matter in any periodical or publication or newspaper for the preparation or publication of which no money or other valuable consideration is paid or promised, directly or indirectly, by any person subject to these regulations.

2.1.2 "Alcohol" means ethyl alcohol, whatever its origin, and shall include synthetic ethyl alcohol but not denatured alcohol.

2.1.3 "Alcoholic liquor" or "liquor" means alcohol, beer, fortified wine and distilled spirits, and any liquid or solid capable of being used as an alcoholic beverage, but shall not include wine with an alcohol content of fourteen percent (14%) or less by volume, nonintoxicating beer or nonintoxicating beverages.

2.1.4 "Alcohol Beverage Control Commissioner" or "ABCC" or "Commissioner" means the West Virginia Alcohol Beverage Control Commissioner (Administrator) or his delegate.

2.1.5 "Average Monthly Inventory" means the amount of food, food products and consumable supplies for the table which are maintained in the inventory of a licensed retailer. Such phrase shall not include stock or inventory of wine. With respect to grocery stores which have no demonstrable history of inventory maintenance of such products on an average monthly basis, such grocery store shall not be granted licensure as a wine retailer until the applicant can demonstrate such history during the three (3) months next preceding the date on which licensure is granted. With respect to those applicants for licensure as a wine retailer, whose business is primarily seasonal because of their association with or close dependence upon a lodge, resort or similar establishment and the Commissioner so finds, such applicant will be permitted to select any quarter during the twelve (12) month period next preceding the month during which application for licensure is made during which quarter so selected the requisite inventory was maintained by the applicant for each month during such quarter. All other applicants for licensure as a wine retailer, other than those with no demonstrable inventory history or those with a seasonal history, who are applying as a grocery store must demonstrate the maintenance of the requisite inventory over the twelve (12) months period next preceding the year or part thereof for which licensure is sought.

2.1.6 "Average Monthly Sales" means the amount of food, food products and consumable supplies for the table which are sold by a licensed retailer. Such phrase shall not include the sales of wine. With respect to grocery stores which have no demonstrable history of sales of such products on an average monthly basis, such grocery store shall not be granted licensure as a wine retailer until the applicant can demonstrate such history during the three (3) months next preceding the date on which licensure is granted. With respect to those applicants for licensure as a wine retailer, whose business is primarily seasonal because of their association with or close dependence upon a lodge, resort or similar establishment and the Commissioner so finds, such applicant will be permitted to select any quarter during the twelve (12) month period next preceding the month during which application for licensure is made during which quarter so selected the requisite sales level was maintained by the applicant for each month during such quarter. All other applicants for licensure as a wine retailer, other than those with no demonstrable inventory history or those with a seasonal history, who are applying as a grocery store must demonstrate the requisite sales over the twelve (12) month period next preceding the year or part thereof for which licensure is sought.

2.1.7 "Case lot" means a complete case of distilled spirits.

2.1.8 "Commissioner" means the West Virginia Alcohol Beverage Control Commissioner or his delegate.

2.1.9 "Department" means the West Virginia Department of Tax and Revenue.

2.1.10 "Distilled spirits" means ethyl alcohol, ethanol or spirits of wine, including all dilutions and mixtures thereof, from whatever source or by whatever process produced, for beverage use, and shall include, but not be limited to, neutral spirits, whiskey, brandy, rum, gin, vodka, cordials and liqueurs. Any alcoholic beverage containing more than twenty-four percent (24%) of alcohol by volume shall be deemed to be distilled spirits.

2.1.11 "Distributor" means any person whose principal place of business is within this State, and who is engaged in selling or distributing wine to retailers or private wine restaurants and selling or distributing port, sherry and madeira wines to wine specialty shop under the authority of West Virginia Code article 60-8 and actually maintains a warehouse in this State for the distribution of wine.

2.1.12 "Food" and "food products" means and includes edible foodstuffs intended for human consumption and items commonly thought of as food, including, by way of illustration and not by limitation, cereals and cereal products, meat and meat products, fish and fish products, poultry and poultry products, fresh and salt water animal products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, flour and flour products, sugar and sugar products, milk and milk products, cocoa and cocoa products, coffee and coffee substitutes, tea, herbs, spices, salt and salt substitutes, condiments, soft drinks, soft drink mixes and syrups, tenderizers, food coloring, bottled drinking water, sugar substitutes, oleomargarine, shortening, gelatins, baking and cooking ingredients, mushrooms, spreads, relishes, desserts, flavorings, edible seeds, nuts and berries: **Provided**, that the term "food" and "food for meals" does not include medicines, vitamins and dietary supplements whether in liquid, powdered, granular, tablet, capsule, lozenge, or pill form; spiritous, malt or vinous liquors or beer; ice; tobacco or tobacco products; candy and confections; chewing gum; cake letters; breath mints; or food sold through a vending machine.

2.1.13 "Food or Foodstuffs Normally Associated with Wine" means food and food products but shall exclude:

2.1.13.1 Any product containing alcohol, other than wine, permitted to be sold at retail pursuant to West Virginia Code article 60-8, including, but not limited to, nonintoxicating beer;

2.1.13.2 Soft drinks; and

2.1.13.3 Tobacco and tobacco products, and other products associated with the use of tobacco, and any other product exempt from consumer sales and service tax.

2.1.14 "Fortified wine" means any wine to which brandy or other alcohol has been added and includes dessert wines which are not fortified and any wine containing greater than fourteen percent (14%) alcohol by volume: **Provided**, That fortified wine shall not include wine with an alcohol content

greater than fourteen percent (14%) if such alcohol content is derived solely from fermentation and no brandy or other alcohol has been added.

2.1.15 "Grocery Store" means any retail establishment, commonly known as a grocery store, supermarket or delicatessen, where food, food products and supplies for the table are sold for consumption off the premises with average monthly sales (exclusive of sales of wines) of not less than three thousand dollars and an average monthly inventory (exclusive of inventory of wine) of not less than three thousand dollars. The term "grocery store" shall also include and mean a separate and segregated portion of any other retail store which is dedicated solely to the sale of food, food products and supplies for the table for consumption off the premises with average monthly sales with respect to such separate or segregated portion (exclusive of sales of wine) of not less than three thousand dollars and an average monthly inventory (exclusive of inventory of wine) of not less than three thousand dollars.

2.1.16 "Immediate family" means and includes, but is not necessarily limited to:

2.1.16.1 If the licensed retailer or private wine restaurant is other than a partnership or corporation, the licensed retailers' spouse, brother, sister, son, daughter, mother, mother-in-law, father, father-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, uncle, aunt or cousin;

2.1.16.2 If the licensed retailer or private wine restaurant is a partnership, each partners' spouse, mother, father, brother, sister, son, daughter, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, uncle, aunt or cousin of each such partner;

2.1.16.3 If the licensed retailer or private wine restaurant is a corporation, the corporations' directors, officers or employees and the spouse, mother, father, brother, sister, son, daughter, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, uncle, aunt or cousin of each such director, officer or employee.

2.1.17 "Importer" means a person who brings in or carries in goods from a foreign country for the purpose of sale of such goods in this country.

2.1.18 "Intoxicated" means having one's faculties impaired by alcohol or other drugs to the point where physical or mental control or both are markedly diminished.

2.1.19 "Licensed retailer" means any person such as a grocery store or wine specialty shop licensed in accordance with West Virginia Code article 60-3, 60-3A or 60-8 by the Commissioner to sell wine at retail to the public for off-premises consumption and shall, where applicable, include private clubs licensed under the provisions of West Virginia Code article 60-7; and shall, with respect to municipal tax and consumer sales tax, be deemed to include farm wineries; however, the term shall not include a private wine restaurant or restaurants specially licensed in accordance with West Virginia Code § 60-8-3(k).

2.1.20 "Manufacture" means to distill, rectify, ferment, brew, make, mix, concoct, process, blend, bottle or fill an original package with any alcoholic liquor or wine.

2.1.21 "Manufacturer" means any person engaged in the manufacture of any alcoholic liquor or wine, and among others will include but not be limited to, a producer, broker, processor, bottler, importer, distiller, rectifier, winemaker or brewer.

2.1.22 "Municipal Tax" means, for purposes of these regulations, the tax imposed by any municipality upon purchases of wine pursuant to the provisions of West Virginia Code § 8-13-7, and shall also include taxes imposed upon all purchases of wine made or consummated outside the corporate limits of any municipality under the provisions of West Virginia Code § 60-3-9d.

2.1.23 "Nonintoxicating beer" shall mean all cereal malt beverages or products of the brewing industry commonly referred to as beer, lager beer, ale and all other mixtures and preparations produced by the brewing industry, including malt coolers and containing at least one half of one percent (.5%) alcohol by volume, but not more than four and two-tenths percent (4.2%) of alcohol by weight, or six percent (6%) by volume, whichever is greater, all of which are declared by West Virginia Code § 11-16-3 to be nonintoxicating and the word "liquor" as used in West Virginia Code § 60-1-1 *et seq.* shall not be construed to include or embrace nonintoxicating beer nor any of the beverages, products, mixtures or preparations included within this definition.

2.1.24 "Original package" means any closed or sealed container or receptacle used for holding alcoholic liquor or wine.

2.1.25 "Person" means any individual; partnership, joint stock company, business trust, association, corporation or other form of business enterprise, including a receiver, trustee or liquidating agent.

2.1.26 "Post-off" means any discount (irrespective of its denomination by the supplier) which a supplier gives to a distributor which relates to a specific brand, class and type of wine or size thereof, which discount is of limited duration, and which bears no relationship to the amount or quantity of such wine purchased by the distributor from the supplier.

2.1.27 "Private wine restaurant" means a restaurant which: (1) Is a partnership, limited partnership, corporation, unincorporated association or other business entity which has as its principal purpose the business of serving meals on its premises to its members and their guests; (2) is licensed under the provisions of West Virginia Code article 60-8 as to all of its premises or as to a separate segregated portion of its premises to serve wine to its members and their guests when such sale accompanies the serving of food or meals; and (3) admits only duly elected and approved dues-paying members and their guests while in the company of a member, and does not admit the general public.

2.1.28 "Public place" means any place, building or conveyance to which the public has, or is permitted to have access, including restaurants, soda fountains, hotel dining rooms, lobbies, and corridors of hotels and any highway, street, lane, park or place of public resort or amusement: **Provided,**

That the term "public place" shall not mean or include any of the above-named places or any portion or portions thereof which qualify and are licensed under the provisions of West Virginia Code Chapter 60 to sell alcoholic liquors for consumption on the premises.

2.1.29 "Retail liquor store" means a store established and operated under the authority of West Virginia Code article 60-3 or West Virginia Code article 60-3A for the sale of alcoholic liquor in the original package for consumption off the premises.

2.1.30 "Sale" means any transfer, exchange or barter in any manner or by any means, for a consideration, and shall include all sales made by principal, proprietor, agent or employee.

2.1.31 "Selling" shall include solicitation or receipt of orders, possession for sale, or possession with intent to sell.

2.1.32 "Soft drink" means any product subject to taxation under the provisions of West Virginia Code article 11-19.

2.1.33 "Spirits" means any alcoholic liquor obtained by distillation and mixed with potable water and other substances in solution and includes brandy, rum, whiskey, cordials and gin.

2.1.34 "Supplier" means any manufacturer, producer, processor, bottler, importer, wholesaler or other supplier of wine who sells, offers to sell, solicits or negotiates the sale of wine to any licensed West Virginia distributor.

2.1.35 "Varietal wine" means any wine labeled according to the grape variety from which such wine is made."

2.1.36 "Vintage wine" or "vintage-dated wine" means wines from which the grapes used to produce such wine are harvested during a particular year or wines produced from the grapes of a particular harvest in a particular region of production.

2.1.37 "Wine" means any beverage obtained by the natural fermentation of the natural content of grapes, other fruits, or honey or other agricultural products; containing sugar, and shall include table wine, but is not limited to, still wines, champagne and other sparkling wines, carbonated wines, imitation wines, vermouth, cider, perry, sake, port, sherry, madeira or other product offered for sale or sold as wine containing not less than seven percent (7%) nor more than twenty-four fourteen percent (24%) (14%) alcohol by volume and shall exclude fortified wine and shall also exclude any product defined as or embraced within the definition of nonintoxicating beer: Provided, That for purposes of these regulations, wine shall include wine coolers and similar beverages containing not less than one-half of one percent (.5%) nor more than seven percent (7%) alcohol by volume.

