

**WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION**

Form #3 □

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: Alcohol Beverage Control Commission TITLE NUMBER: 175

CITE AUTHORITY: W. Va. Code §60-9-5

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 8

TITLE OF RULE BEING PROPOSED: Cigarettes Produced for Export; Imported Cigarettes

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Donald L. Stemple
Authorized Signature

Title 175
C.S.R. 8
Cigarettes Produced for Export; Imported Cigarettes

SUMMARY OF RULE

West Virginia Code §60-9-5 states that the Alcohol Beverage Control Commissioner shall promulgate legislative rules as are necessary to establish policies and procedures for implementing the new article, W. Va. Code §60-9-1 et seq., which prohibits imported cigarettes into this state that do not have the proper tax stamps and also this rule gives definitions of cigarette tax, importer, stamp, tobacco products, unstamped cigarettes and other specific definitions.

On March 11, 2000, the Legislature enacted Senate Bill 475, that has dual responsibilities for the mandates of this bill. The Alcohol Beverage Control Commissioner has the responsibility of enforcement and the Tax Department has the responsibility for issuing the new tobacco license and excise tax. It also clarifies prohibitions for imported cigarettes, unstamped tobacco products and cigarettes produced for export. The enforcement provisions are detailed and the Unfair Trade Practices section details manufacturers relationships with retailers; procedure for establishing proof of a lesser cost of doing business; procedure for filing a complaint, and hearing and appeals procedure is detailed.

This rule also gives authority to seize contraband, establishes penalties and fines, appeals and hearings.

Title 175
C.S.R. 8
Cigarettes Produced for Export; Imported Cigarettes

STATEMENT OF CIRCUMSTANCES

West Virginia Code §60-9-5 states that the alcohol beverage control commissioner shall propose legislative rules as are necessary to implement policies and procedures to implement this new article §60-9-1 et seq., which authorizes the commissioner to seize contraband cigarettes or "gray" cigarettes and to impose fines, unfair trade practices defined and hearings and appeals explained.



**STATE OF WEST VIRGINIA
ALCOHOL BEVERAGE CONTROL ADMINISTRATION**

322 70th Street, SE
Charleston, West Virginia 25304-2900

CECIL H. UNDERWOOD
GOVERNOR

DONALD L. STEMPLER
COMMISSIONER

ROBIN CAPEHART
SECRETARY OF TAX & REVENUE

September 1, 2000

Honorable Ken Hechler
Secretary of State
West Virginia State Capitol Complex
Building 1, Main Office Building
Charleston, WV 25305

Re: Title 175, Series 8 and 9 Proposed Agency Rules

Dear Mr. Secretary:

Pursuant to the Notice of Filing of Proposed Agency Rules, specifically for Series 8 and 9 of Title 175, please be advised that this agency received no comments.

Sincerely,

A handwritten signature in cursive script that reads "Betty Peters White".

Betty Peters White

bp

**WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION**

Form #2

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OFFICE OF THE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Alcohol Beverage Control Commission TITLE NUMBER: 175

RULE TYPE: Legislative CITE AUTHORITY: W.Va. Code §60-9-5

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 8

TITLE OF RULE BEING PROPOSED: Cigarettes Produced for Export; Imported Cigarettes

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON September 1, 2000 AT 4:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Betty Peters White

Alcohol Beverage Control Commission

322 70th Street, S.E.

Charleston, WV 25304

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.

Donald L. Stemple
Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: September 1, 2000

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) Alcohol Beverage Control Commission
322 70th Street, S.E.
Charleston, WV 25304

Telephone: 304-558-2481

LEGISLATIVE RULE TITLE: Cigarettes Prodced for Export; Imported Cigarettes

1. Authorizing statute(s) citation W. Va. Code §60-9-5

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
August 2, 2000

b. What other notice, including advertising, did you give of the hearing?
Class II Legal Advertisement. Charleston Newspapers (See Attached Affidavit of Publication)

c. Date of Public Hearing(s) *or* Public Comment Period ended:
September 1, 2000

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached _____ No comments received X

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

September 1, 2000

- f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Betty Peters White

Alcohol Beverage Control Commission

322 70th Street, S.E.

Charleston, WV 25304

Telephone: 304-558-2481; Fax: 304-558-0081; e-mail:

bwhite@abcc.state.wv.us

- g. **IF DIFFERENT FROM ITEM 'f',** please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

d. Attach findings and determinations and reasons:

Attached

SSS



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SARA DYE
322 70TH STREET SE
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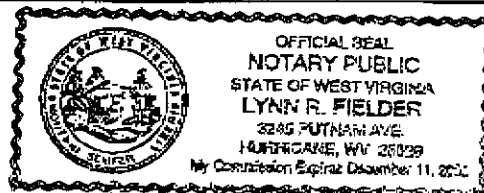
Table with 2 columns: Field Name, Value. Fields include INVOICE DATE (08/17/00), ACCOUNT NBR (025721006), SALES REP ID (0020), INVOICE NBR (766106001).

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State of West Virginia, AFFIDAVIT OF PUBLICATION

I, Sandra Leagy of THE CHARLESTON GAZETTE, A DAILY DEMOCRATIC NEWSPAPER, THE DAILY MAIL, A DAILY REPUBLICAN NEWSPAPER, published in the city of Charleston, Kanawha County, West Virginia, do solemnly swear that the annexed notice of:



LEGISLATIVE RULES

was duly published in said paper(s) during the dates listed below, and was posted at the front door of the court house of said Kanawha County, West Virginia, on the 10TH day of AUGUST 2000. Published during the following dates: 08/09/00-08/16/00

Subscribed and sworn to before me this 30 day of August

Printers fee \$ 89.32

Signature of Lynn R. Fielder



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SALES REP ID	0020
INVOICE NBR	766106001

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 SARA DYE
 322 70TH STREET SE
 CHARLESTON WV 25304

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INVOICE DATE	08/17/00
ACCOUNT NBR	025721006
SALES REP ID	0020
INVOICE NBR	766106001

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 Each successive insertion is discounted by 25% of the first insertion rate (\$.069375 per word).

DATE	AD TYPE	DESCRIPTION	REFERENCE NBR	PROGRAM ORDER NBR	AD NUMBER	HOPE RATE	GROSS AMOUNT	NET AMOUNT
08/09	LEGF	GZ LEGISLATIVE RULES	766106001		L455747 1X0438	4.38 5.83	25.52	
08/09	LEGE	DM LEGISLATIVE RULES	766106001		L455747 1X0438	4.38 5.83	25.52	51.04
08/16	LEGR	GZ LEGISLATIVE RULES	766106002		1X0438	4.38 5.83	25.52	
08/16	LEGR	DM LEGISLATIVE RULES	766106002		1X0438	4.38 5.83	25.52	

State of West Virginia, **AFFIDAVIT OF PUBLICATION**

I, _____ of _____

published in the city of Charleston, Kanawha County, West Virginia, do solemnly swear that the annexed notice of:

was duly published in said paper(s) during the dates listed below, and was posted at the front door of the court house of said Kanawha County, West Virginia, on the _____ day of _____ . Published during the following dates:

Subscribed and sworn to before me this _____ day of _____ .

