

WEST VIRGINIA
SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #7

1990 JUL -3 P. 10 27

NOTICE OF AN EMERGENCY RULE

AGENCY: Nonintoxicating Beer Commissioner TITLE NUMBER: 176

CITE AUTHORITY: West Virginia Code § 11-16-22 and 29A-3-1 et seq.

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES X, NO (Repeal and Replace)

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

TITLE OF RULE BEING AMENDED: Nonintoxicating Beer Licensing and
Operations Procedures

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

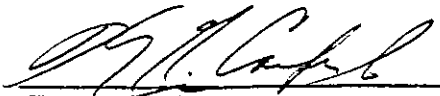
TITLE OF RULE BEING FILED AS AN EMERGENCY:

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE UPON FILING.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

These regulations provide for the licensing of brewers, distributors and retailers, and give substantial guidance on brewer and distributor prohibitions, advertising and hearings. The regulations were not updated when the nonintoxicating beer statutes were substantially amended in 1986. As a result, these regulations now conform to the law. These regulations are necessary to remove public confusion.

Use Additional Sheets If Necessary.


Harry G. Camper, Jr.
Commissioner

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Nonintoxicating Beer Licensing And Operations Procedures

Type of Rule: X Legislative Interpretive Procedural

Agency: Tax Department Address: State Capitol; Charleston, WV 25305

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

2. Explanation of above estimates:

These regulations should have no fiscal impact.

3. Objectives of these rules:

These regulations provide necessary clarification and guidance to brewers, distributors and retailers on licensing and license revocation activities, prohibited activities, advertising requirements, etc. These regulations are now in conformity with the nonintoxicating beer statutes.



State of West Virginia
Department of Tax and Revenue

Charleston 25305

GASTON CAPERTON
GOVERNOR

FILED
JUL 3 1990
10:27 AM
CHARLES O. LORENSEN
SECRETARY

CONSENT TO FILE EMERGENCY RULE

July 3, 1990.

To Whom It May Concern:

Title of Rule: Nonintoxicating Beer Licensing and Operations
Procedures
Title Number: 176
Series Number: 1

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

Signed this 3rd day of July, 1990.

A handwritten signature in cursive script that reads "Charles O. Lorensen".

Charles O. Lorensen, Secretary
Department of Tax and Revenue

EMERGENCY
WEST VIRGINIA LEGISLATIVE REGULATIONS
NONINTOXICATING BEER COMMISSIONER
DEPARTMENT OF TAX AND REVENUE

FILED

08 - 3 1# 4-27

TITLE 176
SERIES 1
1990

NONINTOXICATING BEER LICENSING AND OPERATIONS PROCEDURES

Filed: July 3, 1990

§ 176-1-1. General.

1.1 **Type of Regulation.** - These regulations are emergency legislative regulations as defined in West Virginia Code § 29A-3-15.

1.2 **Scope.** - These emergency legislative regulations repeal and replace 176 C.S.R. 1 and establish general rules for the West Virginia Nonintoxicating Beer Commissioner.

1.3 **Authority.** - These emergency legislative regulations are authorized by West Virginia Code §§ 11-16-22 and 29A-3-15.

1.4 **Filing Date.** - July 3, 1990.

1.5 **Effective Date.** - These emergency legislative regulations become effective upon filing in the State Register.

1.6 **Citation.** - These emergency legislative regulations may be cited as 176 C.S.R. 1, § _____ (1990).

§ 176-1-2. **Definitions.** - As used in these regulations and unless the context clearly requires a different meaning, the following terms shall have the meaning ascribed herein, and shall apply in the singular and in the plural.

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

2.2 "Brewer or "manufacturer" means any person, firm, association, partnership or corporation, including agents and employees of same, who is manufacturing, brewing, mixing, concocting, blending, bottling or otherwise producing, bottling, importing or transshipping from a foreign country nonintoxicating beer for sale at wholesale to any licensed distributor.

2.3 "Brewer's license" means a license issued by the Commissioner to a brewer or manufacturer of nonintoxicating beer which authorizes such person to engage in brewing or manufacturing activities in this State.

2.4 "Class A license" means the license issued by the Commissioner which authorizes such licensed retailers to sell at retail nonintoxicating beer for consumption either on the premises where sold or off such premises: Provided, That for railroads operating in this State, nonintoxicating beer may be sold at retail only for consumption in the licensed dining, club or buffet car where sold.