2.1.38 "Winery" means an establishment where wine is manufactured or in any way prepared.

2.1.39 "Wine accessories" means any product or item directly associated with the use and consumption of wine, e.g.: (1) Glasses, (2) carafes, (3) decanters, (4) wine racks, (5) books, magazines and other publications devoted principally to foods and wines, (6) napkins, (7) items or products similar in nature and/or use to any of the foregoing.

2.1.40 "Wine specialty shop" means a licensed retailer who shall deal principally in the sale of table wine, certain fortified wines, wine accessories and food or foodstuffs normally associated with wine and (1) who shall maintain a representative number of such wines for sale in his inventory which are designated by label as varietal wine, vintage, generic and/or according to region of production and the inventory shall contain not less than fifteen percent (15%) vintage of vintage-dated wine by actual bottle count and (2) who, any other provisions of the Code of West Virginia to the contrary notwithstanding, may maintain an inventory of port, sherry and madeira wines having an alcoholic content of not more than twenty-two percent (22%) alcohol by volume and which have been matured in wooden barrels or casks.

### § 175-4-3. Suppliers.

3.1 Registration of suppliers and sales representatives. - All suppliers are required to be registered and licensed by the Commissioner prior to entering into any sales transactions with a licensed West Virginia distributor. To the extent suppliers are either registered or licensed by the Commissioner to sell wine to a distributor, or to the extent such supplier has a representative licensed pursuant to the provisions of West Virginia Code § 60-4-22 requiring the licensure of sales representatives, such supplier will be deemed to have qualified and registered pursuant to the provisions of W. Va. Code § 60-8-6, which requires the registration of persons or firms supplying or furnishing wine to licensed distributors. Every supplier must have a representative licensed to solicit or consummate sales in this State. Such licensure and registration shall be effectuated by completion of Application for Representative's License, Alcohol Beverage Control Commissioner Form No. ABC-181, which form must be completed and acknowledged by a notary public in the manner provided in such form.

3.1.1 The registration of one (1) sales representative shall not preclude the required registration and licensure of other persons acting as sales representative for the same supplier.

### 3.2 Monthly report of supplier; form; content.

3.2.1 Suppliers are required to furnish properly completed monthly reports of the quantity of wine sold and shipped by suppliers to licensed distributors in this State. This quantity shall be reported in liters or liter equivalents. Such report is required to be filed no later than the fifteenth (15th) day of the month next succeeding the month for which the report is made. Such report shall be made on Monthly Summary Report of Total Liters Sold, Shipped and Delivered to Distributors, West Virginia Alcohol Beverage Control Commissioner Form ABCC-WS-1-F and only one (1) monthly report need be filed by a supplier even though that supplier may have more than one (1) licensed sales representative in the State.

3.2.2 Such report shall contain the following information:

3.2.2.1 The name and address of the supplier;

3.2.2.2 The name and address of the licensed West Virginia representative of the supplier. If the supplier has more than one licensed representative, the licensed representative primarily responsible for the State of West Virginia only need be given, and if all representatives are of equal status, then the name of only one (1) representative need be given;

3.2.2.3 The month for which the report is being made;

3.2.2.4 The name or names of all distributors to whom deliveries were made, the address of all such distributors and the Alcohol Beverage Control Commissioner license number of such distributors;

3.2.2.5 The total number of liters sold and delivered to such distributor;

3.2.2.6 The identification of the person preparing the report on behalf of the supplier and the business telephone number of such person.

All such reports shall be acknowledged before a notary public in the manner provided upon such form.

**3.3 Invoices required; copies to Commissioner; content.** - Two (2) copies of all invoices of all shipments made during the month for which the report is made shall be forwarded to the Commissioner at the time of shipment to a licensed distributor. The invoice shall identify the licensed distributor to whom such shipment is made, the items so shipped by label identification and the quantity stated in liters and the alcohol content of each items so sold, shipped and delivered to such distributor.

**3.4 Post-offs permitted; limitations and restrictions.** - Post-offs shall be permitted subject to the limitations and restrictions herein. No supplier shall offer to any distributor in this State any post-off which is conditioned upon either:

3.4.1 a requirement that the distributor pass through such post-off to any retailer, or

3.4.2 that the distributor participate in such post-off in such a way that the distributor is required to match, either in whole or in part, such post-off. Every post-off shall be offered under equal terms and conditions to every distributor carrying the product of the supplier to which the post-off applies.

3.4.3 Nothing herein shall be construed so as to prohibit the participation by a distributor in any post-off offered by a supplier or from passing on to any licensed retailer or private wine restaurant such post-off so long as the same meets the provisions of this regulation and so long as such post-off is passed on to all retailers, in whole or in part, equally.

3.5 Sales to retailer by supplier prohibited. - No supplier, except a farm winery, shall sell or furnish wine to a licensed retailer or private wine restaurant except through a licensed distributor or the Commissioner.

§ 175-4-4. Wine Distributors.

4.1 Licensure application; form. - The application for licensure as a wine distributor shall be upon forms designated, Application for Wine Distributor License, Alcohol Beverage Control Commissioner Form No. ABCC-WS-1, which shall be provided by the Commissioner.

4.2 Licensure application; content. - The application for licensure as a wine distributor shall contain and include the following:

4.2.1 The name and address of applicant and shall state whether the applicant is an individual, corporation, partnership, association or other business entity;

4.2.2 The business trade name of the applicant;

4.2.3 The exact location of the principal place of business;

4.2.4 The number and exact location of all warehouses to be operated by the applicant for the purpose of distribution of wine;

4.2.5 The date upon which the applicant began the operation of the business;

4.2.6 Whether the applicant is the owner of all business premises for which the license is issued, and if not, whether the applicant is the actual and bona fide lessee of any or all such premises and shall include the lessor's name and address for each business premises so leased;

4.2.7 Whether the applicant intends to carry on the business for which he is to be licensed for himself or under his immediate supervision or direction, and if not, the name, age and address of the person who will manage or conduct the affairs of the distributorship sought to be licensed;

4.2.8 Whether the place of business for which the license is sought conforms to all applicable health and fire laws and regulations and whether the premises for which the license is sought conforms to existing zoning ordinances;

4.2.9 Whether the applicant, if an individual, or whether any partner, member, officer, director or stockholder of the applicant holds or owns any interest in any licensed wine retailer, and if so, the extent and nature of such ownership;

4.2.10 If the applicant is an individual, a statement whether such applicant is a citizen of the United States, a bona fide resident of the State of West Virginia and the length of such residency and whether such applicant has attained the age of eighteen (18) years;

4.2.11 If the applicant is a partnership, association or other business entity, as to each member, a statement whether such member is a citizen of the United States, a bona fide resident of the State of West Virginia and the length of such residency and whether such member has attained the age of eighteen (18) years;

4.2.12 If the applicant is a corporation, a statement whether the person or persons who are or will be conducting or managing the business of such applicant are citizens of the United States, residents of the State of West Virginia and whether such person or persons have attained the age of eighteen (18) years;

4.2.13 Whether the applicant or any partner, member, manager, officer, director or person owning twenty percent (20%) or more of the stock or beneficial interest in the applicant:

4.2.13.1 Has been convicted of a felony or other crime involving moral turpitude within three (3) years next preceding the filing date of the application;

4.2.13.2 Has been convicted of a violation of the liquor laws of any state or the United States within two (2) years next preceding the filing date of the application; or

4.2.13.3 Had any license revoked under the liquor laws of any state or of the United States within five (5) years next preceding the filing date of the application;

4.2.14 Whether the applicant has entered into any exclusive franchise agreement with any manufacturer, producer, processor, distributor or supplier of wine to the extent that the applicant has been granted the exclusive right within the State of West Virginia or within any given territory thereof to distribute the product or products of such manufacturer, producer, processor, distributor or supplier;

4.2.15 If the applicant is a corporation, the names, addresses and corporate title of all officers, which statement shall include the name, address and age of all persons having twenty percent (20%) or more of stock or beneficial interest in the applicant; and

4.1.16 Such other information as the Commissioner may from time to time require.

**4.3 Licensure application; signature and acknowledgment required.** - All applications shall be signed by the applicant and shall be made under oath and acknowledged or verified. In the case of a partnership, the application shall be signed by each of the partners: **Provided**, That in the case of a limited partnership, the application shall be signed by each of the general partners and each limited partner who owns twenty percent (20%) or more of the capital or profits of such limited partnership. In the case of a voluntary association, all members of the governing board shall sign. In the case of a corporation, each officer and director shall sign.

4.4 **Bond.** - No license shall be issued to any applicant for licensure as a distributor until the applicant therefore has executed a surety bond in the penal sum of ten thousand dollars (\$10,000), payable to the State of West Virginia. The surety of said bond shall be executed by a corporate surety authorized to transact business in the State of West Virginia. Such bond shall be conditioned on the payment of all fees and taxes prescribed by the law and on the faithful performance of, and compliance with, the provisions of West Virginia Code article 60-8, and these regulations. The bond required hereby shall be executed on Wine Distributor Bond, Alcohol Beverage Control Commissioner Form No. ABCC-WS-1-B.

4.5 **Corporate charter, partnership agreement or association bylaws required.** - If the applicant for licensure as a wine distributor is a corporation, the applicant shall furnish with its application a copy of its corporate charter, including any amendments thereto. If the applicant is a partnership, limited partnership or association, such applicant shall provide a copy of the partnership agreement or a copy of the association's bylaws.

4.6 **Fees.** - An applicant for licensure as a wine distributor shall remit with the application the annual fee for such license which twenty-five hundred dollars (\$2,500) for the distributor's license and a like amount for each separate warehouse or facility from which the distributor sells, transfers or delivers wine. The annual licensing period shall begin on July 1 of the year for which the application is made and shall end on June 30 of the following year.

If the application is for licensure for less than an entire fiscal year, then such fee shall be proportionate to the remainder of such year according to the date of application, as follows:

4.6.1 If application be made at any time from July 1 through December 31, such fee shall be for the full fiscal year.

4.6.2 If the application be made at any time from January 1 through June 30, such fee shall be one half (1/2) of the annual fee.

Such fee shall be payable to the West Virginia Alcohol Beverage Control Commissioner by certified check, cashier's check or money order.

4.7 **Investigations.** - Upon receipt of an application for licensure as a wine distributor and of the fee, bond and other documents required to be provided with such application, the Commissioner shall make a thorough investigation to determine whether the applicant and all locations and premises to be operated by the applicant pursuant to the license applied for qualify for licensure and shall investigate all matters connected therewith, including, but not limited to, such matters which may affect the public welfare, health and morals.

4.8 **Refusal of license.** - No license shall be issued to any applicant:

4.8.1 That submits an application for licensure that contains any false statement;

4.8.2 - That is affirmatively shown to be not a suitable person in the community or communities in which it operates;

4.8.3 In which any partner, member, manager, officer, director or stockholder owning twenty percent (20%) or more stock or other person conducting or managing the affairs of the applicant or of the proposed licensed premises, in whole or in part:

4.8.3.1 Has been convicted of a felony or other crime involving moral turpitude within three (3) years next preceding the filing date of the application, or

4.8.3.2 - has been convicted of violating the liquor laws of any state or the United States within two (2) years next preceding the filing date of the application, or

4.8.3.3 had any license revoked under the liquor laws of any state or the United States within five (5) years next preceding the filing date of the application; or

4.8.4 - Fails to meet the requirements of the liquor laws or the regulations of either this State or of the United States.

**4.9 License not transferable.** - A license issued to a distributor shall be valid only for the person, firm or corporation named thereon. Such license shall extend to all warehouses utilized by such person, firm or corporation for the distribution of wine to licensed retailers. Such license is not transferable. If there is a change in beneficial ownership of the distributor to the extent of twenty percent (20%) or less, the Commissioner shall be notified in writing with respect thereto within ten (10) days next succeeding such transfer. If there is a change in the beneficial ownership of the distributor in excess of twenty percent (20%), such license shall be voided and the licensee must make application for a new license. In the event there is transfer in the beneficial ownership of any interest in a licensed distributor, irrespective of the amount thereof, the new ownership of such beneficial interest must meet all of the requirements of the provisions of any and all laws of the United States and any Rules and Regulations promulgated pursuant thereto and of the laws of the State of West Virginia, including, but not limited to, the provisions of chapter sixty of the Code and Rules and Regulations promulgated pursuant thereto.