Printers fee \$ _____

**NOTICE OF FILING OF
PROPOSED
LEGISLATIVE RULES
WEST VIRGINIA
ALCOHOL BEVERAGE
CONTROL
ADMINISTRATION**

The proposed legislative rule for Title 175, Series 8 (Cigarettes Produced for Export, Imported Cigarettes) was filed with the Secretary of State's Office on August 2, 2000. This proposed rule will implement new policies and procedures contained in Enrolled Senate Bill 475, 2000 Regular Session, and other statutory changes.

The proposed legislative rule for Title 175, Series 9 (Prohibiting Sale of Tobacco Products in Vending Machines) was filed with the Secretary of State's Office on August 2, 2000. This proposed rule will implement new policies and procedures contained in Enrolled House Bill 4183, 2000 Regular Session, and other statutory changes.

The Secretary of State may assess a copying charge for these documents.

Written comments on these must be received prior to 4 p.m. on September 1, 2000, and should be directed to Keith Wagner, West Virginia Alcohol Beverage Control Commission, 322 70th St., S.E., Charleston, WV 25304.

(455747)

□
APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Cigarettes Produced for Export; Imported Cigarettes §175-8

Type of Rule: 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	0	0	0	0	0
PERSONAL SERVICES	0	0	0	0	0
CURRENT EXPENSE	0	0	0	0	0
REPAIRS & ALTERATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER	0	0	0	0	0

2. Explanation of Above Estimates:

Alcohol Beverage Control Commission does not anticipate any change in the expenditures.

3. Objectives of These Rules:

This rule establishes procedures and policies for implementing the enforcement of illegal imported cigarettes and "gray" cigarettes into this State.

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

No economic impact on State Government is expected.

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

This rule should have no economic impact on political subdivisions; specific industries or specific groups of citizens.

C. Economic Impact on Citizens/Public at Large.

There should be no economic impact on citizens or public at large.

Date: September 1, 2000

Signature of Agency Head or Authorized Representative:

Donald L. Stemple

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**TITLE 175
LEGISLATIVE RULE
ALCOHOL BEVERAGE CONTROL COMMISSION**

**SERIES 8
CIGARETTES PRODUCED FOR EXPORT; IMPORTED CIGARETTES**

§175-8-1. General.

1.1. Scope. - This rule establishes policies and operating procedures for the sale of imported cigarettes, cigarettes produced for export and other tobacco products, prohibitions, penalties and administrative hearing procedures. This article W. Va. Code §60-9 is new.

1.2. Authority. - W. Va. Code §60-9-5

1.3. Filing Date. -

1.4. Effective Date. -

§175-8-2. Definitions.

As used in this rule and unless the context clearly requires a different meaning, the following terms shall have the meaning ascribed herein, and apply in the singular and in the plural.

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

2.2. "Business Registration Certificate" means the West Virginia Business Registration Certificate required by W.Va. Code §11-17-1 et seq.

2.3. "Cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and whether or not such tobacco is flavored, adulterated or mixed with any ingredient, the wrapping or cover of which is made of paper or any substance or material, except tobacco; and any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packing and labeling, is likely to be offered to, or purchased by, consumers as a cigarette.

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

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

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

2.7. "Cigarette tax" or "excise tax" means the tax imposed by the State Tax Commissioner by authority W. Va. Code §11-17-1 et seq.

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

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

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

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

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

2.11. "Person" means an individual, firm, partnership, limited partnership, company, joint-stock company, corporation, limited liability company, voluntary association, club, agency, syndicate, municipal corporation or other political subdivision of this state, trust, receiver, trustee, fiduciary or conservator, and when used in connection with any penalties imposed by this rule, means officers, directors, trustees or members of any firm, copartnership, association, corporation, trust, limited liability company, trustee or any other form of business enterprise, including receiver or liquidating agent.

2.12. "Public place" means any place, building or conveyance to which the public has, or is permitted to have access, including, but not limited to establishments that provide lodging, places that sell food, for consumption on or off the premises including, but not limited to vessels, parks,

airports, 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 by the Commissioner to sell alcoholic liquors for consumption on the premises.

2.13. "Record" means any manner of recording from which a transcript can be made.

2.14. "Retailer" means and includes every person in this state, other than a wholesaler or sub-jobber, engaged in selling cigarettes at retail to a consumer or to any person for any purpose other than resale pursuant to W. Va. Code §11-17-2.

2.15. "Sale" means any transfer, exchange of goods or services, in exchange for money, currency, checks, credit cards or barter in any manner or by any means, for a consideration, and shall include all sales made by principal, proprietor, agent or employee.

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

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

2.18. "Selling" includes solicitation or receipt of orders, possession for sale, and possession with intent to sell.

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

2.20. "Stamped cigarettes" means that the stamp as required by W. Va. Code §11-17-1 et seq. has been affixed to the bottom of the package of cigarettes.

2.21. "Sub-jobber" means any person who purchases stamped cigarettes from any other person who purchases from the manufacturer when the other person is located in any state that levies an excise tax on cigarettes and who purchases such cigarettes solely for the purpose of bona fide resale to retailers.

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

2.23. "Unstamped cigarettes" means that the stamp as required by W.Va. Code §11-17-1 et seq. has not been affixed to the bottom of the package of cigarettes.

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

2.25. "Wholesaler" means any person who purchases unstamped cigarettes directly from the manufacturer or importer for resale.

§175-8-3. Imported Cigarettes – Requirements

3.1 Wholesalers, Sub-jobbers, retail dealers, cigarette vending machine operators and any others selling cigarettes or other tobacco products in this State are required to obtain a Business Registration Certificate and a license for selling cigarettes and other tobacco products from the State Tax Department:

3.2. The application for a license to sell cigarettes, other tobacco products, or wrappers will be a part of the West Virginia Tax Department's Business Registration Certificate Application or the renewal application for same as provided for in W. Va. Code §11-12-4a and Legislative Rule, Title 110, Series 17, Section 3. -- "Cigarette Excise Tax"

3.3. Each person authorized to affix the state tax stamp to cigarettes will file with the Tax Commissioner, on the first business day of each month, a report listing all cigarettes imported into the United States that they stamped the previous month, in compliance with W.Va. Code §60-9-3 and Legislative Rule Title 110, Series 17.

§175-8-4. Cigarettes produced for export – Prohibitions. Unstamped tobacco products

4.1. No person will sell or distribute tobacco in this State to consumers, to acquire, hold, own, possess or transport, for sale or distribution in this state or to import or cause to be imported for sale or distribution in this state:

4.1.1. Any cigarettes that have a statement, label, stamp, sticker or notice that the manufacturer did not intend the cigarettes to be sold, distributed or used in the United States, including but not limited to labels stating "for export only," "U.S. tax-exempt," "for use outside U.S." or similar wording; or

4.1.2. Does not meet federal requirements regarding warnings on packages of cigarettes manufactured, packaged or imported for sale, distribution, or use in the United States, including, but not limited to, the precise warning labels specified in the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1333; and all federal trademark and copyright laws;

4.1.3. Cigarettes imported into the United States in violation of 26 U.S.C. 5754 or other federal laws or the implementing federal regulations;

4.1.4. Cigarettes that have not submitted the list of ingredients added to tobacco in the manufacture of cigarettes to the secretary of the United States department of health and human services as required by Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1355a;

4.1.5. Altering the package of cigarettes prior to sale to ultimate consumer by removing, concealing or obscuring:

4.1.5.a. Any statement, label, stamp, sticker or notice indicating that the manufacturer did not intend the cigarettes to be sold, distributed or used in the United States;

4.1.5.b. Any health warning not specified in the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1333; or

4.1.5.c. Affix any stamp required by the state tax department to any cigarettes pursuant to W. Va. Code §11-17-1 et seq.