2.5 "Class B license" means the license issued by the Commissioner which authorizes such licensed retailers to sell nonintoxicating beer at retail in bottles, cans or other sealed containers only, and only for consumption off the licensed premises: Provided, That a Class B license may only be issued to the proprietor or owner of a grocery store.

2.6 "Class S license" means the special license issued by the Commissioner for the retail sale of nonintoxicating beer at a fair or festival sponsored or endorsed by the municipality or county wherein the fair or festival is conducted, and on other special event approved by the Commissioner.

2.7 "Commissioner" means the West Virginia Nonintoxicating Beer Commissioner.

2.8 "Distributor" means any person, including such person's agents or employees, jobbing or distributing nonintoxicating beer to licensed retailers at wholesale and whose warehouse and chief place of business is located within this State.

2.9 "Distributor license" means a license issued by the Commissioner to a distributor which authorizes the distributor to engage in such commercial activities.

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

2.11 "Grocery store" means any retail establishment commonly known as a grocery store or delicatessen, where food or food products are sold for consumption off premises, and shall include a separate and segregated portion of any other retail store which is dedicated solely to the sale of food, food products and supplies for the table for consumption off the premises.

2.12 "Licensed retailer" means any person, including the person's agents and employees, selling, serving or otherwise dispensing nonintoxicating beer and all products regulated by West Virginia Code article 11-16, including, but not limited to, any malt beverages or malt coolers, at such retailer's established and licensed place of business.

2.13 "Licensee" means any person licensed in accordance with West Virginia Code article 11-16 to brew, manufacture, distribute, or sell, at wholesale or retail, any Nonintoxicating beer.

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

2.15 "Original container" means the container used by the brewer at the place of manufacturing, bottling or otherwise producing nonintoxicating beer for sale at wholesale.

2.16 "Person" means and include an individual, firm, partnership, limited partnership, association or corporation.

2.17 "Private club" means any corporation or unincorporated association licensed in accordance with West Virginia Code article 60-7 which either:

2.17.1 belongs to or is affiliated with a nationally recognized fraternal or veterans organization, which is operated exclusively for the benefit of its members, which pays no part of its income to its shareholders or individual members, which owns or leases a building or other premises, to which club are admitted only duly elected or approved dues paying members in good standing of such corporation or association and their guests while in the company of a member and to which club the general public is not admitted, and which club maintains in said building or on said premises a suitable kitchen and dining facility with related equipment for serving food to members and their guests; or

2.17.2 is a nonprofit social club, which is operated exclusively for the benefit of its members, which pays no part of its income to its shareholders or individual members, which owns or leases a building or other premises, to which club are admitted only duly elected or approved dues paying members in good standing of such corporation or association and their guests while in the company of a member and to which club the general public is not admitted, and which club maintains in said building or on said premises a suitable kitchen and dining facility with related equipment for serving food to members and their guests; or

2.17.3 is organized and operated for legitimate purposes, which has at least one hundred (100) duly elected or approved dues paying members in good standing, which owns or leases a building or other premises, including any vessel licensed or approved by any federal agency to carry or accommodate passengers on navigable waters of this State, to which club maintains in said building or on said premises a suitable kitchen and dining facility with related equipment and employs a sufficient number of persons for serving meals to members and their guests; or

2.17.4 is organized for legitimate purposes and owns or leases a building or other limited premises in any state, county or municipal park or at any airport, in which building or premises a club has been established, to which club are admitted only duly elected and approved dues paying members in good standing and their guests while in the company of a member and to which club the general public is not admitted, and which maintains in connection with said club a suitable kitchen and dining facility and related equipment and employs a sufficient number of persons for serving meals in said club to said members and their guests.

2.18 "Private wine restaurant" means a restaurant licensed in accordance with West Virginia Code article 60-8 which:

2.18.1 is a partnership, limited partnership, corporation, unincorporated association or other business entity which has as its principal purpose the business of serving meals on its premises to its members and their guests;

2.18.2 is licensed under the provisions of West Virginia Code article 60-8 as to all of its premises or as to a separate segregated portion of its premises to serve wine to its members and their guests when such sale accompanies the serving of food or meals; and

2.18.3 admits only duly elected and approved dues paying members and their guests while in the company of a member, and does not admit the general public.

§ 176-1-3. Licenses.

3.1 License requirement. - Each person seeking to manufacture, sell, possess for sale, transport or deliver nonintoxicating beer in West Virginia must first be licensed in accordance with West Virginia Code article 11-16, such license to be for one (1) year and for the period of July 1 through June 30 of the following year.