**4.10 Warehousing; copies of license to be posted; records required to be maintained at each warehouse; interdistributor coming of stock prohibited.**

4.10.1 All licensed distributors must have, prior to licensure as such, sufficient and adequate warehouse facilities for the storage and distribution of wine. Such facilities shall be:

4.10.1.1 Located in a building which has floor space adequate to stock projected wine inventory in a safe manner;

4.10.1.2 Located in a building which is not used as a dwelling place or a garage; and

4.10.1.3 Located in a building having adequate egress and ingress for delivery trucks.

4.10.2 In the event a distributor maintains separate warehouse facilities, a copy of his license must be displayed at each warehouse location.

4.10.3 In the event a licensed distributor has more than one warehouse to which the license applies and from which wine is distributed, each warehouse shall be regarded as a separate entity and any record, invoice or other document required by law or these regulations to be kept by such distributor shall actually be maintained at each warehouse with respect to all wine received at and/or distributed from such warehouse.

4.10.4 Except with respect to interdistributor transfers that may be authorized by the laws of this State or by these regulations, no licensed distributor shall utilize in any manner the warehouse facilities of another licensed distributor nor shall the wine stock of any distributor be comingled in any way with the wine stock of any other licensed distributor.

**4.11 Change of location.** - If any distributor desires or intends to change the location of his principal place of business or of any warehouses, or to acquire and utilize an additional warehouse or warehouses for the distribution of wine during the period for which his license is current, such distributor shall notify the Commissioner in writing at least thirty (30) days next preceding the date of such relocation or acquisition and may do so only upon the written approval of the Commissioner: **Provided**, That in the case of fire or flood, the thirty (30) day advance notice may be waived by the Commissioner upon request of the affected distributor.

**4.12 Wine label registration required.** - No wine may be sold by a supplier to a licensed distributor or by a licensed distributor to a licensed retailer or private wine restaurant until the label of such wine is registered with the Commissioner.

**4.13 Label registration; form; number required.** - Application for label registration by a licensed distributor shall be upon Wine Label Registration, Alcohol Beverage Control Commissioner Form No. ABCC-WS-1-D.

Only one (1) registration shall be required irrespective of the number of various sizes of the wine or product to be sold.

**4.14 Label registration; content.** - The application for wine label registration shall contain and include the following:

- 4.14.1 The West Virginia distributor's name;
- 4.14.2 The West Virginia distributor's State license number;
- 4.14.3 The West Virginia distributor's federal basic permit number;
- 4.14.4 The name and address of the supplier;

4.14.5 The name of the West Virginia licensed representative of the supplier. If the supplier has more than one (1) licensed representative, only the name of the representative dealing primarily with the West Virginia distributor need be given;

4.14.6 The brand name of the wine to be registered;

4.14.7 The class and/or type of wine to be registered;

4.14.8 The alcohol content of the wine by volume;

4.14.9 The date upon which such wine label registration application is made; and

4.14.10 The signature and title of the person actually making or completing such registration on behalf of the licensed distributor.

The label registration form shall be accompanied by unattached labels of all wines to be registered, and ATF Form 1649, Application for and Certification of Label Approval Under Federal Alcohol Administration Act.

**4.15 Label registration; fees.** - A fee of three dollars (\$3.00) for each label submitted for registration shall be remitted at the time of registration. Payment of such fee may be made by either certified check, cashier's check or money order payable to the Alcohol Beverage Control Commissioner.

**4.16 Presales required; sales by route delivery men prohibited; invoices or purchase orders required.** - No route delivery men or other person delivering wine from a distributor to a licensed retailer shall be permitted to sell or to deliver to such retailer any wine which has not been previously ordered by such retailer. All sales of wine from a distributor to a retailer shall be upon order made by such retailer prior to the delivery thereof and all such sales shall be paid for in their entirety upon delivery thereof. No distributor shall transport any wine for which there is no invoice or purchase order.

No delivery shall be increased in the amount of wine delivered beyond that which has been previously ordered nor shall there be any substitution of any particular wine for another which has not been previously ordered.

**4.17 Credit sales prohibited.** - No credit shall be extended by the distributor to a licensed retailer, either in whole or in part, for any wine product received by a licensed retailer and every delivery of wine to a licensed retailer shall be paid for in its entirety no later than the completion of such delivery. All distributors must immediately, and in the regular course of business, deposit in a bank all checks given them by licensed retailers for the purchase of wine. No distributor shall through himself, his agents or employees, enter into any agreement or understanding with any licensed retailer to hold any checks so given beyond the time required by this regulation.

The giving of a worthless check by the licensed retailer to a distributor or the acceptance of a worthless check from the licensed retailer by a distributor, shall be prima facie evidence of an extension of credit and shall,

in the discretion of the Commissioner, be grounds for the revocation or suspension of such licensed retailer's or distributor's license.

**4.18 Split case sales permitted; charges.** - A distributor may distribute wine to a licensed retailer or private wine restaurant in either full cases containing only one (1) size and type of wine or in "Split Cases" which is a case of wine which is not entirely of one (1) size and type. The distributor may charge a surcharge in an amount to be determined by him, which shall be applied equally to every licensed retailer to whom such distributor sells split cases.

**4.19 Transportation of wine or other alcoholic liquors by distributors.** - A distributor, by virtue of his license as such, may transport within this State any wine permitted to be sold at retail under the provisions of West Virginia Code article 60-8 which wine has either been consigned to him, or for which the person actually transporting such wine has either an invoice or purchase order in his possession. A distributor may not transport any other alcoholic liquor without a transportation permit issued by the Commissioner.

**4.20 Platform deliveries permitted.** - Platform deliveries or truck pickups at the licensed premises of a distributor by a licensed retailer or private wine restaurant are permitted so long as the person taking possession at the time of delivery is twenty-one (21) years of age or older.

**4.21 Identification of distributor representatives and employees.** - All promotional representatives or other persons soliciting sales on behalf of a distributor and every person delivering wine for a distributor must have identification cards provided by such distributor identifying them as the representative or employee of such distributor and must exhibit such identification on demand by any licensed retailer or representative of the Commissioner.

**4.22 Samples.** - Distributors shall be permitted to give a sample to a licensed retailer or a private wine restaurant of any wine not then currently carried in the inventory of such licensed retailer or private club. No sample may be sold by the licensed retailer or private wine restaurant. All such samples shall be noted on the report required to be filed under the provisions of West Virginia Code § 60-8-4, such report to be attached to the Distributor's Summary of Wine Sales and Taxes, and to be made on the Distributor's Monthly Report of Breakage, Leakage, Spoilage and Samples, Alcohol Beverage Control Commissioner Form No. ABCC-SW-1-G. Samples may be no greater in amount than 750 milliliters and must be labeled with the word "Sample" clearly printed thereon in at least one inch point type and shall indicate that such product is not for sale.

**4.22.1** Only a licensed distributor may give such samples to a licensed retailer or private wine restaurant. Suppliers, and employees and representatives of such suppliers, are hereby prohibited from giving samples to licensed retailers or private wine restaurants. This prohibition shall not preclude an employee or a representative of a supplier from accompanying any distributor, or the representative or employee of any distributor, at the time such sample is given or delivered to any retailer, licensed retailer or private wine restaurant.

4.22.2 In the event any person, firm or corporation holds more than one (1) licensed retailer's license, such person, firm or corporation may receive one (1) sample of any wine bearing the same label for each retail licensed establishment: **Provided**, That a sample must be delivered to each such licensed establishment.

4.23 A distributor may rotate and stock wine in a grocery store or wine specialty shop: **Provided**, That products purchased from other distributors are not altered or disturbed.

**§ 175-4-5. Wine Retailers.**

5.1 **Licensure application; form.** - The application for licensure as a wine retailer shall be upon forms designated "Application for Retail Wine License," Alcohol Beverage Control Commissioner Form ABCC-WS-2.

5.2 **Licensure application; content.** - The application for licensure as a wine retailer shall contain and include the following:

5.2.1 The name and address of the applicant and shall state whether the applicant is an individual, corporation, partnership, association or other business entity;

5.2.2 The business trade name of the applicant;

5.2.3 The exact location of the business establishment;

5.2.4 Whether the application is for the sale of wine in a bona fide grocery store, a separate and segregated portion of any other retail store dedicated solely to the sale of food, or a wine specialty shop;

5.2.5 The date upon which the applicant began the operation of the business;

5.2.6 Whether the applicant is the owner of the business premises for which the license is sought, and if not, whether the applicant is the actual and bona fide lessee of such premises and the application shall include the lessor's name and address;

5.2.7 Whether the applicant intends to carry on the business for which he is to be licensed for himself or under his immediate supervision or direction, and if not, the application shall state the name, age and address of the person who will manage or conduct the affairs of the retail business sought to be licensed;

5.2.8 Whether the place of business for which the license is sought conforms to all applicable health and fire laws and regulations and whether the premises for which the license is sought conforms to existing zoning ordinances;

5.2.9 Whether the applicant, if an individual, or whether any partner, member, officer, director or stockholder of the applicant holds or owns

any interest in any licensed wine distributor, and if so, the extent and nature of such ownership;

5.2.10 If the applicant is an individual, whether such applicant is a citizen of the United States, a bona fide resident of the State of West Virginia and length of such residence and whether such applicant has attained the age of eighteen (18) years;

5.2.11 If the applicant is a partnership, association or other business entity, as to each member, whether such member is a citizen of the United States, a bona fide resident of the State of West Virginia and length of such residence and whether such member has attained the age of eighteen (18) years;

5.2.12 If the applicant is a corporation, whether the person or persons who are or will be conducting or managing the business of such applicant are citizens of the United States, residents of the State of West Virginia and whether such person or persons have attained the age of eighteen (18) years;

5.2.13 Whether the applicant or any partner, member, manager, officer, director or person owning twenty percent (20%) or more of the stock or beneficial interest in the applicant:

5.2.13.1 Has been convicted of a felony or other crime involving moral turpitude within three (3) years next preceding the filing date of the application;

5.2.13.2 Has been convicted of a violation of the liquor laws of any state or of the United States within two (2) years next preceding the filing date of the application; or

5.2.13.3 Had any license revoked under the liquor laws of any state or of the United States within five (5) years next preceding the filing date of the application;

5.2.14 If the applicant is a corporation, the names, addresses and corporate title of all officers, which statement shall include the name, address and age of all persons having twenty percent (20%) or more of the stock or beneficial interest in the applicant;

5.2.15 Whether the business premises of the applicant are located within an incorporated municipality or within one (1) mile of the corporate limits of one (1) or more incorporated municipalities, and, if so, the application shall so state and shall indicate the names of all municipalities;

5.2.16 Whether the applicant is licensed either as an Alcohol Beverage Control Commissioner licensed private club under the provisions of West Virginia Code article 60-7, or as either a Class A nonintoxicating beer retailer or a Class B nonintoxicating beer retailer licensed under the provisions of West Virginia Code article 11-16;

5.2.17 If the application is for a bona fide grocery store or for any other type of retail store with a separate and segregated portion of the

store devoted to the sale of food, food products and supplies for the table, such application shall indicate whether the average monthly sales of grocery items, exclusive of wines, exceed three thousand dollars (\$3,000) and whether the average monthly inventory, exclusive of wines, exceed three thousand dollars (\$3,000); and

5.2.18 Such other information as the Commissioner may require.

**5.3 Licensure application; signature and acknowledgement required.** - All applications shall be signed by the applicant and shall be made under oath and acknowledged or verified. In the case of a partnership the application shall be signed by each of the partners: **Provided**, That in the case of a limited partnership, the application shall be signed by each of the general partners and by each limited partner who owns twenty percent (20%) or more of the capital or profits of such limited partnership. In the case of a voluntary association, all members of the governing board shall sign. In the case of a corporation, the application shall be signed by either its president or a vice president.