§175-8-5. Penalties

5.1. Except as otherwise provided in this rule, any tobacco products as noted in Section 4 of this rule, or any tobacco products that are required to have West Virginia tobacco stamps affixed thereto, and are found any place in this State without the proper stamps affixed thereto, or without applicable West Virginia tobacco tax having been paid, unless such products are in the possession of a person or firm currently licensed, qualified and authorized to possess such tobacco products, or unless they are in course of transit from and consigned to a person or firm currently licensed, qualified and authorized to possess such tobacco products, or in the possession of a common carrier complying with the provisions of this part, are declared to be contraband goods, and will be seized, without warrant, by the Commissioner or by any peace officer of this state authorized by the Commissioner to do so.

5.2. Duly licensed wholesale dealers and sub-jobbers not appointed stamping agents who in their normal course of business receive from out of state untaxed tobacco products, may, upon written authorization from the Commissioner, have such untaxed tobacco products in their possession for a period not to exceed twenty-four (24) hours, exclusive of Saturdays, Sundays and legal holidays, before being required to have proper stamps affixed thereto, or applicable West Virginia tobacco tax paid thereon by an authorized tobacco tax stamping agent.

5.3. Under no condition may such tobacco products be sold, used or otherwise disposed of before having tax stamps affixed thereto and applicable tobacco tax paid thereon.

5.4. All such tobacco products requiring tobacco tax to be paid thereon and found in the possession of any person will be presumed to have been held by the person for more than twenty-four (24) hours unless proof can be shown to the contrary.

5.5. The provisions of this section do not apply to persons possessing no more than twenty (20) packages of twenty (20) cigarettes each, or cigars in an amount not exceeding fifty (50) cigars, or other tobacco products which have been brought into the state by the person; and in all instances of possession in excess of the limited quantities enumerated, the foregoing provision for exception of any cigarettes, cigars or other tobacco products will not be applicable and any and all such products, including those quantities excepted on which the applicable West Virginia tobacco tax has not been paid, shall be deemed to be contraband and may be seized, without warrant.

5.6. Every person who transports within this state, cigarettes not bearing West Virginia tobacco tax stamps or any other tobacco products upon which the West Virginia tax has not been paid will be presumed to be transporting these products in violation of the provisions of this rule, and such products and any vehicles used to transport them will be deemed contraband. Such products shall be confiscated and disposed of as provided for in this rule. Such vehicles may likewise, in the discretion of the commissioner, be confiscated and disposed of as provided for in this rule.

5.7. This presumption may be rebutted by the person transporting the tobacco products; provided, that the person has in the person's actual possession invoices or delivery tickets for the products which show the true name and exact address of the consignor or seller, the true name and exact address of the consignee or purchaser, and the quantity and brands of such products so transported.

5.8. If the tobacco products are consigned to or purchased by any person in West Virginia, such purchaser or consignee must be a person that is authorized to possess such tobacco products in this state; and if the invoice or delivery ticket specifies that the tobacco products are to be delivered to any person in any other state or jurisdiction, such person must be authorized by the laws of the other state or jurisdiction to receive or possess tobacco products on which the taxes imposed by the other state or jurisdiction have not been paid.

5.9. The presumption provided for herein may not be overcome if the invoice or delivery ticket is false, or if the purchaser, as indicated by the name and/or address shown on the invoice or delivery ticket, is not authorized by the laws of the receiving state to possess such tobacco products.

5.10. The Commissioner is hereby authorized to take custody and retain any such products and any vehicle being used to transport them until the correctness of any invoices or delivery tickets provided for herein can be determined by the Commissioner, either before or at a hearing, as provided for in this rule.

5.11. In addition to any other penalties provided for in this rule, any person unlawfully transporting or unlawfully in possession of cigarettes or other tobacco products will, in the discretion of the Tax Commissioner, be liable for a penalty of not more than five thousand dollars (\$5,000.00), or imprisoned in a state correctional facility for not more than five years, or both fined and imprisoned and further, at the discretion of the ABCC may impose on the person a civil penalty in an amount not to exceed the greater of five hundred percent (500%) of the retail value of the cigarettes involved or five thousand dollars (\$5,000.00), upon finding a violation by such person of this rule.

5.12. After qualifying with and receiving authorization from the Commissioner, wholesale dealers and sub-jobbers and manufacturing distributors licensed under the provisions of this rule may have in their possession tobacco products on which the West Virginia tax has not been paid to fulfill ordinary export requirements and to provide for their sale to airplanes, trains, Indian Reservations, armed forces installations, and veterans administration hospitals, where such products are sold only to patients registered and admitted therein.

5.13. To provide for its ordinary export requirements, and after qualifying and receiving authorization from the Commissioner, a West Virginia licensed wholesaler dealer and sub-jobber or tobacco distributor servicing stores, vending machines or other retail businesses located in another state may possess, in storage warehouses in this state or in vehicles in the process of transporting, foreign stamped or other such tobacco products in an amount authorized by the Commissioner if acquired from a West Virginia appointed and bonded stamping agent and which bear, if required by the Commissioner, the tax stamps of the state in which the product is to be sold.

5.14. The Commissioner is hereby empowered, if the Commissioner deems it necessary, to limit such authorizations by designating only a state or specified states from which these licensees may possess such foreign stamped or other unstamped products, and in what maximum quantity.

5.15. Also, upon qualifying and receiving permission from the Commissioner, any tobacco dealer licensed and domiciled in another state may obtain from a West Virginia appointed stamping agent foreign stamped or other unstamped tobacco products and transport them to the dealer's business location in the foreign state, but the dealer must have in their possession an invoice showing the true name and exact address of the consignor or seller, the true name and

exact address of the consignee or purchaser, the quantity and brands of the cigars or cigarettes transported, and any other information that the Commissioner may require.

5.16. A person licensed to engage in the business of a tobacco manufacturer's warehouse, as defined by this rule, is authorized to have in the person's possession foreign stamped or other unstamped tobacco products for the purpose of supplying properly licensed West Virginia wholesale dealers and sub-jobbers or for export purposes.

5.17. Every person, as defined by this rule including, but not limited to, persons licensed to engage in the business of a tobacco manufacturer's warehouse, authorized by this rule to possess foreign stamped or other unstamped tobacco products, may be required to account for the distribution of such foreign or other unstamped products, and will be unconditionally liable for the tax imposed by this rule for each and every foreign or other unstamped tobacco product removed from inventory and not sold as above defined or exported from the state of West Virginia.

§175-8-6. Enforcement of youth smoking laws; ABCC; use of minors in inspections.