3.1.1 A person may be licensed only in one capacity as a brewer, distributor or licensed retailer and there shall be no connection or interest, direct or indirect, between such persons.

3.1.2 No brewer or manufacturer whose chief place of business is outside of West Virginia shall offer for sale, sell, consign, ship or deliver nonintoxicating beer into this State except to a duly licensed distributor for delivery at such distributor's place of business.

3.1.3 A brewer or manufacturer with a brewery or place for manufacturing nonintoxicating beer in this State may act as the distributor of the products of such brewery or place for manufacturing. However, a distributor's license is required for such a person to distribute nonintoxicating beer from a place other than where brewed or manufactured.

3.1.4 The annual license fee for a brewer with a principal place of business located in this State is \$1,500 for each place of manufacture.

3.1.4.1 If the period of the original license for the principal place of business or for a warehouse commences on or after January 1 of any year, the license fee for such facility shall be seven hundred fifty dollars (\$750).

3.2 Foreign corporation brewer's license application. - A foreign corporation seeking a West Virginia brewer's license shall submit a verified application to the Commissioner, which application shall state:

3.2.1 The name of the corporation and the state where incorporated.

3.2.2 The date incorporated.

3.2.3 The address of the corporation's main office.

3.2.4 The names and respective addresses of the corporation's offices and directors.

3.2.5 The date the corporation qualified to transact business in this State.

3.2.6 Any other information required by the Commissioner.

3.2.7 The applicant shall also provide:

3.2.7.1 A surety bond in an amount not less than five thousand dollars (\$5,000) nor more than twenty-five thousand dollars (\$25,000) payable to the State of West Virginia and conditioned upon the payment of any and all taxes accruing during the license period,

3.2.7.2 A certified copy of the certificate of authority issued by the Secretary of State authorizing such corporation to transact business in this State, and

3.2.7.3 A certified copy of the corporation's most recent charter.

3.2.8 The annual license fee for a brewer's license for a foreign corporation selling nonintoxicating beer in this State, regardless of where its principal place of business is located, is fifteen hundred dollars (\$1,500).

3.2.8.1 If the period of the original license commences on or after January 1 of any year, the license fee shall be seven hundred fifty dollars (\$750).

3.2.8.2 The sales representatives for such manufacturers must be issued a permit by the Commissioner, such permit to cost fifty dollars (\$50) per year. See Section 3.5 of these regulations for additional information.

3.3 Distributor, Class A and Class B licenses. - The following information must be provided on the application for a distributor, Class A or Class B license.

3.3.1 The name and residence of the applicant.

3.3.1.1 If an individual, that the applicant is at least twenty-one (21) years of age and a resident of West Virginia for a period of two (2) years next preceding the date of application.

3.3.1.2 If a firm, association, partnership, limited partnership or corporation, the application shall include the residence of the members or officers for the two (2) year period next preceding the date of application: Provided, That if a corporation applies for a Class A or Class B license, the officers, agents or employees who shall manage and be in charge of the licensed premises must possess all of the requirements of an individual applicant for a licensed retailer's license.

3.3.1.3 If the application is for a distributor license, the application shall state that the person, or for a firm, partnership, limited partnership or association, the officers or members thereof, have each been a bona fide resident of West Virginia for the four (4) years preceding the date of application.

3.3.2 Place of birth of the applicant, that the applicant is a citizen of the United States, of good moral character, and if naturalized when and where naturalized.

3.3.2.1 If a corporation, where and when incorporated with the name and address of each officer, and that each officer is a United States citizen and a person of good moral character.

3.3.2.2 If a firm, association, partnership or limited partnership, the place of birth of each member, that each member is a United States citizen and if naturalized, when and where, and each member must qualify and sign the application.

3.3.3 The particular place for which the license is desired and a detailed description thereof.

3.3.4 The name of the owner of the building and if the owner is not the applicant, that such applicant is the actual and bona fide lessee of the premises.

3.3.5 Verification that the place or building in which the proposed business will be located:

3.3.5.1 conforms to all health, fire, safety and zoning regulations;

3.3.5.2 is a safe and proper place or building; and

3.3.5.3 is not within three hundred (300) feet of any church or school, measured from front door to front door, along the street or streets; Provided:

3.3.5.3.a that this requirement shall not apply to a Class B license, or any place occupied by a licensed retailer licensee so long as such place is continuously so occupied, and

3.3.5.3.b that this requirement shall not apply to a college or university that has notified the Commissioner, in writing, that it has no objection to the location of the proposed business.