**5.4 Corporate charter, partnership agreement or association bylaws required.** - If the applicant for licensure as a wine retailer is a corporation, the applicant shall furnish with its application a copy of its corporate charter, including any amendments thereto. If the applicant is a partnership, limited partnership or association, such applicant shall provide a copy of the partnership agreement or a copy of the association's bylaws.

**5.5 Fees.** - An applicant for licensure as a wine retailer shall remit with the application the annual fee for such license. The annual licensing period shall begin on July 1 of the year for which the application is made and shall end on June 30 of the following year.

If the application is for licensure for less than an entire fiscal year, then such fee shall be proportionate to the remainder of such year according to the date of application, as follows:

5.5.1 If the application be made at any time from July 1 through December 31, such fee shall be for the full fiscal year, or one hundred fifty dollars (\$150).

5.5.2 If the application be made at any time from January 1 through June 30, such fee shall be one half (1/2) of the annual fee, or seventy-five dollars (\$75);

Such fee shall be payable to the West Virginia Alcohol Beverage Control Commissioner by certified check, cashier's check or money order.

**5.6 Investigations.** - Upon receipt of an application for licensure as a licensed retailer and of the fee, bond and other documents required to be provided with such application, the Commissioner shall make a thorough investigation to determine whether the applicant, and all locations and premises to be operated by the applicant pursuant to the license applied for, qualify for licensure and shall investigate all matters connected therewith, including, but not limited to, such matters which may affect the public welfare, health and morals.

5.7 Refusal of license. - No license shall be issued to any applicant;

5.7.1 That submits an application for licensure that contains any false statement;

5.7.2 That is affirmatively shown to be not a suitable person in the community or communities in which it operates. The Commissioner may refuse to grant any license if he has reasonable cause to believe that the applicant, or if the applicant is a partnership or association, any partner or member thereof, or if the applicant is a corporation, any officer, director or manager thereof or shareholder owning twenty percent (20%) or more of its capital stock, or other person conducting or managing the affairs of the applicant or of the proposed licensed premises, in whole or in part:

5.7.2.1 Is not twenty-one (21) years of age or older.

5.7.2.2 Has been convicted of a felony or other crime involving moral turpitude within three (3) years next preceding the filing date of the application.

5.7.2.3 Has been convicted of violating the liquor laws of any state or the United States within two (2) years next preceding the filing date of the application.

5.7.2.4 Has had any license revoked under the liquor laws of any state or the United States within five (5) years next preceding the filing date of the application.

5.7.2.5 Is not a person of good moral character or repute.

5.7.2.6 Is not the legitimate owner of the business proposed to be licensed, or other persons have ownership interests in the business which have not been disclosed.

5.7.2.7 Is not possessed of or has not demonstrated financial responsibility sufficient to adequately meet the requirements of the business proposed to be licensed.

5.7.2.8 Has maintained a noisy, loud, disorderly or unsanitary establishment.

5.7.2.9 Has demonstrated, either by his police record or by his record as a former licensee under West Virginia Code chapter 60, a lack of respect for law and order.

5.7.2.10 Is unable to speak, understand and read the English language in a reasonably satisfactory manner.

5.7.2.11 Is a person to whom alcoholic beverages may not be sold under the provisions of West Virginia Code chapter 60.

5.7.2.12 Has the general reputation of drinking alcoholic beverages to excess, or is addicted to the use of narcotics.

5.7.2.13 Is physically unable to carry on the business or has been adjudicated an incompetent.

5.7.2.14 Is an officer or employee of the Alcohol Beverage Control Commissioner.

5.7.3 Fails to meet the requirements of the liquor laws or the regulations of either this State or of the United States.

**5.8 License not transferable.** - A license issued to a licensed retailer shall be valid only for the person, firm or corporation named thereon and shall be valid only for the premises for which the license is sought and issued. Such license is not transferable. If there is a change in beneficial ownership to the extent of twenty percent (20%) or less thereof, the Commissioner shall be notified in writing with respect thereto within ten (10) days next succeeding such transfer. If there is a change in the beneficial ownership in excess of twenty percent (20%), then such license shall be voided and the licensee must make application for a new license.

In the event there is a transfer in the beneficial ownership of any interest in a licensed retailer, irrespective of the amount thereof, the new owner of such beneficial interest must meet all of the requirements of the provisions of any and all laws of the United States and any Rules and Regulations promulgated pursuant thereto and of the laws of the State of West Virginia, including, but not limited to, the provisions of chapter 60 of the Code and of the Rules and Regulations promulgated pursuant thereof.

**5.9 Change of location.** - If any licensed retailer desires or intends to change the location of the premises for which his license is issued during the period for which his license is current, such licensed retailer shall notify the Commissioner in writing at least thirty (30) days next preceding the date of such relocation and the relocation may occur only upon the written approval of the Commissioner: **Provided**, That in the event of flood or fire, the Commissioner may waive the thirty (30) day requirement upon request of the affected licensed retailer.

**5.10 Licensure of licensed retailer as private club or Class A nonintoxicating beer retailer.** - No person licensed as an Alcohol Beverage Control Commissioner private club or as a Class A nonintoxicating beer retailer shall be issued a licensed retailer license if the wine retail business for which the license is sought is to be conducted upon the same premises at which either such private club or Class A nonintoxicating beer retailer establishment.

This regulation shall not be construed to prohibit the holder of an Alcohol Beverage Control Commissioner private club license or the holder of a Class A nonintoxicating beer license from holding or being a part owner in any licensed wine retailer whose business premises are totally separate, distinct and apart from the premises of such private club or Class A nonintoxicating beer retailer establishment.

**5.11 Connection between licensed retailer and private club and Class A nonintoxicating beer retailer prohibited.** - In the event a licensed retailer applicant is located within the same building or structure as an Alcohol

Beverage Control Commissioner licensed private club or a Class A nonintoxicating beer retailer, there shall be no internal interconnection or door between the premises of the wine retailer and the premises of the licensed club or Class A nonintoxicating beer retailer.

**5.12 Transportation of wine by retailer.** - A licensed retailer shall not transport any wine or other alcoholic liquor unless such retailer has been issued a transportation permit so to do by the Commissioner.

**5.13 Transfers of wine between retailers prohibited.** - A licensed retailer who operates more than one (1) licensed retail establishment may transfer wine from one (1) such licensed retail establishment to another licensed retail establishment. However, a licensed retailer may not transfer, sell or convey wine to another licensed retailer. A licensed retailer may purchase wine only from a distributor which is licensed in accordance with W. Va. Code § 60-8-1 et seq., or a farm winery licensed in accordance with W. Va. Code § 60-8-1 et seq.

**5.14 Wine specialty shop; inventory required.** - Wine specialty shops shall, in addition to maintaining a representative inventory of wines which include varietal wines, generic wines and wines labeled according to the region or place of production, maintain an inventory of not less than fifteen percent (15%) by actual bottle count of wines which are vintage or vintage dated, which shall be determined by actual bottle count of the total wine inventory. In addition, wine specialty shops shall at all times have in their inventory available for sale food or foodstuffs which are normally associated with wines and have a representative inventory of wine accessories.

**5.14.1** Wine specialty shops are authorized to maintain an inventory of port, sherry and madeira wines having an alcoholic content of not more than twenty-two percent (22%) alcohol by volume. Such wines must be purchased from a licensed distributor in this State.

**5.15 Packaging of wine sold after purchase required.** - All wine sold by any licensed retailer shall be placed in a paper bag or container sufficient to hold the wine purchased prior to delivery of such wine to the customer. No wine shall be permitted or allowed to be carried from the premises of any licensed retailer by any customer thereof unless the same has been placed in such a paper bag or container.

**5.16 Blood alcohol chart.** - Each licensed retailer shall post in an open and prominent place within the licensed premises a blood alcohol chart in the form prescribed by West Virginia Code § 60-6-24.

**§ 175-4-6. Private Wine Restaurant.**

**6.1 Licensure application; form.** - The application for licensure as a private wine restaurant shall be upon forms designated "Application for Private Wine Restaurant," Alcohol Beverage Control Commissioner Form ABCC-WS-5.

**6.2 Licensure application; content.** - The application for licensure as a private wine restaurant shall contain and include the following:

6.2.1 The name and address of the applicant restaurant and shall state whether the applicant is an individual, corporation, partnership, association or other business entity;

6.2.2 The name, address, date of birth and length of West Virginia residency of the manager or steward;

6.2.3 The complete description, including photographs and a diagram of every room, of the proposed private wire restaurant;

6.2.4 The name and address of the property owner and if the property is leased, the expiration date of the lease;

6.2.5 Verification that monthly sales of food, exclusive of wine and nonintoxicating beer, exceed twenty-five hundred dollars (\$2,500) and if the restaurant is not yet in operation, verification that such monthly sales will exceed twenty-five hundred dollars (\$2,500);

6.2.6 Verification that the place of business conforms to health and fire laws and regulations and zoning ordinances;

6.2.7 Whether the premises is located within municipal boundaries, within one (1) mile of municipal boundaries, or within one (1) mile of the boundaries of two (2) or more municipalities and if so, the names of such municipalities;

6.2.8 Whether the premises is currently licensed as a Class A Nonintoxicating Beer Retailer;

6.2.9 If the applicant is an individual, whether such applicant has attained the age of eighteen (18) years;

6.2.10 If the applicant is a partnership, association or other business entity, as to each member, whether such member has attained the age of eighteen (18) years;

6.2.11 If the applicant is a corporation, whether the person or persons who are or will be conducting or managing the business have attained the age of eighteen (18) years;

6.2.12 Whether the applicant or any partner, member, manager, officer, director or person owning twenty percent (20%) or more of the stock or beneficial interest in the applicant:

6.2.12.1 Has been convicted of a felony or other crime involving moral turpitude within three (3) years next preceding the filing date of the application;

6.2.12.2 Has been convicted of a violation of the liquor laws of any state or of the United States within two (2) years next preceding the filing date of the application; or

6.2.12.3 Had any license revoked under the liquor laws of any state or of the United States within five (5) years next preceding the filing date of the application;

6.2.13 If the applicant is a firm, partnership or association, the names, addresses, residence and length thereof and percentage of ownership of all persons having an ownership interest in the applicant of twenty percent (20%) or more.

6.2.14 If the applicant is a corporation, the names, addresses and corporate title of all officers, which statement shall include the name, address and age of all persons having twenty percent (20%) or more of the stock or beneficial interest in the applicant;

6.2.15 Such other information as the Commissioner may require.

**6.3 Licensure application; signature and acknowledgement required.** - All applications shall be signed by the applicant and shall be made under oath and acknowledged or verified. In the case of a partnership the application shall be signed by each of the partners: **Provided**, That in the case of a limited partnership, the application shall be signed by each of the general partners and by each limited partner who owns twenty percent (20%) or more of the capital or profits of such limited partnership. In the case of a voluntary association, all members of the governing board shall sign. In the case of a corporation, the application shall be signed by either its president or a vice president.

**6.4 Corporate charter, partnership agreement or association bylaws required.** - If the applicant for licensure as a private wine restaurant is a corporation, the applicant shall furnish with its application a copy of its corporate charter, including any amendments thereto. If the applicant is a partnership, limited partnership or association, such applicant shall provide a copy of the partnership agreement or a copy of the association's bylaws.

**6.5 Fees.** - An applicant for licensure as a private wine restaurant shall remit with the application the annual fee of two hundred fifty dollars (\$250) for such license. The annual licensing period shall begin on July 1 of the year for which the application is made and shall end on June 30 of the following year.

If the application is for licensure for less than an entire fiscal year, then such fee shall be as follows:

6.5.1 If the application be made at any time from July 1 through December 31, such fee shall be for the full fiscal year, or two hundred fifty dollars (\$250).

6.5.2 If the application be made at any time from January 1 through June 30, such fee shall be one half (1/2) of the annual fee, or one hundred twenty-five dollars (\$125);

Such fee shall be payable to the West Virginia Alcohol Beverage Control Commissioner by certified check, cashier's check or money order.