6.1. The Commissioner, the superintendent of the West Virginia state police, the sheriffs of the counties of this state and the chiefs of police of municipalities of this state, may periodically conduct unannounced inspections at establishments where tobacco products are sold or distributed to ensure compliance with the provisions of this rule and in a manner that conforms to the applicable federal and state laws, rules and regulations. Persons under the age of eighteen years may be enlisted by the commissioner or agents thereof to test compliance with this rule. The minors may be used to test compliance only if the testing is conducted under the direct supervision of the commissioner or agents thereof and written consent of the parent or guardian of such person is first obtained and the minors will not be in violation of this rule.

§175-8-7. Administrative Sanctions W. Va. Code §60-9-5

7.1. The Commissioner may impose on a person for violation of this rule, a civil penalty in an amount not to exceed the greater of five hundred percent (500%) of the retail value of the tobacco involved or five thousand dollars (\$5,000.00) as authorized in W. Va. Code §60-9-5.

7.2. The Commissioner may seize cigarettes that are acquired, held, owned, possessed, transported in, imported into or sold or distributed in this state in violation of W. Va. Code §60-9-5 and this rule and such cigarettes are considered contraband and, without warrant, are subject to seizure and forfeiture.

7.3. Any monetary penalty assessed and collected by the Commissioner will be transmitted to the state treasurer and credited to the Alcohol Beverage Control Enforcement Fund

pursuant to W.Va. Code §60-7-13. The state treasurer will not use these moneys for any other purpose, nor will the state auditor use this fund as any part of the general revenue fund of the state. The moneys collected, received and deposited in the Alcohol Beverage Control Enforcement Fund will be used for enforcement of this rule.

§175-8-8. Hearing and Appeal Procedure.

8.1. If the Commissioner finds the person in violation of this rule, he or she shall make and enter an order to that effect and mail by certified mail, return receipt requested, a copy of the order to the violator, or serve it as provided for the service of legal process in accordance with the West Virginia Rules of Civil Procedure.

8.2. Petition for hearing. - Any person adversely affected by an order of the Commissioner, shall have the right to a hearing before the Commissioner or a person designated by him or her as hearing examiner. A petition in writing requesting a hearing must be served upon the Commissioner within ten (10) days following the receipt of the order.

8.3. Petition requirements. - The petition for a hearing shall be in writing. An original and one (1) copy of the petition shall be served upon the Commissioner. It shall be complete in itself so as to fully state the issues. No telegram, facsimile transmission, electronic mail, telephone call, letter or similar communication will be regarded as a petition. The petition must contain the following:

8.3.1. A clear and concise assignment of each error that 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.

8.3.2. A clear and concise statement of fact upon which the petitioner relies as sustaining its assignment of error.

8.3.3. A prayer setting forth the relief sought.

8.3.4. The signature of the petitioner or its officers signing such petition.

8.3.5. A verification by the petitioner.

8.4. Form for petition. - A petition for hearing shall be in the form set forth below.

PETITION FOR HEARING

To: West Virginia
Alcohol Beverage Control Commissioner
322 70th Street, S.E.
Charleston, WV 25304

(For Commission Use Only)

Docket No. _____

Date of Ruling of Violation _____

In the Matter of: Petitioner's Business Name _____

Petitioner's Business Registration Certificate Tobacco No. _____

Address _____

The above named against whom you have issued an order of violation, and in support of such petition avers as follows:

First: Your petitioner admits as true and correct all of the determinations made by the Commissioner and set forth in the above order and basis thereof, except the following: (Specify here each error which the petitioner alleges to have been made by the Commissioner.)

Second: (Set forth clear and concise statements of fact upon which the petitioner relies as sustaining the assignment of error.)

Wherefore, your petitioner prays (insert relief sought, i.e., this order be set aside).

State of _____)

Business Name _____)

SS Signature of Affiant _____)

County Of _____)

Title _____, being duly sworn according to law, deposes and says that the facts alleged in this petition, including any sheets attached hereto, are true and affiant is the petitioner or is duly authorized to represent the petitioner.

By: _____

Sworn to and subscribed before me this _____ day of _____, 20 ____ at _____.

Notary Public

My commission expires _____
Notary Public

8.5. Hearings. - Cost deposit. - The person demanding a hearing shall give security for the cost of the hearing in the amount of three hundred dollars (\$300.00). The cost deposit will be advanced by certified check, cashier's check or money order and shall accompany the petition demanding a hearing.

8.6. Subpoenas and subpoenas duces tecum. - In all hearings held under W.Va. Code §60-9-1 *et seq.*, and this rule, 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 Alcohol Beverage Control Commissioner or by the petitioner, the same to be issued by either the Commissioner or his duly appointed hearing examiner.

8.6.1. 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 eighteen (18) years of age or older or by registered mail, but a return acknowledgment 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.

8.6.2. 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 Alcohol Beverage Control Commissioner are to be the responsibility of the 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 W.Va. Code §55-1-1 *et seq.*

8.6.3. 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.

8.6.4. All such fees related to any subpoenas or subpoena duces tecum issued at the insistence of a petitioner will be paid by the petitioner who asks that such subpoena or subpoena duces tecum be issued, out of the hearing deposit.

8.6.5. All requests by the petitioner 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.

8.6.6. 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 the 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 proceedings 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.

8.7. Stay of violation order. - The service of a petition for hearing upon the Commissioner shall operate, other than herein provided, to suspend the execution of violation fines with respect to which a hearing is being demanded.

8.8. Hearing date. - The Commissioner shall set a date for any hearing demanded and notify the person demanding the hearing of the date and time of the hearing.

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

8.10. Continuances. - Hearings will not be delayed by a motion for continuance, unless it is timely made 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.

8.11. 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.

8.12. Hearing. - The Alcohol Beverage Control Commissioner may designate an examiner to conduct the hearing.

8.12.1. 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.

8.12.2. The petitioner, his or her 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.

8.13. 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 may accept briefs in lieu of argument. Briefs must be filed within ten (10) days after the hearing.

8.14. Evidence admissible at hearing. - The Commissioner may admit any relevant evidence, except that he or she 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.

8.15. Record of proceedings. - There shall be a record made at all hearings held by the Commissioner.

8.16. Commissioner's decision. - After the conclusion of the hearing or within ten (10) days of receipt of the transcript, 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 the recommended decision, shall either accept or reject the recommended decision. If he or she accepts the decision, he or she shall sign and acknowledge the same as his or her own after having reviewed the transcript and all exhibits attached and affixed thereto. If he or she rejects the decision, he or she shall within ten (10) days of receipt of the recommended decision prepare a decision setting forth his or her 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. A copy of the order shall be served upon each party to the hearing and attorneys of record, if any, in person or by registered or certified mail.

8.17. Appeal to circuit court. - An appeal may be taken by the applicant or licensee to the Circuit Court of Kanawha County, West Virginia, or the circuit court of the county in which the petitioner resides or does business, or with the judge thereof in vacation, if filed within thirty (30) days after the charge upon which the party received notice of the final order of the Alcohol Beverage Control Commissioner.

§175-8-9. General Enforcement Provisions.

