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2009 DEC 14 PM 2:12

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December 14, 2009

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: West Virginia Alcohol Beverage Control Commission

RULE: Amendment, 175CSR5, Licensing of Retail Outlets

DATE FILED AS AN EMERGENCY AMENDMENT: December 10, 2009

DATE FILED AS AN EMERGENCY RULE: August 31, 2009

DECISION NO. 30-09

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

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 30-09)

AGENCY: Alcohol Beverage Control Commission
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par. 1 The Alcohol Beverage Control Commission (ABCC) has filed the above amendments to an existing rule as an emergency amendment.

par. 2 W. Va. Code §29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.

par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].

par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).

par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.

par. 6 The ABCC filed this emergency rule with supporting documents with the Secretary of State December 10, 2009 and with the LRMRC December 10, 2009.

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

par. 8 (B) Statutory Authority – W. Va. Code §60-3A-6(b)(3) reads:

3) Notwithstanding any other provision of this code to the contrary, proposed legislative rules for this article filed in the State Register by September 1, 2009, may be filed as emergency rules. Such emergency rules shall include the standards, criteria and formulae or methodology utilized by the board when establishing the minimum bid for each license pursuant to section ten-b of this article.

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

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

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

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

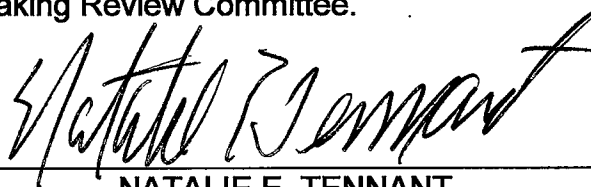
par. 12 The facts and circumstances as presented by the ABCC are as follows:

HB 105 passed during the 1st 2009 Special Session, rule edits are required for 175 CSR 5's new dates and requirements which the prior rule failed to contemplate bidding licenses for a 10 year license period beyond 2000. Edits are: (1) add Purchase Option; (2) add Deferred Payment Financing; (3) Revise Bid processes; (4) adding restrictions, licensed retailer requirements and other licensure requirements; (5) clarify statutory preferences not in the rule; and (6) Clean up language due to bill changes or typos. W. Va. Code §60-3A-6(c)(3) provides emergency status of the rule. Furthermore the rule warrants emergency status along with 175 CSR 1 so the State will: (1) provide purchase options and bid the 10 year licenses for the retail liquor sales; (2) ensure the continued supply and sales of liquor; (3) prevent harm to the public and licensed retailers that could result from not issuing licenses; (4) permit the Commissioner to perform his statutory duties and responsibilities; and (5) modernize the process for liquor ordering, payment and delivery. Thus, the granting of emergency status to this rule prevents any public harm that could result from the unavailability of licensed retailers to sell liquor in West Virginia and further prevent the loss of revenue to the State. Emergency status was previously granted for this rule and on November 18, 2009, the Retail Liquor Licensing Board approved an amendment to the formula which necessitates this Emergency Amendment to the Emergency Rule.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "time limitation"

par. 14

This decision shall be cited as Emergency Rule Decision 30-09 or ERD 30-09 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Alcohol Beverage Control Commission, the Attorney General and the Legislative Rule Making Review Committee.



NATALIE E. TENNANT
Secretary of State

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