6.6 **Investigations.** - Upon receipt of an application for licensure as a private wine restaurant and of the fee, bond and other documents required to be provided with such application, the Commissioner shall make a thorough investigation to determine whether the applicant, and all locations and premises to be operated by the applicant pursuant to the license applied for, qualify for licensure and shall investigate all matters connected therewith, including, but not limited to, such matters which may affect the public welfare, health and morals.

6.7 **Refusal of license.** - No license shall be issued to any applicant;

6.7.1 That submits an application for licensure that contains any false statement;

6.7.2 That is affirmatively shown to be not a suitable person in the community or communities in which it operates. The Commissioner may refuse to grant any license if he has reasonable cause to believe that the applicant, or if the applicant is a partnership or association, any partner or member thereof, or if the applicant is a corporation, any officer, director or manager thereof or shareholder owning twenty percent (20%) or more of its capital stock, or other person conducting or managing the affairs of the applicant or of the proposed licensed premises, in whole or in part:

6.7.2.1 Is not twenty-one (21) years of age or older.

6.7.2.2 Has been convicted of a felony or other crime involving moral turpitude within three (3) years next preceding the filing date of the application.

6.7.2.3 Has been convicted of violating the liquor laws of any state or the United States within two (2) years next preceding the filing date of the application.

6.7.2.4 Has had any license revoked under the liquor laws of any state or the United States within five (5) years next preceding the filing date of the application.

6.7.2.5 Is not a person of good moral character or repute.

6.7.2.6 Is not the legitimate owner of the business proposed to be licensed, or other persons have ownership interests in the business which have not been disclosed.

6.7.2.7 Is not possessed of or has not demonstrated financial responsibility sufficient to adequately meet the requirements of the business proposed to be licensed.

6.7.2.8 Has maintained a noisy, loud, disorderly or unsanitary establishment.

6.7.2.9 Has demonstrated, either by his police record or by his record as a former licensee under West Virginia Code Chapter 60, a lack of respect for law and order.

6.7.2.10 Is unable to speak, understand and read the English language in a reasonably satisfactory manner.

6.7.2.11 Is a person to whom alcoholic beverages may not be sold under the provisions of West Virginia Code Chapter 60.

6.7.2.12 Has the general reputation of drinking alcoholic beverages to excess, or is addicted to the use of narcotics.

6.7.2.13 Is physically unable to carry on the business or has been adjudicated an incompetent.

6.7.2.14 Is an officer or employee of the Alcohol Beverage Control Commissioner.

6.7.3 Fails to meet the requirements of the liquor laws or the regulations of either this State or of the United States.

**6.8 License not transferable.** -- A license issued to a private wine restaurant shall be valid only for the person, firm or corporation named thereon and shall be valid only for the premises for which the license is sought and issued. Such license is not transferable. If there is a change in beneficial ownership to the extent of twenty percent (20%) or less thereof, the Commissioner shall be notified in writing with respect thereto within ten (10) days next succeeding such transfer. If there is a change in the beneficial ownership in excess of twenty percent (20%), then such license shall be voided and the licensee must make application for a new license.

In the event there is a transfer in the beneficial ownership of any interest in a private wine restaurant, irrespective of the amount thereof, the new owner of such beneficial interest must meet all of the requirements of the provisions of any and all laws of the United States and any rules and regulations promulgated pursuant thereto, and of the laws of the State of West Virginia, including, but not limited to, the provisions of West Virginia Code Chapter 60, and of the rules and regulations promulgated pursuant thereof.

**6.9 Change of location.** -- If any private wine restaurant desires or intends to change the location of the premises for which the license is issued during the period for which the license is current, such private wine restaurant shall notify the Commissioner in writing at least thirty (30) days next preceding the date of such relocation and the relocation may occur only upon the written approval of the Commissioner: **Provided**, That in the event of flood or fire, the Commissioner may waive the thirty (30) day notice upon request of the affected private wine restaurant.

**6.10 Licensure of private wine restaurant as private club or Class A nonintoxicating beer retailer.** -- No person licensed as an Alcohol Beverage Control Commissioner private club shall be issued a private wine restaurant license if the wine retail business for which the license is sought is to be conducted upon the same premises as such private club. However, a private wine restaurant may also be licensed as a Class A retail dealer in nonintoxicating beer.

This regulation shall not be construed to prohibit the holder of an Alcohol Beverage Control Commissioner private club license from holding or being a part owner in any private wine restaurant whose business premises are totally separate, distinct and apart from the premises of such private club, as provided in the following Section 6.11.

**6.11 Connection between private wine restaurant and private club prohibited.** - In the event a licensed retailer applicant is located within the same building or structure as an Alcohol Beverage Control Commissioner licensed private club, there shall be no internal interconnection or door between the premises of the private wine restaurant and the premises of the licensed private club.

**6.12 Transportation of wine by private wine restaurant.** - A private wine restaurant shall not transport any wine unless such retailer has been issued a transportation permit so to do by the Commissioner.

**6.13 Transfers of wine between retailers prohibited.** - A person who operates more than one (1) private wine restaurant may transfer wine from one (1) such private wine restaurant to another private wine restaurant. However, a private wine restaurant may not transfer, sell or convey wine to a licensed retailer or to a private wine restaurant licensed to another person. A private wine restaurant may purchase wine only from a distributor licensed in accordance with W. Va. Code § 60-8-1 et seq., or a farm winery licensed in accordance with W. Va. Code § 60-8-1 et seq.

**6.14 Restaurant sales of West Virginia wine.** - Any restaurant specially licensed under West Virginia Code § 60-8-3(k) may only sell wine which is manufactured by a West Virginia winery, such wine to be served and consumed with meals and not to be sold by the bottle for off-premises consumption.

**6.14.1** The application for such a special license shall be on the form designated by the Commissioner and all licensing requirements applicable to private wine restaurants shall be applicable to such specially licensed restaurants.

**6.14.2** The annual fee for such special license shall be twenty-five dollars (\$25).

**6.15 Blood alcohol chart.** - Each private wine restaurant shall post in an open and prominent place within the licensed premises a blood alcohol chart in the form prescribed by West Virginia Code § 60-6-24.

**§ 175-4-7. Wine Liter Tax and Municipal Tax on Wine Sales; Reports Required.**

**7.1 Distributor's purchase order.** - All sales of wine except retail sales of wine shall be upon purchase order. All such forms shall include the following information for each item purchased from the supplier: Brand name, unit size, number of cases and bottles, total quantity in extended liters (the unit size multiplied by the number of bottles will give the extended liters), case price and the total cost of each item purchased. All purchase orders are to be dated, numbered and shall identify the purchaser and distributor and are to be signed by the distributor, or his agent or employee.

7.1.1 The Commissioner shall furnish with each distributor's license a copy of "Purchase Order," Alcohol Beverage Control Commissioner Form No. ABCC-WS-1-H, which is a suggested and recommended form for purchase orders. This form need not be followed in exact detail or outline so long as the purchase order form used contains the information required herein; i.e., receiving documents and computer generated receipts may be used if the necessary information is provided.

7.1.2 A copy of all purchase orders shall be retained by the distributor for a period of four (4) years for use by the Commissioner for review and audit.

## 7.2 Distributor's wine invoice.

7.2.1 All deliveries of wine from a distributor shall be accompanied by a distributor's wine invoice which shall include the following information: The date of invoice, the date of delivery, the trade name and address of the licensed retailer or private wine restaurant, such licensed retailer's or private wine restaurant's license number, the number of cases and bottles ordered, and the size of each stated in liters, the identity of the product ordered, stated by brand and type, the total number of liters of each, the unit price of each such brand and type ordered, and the total sales price for each, the total number of liters included upon the invoice and the total purchase price thereof; ~~and the total purchase price including the liter tax received by the distributor from the licensed retailer or private wine restaurant.~~ Such invoice shall also reflect a statement to be executed by the licensed retailer or private wine restaurant indicating the date of receipt of the wine so purchased and that such distributor was paid in full for all items so received, and the invoice shall include the name of the person, firm or corporation from whom the shipment was received or by whom the same was delivered. All invoices shall state the mode or method of payment.

7.2.1.1 The Commissioner shall furnish with each distributor's license a copy of "Distributor's Wine Invoice," Alcohol Beverage Control Commissioner Form No. ABCC-WS-1-1, which is a suggested and recommended form for distributor's wine invoices. This form need not be followed in exact detail or outline so long as the form contains the information required hereinabove.

7.2.1.2 A copy of all distributor's wine invoices shall be retained by the distributor and the retailer for a period of four (4) years for use by the Commissioner for review and audit.

7.3 Taxpayer. - The term taxpayer shall, with respect to the liter tax, and for the purpose of determining the proper party to claim a refund of such tax, be only the person who pays such tax to the Commissioner: Provided, That for purposes of claiming a refund for a casualty loss, the term may include a distributor, licensed retailer or private wine restaurant. With respect to credit against such tax, the term taxpayer shall include only the distributor claiming the same.

7.4 Liter tax. - West Virginia Code § 60-8-4 imposes a tax of twenty-six and four hundred six thousandths cents (\$.26406) per liter on all wine sold by suppliers to distributors in this State. The amount of this tax shall be added

to and constitute a part of the sales price charged by distributors when such distributors sell wine.

**7.5 Liter tax; monthly reporting and payment of tax.** - No later than the fifteenth day of each month, every supplier shall file a written report with the Commissioner which shall be denominated "Supplier's Summary of Wine Sales and Taxes," Alcohol Beverage Control Commissioner Form No. ABCC-WS-1-E. Such form shall reflect the name and address of the supplier, the ABCC license number assigned to such supplier and the month for which the report is made. Such report shall include all sales made by the supplier for the next preceding month and shall include such items and information as may be required by the Commissioner such as the identity of the purchaser, the quantity, label and alcoholic content of the wine sold during the preceding month and the amount of tax due. The tax due shall be remitted with the report.

7.5.1 All such forms shall be furnished by the Commissioner in duplicate and the original thereof (white copy) shall be completed and returned to the Commissioner and the duplicate copy (green copy) retained by the licensed distributor. Such form shall be completed in the manner provided in the memorandum of instruction entitled "Wine Tax Reporting System," Alcohol Beverage Control Commissioner Form No. ABCC-WS-1-E (Inst.).

**7.6 Report of breakage, leakage, spoilage and samples.** - All wines which are rendered unsealable by reasons of breakage, leakage and spoilage, as well as all wine used as samples, or disposed of as samples by the distributor, shall be noted on "Supplier's Monthly Report of Breakage, Leakage, Spoilage and Samples," Alcohol Beverage Control Commissioner Form No. ABCC-WS-1-G, which form shall be filed with the Supplier's Summary of Wine Sales and Taxes (Form No. ABCC-WS-1-E). Form ABCC-WS-1-G shall be completed in the manner and form outlined in the wine tax reporting system memorandum of instruction (Form No. ABCC-WS-1-E Inst.).

7.6.1 All containers which have been subject to breakage, leakage or spoilage shall be retained by the supplier until permission to dispose of the same has been granted by the Commissioner.

**7.7 Refund of liter tax by reason of casualty loss.** - In the event that a distributor, licensed retailer or a private wine restaurant, while the owner of wine on which the liter tax has been paid, loses such wine through fire or other casualty and such wine has been declared by the Commissioner to be unfit for sale, the Commissioner shall provide for a refund of the liter tax paid, but only if the amount of such tax paid on such wine and claimed for refund exceeds fifty dollars (\$50.00). Neither theft nor breakage occurring on the premises of the distributor, licensed retailer or private wine restaurant, shall be deemed a casualty within the meaning of these regulations.

7.7.1 Any distributor, licensed retailer or private wine restaurant having a loss through fire or other casualty for which refund of taxes may be claimed in which the total tax paid on such wine exceeds fifty dollars (\$50.00) is required to contact the Commissioner within five (5) calendar days of the occurrence or casualty resulting in such loss for verification thereof. Upon verification of the loss and the reasons therefor, the Commissioner shall take such steps necessary to effect payment in full to

the distributor, licensed retailer or private wine restaurant having a claim in excess of fifty dollars (\$50.00). No refund or claim may be granted or considered by the Commissioner for liter taxes in an aggregate of less than fifty dollars (\$50.00).