9.1. The Commissioner may for the purpose of enforcing W.Va. Code §60-9-1 et seq. and this rule, share information with and request information from other state agencies, constitutional officers, local agencies, federal agencies and any agency or constitutional officer of this or any other state or any local agency thereof, notwithstanding the provisions of confidentiality of the State Code.

9.2. The Commissioner shall appoint a director of the ABCC Tobacco Education and Enforcement Division and adequate staff to implement W.Va. Code §60-9-1 et seq. and this rule, including, but not limited to education for enforcement procedures (ABCC Form Number T-2000 WV ABCC Tobacco Enforcement Procedures) (Appendix I).

9.3. In addition to any other remedy provided by law, a person may bring an action for appropriate injunctive or other equitable relief for a violation of this article; actual damages sustained by reason of the violation; as determined by the court, interest on the damages from the date of complaint, taxable costs, and reasonable attorney's fees. If the trier of fact finds that the violation is flagrant, it may increase recovery to an amount not in excess of three times the actual damages sustained by reason of the violation.

§175-8-10. Applicability.

10.1. This rule does not apply to cigarettes allowed to be imported or brought into the United States for personal use and cigarettes sold or intended to be sold as duty-free merchandise by a duty-free sales enterprise in accordance with the provisions of 19 U.S.C. 1555(b) and any implementing regulations; provided this rule does apply to cigarettes brought back into the customs territory for resale within the customs territory. The penalties provided in this rule are in addition to any other penalties imposed under other law.

§175-8-11. Unfair Trade Practices.

11.1. Unfair trade practice means:

11.1.1. The sale of cigarettes in violation of W.Va. Code §60-9-2;

11.1.2. The failure to comply with W.Va. Code §60-9-3;

11.1.3. The sale of cigarettes at wholesale for less than the markup to cover, in part, the cost of doing business, of four percent of the aggregate of the invoice cost or replacement cost, less trade discounts, except customary discounts for cash, and plus freight charges.

11.1.4. The sale of cigarettes at retail for less than the mark up to cover, in part, the cost of doing business, of seven percent of the aggregate of invoice cost or replacement cost, less trade discounts, except customary discounts for cash, plus freight charges.

11.2. Exception to Unfair Trade Practices:

11.2.1. Proof of a lesser cost of doing business as provided in these rules;

11.2.2. Sales in good faith to meet the legal prices of a competitor selling cigarettes in this state as provided in these rules;

11.2.3. Sales in closing out in good faith an owner's stock for the purpose of discontinuing the sale of cigarettes;

11.2.4. Sales of cigarettes that are damaged or deteriorated in quality or where cigarettes are sold in bona fide clearance sales, and, in each case, cigarettes are advertised, marked and sold as such;

11.2.5. Sales by an officer acting under the orders of any court;

11.2.6. Sales for charitable purposes or to relief agencies;

11.2.7. Where cigarettes are sold on contract to departments of the government or governmental institutions;

§175-8-12. Manufacturers Relationships with Retailers.

12.1. Each retailer, that receives funds from manufacturers for cigarette display allowances, shall ensure separate accounting and record keeping for display allowances. A retailer may not use display allowance payments to reduce the cost of cigarettes for sale to consumers.

12.2. Any retailer that offers for sale any cigarettes for which the manufacturer makes a contribution to the retail price paid by a consumer (by means of coupons, stickers, buy-downs, or otherwise) shall post in a conspicuous place a notice advising the public of that fact and any such contribution shall be included in calculating the price for which the cigarettes are sold under this section.

12.3. No retailer may sell cigarettes to consumers that have been provided by the manufacturer as complimentary cigarettes. Such complimentary cigarettes are typically labeled on the package as Complimentary, not for resale or words of similar effect.

§175-8-13. Procedure For Establishing Proof Of A Lesser Cost Of Doing Business.

13.1. Any person seeking to establish proof of a lesser cost of doing business shall adhere to the following procedure:

13.1.1. Complete application forms, prepared by the Commissioner, and submit the completed forms to the Commissioner with a processing fee of \$2,000.

13.1.2. Make available to the Commissioner all financial records and documentation held in the regular course of business;

13.1.3. Submit, and appear in person before the Commissioner, financial statements audited by an independent third-party accountant with supplementary financial information included in the accountant's report; and,

13.1.4. The scope of the analysis shall be limited to the cost of doing business of selling cigarettes, but all supplementary financial information shall be provided to the Commissioner.

13.2. The Commissioner shall analyze the financial information submitted to determine whether the applicant has established by clear and convincing evidence that the applicant has proven a lesser cost of doing business.

13.3. The Commissioner is authorized to employ individuals or contract with persons necessary, and with the appropriate educational and financial background, experience and expertise, to engage in a thorough review and audit of the financial information. The applicant shall reimburse the Commissioner for all expenses associated with the financial analysis and auditing.

13.4. If the Commissioner finds that the applicant established a lesser cost of doing business, the Commissioner shall issue a written authorization to the applicant establishing the new minimum price, and shall publish its findings in the State Register. The Commissioner shall also inform the State Tax Division and publish a legal advertisement of the new minimum price. The Commissioner shall further distribute the new minimum price information to interested wholesalers and retailers by whatever means the Commissioner deems expedient.

13.5. Upon publication in the State Register, that price becomes the new minimum price. All entities similarly situated, i.e. wholesaler or retailer, are similarly authorized to sell at the new minimum price.

13.6. The authorization to sell at the new minimum price is effective for one year following the initial date of publication in the State Register.

§175-8-14. Procedure For Filing Complaint.

14.1. Any person who has been aggrieved by the sales of cigarettes by a retailer or wholesaler may file a verified complaint with the Commissioner. The complaint shall contain the following information:

14.1.1. Name, address and telephone number of complainant;

14.1.2. The name, address and telephone number of the alleged offender and a detailed description of the alleged unfair trade practice, including:

14.1.2.a. The dates and times of the offending practice;

14.1.2.b. The location of the offending practice;

14.1.2.c. The nature of the offending practice, i.e., sale of gray market cigarettes, sales below costs, or sales below statutory minimum pricing;

14.1.2.d. The quantity of cigarettes sold and the price, if known, available or applicable;

14.1.2.e. The brand of cigarettes involved;

14.1.2.f. The duration of the alleged offense, i.e. one day, one week, one month;

14.1.2.g. Whether there has been a sudden and inexplicable decline in sales establishing reasonable cause that cigarettes are being sold at a cost less than the statutory minimum pricing; and,

14.1.2.h. Any other pertinent information that establishes or provides evidence that the unfair trade practices law has been violated;

14.2. The Commissioner shall investigate all valid complaints filed with the ABCC.

14.3. Upon a finding that the allegations set forth in the complaint are justified, or upon independent investigation that a prima facie violation may have occurred, the Commissioner shall notify the alleged offender of the allegations of unfair trade practices by certified mail,

return receipt requested. The notice of violation shall include the following information:

14.3.1. The factual basis for the allegation of unfair trade practice violation;

14.3.2. The pertinent statutory citation which was violated;

14.3.3. That the alleged violator has an opportunity to respond to the allegations within twenty (20) days from receipt of the notice of violation;

14.3.4. The address at the ABCC to which an answer to the allegations shall be delivered;

14.3.5. The name and telephone number of the person within the employ of the ABCC with responsibility for prosecuting the allegations;

14.3.6. That the alleged violator has a right to be represented by counsel;

14.3.7. That the alleged violator has an opportunity for a hearing before the Commissioner to respond to the allegations which hearing will be scheduled no later than thirty days following the date upon which the answer to the allegations was due to be filed with the Commissioner.