3.3.6 That the applicant is not incarcerated and has not during the five (5) years immediately preceding the application date been convicted of a felony.

3.3.7 That the applicant is and shall so remain for the license period the only person pecuniarily interested in the business to be licensed.

3.3.8 That the applicant has not during the five (5) years immediately preceding the application date had a nonintoxicating beer licensed revoked.

3.3.9 The license shall be refused if the applicant fails to satisfy any of the foregoing requirements or if in the Commissioner's opinion the applicant has engaged in conduct declared to be unlawful by West Virginia Code article 11-16.

3.3.10 That the applicant is not a suitable person to be licensed.

3.3.11 The Commissioner may require any additional information from the applicant and may conduct any investigation of the applicant or proposed place of business as is deemed necessary.

3.3.12 Annual license taxes are as follows:

3.3.12.1 Class A licensed retailer - one hundred fifty dollars (\$150) for each place of business.

3.3.12.2 Class A licensed retailer-for each social, fraternal or nonprofit club in continuous operation for two (2) or more years immediately preceding application date - one hundred fifty dollars (\$150).

3.3.12.3 Class A licensed retailer-for each railroad dining, club or buffet car in which nonintoxicating beer will be dispensed - ten dollars (\$10) for each such car.

3.3.12.4 Class B licensed retailer - one hundred fifty dollars (\$150) for each place of business.

3.3.12.5 Distributor - one thousand dollars (\$1,000) for each place of business.

3.4 Class S license.

3.4.1 The application for a Class S license must be submitted to the Commissioner at least thirty (30) days before the first day upon which nonintoxicating beer is to be sold at a fair or festival or other special event approved by the Commissioner. Any time a Class S license is obtained, the licensee is required to contact all distributors in the area where the fair, festival or special event will occur in order that all such distributors are provided the opportunity to participate.

3.4.2 A Class S license may be issued for a term of no longer than ten (10) consecutive days.

3.4.3 The license fee for a Class S license is two hundred fifty dollars (\$250).

3.5 Brewery representatives, permits, fee, term, suitability. - No person shall act as agent, representative, solicitor or salesman in the State of West Virginia for any manufacturer of nonintoxicating beer, ale, malt beverages or malt coolers until such person shall have obtained a permit to act as such agent, representative, solicitor or salesman, from the Commissioner.

3.5.1 Application: Application for such permit, accompanied by photograph (2 inches by 3 inches) of applicant, shall be made on such form as shall be prescribed and furnished by the Commissioner.

3.5.2 Fee: The fee for such permit to act as an agent, representative, solicitor or salesman shall be fifty dollars (\$50.00).

3.5.3 Term: All such permits shall expire on September 30 next succeeding the date of issuance, unless sooner suspended, cancelled, or revoked.

3.5.4 Suitability: Permits shall be issued to any suitable persons upon showing:

3.5.4.1 He or she is a citizen of the United States of America;

3.5.4.1 At least twenty-one (21) years of age;

3.5.4.2 Has not been convicted of a felony within the five (5) years immediately preceding submitting the application for a permit;

3.5.4.3 Has not been convicted of a violation of federal or state liquor or beer law within the five (5) years immediately preceding submitting the application for a permit;

3.5.4.4 Has not had a similar license or permit revoked or suspended in this or any other state within the five (5) years immediately preceding submitting the application for a permit;

3.5.4.5 Is a person of good morals and reputation;

3.5.4.6 Is employed by a nonintoxicating beer, ale, malt beverages or malt coolers manufacturer or brewer qualified to sell or ship such products into the State of West Virginia.

3.5.5 Bond: No permit shall be issued a permit unless bond, with a solvent surety company approved by the Commissioner and registered to do business in this State, in the penalty of five hundred dollars (\$500), conditioned upon the observance of the West Virginia Nonintoxicating Beer Law and regulations promulgated thereunder by the Commissioner, is filed with the Commissioner.

3.5.6 Suspension or Revocation: Permits may be suspended or revoked by the Commissioner for noncompliance with the West Virginia Nonintoxicating Beer Law and regulations promulgated thereunder by the Commissioner, or false or fraudulent representations made in securing such permits, after a hearing upon ten (10) days notice, in writing, of the charge or charges, time and place of hearing thereon, served upon such permittee by registered mail, addressed to the office of such permittee's principal, as set out in the application.

3.6 Transfer. - Nonintoxicating beer licenses are not transferable from one person to another; however, with the consent of the Commissioner, endorsed on the face thereof, such a license may be transferred from one (1) location to another.