7.7.2 To the extent that any available insurance or other source from which a claim for casualty loss is recoverable, the Commissioner shall be regarded as source of refund of last resort and no such claim for refund will be honored until all other available sources of such coverage have been exhausted or to the extent the same is covered or recoverable by or through any valid and collectible insurance. For the purpose of any refund, each casualty shall be regarded separately from any other casualty and no claim for refund may include more than one casualty.

**7.8 Municipal tax on sales of wine to be collected and remitted to the State Tax Department.** - All taxes required to be levied and collected on sales of wine made by distributors, licensed retailers and farm wineries pursuant to the provisions of either West Virginia Code § 8-13-7, or West Virginia Code § 60-3-9d, or both, shall be remitted to and collected by the Department of Tax and Revenue. All such taxes shall be deposited with the State Treasury, which shall be responsible for the distribution thereof to the appropriate county or municipality. All assessments, petitions for reassessment and hearings required on petitions for reassessment shall be administered and conducted by the Department of Tax and Revenue. Any rulings to be made thereon shall be made by such Department. All statutes, rules and regulations and procedures adopted by the Department of Tax and Revenue with respect to assessments, reassessments, petitions for reassessment, hearings thereon, administrative appeals and all matters relating thereto insofar as the same may relate to the imposition and collection of the municipal tax on sales of wine are adopted and incorporated herein by reference to the same extent as if the same were set forth here in extensio and shall apply to the imposition and collection of such tax.

The provisions of this section shall not include the collection of taxes, or the allocation or distribution thereof, with respect to retail sales made by the Alcohol Beverage Control Commissioner, which shall be responsible for such collection, allocation and distribution of such taxes on sales made by it.

**§ 175-4-8. Advertising.**

**8.1 General prohibition.** - All advertising of wine which encourages intemperance, makes the consumption of alcoholic liquor appear to be glamorous, is lewd or obscene, induces minors to purchase, or tends to deceive or misrepresent, is hereby prohibited. Federal law, as interpreted by the ABCC, provides the following guidelines relative to acceptable and prohibited advertising of wine.

**8.2 Permissible media.** - Printed advertising of wine in West Virginia shall be limited to billboards, newspapers, magazines and similar publications, and radio and television.

**8.3 Application.** - No person engaged in business as a producer, processor, broker, manufacturer, bottler, importer, wholesaler or retailer of wine, directly or indirectly, or through an affiliate, shall publish or disseminate or

cause to be published or disseminated in any billboard, newspaper, magazine or similar publication any advertisement of wine, unless such advertisement in conformity with these regulations: **Provided**, That these provisions shall not apply to the publisher or standardized outdoor advertising company of any billboard, newspaper, magazine or similar publication, unless such publisher or outdoor advertising company is engaged in business as a producer, manufacturer, bottler, importer, wholesaler or retailer of wine, directly or indirectly, or through an affiliate.

#### 8.4 Mandatory statements.

8.4.1 **Responsible advertiser.** - The advertisement shall state the name and address of the producer, manufacturer, bottler, importer or wholesaler responsible for its publication. Street name and number may be omitted in the address.

8.4.2 **Class, type and distinctive designation.** - The advertisement shall contain a conspicuous statement of the class and type, or other designation of the product, corresponding with the complete designation which appears on the brand label of the product.

8.4.3 **Alcoholic content.** - The alcoholic content shall be stated in the manner and form in which it appears on the labels of the wine advertised.

#### 8.5 Lettering.

8.5.1 **Conspicuousness of mandatory statements.** - Statements required by this part to be stated in any written, printed or graphic advertisement shall appear in lettering or type of a size, kind and color sufficient to render them both conspicuous and readily legible.

In particular:

8.5.1.1 Required information shall be stated against a contrasting background and in type or lettering which is at least the equivalent of eight (8) point type.

8.5.1.2 Required information shall be so stated as to appear to be a part of the advertisement and shall not be separated in any manner from the remainder of the advertisement.

8.5.1.3 Where an advertisement relates to more than one product, the required information shall appear in such a manner as to clearly indicate the particular products to which it is applicable.

8.5.1.4 Required information shall not be buried or concealed in unrequired descriptive matter or decorative designs.

#### 8.6 Prohibited statements - Generally.

8.6.1 **Restrictions.** - An advertisement shall not contain:

8.6.1.1 Any statement that is false or misleading in any material particular. For example, the reproduction of medals or facsimiles of awards, when no medals or awards have been given or where the medals or awards were not given on a competitive or comparative basis are prohibited.

8.6.1.2 Any statement that is disparaging of a competitor's product.

8.6.1.3 Any statement, design, device or representation which is obscene, lewd or indecent.

8.6.1.4 Any statement, design, device or representation of, or relating to, analyses, standards or tests, irrespective of falsity which is likely to mislead the consumer. For example, an advertisement may not contain a statement such as "Analyzed by the \_\_\_\_\_ laboratory and found to be pure and free from deleterious ingredients," or "Tested and approved. Signed by the \_\_\_\_\_ Research Institute."

8.6.1.5 Any statement, design, device or representation of, or relating to, any guaranty, irrespective of falsity, which is likely to mislead the consumer.

8.6.1.5.a Nothing in this section shall prohibit the use of any enforceable guaranty in substantially the following form:

"We will refund the purchase price to the purchaser if he is in any manner dissatisfied with the contents of this package."

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Blank to be filled in with the name of person making guaranty.

8.6.1.6 Any statement that the product is produced, made, bottled, packed or sold under, or in accordance with, any authorization, law or regulation of any municipality, county or state, federal or foreign government unless such statement is required or specifically authorized by the laws or regulations of such government; and if a municipal county, state or federal permit number is stated, such permit number shall not be accompanied by any additional statement relating thereto.

8.6.2 **Statements inconsistent with labeling.** - The advertisement shall not contain any statement concerning a brand or lot of wine that is inconsistent with any statement on the labeling thereof.

8.6.3 **Curative and therapeutic effects.** - The advertisement shall not contain any statement, design or device representing that the use of any wine has curative or therapeutic effects, if such statement is untrue in any particular or tends to create a misleading impression. For example, advertisements may not contain statements such as "\_\_\_\_\_ is good for you" or "Conducive to well-being."

8.6.4 **Place of origin.** - The advertisement shall not represent that the wine were manufactured in, or imported from, a place or country other than that of their actual origin, or were produced or processed by one who was not in fact the actual producer.

8.6.5 **Flags, seals, coats of arms, crests and other insignia.** - No advertisement shall contain any statement, design, device or pictorial representation of, or relating to, or capable of being construed as relating to the armed forces of the United States, or of the American Flag, any state flag or any emblem, seal, insignia or decoration associated with any such flag or the Armed Forces of the United States; nor shall any advertisement contain any statement, device, design or pictorial representation of or concerning any flag, seal, coat of arms, crest or other insignia, likely to falsely lead the consumer to believe that the product has been endorsed, made or used by, or produced for, or under the supervision of, or in accordance with the specifications of the government, organization, family or individual with whom such flag, seal, coat of arms, crest or insignia is associated.

#### 8.7 **Restrictions.**

8.7.1 An advertisement may not contain any statement of a bonded wine cellar and bonded winery numbers unless stated in direct conjunction with the name and address of the person operating such winery or storeroom. The statement of a bonded wine cellar and bonded winery number may be made in the following form: "Bonded Wine Cellar No. \_\_\_\_\_," "Bonded Winery No. \_\_\_\_\_," "B.W.C. No. \_\_\_\_\_," "B.W. No. \_\_\_\_\_."

No additional reference thereto shall be made, nor shall any use be made, of such statement that may convey the impression that the wine has been made or matured under United States government or any state government supervision or in accordance with United States government or any state government specifications or standards.

8.7.2 Any statement, design, device or representation which relates to alcoholic content or which tends to create the impression that a wine is "Unfortified" or has been "Fortified," or has intoxicating qualities, or contains distilled spirits (except for a reference to distilled spirits in a statement of composition where such statement is required by these regulations to appear as a part of the designation of the product) is prohibited.

#### § 175-4-9. **Trade Practices and Conduct of Business Generally.**

9.1 **Improper inducements.** - Federal law, as interpreted by the ABCC, prohibits and these regulations do not in any manner authorize a manufacturer to induce, directly or indirectly, any distributor, licensed retailer or private wine restaurant to purchase any wines from the manufacturer thereof to the exclusion, in whole or in part, of such products which are sold or offered for sale by another manufacturer, when such inducements are in any of the following manners:

9.1.1 By acquiring or holding any interest in any license with respect to the distributor, licensed retailer or private wine restaurant, or any

other premises which is owned, occupied or used in any manner by such person or his immediate family;

9.1.2 By acquiring any interest in the real or personal property which is owned, occupied, or in any manner used by the distributor, licensed retailer or private wine restaurant or his immediate family in the conduct of the business wherein wine is sold or any other of his businesses;

9.1.3 By furnishing, giving, renting, lending, or selling to the distributor, licensed retailer or private wine restaurant or his immediate family any equipment, fixtures, exterior signs, supplies, money, services or other things of value: **Provided**, That a manufacturer may furnish items of nominal value for in-store display or sales purposes and which may only be used within the confines of such commercial establishment.

9.1.4 By paying or crediting the distributor, licensed retailer or private wine restaurant or his immediate family for any advertising, display, or distribution services;

9.1.5 By guaranteeing any loan for the repayment of any financial obligation of the distributor, licensed retailer or private wine restaurant or his immediate family; or

9.1.6 By requiring the distributor, licensed retailer or private wine restaurant to take and dispose of a certain quota of any wine.

**9.2 Interest in the retail license.** - The manufacturer may not acquire or hold any interest in any license required to be obtained by the distributor, licensed retailer or private wine restaurant or his immediate family, with respect to the subject commercial establishment or any other premises which is owned, occupied or in any manner used by the distributor, licensed retailer or private wine restaurant or his immediate family.

9.2.1 This prohibition includes the officers, partners, employees, other representatives, and the immediate family of any such individuals, of the manufacturer.

9.2.2 Also prohibited is any such interest acquired by a separate corporation in which the manufacturer or its officers, partners, employees or other representatives, and the immediate family of any such individuals, hold any ownership interests or with which such persons are otherwise affiliated.

**9.3 Interest in real or personal property of the distributor, licensed retailer or private wine restaurant.**

9.3.1 Manufacturers may not acquire or hold any interest in real or personal property which is owned, occupied, or in any manner used by the distributor, licensed retailer or private wine restaurant or his immediate family in the conduct of the business of selling wine or any other of his businesses or those of his immediate family.

9.3.2 The foregoing prohibition also applies to any interest acquired by corporate officials, partners and employees or other

representatives, or the immediate family of any such individuals, of the manufacturer and to any interest which is acquired by a separate corporation in which the manufacturer or its officers, partners, employees or other representatives, or the immediate family of any such individuals, hold any ownership interest or in which they are otherwise affiliated.

9.3.3. A manufacturer is prohibited from acquiring a mortgage or similar type of document on a distributor's, licensed retailer's or private wine restaurant's real or personal property or on the real or personal property of such person's immediate family.

9.3.4. A manufacturer is prohibited from the renting of display space or shelf space at any commercial establishment operated by the distributor, licensed retailer or private wine restaurant or his immediate family.

#### 9.4 Furnishing things of value.

9.4.1. A manufacturer may not furnish, give, rent, or lend to the distributor, licensed retailer or private wine restaurant or his immediate family any equipment, fixtures, exterior signs, supplies, money, services or other things of value. However, a manufacturer may sell to the distributor, licensed retailer or private wine restaurant goods which are to be resold to the general public, or to members of the private wine restaurant, and which is not wine, so long as the distributor, licensed retailer or private wine restaurant must pay the normal sale price for such goods.

9.4.2. This prohibition also applies to any similar activity which occurs through a third party, such as a retailer association or display company, where the benefits resulting to the distributor, licensed retailer or private wine restaurant may be considered as providing such persons with a thing of value without the payment of an appropriate purchase price.

9.4.3. The sale of any equipment, supplies or fixtures to a distributor, licensed retailer or private wine restaurant by a manufacturer must take place at the then current market value and there may be no special price advantage to purchasing from one manufacturer as opposed to another manufacturer.