14.3.8. The amount of the monetary penalty assessed by the Commissioner, and any other appropriate and equitable relief allowed by statute.

14.4. Any alleged violator shall have a right to a hearing before the Commissioner, providing that demand in writing for such hearing is served upon the Commissioner within ten (10) days following the receipt by alleged violator of the copy of the notice of violation. If the alleged violator fails to request a hearing as provided in this rule, any monetary penalty assessed shall be due and owing to the State of West Virginia no later than ten (10) days following the date upon which the request for hearing could have been filed with the Commissioner.

§175-8-15. Hearing and Appeal Procedure.

15.1. Hearings. All hearings shall be held in Charleston, West Virginia at the ABCC offices, unless another location is selected in the sole discretion of the Commissioner.

15.2. Any alleged violator shall have a right to a hearing before the Commissioner, providing that demand in writing for such hearing is served upon the Commissioner within ten (10) days following the receipt by alleged violator of the copy of the notice of violation. The person demanding a hearing shall give security for the cost of such hearing in such form and

amount as the Commissioner may reasonably require. If the person demanding such hearing does not prevail in such hearing, or upon judicial review thereof, the costs of such hearing shall be assessed against him by the Commissioner and may be collected by an action at law or other proper remedy.

15.2.1. The Commissioner shall immediately set a date for such hearing and notify the person demanding such hearing thereof, which hearing shall be held within thirty (30) days after receipt of said demand.

15.3. Prima Facie Violation. At the hearing, the Commissioner must establish a prima facie case that the unfair trade practices law has been violated.

15.3.1. The prima facie case shall be established by one of the following:

15.3.1.a. Evidence that a wholesaler has sold cigarettes to a retailer at less than the statutory minimum pricing, as published by the Commissioner;

15.3.1.b. Evidence that a retailer has sold cigarettes at retail to consumers at a price less than the statutory minimum pricing, as published by the Commissioner;

15.3.1.c. Evidence of advertisement, offering to sell, or sale of cigarettes by any retailer or wholesaler at less than cost to him;

15.3.1.d. Evidence that cigarettes have been sold which violate the W.Va. Code §60-9-2.

15.4. Defense of Prima Facie Violation

15.4.1. An alleged violator may rebut establishment of violation of the unfair trade practices act by establishing:

15.4.1.a. Proof of a lesser cost of doing business as provided in this rule;

15.4.1.b. Sales in good faith to meet the legal prices of a competitor selling cigarettes in this state;

15.4.1.b.1. A wholesaler may engage in sales in good faith to meet the legal prices of a wholesaler or a sub-jobber competitor selling cigarettes in this state. If a competitor offers a retailer a price on cigarettes less than the current sales price, the wholesaler currently servicing that account may meet the competitive price, and sell the cigarettes for the same price offered by the competition. In doing so, the wholesaler must obtain a signed

statement from the retailer indicating the date and price paid for the cigarettes. The acknowledgment of a lower selling price shall be forwarded to the Commissioner, who shall maintain a record of the signed statements from retailers.

15.4.1.c. Sales in closing out in good faith an owner's stock for the purpose of discontinuing the sale of cigarettes;

15.4.1.d. Sales of cigarettes that are damaged or deteriorated in quality or where cigarettes are sold in bona fide clearance sales, and, in each case, cigarettes are advertised, marked and sold as such;

15.4.1.e. Sales by an officer acting under the orders of any court;

15.4.1.f. Sales for charitable purposes or to relief agencies;

15.4.1.g. Where cigarettes are sold on contract to departments of the government or governmental institutions.

15.5. Upon receipt of evidence, the Commissioner shall enter an order supported by findings of facts and conclusions of law and may provide relief or impose fines and penalties as provided by W.Va. Code §60-9-1 et seq. Absent a request for appeal, any fines or penalties imposed by the Commissioner shall be due and owing the State of West Virginia within thirty (30) days of the entry of the Order. All monetary penalties assessed shall be transmitted to the state treasury to the credit of the Alcohol Beverage Control Enforcement Fund. Failure to remit the amount owing shall be deemed to be a debt due and owing the State of West Virginia and any lawful remedy may be pursued by the Commissioner.

15.6. The order resulting from the hearing shall be final unless vacated or modified upon Judicial review thereof.

15.7. The hearing and the administrative procedure prior to, during and following the hearing shall be governed by and in accordance with the provisions of W. Va. Code §29A-5-1 et seq..

15.8. Appeal procedure.

15.8.1. Any person adversely affected by an order entered following such hearing shall have the right of judicial review in accordance with the provisions of W. Va. Code §29A-5-4.

15.8.2. The judgment of a circuit court reviewing the order of the Commissioner

shall be final unless reversed, vacated or modified on appeal to the West Virginia Supreme Court of Appeals in accordance with the provisions of W. Va. Code §29A-6-1 et seq.

15.8.3. Legal counsel and services for the Commissioner in all such proceedings in any circuit court and the Supreme Court of Appeals shall be provided by the attorney general or his assistants and in any proceedings in any circuit court by the prosecuting attorney of that county as well, all without additional compensation.

§175-8-16. Publication of State Minimum Pricing.

16.1. When manufacturers make changes in cigarette prices, or when otherwise appropriate, or at least periodically, the Commissioner shall publish the current minimum statutory prices under the West Virginia Unfair Trade Practices Act. Wholesale prices are computed at four (4%) percent above the cost, as defined in this rule, and retail prices are computed at seven (7%) percent above the cost, as defined in this rule. The publication shall be made available to any wholesaler or retailer who expresses a desire, in writing, to be maintained on a master list to be maintained by the Commissioner. The Commissioner may utilize other methods of publication within his discretion. The state minimum statutory prices shall reflect the cost per thousand, wholesale carton price, retail carton price and retail price per pack of cigarettes for premium, generic, and such other categories as the Commission determines in his discretion.

16.2. Each wholesaler and retailer must determine the prices individually based upon the wholesaler's or retailer's individual costs. In clarifying the price calculations at both the wholesale and retail level, individual merchants retain absolute pricing discretion as long as they do not sell below the minimum statutory price.

§175-8-17. Severability.

17.1. 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 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.

