

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

Form #4 ■

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: Alcohol Beverage Control Commission TITLE NUMBER: 175

CITE AUTHORITY: W. Va. Code section 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 RULES, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE, IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.

Thomas A. Keeley
Authorized Signature

**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, prohibitions, and penalties. 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.

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 or his or her delegate.

2.2. "Business Registration Certificate" means the West Virginia Business Registration Certificate required by W.Va. Code §11-12-1 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. "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.

2.13. "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.

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

2.15. "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.

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

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

2.18. "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.

2.19. "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.

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

2.21. "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.

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

2.23. "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. W. Va. Code § 11-12-1 et seq.

§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, or 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. Cigarettes that do 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. Cigarettes in packages that have been altered 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.

4.2. No person shall affix any stamp required by the State Tax Department pursuant to W.Va. Code § 11-17-1 et seq. to any package of cigarettes described in section 4.1 of this rule.

§175-8-5. Penalties

5.1. Except as otherwise provided in this rule, any tobacco products produced for export or import found to be in violation of § 4 of this rule, or any tobacco products without the required West Virginia tobacco stamps 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 Tax Commissioner or by any law enforcement officer of this state.

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

§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 prior written consent of the parent or guardian of such person is obtained.

§175-8-7. Administrative Sanctions

7.1. The Commissioner may impose 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) for violation of W.Va. Code § 60-9 et seq.

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

8.1 If the Commissioner finds any person in violation of W. Va. Code § 60-9-1 et seq. or this rule, the Commissioner shall notify that person of the civil penalty to be applied. Any person aggrieved by this imposition of a civil penalty has the right to request a hearing before the Commissioner pursuant to W. Va. Code § 60-9-5 and Legislative Rule, Title 175, Series 10, Procedural Rule for 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 Any person found to be in violation of W. Va. Code § 60-9-1 et seq. may be subject to 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).

§175-8-10. Unfair Trade Practices.

10.1. Unfair trade practice means:

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

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

10.1.3. The sale of cigarettes at wholesale for less than the invoice cost to the wholesaler plus applicable taxes or the replacement cost thereof within 30 days of the date of the sale, offer of sale, or advertisement of sale, whichever is lower, less any trade discounts except customary discounts for cash, to either of which may be added the following items of expense

10.1.3.a. Freight charges not otherwise included in the cost of the cigarettes;
and

10.1.3.b. Any markup to cover the cost of doing business of four percent absent proof of a lesser cost.

10.1.4. The sale of cigarettes at retail for less than the invoice cost or replacement cost within 30 days of the sale, offer of sale, or advertisement of sale, whichever is lower, less any trade discounts, to either of which may be added:

10.1.4.a. Freight charge; and

10.1.4.b. A markup of seven percent of the aggregate of the invoice or replacement cost.

10.2. Exception to Unfair Trade Practices:

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

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

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

10.2.4. 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;

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

10.2.6. Sales for charitable purposes or to relief agencies;

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

§175-8-11. Manufacturers Relationships with Retailers.

11.1. 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.

11.2. 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.

11.3. 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.

§175-8-12. Procedure For Filing Complaint.

12.1. Any person who has been aggrieved by the sales of cigarettes by a retailer or wholesaler may file a verified complaint with the Commissioner. Such complaint shall be in writing and filed with the Commissioner in accordance with Legislative Rule, Title 175, Series 10, Procedural Rules for the Alcohol Beverage Control Commissioner.

§175-8-13. Hearing and Appeal Procedure.

13.1. All hearings and appeals shall be held pursuant to W. Va. Code § 60-9-5 and Legislative Rule, Title 175, Series 10, Procedural Rules for the Alcohol Beverage Control Commissioner.