9.4.4. The manufacturer may not provide any assistance (financial, legal, administrative or influential) to the distributor, licensed retailer or private wine restaurant in such person's acquisition of the license required to be a distributor, licensed retailer or private wine restaurant.

9.4.5. A manufacturer may not furnish any exterior advertising signs to a distributor, licensed retailer or private wine restaurant. However, it is possible for the manufacturer to provide interior signs to such persons. Additionally, the manufacturer may advertise by billboards which display alcoholic liquors, wine or nonintoxicating beer, but the manufacturer may not identify any distributor, licensed retailer or private wine restaurant within such advertisement.

9.4.6 A manufacturer may not furnish to a distributor, licensed retailer or private wine restaurant at less than the normal sale price anything of value which the licensed retailer may merchandise in his business. These things of value include nonalcoholic mixers, pouring racks, and similar items.

**9.5 Paying for advertising, display or distribution service.**

9.5.1 A manufacturer may not provide a distributor, licensed retailer or private wine restaurant, or the immediate family of either, with free advertisement, exterior display or distribution services, or any similar types of services in any business activities.

**9.6 Quota sales.**

9.6.1 A distributor, licensed retailer or private wine restaurant may not be required to purchase any alcoholic liquors in order to purchase nonalcoholic liquors or other products from a manufacturer.

**9.7 Other.**

9.7.1 A manufacturer may not touch the product or displays of another manufacturer.

**§ 175-4-10. Refusal, Suspension or Revocation of License.**

**10.1 Refusal, suspension or revocation of license; applicant or licensee not a suitable person.** - To the extent that West Virginia Code § 60-8-7 requires that the Commissioner refuse to license any applicant therefore if he finds that "such applicant is not a suitable person," the Commissioner shall refuse to license any applicant or shall revoke or suspend the license of any licensee whom he affirmatively finds not to be of good reputation in the community wherein such license is sought or granted. In considering whether a person is "not a suitable person," the Commissioner may take into account other factors, such as are stated in Section 4.8, 5.7 or 6.7 of these regulations as appropriate, with respect to such person in addition to the reputation of such person in the community wherein licensure is sought or granted. This regulation shall include within its purview the person or persons who manage or conduct the affairs of the applicant or licensee insofar as the same relates to the purpose for which the license is sought or granted hereunder.

**10.2 Refusal, suspension or revocation of license; premises not a suitable place.** - If the Commissioner finds that the premises for which licensure is sought is not a "Suitable Place," fails to meet the requirements of any provision of Law or regulations of this State or of the United States, is in violation of any zoning ordinance and that no variance has been granted to the extent therefor, or that illegal activities are occurring or are allowed to occur at such premises, the Commissioner shall refuse the application for licensure.

To the same extent, if such foregoing condition is found to exist after licensure has been granted with respect to such premises, the Commissioner may either suspend or revoke any such license, or may grant a reasonable time within which to correct any such violation or condition.

**10.3 Refusal, suspension or revocation of license; disqualification of beneficial owner or of persons managing or conducting affairs of applicant or licensee.** - When, by the provisions of any law or regulation, a person is prohibited from owning any interest in a distributor, a licensed retailer or a private wine restaurant, such prohibition shall extend and be deemed to include any beneficial interest in such licensed distributor, licensed retailer or licensed private wine restaurant. Licensure may be refused at any time it is found by the Commissioner that a person so prohibited is, in fact, a true and actual owner or part owner in such distributor, licensed retailer or private wine restaurant. Such limitations as to ownership shall also apply with respect to persons who actually, in whole or part, manage or conduct the affairs for which licensure is sought or granted. If at any time the Commissioner determines that the true, beneficial and actual ownership, management or the conducting of the affairs of a licensed person, firm or corporation is held, controlled, managed or conducted by persons not permitted so to do pursuant to either federal or state law or regulations, the same shall be grounds for immediate revocation of licensure.

**10.4 Dual ownership prohibited.** - No person, including the spouse or unemancipated child of such person or any child of such person while a resident of the household of such person, whether or not such child has attained his or her majority, shall be licensed simultaneously as a distributor and a licensed retailer, as a private wine restaurant and a distributor, or as a licensed retailer and a private wine restaurant; similarly, no such person may own a simultaneous interest, including any beneficial interest, in such activities.

**10.5 Alcohol Beverage Control Commissioner employees prohibited from ownership in a private wine restaurant, licensed retailer or distributor.** - Neither the Alcohol Beverage Control Commissioner nor any employee of the Alcohol Beverage Control Commissioner shall have any interest of whatsoever nature or kind, beneficial or otherwise, in any licensed retailer, distributor or private wine restaurant, nor shall the spouse or unemancipated child of such Commissioner or employee, nor shall any child of any such person, while a resident of the household of such person, whether or not such child has attained his or her majority, hold or own any interest, including a beneficial interest.

**10.6 Management or conduct of affairs of licensee by certain persons prohibited.** - No person shall be licensed as either a distributor or retailer when such person allows or permits any other person to in any way or in any capacity conduct or manage, in whole or in part, the affairs of the person seeking to be licensed when either of such person has: (a) been convicted of a felony or other crime involving moral turpitude within three (3) years next preceding the date upon which the application is filed, (b) been convicted in a court of record of violating the liquor laws of any state or the United States within two (2) years next preceding the date upon which the application is filed, or (c) had any license revoked pursuant to the provisions of West Virginia Code chapter 60 or under the liquor laws of any other state within five (5) years next preceding the date upon which the application is filed. In determining compliance with this section, the Commissioner shall make such determination based upon the substantial duties of the person in question and not upon the title or other extraneous factors relating thereto.

10.6.1 This regulation shall apply only to the extent that the person, firm or corporation seeking or attaining licensure has such person or persons employed or engaged:

10.6.1.1 in either the sale or distribution of wine,

10.6.1.2 in the acquisition of wine, or

10.6.1.3 in any substantial way manages or conducts the affairs of the applicant or licensee.

10.6.2 This regulation shall apply to all renewals of licensure and violation of its provisions during any period for which licensure has been granted shall be grounds for immediate revocation.

10.7 Refusal, suspension or revocation of license. - The Commissioner may refuse to license or may suspend or revoke the license of any supplier, distributor, licensed retailer or private wine restaurant whom he finds not to be in compliance with the provisions of any law rule or regulation of the United States or of this State relating to the sale or distribution of wine.

**§ 175-4-11. Hearing and Appeal Procedure.**

11.1 Order refusing license, suspending or revoking same. - If the Commissioner refuses to issue a license or suspends or revokes a license, he shall make and enter an order to that effect and mail by certified mail, return receipt requested, a copy of said order to the licensee, or serve the same as provided for the service of legal process in accordance with the West Virginia Rules of Civil Procedure.

11.2 Petition for hearing. - Any applicant or licensee, as the case may be, adversely affected by such order, shall have the right to a hearing thereon before the Commissioner or a person designated by him as hearing examiner: **Provided**, That a petition in writing for such a hearing is served upon the Commissioner within ten (10) days following the receipt by such applicant or licensee of said copy of said order.

11.3 Petition requirements. - The petition for a hearing is to be in writing with an original and one (1) copy. It shall be complete in itself so as to fully state the issues. No telegram, telephone call, letter or similar communication will be regarded as a petition. The petition must contain the following:

11.3.1 A jurisdictional statement.

~~11-3-1~~ 11.3.2 A clear and concise assignment of each error which the petitioner alleges to have been committed by the Commissioner in the determination of a violation, with each assignment of error being shown in separately numbered paragraphs.

~~11-3-2~~ 11.3.3 A clear and concise statement of fact upon which the petitioner relies as sustaining its assignment of error.

~~11-3-3~~ 11.3.4 A prayer setting forth the relief sought.

~~11-3-4~~ 11.3.5 The signature of the petitioner or its officers signing such petition.

~~11-3-5~~ 11.3.6 A verification by the petitioner.

**11.4 Hearings - cost deposit.** - The person demanding a hearing shall give security for the cost of said hearing in the amount of three hundred dollars (\$300) and said cost deposit shall be advanced by certified check, cashier's check or money order payable to the Alcohol Beverage Control Commissioner and shall accompany the petition demanding a hearing. The deposit will be returned if the person demanding the hearing prevails at the hearing.

**11.5 Subpoenas and subpoenas duces tecum.** - In all hearings held under West Virginia Code article 60-8, and these regulations, the evidence of witnesses and the production of documentary evidence may be required through the use of subpoenas and subpoenas duces tecum. Such subpoenas or subpoenas duces tecum may be issued at the request of the Commissioner or by the licensee, the same to be issued by either the Commissioner or his duly appointed hearing examiner.

**11.5.1** Every such subpoena and/or subpoena duces tecum shall be served at least five (5) days before the return date thereof, either by personal service made by any person twenty-one (21) years of age or older or by registered or certified mail, but a return acknowledgement signed by the person to whom the subpoena or subpoena duces tecum is directed shall be required to prove service by registered or certified mail.

**11.5.2** All subpoenas and subpoenas duces tecum will be issued in the name of the Alcohol Beverage Control Commissioner, but any party requesting their issuance must see that they are properly served. Service of subpoenas and subpoenas duces tecum issued at the insistence of the Commissioner are to be the responsibility of such Commissioner. Any person who serves any such subpoena or subpoena duces tecum is entitled to the same fee as sheriffs who serve witness subpoenas for the circuit courts of this State, and fees for the attendance and travel of witnesses shall be the same as for witnesses before the circuit courts of this State.

**11.5.3** All such fees shall be paid by the Commissioner if the subpoena or subpoena duces tecum is issued, without the request of an interested party, at the insistence of the Commissioner.

**11.5.4** All such fees related to any subpoenas or subpoena duces tecum issued at the insistence of a licensee shall be paid by the licensee who asks that such subpoena or subpoena duces tecum be issued, such payment to be made out of the hearing deposit.

**11.5.5** All requests by the licensee or the Commissioner for subpoena and subpoena duces tecum shall be in writing and shall contain a statement acknowledging that the requesting party agrees to pay such fees.

**11.5.6** Any person receiving a subpoena or subpoena duces tecum issued hereunder shall honor the same as though it was issued by a circuit court

of the State, and shall appear as witness and/or produce such books, records or papers in response to such subpoena or subpoena duces tecum. In case of disobedience or neglect of any subpoena or subpoena duces tecum served on any person or the refusal of any witness to testify to any matter regarding which he or she may be lawfully interrogated, the circuit court of the county in which the hearing is being held or the judge thereof in vacation, upon application by the Commissioner, shall compel obedience by attachment proceeds for contempt as in the case of disobedience of the requirements of a subpoena or subpoena duces tecum issued from such circuit court or a refusal to testify therein.

**11.6 Stay of suspension or revocation order.** - The service of a petition for hearing upon the Commissioner shall operate to suspend the execution of any revocation or suspension of a distributor, licensed retailer or private wine restaurant with respect to which a hearing is demanded.

**11.7 Hearing date.** - The Commissioner shall set a date for any hearing demanded and notify the person demanding such hearing of the date and time of said hearing, which said hearing shall be held within thirty (30) days after receipt of said demand.

**11.8 Place of hearing.** - Hearings will be held in Charleston, West Virginia, unless the Commissioner determines otherwise.

**11.9 Continuances.** - Hearings will not be delayed by a motion for continuance, unless it is timely made no later than ten (10) days before the date set for the hearing and sets forth good and sufficient cause. Conflicting engagements of counsel or the employment of new counsel will never be regarded as good ground for a continuance, unless set forth in a motion filed promptly after the notice of hearing has been mailed, or unless extenuating circumstances are shown which the Commissioner deems adequate.

~~11.10 Absence of petitioner, counsel or his representative. - The absence of the petitioner, his legal counsel or his representative at a hearing, after service of notice of time, place and date, shall not be the occasion for delay or continuance. The hearing shall proceed and the case be regarded as having been submitted for decision on the part of the absent petitioner or petitioners.~~

**11.10 Waiver of hearing.** - In any case involving violation of the alcohol beverage control laws, rules or regulations, where the Commissioner deems it appropriate, the Commissioner may afford the licensed retailer or agent an opportunity to waive a formal hearing which has been timely requested. If the licensed retailer or agent so elects to waive a formal hearing, he or she may then state in writing any matter in explanation or mitigation of the violations which he or she desires the Hearing Examiner and Commissioner to consider in making a decision. In the event that the licensed retailer or agent elects to waive a formal hearing, the retailer or agent shall thereafter be bound by such election and may not thereafter request a formal hearing.