**WV ABCC
TOBACCO ENFORCEMENT
PROCEDURES**

FORM #T-2000

WV ABCA TOBACCO FORMS

WV ABCA T-0001-TOBACCO INSPECTION REPORT

WV ABCA T-0002-TOBACCO VIOLATION REPORT

WV ABCA T-0003-TOBACCO COMPLIANCE REPORT

WV ABCA T-0004-ABCA EVIDENCE FORM

WV ABCA T-0005-UNDERAGE BUYER AGREEMENT

WV ABCA T-0006-CONSENT FORM

WV ABCA TOBACCO ENFORCEMENT

PROCEDURES FOR TOBACCO COMPLIANCE CHECKS

- C Parental Permission form T-0006 must be obtained
- C Underage buyer agreement T-0005 must be obtained
- C Participating underage will be supervised AT ALL TIMES by WV ABCA Inspector
- C Inspector will remain outside the establishment and in close proximity, or may either enter shortly after underage youth enters.
- C Participating underage buyer will be given the money for the attempted purchase. Inspector will notate amount of money given to the underage buyer prior to entering the establishment.
- C Participating underage buyer will be instructed not to misrepresent their age or pressure clerk to sell tobacco.
- C Underage buyer must show identification if asked, if no ID then say no, they must always tell the truth about their age.
- C Upon entering the tobacco establishment the underage buyer will attempt to observe the following #1. The clerk selling the tobacco product to obtain a good description. #2 Look for the tobacco sign to see if posted.
- C After the purchase attempt, the youth will exit with or without the tobacco product.
- C If tobacco products are purchased, an identifying sticker will be placed on the product to identify it with the compliance report T-0003, which will be completed immediately. Violation Report T-0002 will be completed later.
- C Within a reasonable time after conducting tobacco stings, the inspector will inform licensee who sold products to the underage buyer.
- C At the conclusion of the Tobacco Compliance checks, the youth will be transported directly home or released to a parent unless some other pre-arranged agreement has been made with the parent(s) or guardian.
- C Upon agreement, the underage buyer will be paid in full at the completion of his/her participation. (Payment may be delivered to participating underage buyer at a later date).

PROCEDURES FOR RECRUITING UNDERAGE BUYERS

- C Inspectors will recruit underage buyer in there assigned area.
- C If Inspectors are unable to recruit underage buyers we will refer to the FDA Compliance Associate list
- C Each underage buyer will complete an Information sheet, a Parental consent form, and a Underage Buyer Agreement.
- C Underage buyers are to be between the ages 15-17, preferably 16 and 17 year olds, due to obtaining a work permit for 15 year olds.

PROCEDURES FOR ROUTINE TOBACCO INSPECTIONS

- C Inspectors enter retail establishment.
- C Inspectors show identification and badge to person in charge.
- C Inspector advises person in charge that they are there to do tobacco inspections.
- C Conduct inspections looking for tobacco license, tobacco signs posted, requiring proof of age, cigarettes with WV Tax Stamps, warnings posted on packages, cigarettes with Out of State stamp, marked for export only, marked U.S. Tax exempt, marked for use outside the U.S., package altered, illegal vending machines, complimentary cigarettes being sold, illegal imported cigarettes, selling below minimum.
- C Person in charge is to sign forms and receive a copy of Inspection, one copy to inspector and one copy to Tobacco Enforcemnt.
- C Inspector is polite and courteous at all times.

EVIDENCE PROCEDURE

After Underage "Buy" has been made:

- The Inspector takes evidence to the car. There the Inspector and Underage completes a violation outline with clerk ID.
- Inspector then fills out an evidence label and secures it on the evidence.
- Before placing evidence in evidence bag, fill out the front of bag with the date, time and name and address of store.
- The Inspector then fills out an evidence form T-0004 and places it in bag - Do Not Seal Bag.
- After all buys have been conducted and evidence placed in evidence bags, lock all evidence in trunk of car to avoid evidence tampering.
- As soon as the Inspector can, the evidence needs to be transported to the ABC office.
 - If Inspector can not hand deliver evidence to office:
 - Package all evidence into an envelope that is appropriately color coded for tobacco division.
 - Secure envelope to avoid tampering.
 - Mail evidence to ABC office to Attention Betty Hodge.
 - Get a receipt for cost of postage and record it on an expense form with receipt attached for reimbursement.
- The Inspector then fills out a violation report T-0002 stating in detail date, time, place violation and what took place at time of violation. The violation report number (found in upper right hand corner of form) must be used on all forms related to each piece of evidence. On evidence labels, record number where it asks for "article number." On evidence bags, record number where it asks for "case number." On evidence form, record number in upper right hand corner where it asks for "control number."
- On the front of evidence bags, the Inspector must record chain of evidence taken to transport evidence from store to ABC office including dates and times (in military time) of every movement.
- Before sealing evidence bag, place a copy of the evidence form T-0004 inside bag. Give original evidence form and completed violation form to Betty Hodge.
- Once evidence has been transported to ABC office, turn evidence over to Betty Hodge to be logged in and placed in evidence room. Evidence is not to be handled by anyone but the reporting Inspector and Betty Hodge.

After evidence has been seized:

- The Inspector fills out an evidence form T-0004 with date, time, name of person in charge, and description of evidence seized. The Inspector then gives a copy of the evidence form T-0004 to person in charge.
- The Inspector takes evidence to the car.
- The Inspector then fills out an evidence label and secures it on the evidence.
- Before placing evidence in evidence bag, fill out the front of bag with the date, time and name and address of store.
- The Inspector then fills out an evidence form T-0004 and places it in bag - Do Not Seal Bag.
- Lock evidence in trunk of car to avoid tampering until evidence can be transported. As soon as the Inspector can, the evidence needs to be transported to the ABC office.
 - If Inspector can not hand deliver evidence to office and evidence is not too much to mail:
 - Package all evidence into an envelope that is appropriately color coded for tobacco division.
 - Secure envelope to avoid tampering.
 - Mail evidence to ABC office to Attention Betty Hodge.
 - Get a receipt for cost of postage and record it on an expense form with receipt attached for reimbursement.
- The Inspector then fills out a violation report T-0002 stating in detail date, time, place of violation and what took place at time of violation. The violation report number (found in upper right hand corner of form) must be used on all forms related to each piece of evidence. On evidence labels, record number where it asks for "article number." On evidence bags, record number where it asks for "case number." On evidence form, record number in upper right hand corner where it asks for "control number."
- On the front of evidence bags, the Inspector must record chain of evidence taken to transport evidence from store to ABC office including dates and times (in military time) of every movement.
- Before sealing evidence bag, place a copy of the evidence form T-0004 inside bag. Give original evidence form and completed violation form to Betty Hodge.
- Once evidence has been transported to ABC office, turn evidence over to Betty Hodge to be logged in and placed in evidence room. Evidence is not to be handled by anyone but the reporting Inspector and Betty Hodge.

