

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

Form #3

FILED
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SEP 1 4 05 PM '00

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 §16-9A-8

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: 9

TITLE OF RULE BEING PROPOSED: Prohibiting Sale of Tobacco Products in Vending
Machines

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. 9

PROHIBITING SALE OF TOBACCO PRODUCTS IN VENDING MACHINES

STATEMENT OF CIRCUMSTANCES

West Virginia Code §16-9A-8 states that the Alcohol Beverage Control Commissioner shall promulgate rules pursuant to article three, chapter twenty-nine-a of this code , which rules shall establish standards for the location and control of the vending machines in class A licensed establishments for the purpose of restricting access by minors. This rule establishes policies and procedures to implement and enforce §16-9A-8. This is a new section.

On March 9, 2000, the Legislature enacted House Bill 4183 making tobacco product vending machines illegal and upon conviction the person is guilty of a misdemeanor and will be fined two hundred fifty dollars; except that these vending machines will be allowed in ABCC Class A private clubs and other adult-only establishments.

This rule establishes the procedures and policies for implementing the mandate of enforcement, penalties, hearings and appeals.

**Title 175
C.S.R. 9**

PROHIBITING SALE OF TOBACCO PRODUCTS IN VENDING MACHINES

SUMMARY OF RULE

West Virginia Code §16-9A-8 states that the Alcohol Beverage Control Commissioner shall promulgate rules pursuant to article three, chapter twenty-nine-a of this code , which rules shall establish standards for the location and control of the vending machines in class A licensed establishments for the purpose of restricting access by minors. This rule establishes policies and procedures to implement and enforce §16-9A-8.

In order to accomplish the above, definitions were provided to ensure clarity of meaning for rule. The rule also defines the location and the people responsible for the vending machines in the ABCC Class A Licensed establishments. It also establishes fines and hearings on appeals.



**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 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 §16-9A-8

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: 9

TITLE OF RULE BEING PROPOSED: Prohibiting Sale of Tobacco Products in Vending Machines

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.



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: Prohibiting Sale of Tobacco Products in Vending Machines
§175-9

1. Authorizing statute(s) citation W.Va. Code §16-9A-8

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 published in Charleston Newspapers. (See Attached)

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

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

Attached _____ No comments received XX

- 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

ASB



CHARLESTON NEWSPAPERS

P.O. Box 2993
Charleston, West Virginia 25330
Billing 348-4898
Classified 348-4848
1-800-WVA-NEWS



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

BILLED TO

WV ALCOHOL BEVERAGE CONTROL
SARA DYE
322 70TH STREET SE
CHARLESTON WV 25304

Please return this portion with your payment.
Make checks payable to: Charleston Newspapers

AMOUNT PAID:



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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).

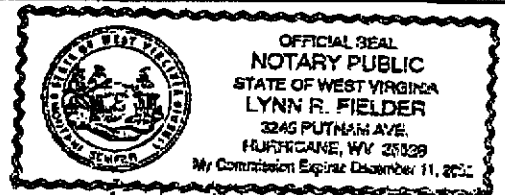
Legal pricing is based upon 63 words per column inch at a rate of \$.0925 per word.
Each successive insertion is discounted by 25% of the first insertion rate (\$.069375 per word).

Main invoice table with columns: ISSUE DATE, AD TYPE, REF, DESCRIPTION, QUANTITY, UNIT PRICE, TOTAL PRICE, GROSS AMOUNT, NET AMOUNT. Includes row for LEGAL DISCOUNT 25% and TOTAL INVOICE AMOUNT.

State of West Virginia,

AFFIDAVIT OF PUBLICATION

I, Sara Legg 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 Notary Public Lynn R. Fielder



CHARLESTON NEWSPAPERS

P.O. Box 2993
Charleston, West Virginia 25330
Billing 348-4898
Classified 348-4848
1-800-WVA-NEWS



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

BILLED TO

WV ALCOHOL BEVERAGE CONTROL
SARA DYE
322 70TH STREET SE
CHARLESTON WV 25304

Please return this portion with your payment.
Make checks payable to: Charleston Newspapers

AMOUNT PAID: _____



CHARLESTON NEWSPAPERS

P.O. Box 2993
Charleston, West Virginia 25330
Billing 348-4898
Classified 348-4848
1-800-WVA-NEWS
FEIN 55-0676079

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

Legal pricing is based upon 63 words per column inch at a rate of \$.0925 per word.
Each successive insertion is discounted by 25 % of the first insertion rate (\$.069375 per word).

Main advertising insertion table with columns: DATE, AD TYPE, SUB, DESCRIPTION, AD NUMBER, COPIES RUN, RATE, GROSS AMOUNT, NET AMOUNT. Contains 4 rows of data for 'LEGISLATIVE RULES'.