**11.11 Appearance and practice before the Hearing Examiner.**

**11.11.1 Petitioner.**

11.11.1.1 The petitioner shall be present at the hearing unless excused by the Hearing Examiner because of extraordinary circumstances, provided:

11.11.1.2 The petitioner may appear either in person or by counsel to present oral testimony or other evidence;

11.11.1.3 In the event the petitioner fails to appear and has not been excused, the Hearing Examiner may treat such action as a withdrawal of the petition or request.

11.11.2 Respondent:

11.11.2.1 The respondent may appear at the hearing with or without counsel;

11.11.2.2 Failure to appear shall not prevent presentation of the case before the Hearing Examiner or the entering of a final order.

11.11.3 Interested parties:

11.11.3.1 Any person not initially joined in the proceeding shall be permitted to timely petition the Hearing Examiner for intervention.

11.12 Standards of ethical conduct. - All persons appearing before the Hearing Examiner in a representative capacity shall conform to the standards of ethical conduct required of attorneys before the courts of the State of West Virginia. If any person does not conform to the standards, the Hearing Examiner may decline to permit the person to continue to appear in a representative capacity in the proceeding.

~~11-11~~ 11.13 Hearing. - The Commissioner may designate an examiner to conduct the hearing.

~~11-11-1~~ 11.13.1 - The petitioner may appear individually, or by legal counsel, or by duly authorized representative. In the absence of the petitioner, written evidence of a representative's agent's authority must be presented to the satisfaction of the Commissioner.

~~11-11-2~~ 11.13.2 The petitioner, his duly authorized representative or agent, may with the approval of the Commissioner, waive the right to a hearing and agree to submit the case for decision upon the petition and record, with or without a written brief. Such waivers and agreements are to be in writing or upon the record.

~~11-12~~ 11.14 Argument and briefs. - Petitioners will be given an opportunity for argument within the time limits fixed by the Commissioner following submission of evidence. The Commissioner will accept briefs in lieu of argument. Briefs must be filed within ~~ten~~ twenty (~~10~~) (20) days after the hearing.

11.15 Discovery. - Subsequent to the issuance and service of Notice of Hearing upon a respondent, the parties may employ pre-hearing discovery

measures. The Hearing Examiner is to utilize an informal set of guidelines using the Rules of Civil Procedure as a model.

~~11-13~~ 11.16 Evidence admissible at hearing. - The Commissioner may admit any relevant evidence, except that he shall observe the rules of privilege recognized by law relating to communications and topics. A finding is to be supported by the kind of evidence commonly relied upon by reasonably prudent men in the conduct of their affairs, whether or not the evidence would be admissible before a jury. The Commissioner may exclude any evidence which is irrelevant, unduly repetitious, or lacking in substantial probative effect. General principals of West Virginia Rules of Evidence shall be observed.

~~11-14~~ 11.17 Record of proceedings. - There shall be a record made at all hearings held pursuant to these regulations.

~~11-15~~ 11.18 Commissioner's decision. - After the conclusion of the hearing, or within ten (10) days of receipt of the transcript thereof or after receipt of briefs submitted in lieu of argument, the person designated by the Commissioner as hearing examiner shall prepare a recommended decision supported by findings of fact and conclusions of law affirming, modifying or vacating the earlier order of the Commissioner. Thereafter, the Commissioner, within ten (10) days of receipt of such recommended decision, shall either accept or reject such recommended decision, and if he shall accept such decision, he shall sign and acknowledge the same as his own after having reviewed the transcript and all exhibits attached and affixed thereto, and if he shall reject the same, he shall within ten (10) days of receipt of such recommended decision prepare a decision setting forth his own findings of fact and conclusions of law. In either event, the order signed by the Commissioner shall be final unless vacated or modified upon judicial review thereof. A copy of said order shall be served upon each party to the hearing and their attorney of record, if any, in person or by registered or certified mail.

11.19 Motion for reconsideration.

11.19.1 Motion for reconsideration of a final order made by the Commissioner, must be made within seven (7) days after being served with the decision. The motion shall identify the matter the party desires to have reconsidered and shall fully state the reasons for reconsideration and shall be served on all parties.

11.19.2 When a motion for reconsideration has been filed, the order of the Commissioner shall not be deemed final for purposes of appeal until the Commissioner has served its ruling on the motion.

11.19.3 Motion for reconsideration of a proposed order issued by the Examiner may be appealed through a motion within seven (7) days after the date of service to be proposed initial order. A copy of the exceptions shall be served on all parties. The Commissioner shall issue an order within thirty (30) days after hearing date either affirming or reversing the Hearing Examiner's decision.

~~11-16~~ 11.20 Appeal to circuit court. - An appeal may be taken in accordance with West Virginia Code article 29A-5 by the applicant or licensee to

the Circuit Court of Kanawha County, West Virginia or with the judge thereof in vacation, if filed within thirty (30) days after the charge upon which said party received notice of the final order of the Commissioner. The record published under subsection 11.17 supra shall be the record for purposes of an appeal. The party requesting a transcript of the record shall be responsible for the expense incurred in the preparation thereof.

**11.21 Filing and service of documents and orders.**

11.21.1 All documents required to be filed in an appeal under these rules shall be filed with the Alcohol Beverage Control Commissioner either by personal delivery to his office at 322 70th Street, S.E., Charleston, West Virginia 25304 or by mail to the above address.

11.21.2 Filing is effective upon delivery or upon mailing as determined by postmark.

11.21.3 Copies of all documents filed in an appeal under these rules shall be served upon all other parties.

11.21.4 Service of documents shall be accomplished by personal delivery or by registered or certified mail, return receipt requested. Whenever a party is represented by an attorney who has signed any document filed on behalf of such party or otherwise entered an appearance on behalf of such party, service thereafter shall be made upon the attorney.

11.21.5 In the case of personal delivery, service is effective on delivery. In the case of mailing, service is effective upon mailing.

11.21.6 All documents required to be served shall be accompanied by proof of service in the form of a certificate of service. The certificate of service shall include a statement of how service was accomplished. Among those documents required to be served are: Notice of Hearing, Notice of Appeal, the final order and any motions made. Also included are any documents the Commissioner adopts as being necessary for procedural purposes.

~~11-17~~ **11.22 Supreme Court of Appeals.** - An appeal may be taken by the applicant or licensee, or by the Commissioner from the final judgment of the circuit court to which the applicant or licensee has appealed, the same to be taken in the manner and within the time provided by law for civil appeals generally.

**§ 175-4-12. Severability.**

**12.1 Severability.** - The sections and subsections of these regulations shall be deemed severable. Should any section or subsection, be deemed by judicial opinion or legislative enactment to be invalid, unconstitutional or in any manner contrary to the laws of the State of West Virginia, then such opinion or enactment shall invalidate only that particular section or subsection of these regulations and all other sections or subsections shall remain in full force and effect: **Provided,** That such remaining portions are not determined to be inseparable, and to this end these regulations are declared separable.

KEN HECHLER  
Secretary of State

MARY P. RATLIFF  
Deputy Secretary of State

ROBERT E. WILKINSON  
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STATE OF WEST VIRGINIA

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Charleston 25305

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DONALD R. WILKES  
Director, Corporations

SHEREE COHEN  
Special Assistant

(Plus all the volunteer  
help we can get)

FILED IN THE OFFICE OF  
THE SECRETARY OF STATE  
THIS DATE July 15, 1991  
ADMINISTRATIVE LAW DIVISION

July 15, 1991

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Alcohol Beverage Control Commission

RULE: Amendments, Series 4, Retail Sale of Wine in Grocery  
Stores, Wine Specialty Shops and Private Wine Restaurants

DATE RULE FILED AS AN EMERGENCY RULE: July 3, 1991

DECISION NO. 57-91

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

  
KEN HECHLER  
Secretary of State

KEN HECHLER  
Secretary of State

MARY P. RATLIFF  
Deputy Secretary of State

ROBERT E. WILKINSON  
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## STATE OF WEST VIRGINIA

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#### DECISION

#### EMERGENCY RULE DECISION (ERD 57-91)

AGENCY: Alcohol Beverage Control Commission  
RULE: Amendments, Series 4, Retail Sale of Wine in Grocery Stores,  
Wine Specialty Shops and Private Wine Restaurants  
FILED AS EMERGENCY RULE: July 3, 1991

- par. 1 The Alcohol Beverage Control Commission (ABCC) has filed amendments to the above emergency rule.
- par. 2 West Virginia Code 29A-3-a 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-a(a))].
- par. 4 (A) Procedural Compliance: WV 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 ABCC filed this emergency rule with supporting documents with the Secretary of State July 3, 1991 and with the LRMRC July 3, 1991.

par. 7 It is the determination of the Secretary of State that the ABCC has complied with the procedural requirements of WV Code §29A-3-15 for adoption of an emergency rule.

par. 8 (B) Statutory Authority -- WV Code §60-2-16 reads:

*The commission shall have the power to prescribe rules and regulations to give effect to the powers vested in it by this chapter. Rules and regulations shall be recorded in a book especially kept for that purpose, and in its discretion may be published for general circulation. All other records and entries necessary to show the official conduct of the commission shall be preserved and shall be public records and open for inspection during business hours.*

par. 9 The WV Code further states in §60-8-23:

*§60-8-23. Duties and powers of commissioner; rules and regulations.*

*(a) The commissioner is hereby authorized:*

*(1) To enforce the provisions of this article.*

*(2) To enter the premises of any licensee at reasonable times for the purpose of inspecting the premises, and determining the compliance of the licensee with the provisions of this article and any rules and regulations promulgated by the commissioner.*

*(3) In addition to rules and regulations relating to the tax imposed by §60-8-4 of this article or otherwise authorized by this article, to promulgate reasonable rules and regulations as he deems necessary for the execution and enforcement of the provisions of this article, which may include, but shall not be limited to:*

*(A) The transport, use, handling, service and sale of wine;*

*(B) Establishing standards of identity, quality and purity to protect the public against wine containing deleterious, harmful or impure substances or elements and against spurious or imitation wines and wines unfit for human consumption; and*

*(C) Restricting the content of wine advertising so as to prohibit false or misleading claims, or depictions or descriptions of wine being consumed irresponsibly or immoderately, or advertising presentations designed to appeal to persons below the legal drinking age: Provided, That the commissioner shall not promulgate any rule or regulation which prohibits the advertising of a particular brand or brands of wine and the price thereof: Provided, however, That price shall not be advertised in a medium of electronic communication subject to the jurisdiction of the federal communications commission.*

par. 10 It is the determination of the Secretary of State that the ABCC has not exceeded its statutory authority in promulgating this emergency rule.

par. 11 (C) Emergency WV Code 29A-3-15(g) defines "emergency" as follows:

(g) 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. 12 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. 13 The facts and circumstances as presented by the ABCC are as follows:

W. Va. Code §60-8-2 specifically excludes fortified wine from the definition of wine: the rule is not equally clear. §60-8-4 states that the wine liter tax is imposed on sales by suppliers to distributors. 175 CSR 4, §7.2.1 does not comply with that requirement. Other areas need technical corrections. Also, an improved hearing procedure is necessary to provide appropriate procedural protections. Because of the differences which exist between the code and the rule, confusion currently exist. An emergency filing is necessary to protect the public welfare.

par. 14 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(g). . . "immediate preservation of public peace, health, safety or welfare."

par. 15 This decision shall be cited as Emergency Rule Decision 57-91 or ERD 57-91 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Alcohol Beverage Control Commissioner, the Attorney General and the Legislative Rule Making Review Commission.



KEN HECHLER  
Secretary of State

Entered July 15, 1991

FILED IN THE OFFICE OF  
THE SECRETARY OF STATE  
THIS DATE July 15, 1991  
ADMINISTRATIVE LAW DIVISION