West Virginia Alcohol Beverage Control Administration TOBACCO INSPECTION REPORT

License# _____ Date: _____ Time: _____

Entity: _____

DBA: _____

County: _____ Telephone: _____

Mailing Address: _____

Physical Address: _____

ALL:	YES	NO
Tobacco License Posted	_____	_____
Signs Posted	_____	_____
Requiring Proof of Age	_____	_____

CIGARETTES:

Cigarettes-WV Tax Stamp	_____	_____
Warnings Posted on Packages	_____	_____
Cigarettes-(Out of State)stamp	_____	_____
Marked for Export Only	_____	_____
Marked U.S. Tax-Exempt	_____	_____
Marked for Use Outside the U.S.	_____	_____
Package Altered comment)	_____	_____
Illegal Vending Machines	_____	_____
Complimentary Cigarettes being sold	_____	_____
Illegal Imported Cigarettes	_____	_____
Selling Below Minimum	_____	_____

COMMENTS: _____

 PERSON IN CHARGE

 INSPECTOR

Case No. _____ Evidence/Property _____

TEAR HERE

SEALED BY: _____

DATE: _____

FOLD HERE

EVIDENCE PROPERTY

Agency _____ Case _____

Item No. _____ Office _____

Suspect _____

Victim _____

Date and Time of Recovery _____

Recovered By _____

Description and/or Location _____

CHAIN OF CUSTODY

FROM	TO	DATE

TO USE:

- 1) Remove Release Liner from Flap.
 - 2) Fold Where Indicated. BAG IS NOW SEALED.
 - 3) Tear Where Indicated and Retain Evidence Receipt.
- CAUTION: ATTEMPTS TO REOPEN WILL DISTORT SEALED AREA.**

CONDITION OF BAG WHEN OPENED: SEALED
 OTHER _____

OPENED BY _____ DATE _____

DO NOT CUT HERE TO OPEN — DO NOT CUT HERE TO OPEN — DO NOT CUT HERE TO O

DO NOT CUT HERE TO OPEN — DO NOT CUT HERE TO OPEN — DO NOT CUT HERE TO OPEN

West Virginia Alcohol Beverage Control Administration
TOBACCO VIOLATION REPORT 0001

Date of Report: _____ Date/Time of Violation: _____

Reporting Inspector: _____

Assisting Inspector: _____

License # _____ County: _____

Entity: _____

DBA: _____

Mailing Address: _____

Physical Address: _____

Agency Originating Violation(if other than WV ABCA): _____

Violations: _____

Exhibits: _____

Witness(es), Addresses, Telephone Numbers, (people to subpoena):

<u>Name</u>	<u>Address</u>	<u>Telephone</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

INSPECTOR'S SIGNATURE

**WEST VIRGINIA
ALCOHOL BEVERAGE CONTROL ADMINISTRATION
TOBACCO COMPLIANCE REPORT**

Violation Report # _____

DATE: _____

NAME OF LICENSEE(DBA): _____

LICENSE: # _____

ADDRESS: _____

TOWN/CITY: _____

ENTERING TIME: _____ EXITING TIME: _____

UNDERAGE ID: _____

WAS SELL COMPLETED? YES ___ NO ___ OTC ___ VENDING ___ SELF SERVICE ___
TOBACCO SIGN POSTED YES ___ NO ___

WAS UNDERAGE ASKED FOR IDENTIFICATION? YES ___ NO ___

TOBACCO BRAND: _____ COST OF TOBACCO: _____

NAME OF CLERK: _____ SEX: _____

NAME TAG: ___ YES ___ NO HEIGHT: ___ SHORT ___ AVERAGE ___ TALL RACE: ___ WHITE ___ BLACK ___ ASIAN ___ HISPANIC

BUILD: ___ SLIM ___ MEDIUM ___ HEAVY AGE: ___ TEEN ___ YOUNG ADULT ___ ADULT ___ SENIOR HAIR: ___ SHORT

___ MEDIUM ___ LONG COLOR: _____

DISTINGUISHING CHARACTERISTICS: ___ TATTOO ___ GLASSES ___ FACIAL HAIR
___ OTHER: _____

OTHER EXPENSES: _____

OTHER COMMENTS: _____

INITIALS UNDERAGE BUYER

INSPECTORS NAME

STATE OF WEST VIRGINIA
ALCOHOL BEVERAGE CONTROL ADMINISTRATION
TOBACCO ENFORCEMENT DIVISION
322-70TH. STREET, S.E.
Charleston, WV 25304-2900
UNDERAGE BUYER AGREEMENT

During my association with the West Virginia Alcohol Beverage Control Administration, Tobacco Enforcement Division, as an Underage Buyer, I, the undersigned, do hereby agree to be bound by the following conditions and procedures while so associated.

1. I agree that I have no police powers under the State of West Virginia or West Virginia Alcohol Beverage Control Administration, Tobacco Enforcement Division or any local governmental subdivision and have no authority to carry a weapon while performing my activity as a Underage Buyer.

2. I further agree not to divulge to any person, except the West Virginia Alcohol Beverage Control Administration agent or agents with whom I am associated, my status as an Underage Buyer unless required to do so in court and will not represent myself to others as an employee or representative of the WV ABCA, Tobacco Enforcement Division, and will not appear at any WV ABCA office without prior consent of the WV ABCA.

3. I further agree not to use the West Virginia Alcohol Beverage Control Administration or any of its agents, employees or representatives as credit references, unless prior approval is obtained from the WV ABCA.

4. I further agree that my association with the WV ABCA, Tobacco Enforcement Division does not afford me any special privileges.

5. I further agree that after making a purchase of tobacco products of evidentiary value, I will return immediately to the vehicle and hand the evidence to the WV ABCA agent or agents that I am associated with.

6. I further agree to maintain a strict accounting of all funds provided to me by the WV ABCA as part of my purchasing of tobacco products. I understand that misuse of State funds will be grounds for criminal prosecution against me.

7. I further agree that I will not use the WV ABCA address or telephone numbers for my own personal or private use.

8. I understand that in my capacity as an Underage Buyer that I may be called upon to testify before Local, State or Federal Court or Grand Jury. I further agree to make myself available for any of these proceedings or any other proceedings prescribed by the Prosecutor or WV ABCA.

9. Finally, I agree that violations of any of the above enumerated provisions will be grounds for immediate termination and probable criminal charges.

Signature of Underage Buyer: _____ Date: _____

Witnessed by: _____ Date: _____

**WEST VIRGINIA ABCA
CONSENT FORM FOR TOBACCO COMPLIANCE CHECKS**

As an underage Compliance Associate, I agree to comply with all the procedures for conducting the above mentioned tobacco compliance checks as explained to me by WV ABCA staff.

Underage Buyer Name Age Date of Birth

Underage Buyer Signature Date signed

I, _____, parent(s) or guardian of the above mentioned Compliance Associate, do hereby grant consent for him/her to participate in the above mentioned WV ABCA tobacco compliance checks. I agree and grant consent to allow my child to be transported by WV ABCA staff vehicles in order to participate in the tobacco compliance checks.

parent(s)/guardian Date

Address

Telephone

WV ABCA
322 70TH STREET, SE
CHARLESTON, WV 25304

MEDICAL INSURANCE INFORMATION

Medical Insurance Carrier: _____

Policy # _____ Effective date of coverage: _____

I, do hereby give my permission for emergency medical treatment. I understand that all reasonable precautions will be taken for safety at all times. I further release the West Virginia Alcohol Beverage Control, and all persons associated with this organization from any liability associated with any accident, injury, or disease.

Signature of parent/legal guardian Date

RELEASE OF LIABILITY

I hereby release _____(agency) from all claims and liability arising out of my participation in the underage buys conducted . With this understanding, I further agree to indemnify, defend and save harmeless the _____(agency) and it's respective officers, agents, and employees from and against any and all claims, loses, injuries, suits, or judgments arising from, or in connection with my participation in the underage buys conducted. I agree to this indemnification and save harmless myself, my successors, assigns, heirs, executors, administrators, and any other persons or entities who which may have a claim based on my personal injuries and/or property damage.

Signature of underage Date

Signature of parent/legal guardian Date

Questions call 304-558-2481