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)

LEGISLATIVE

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WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

SEP 24 11 11 AM '00

Form 47-2

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Alcohol Beverage Control Commission TITLE NUMBER: 175
RULE TYPE: Legislative W. Va. Code § 16-9A-6
AMENDMENT TO AN EXISTING RULE: YES X NO
IF YES, SERIES NUMBER OF RULE BEING AMENDED:
TITLE OF RULE BEING AMENDED:

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 9
TITLE OF RULE BEING PROPOSED: Prohibiting Sale of Tobacco Products in Vending Machines

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:

Betsy Peters White
Alcohol Beverage Control Commission
322 70th Street, S.E.
Charleston, WV 25304
Arnold J. Stegale
Authorized Signatory

ATTACH A BRIEF SUMMARY OF YOUR PROPOSAL

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WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

SEP 1 2 57 PM '00

Form 47-2

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia Board of Architects TITLE NUMBER: 2
RULE TYPE: Legislative W. Va. Code § 30-12-1
AMENDMENT TO AN EXISTING RULE: YES X NO
IF YES, SERIES NUMBER OF RULE BEING AMENDED: Series 1
TITLE OF RULE BEING AMENDED: Registration of Architects

IF NO, SERIES NUMBER OF RULE BEING PROPOSED:
TITLE OF RULE BEING PROPOSED:

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 August 31, 2000 AT 12:00 Noon ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

West Virginia State Board of Architects
916 5th Avenue, Suite 203
P.O. Box 589
Huntington, WV 25710-0589
E. Hill Dean
Authorized Signatory

ATTACH A BRIEF SUMMARY OF YOUR PROPOSAL

□
APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Prohibiting Sale of Tobacco Products in Vending Machines

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 expect any changes in expenditures.

3. Objectives of These Rules:

This rule establishes policies and procedures to prevent minors from having access to tobacco vending machines by limiting the location of such machines to adult-only establishments.

Rule Title: Prohibiting Sale of Tobacco Products in Vending Machines

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

This rule should not have an economic impact on State Government.

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.

This rule should have no economic impact on citizens or the public at large.

Date: September 1, 2000

Signature of Agency Head or Authorized Representative:

Ronald L. Stemple

FILED

TITLE 175
LEGISLATIVE RULE
ALCOHOL BEVERAGE CONTROL COMMISSION

SEP 1 4 01 PM '00

SERIES 9
CIGARETTE VENDING MACHINES

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

§175-9-1. General.

1. Scope. - This rule establishes policies and operating procedures for the prohibition of the sale of tobacco products in vending machines, criminal penalties, administrative penalties and hearing procedures. This section §16-9A-8 is new.

1.2. Authority. - W. Va. Code §16-9A-8 and §29A-3-1 et seq.

1.3. Filing Date. -

1.4. Effective Date. -

§175-9-2. 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. "Adult" means a person who is at least eighteen (18) years of age.

2.3. "Cashier/Manager" means the person who collects payments for purchases.

2.4. "Child" means a person who has not attained the age of eighteen (18) years, or a person who is otherwise subject to the juvenile jurisdiction of a court pursuant to W.Va. Code §49-5-1.

2.5. "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.

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

2.7. "Class A Licensee" as defined for this rule, means a person who is licensed as a private club or a fraternal club by the Commissioner pursuant to W.Va. Code §60-7-1 et seq.

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

2.9. "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.

2.10. "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, partnership, association, corporation, trust or any other unit acting as a group.

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 of cigarettes at retail to a consumer or to any person for any purpose other than resale.

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

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

2.19. "Wholesaler" means any person engaged in this State in the business of purchasing unstamped cigarettes directly from a manufacturer or importer for resale.

§175-9-3. Tobacco Registration License Tax

3.1. The license for selling cigarettes, other tobacco products, or wrappers is 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 – Cigarette Excise Tax.

§175-9-4. Cigarette Vending Machine operators

4.1. Each vending machine operator shall apply for and obtain a Business Registration Certificate from the State Tax Commissioner and the license required by West Virginia Code §11-12-4a for the purpose of selling cigarettes, other tobacco products and cigarette wrappers before selling or offering for sale any cigarettes through a vending machine. Whenever any cigarette vending machine operator purchases cigarettes directly from the manufacturer, the operator shall be deemed to be a wholesaler and shall be liable for both the excise tax and affixing the required stamps.

4.2. Although cigarette vending machine operators, like wholesalers, purchase unstamped cigarettes directly from the manufacturer, the sale of cigarettes through vending machines is construed as a sale at retail. Therefore, vending machine operators shall also be classified as retail dealers.

4.3. It is the location of the vending machine and not the vending machine that is subject to Business Registration. The liability for obtaining the Business Registration Certificate for the operation of a cigarette vending machine shall be on the person responsible for stocking the machine and collecting the money from sales.

4.3.1. If the vending machine is owned by a person who leases the machine to another who then places the machine at a business location and the lessee assures the machine is stocked and collects the money from the sales, the lessee is responsible for obtaining a Business Registration Certificate for the location.

4.3.2. If the vending machine is owned by a person who leases the machine to another who then leases the machines to a business establishment and the business establishment assures the machine is stocked and collects the money from the sales, the machine is covered by the business establishment's Business Registration Certificate.

4.3.3. If the vending machine is owned by a person who places it at a business location and assures the machine is stocked and collects the money from the sales, the owner of the machine is responsible for obtaining a Business Registration Certificate for the location.

4.3.4. If the vending machine is owned by a person who leases the machine to a business establishment, and the business establishment assures the machine is stocked and collects the money from the sales, the machine is covered by the business establishment's Business Registration Certificate.

4.3.5. If the vending machine is owned by the business establishment where it is situated, the machine is covered by the establishment's Business Registration Certificate.

4.4. If a person has more than one vending machine at a location, only one Business Registration Certificate is required for all of the machines at that location.

4.5. Each cigarette vending machine operator in this State shall for each shipment of cigarettes obtain an invoice showing the amount and value of the shipment, the date of receipt of the shipment, and the name of the shipper. The operator will retain the invoice for a period of three years, and it shall be subject to the inspection of the Commissioner. The operator shall file a monthly report showing total purchases, stamped or unstamped, and sales of cigarettes, and such other information as the Commissioner and the Tax Commissioner may require on forms provided by the Tax Commissioner.

4.6. Records of cigarette vending machine operators will be subject to auditing by the Commissioner and the Tax Commissioner and the vending machine operators shall make records available at any time during regular business hours.

4.7. If unstamped cigarettes or any cigarettes that do not meet federal requirements regarding warnings on packages as specified in the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1333, or do not have a statement, 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 are found in any vending machine, both the cigarettes and the vending machine will be contraband goods and may be seized, without warrant, by the ABCC or by any peace officer of the State at the direction of Commissioner.

4.8. No cigarette vending machines shall be placed in operation within this State that is not so constructed as to display at least one package of cigarettes in each column. All cigarettes shall be placed in the machines in such a manner that the stamps affixed thereto shall be clearly visible.

175-9-5. Enforcement - Standards for location of vending machines.

5.1. The standards for the location of the vending machines in ABCC Class A licensed establishments in order to comply with §16-9A-8 which intent is for the purpose of restricting access of the vending machines by minors:

5.1.1. The vending machine(s) must be in full view and control of the cashier/manager, i.e., the person who accepts payments for purchases in the establishment.

5.2. Control of the vending machine is the responsibility of the cashier/manager and it is their responsibility to restrict access to the vending machines by any child.

175-9-6. Enforcement of youth smoking laws; ABCC Class A license establishments; use of minors in inspections.

6.1. The Commissioner may periodically conduct unannounced inspections at ABCC Class A Licensed establishments and other 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 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 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. It is unlawful for any person to use persons under the age of eighteen years to test compliance in any manner not set forth herein and the person so using a minor is guilty of a misdemeanor and upon conviction thereof, shall be fined the same amounts as set forth in W. Va. Code §16-9A-2, all pursuant to W.Va. Code §16-9A-7 (a), W.Va. Code §16-9A-7 (b), W.Va. Code §16-9A-7 (b)(1), W.Va. Code §16-9A-7 (b)(2), and W.Va. Code §16-9A-7 (b)(3).

175-9-7. Penalties, Exceptions

7.1. Any person violating this rule will be guilty of a misdemeanor and upon conviction will be fined two hundred fifty dollars (\$250.00), with the exception of airplanes, trains, Indian Reservations or armed forces installations, and veterans administration hospitals, where such products are sold only to patients registered and admitted therein.

7.2. The vending machines involved in this violation are considered contraband and may be seized, without warrant, and the Commissioner has discretion to decide the disposition of the machines.

7.3. All of the tobacco products from the vending machine are considered contraband and will be seized without warrant, and upon conviction they will be disposed of at the discretion of the Commissioner.

7.4. All of the monies from the vending machine are considered contraband and will be seized without warrant, and upon conviction, will be placed in the Alcohol Beverage Control Enforcement Fund pursuant to W.Va. Code §60-7-13.

§175-9-8. Hearing and Appeal Procedure.

8.1. If the person convicted upon this rule, disagrees with the Commissioner's ruling

regarding the contraband, he or she shall make and enter an order to that effect and mail by certified mail, return receipt requested, a copy of the ruling 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 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 Order _____
Subject of Order/Ruling _____

In the Matter of: Petitioner's Business Name _____
Petitioner's ABCC License No. _____
Address _____

The above named against whom you have issued an order, 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 §60-7-1 *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 licensee, 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 shall 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 order. - The service of a petition for hearing upon the Commissioner shall operate, other than herein provided, to suspend the execution of any order 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 pursuant to W. Va. Code §60-7-1 *et seq.*, and this rule.

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 petitioner 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.

175-9-18. Severability.

18.1. 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.