3.6.1 Licenses shall not be transferred from one (1) location to another before such transfer is approved by the Commissioner.

3.6.2 Application for a transfer of a license shall be made on the regular license application form.

3.6.3 A letter from licensee's surety company accepting liability on the new location must accompany the transfer application.

3.6.4 The transfer of a license will not be approved before the letter from the surety company accepting liability on the new location is received by the Commissioner.

3.7 Abandonment, leasing or loaning. - No licensee shall abandon, loan, rent or lease his license.

3.7.1 Upon the sale of an outlet, the licensee shall remove his license from the premises and file the same with the Commissioner.

3.7.2 Licensees, together with their surety, permitting others to use their licenses, either by express permission or by abandonment, will be held strictly liable for any bond forfeiture ordered against said licensees for violations of the West Virginia Code article 11-16.

3.8 **Establishment.** - The following businesses and locations are generally not suitable for the retail sale of beer and, depending upon the circumstances, a license therefor may be refused.

3.8.1 Establishments in reasonable close proximity to churches, schools, state institutions, privately operated charitable or eleemosynary institutions: Provided, however, That a Class A license shall not be issued to a new establishment located within three hundred (300) feet of a school or church, measured from front door to front door along the street or highway.

3.8.2 Establishments in predominantly residential districts of any city, town or village.

3.8.3 Filling stations or grocery stores, unless a bona fide restaurant is operated in connection therewith, and the sale, serving and consumption of beer is restricted to the restaurant section of said filling station or grocery store.

3.8.4 Establishments not completely under the control of the licensee, including all balconies and adjacent connecting rooms.

3.8.5 Premises on which there is an outstanding nonintoxicating beer license unless the applicant for a license and the owner of the building submit notarized statements to the Commissioner to verify that substantial efforts were made to redeem the outstanding license.

3.8.6 To any person or party whose nonintoxicating beer license has been revoked until said revocation has been in effect for a period of five (5) years.

3.9 **Posting license.** - The license granted in accordance with these Regulations must be kept posted in a conspicuous place on the licensed premises.

3.10 **Posting of blood-alcohol chart.** - A blood alcohol chart, as prescribed by West Virginia Code § 60-6-24, shall be posted in every establishment in West Virginia which sells or offers for sale nonintoxicating beer.

3.10.1 Every private club licensed in accordance with West Virginia Code article 60-7 with a nonintoxicating beer license shall prominently post the blood-alcohol chart, which chart shall be so posted as to be readily accessible and easily readable by the members and guests of such licensed private club.

3.10.2 Every licensed retailer licensed to sell nonintoxicating beer pursuant to the provisions of West Virginia Code article 11-16 shall prominently display during the hours for which the retail sale of nonintoxicating beer is permitted, the blood-alcohol chart at or near that portion of the retail establishment devoted to the sale and/or display of any nonintoxicating beer sold by such licensed retailer. In the event any such

licensed retailer shall have nonintoxicating beer displayed for sale at more than one location within the licensed premises, or have multiple points of sale, or multiple points of ingress and egress from the licensed premises, then such licensed retailer may be required to display additional blood-alcohol charts at or near the displays, points of sale or store exits.

3.10.3 The licensed retailer shall be responsible for the prudent care of such blood-alcohol chart and for assuring that the chart is displayed in accordance with the provisions of this regulation.

§ 176-1-4. Labels, Brewer's Reports, Taxation, Distributor's Reports, Records Management By Brewers And Distributors.

4.1 **Approval of Commissioner.** - The Commissioner must approve the label to be affixed upon any nonintoxicating beer, ale, malt beverage or malt cooler container sold or to be sold in this State. Labels must be submitted in duplicate to the Commissioner who must approve such labels before they can be used on any container sold or to be sold in this State.

4.1.1 No label may be affixed to any nonintoxicating beer, ale, malt beverage or malt cooler container, sold or for sale in this State, which bears any design, picture or wording indicating that the contents of such container are brewed or manufactured for one particular distributor or retailer or group of retailers, or use any trademark other than that of a licensed brewer or manufacturer.

4.2 **Serving bottled beer from which labels have been removed.** - No licensed retailer of beer shall serve to any customer any bottle of beer from which the label has been removed unless such retailer exhibits such bottle with crown intact, to the customer prior to the opening thereof.

4.3 **Brewer's reports, taxation.** - A tax is imposed and levied by West Virginia Code § 11-16-13 in the amount of five dollars and fifty cents (\$5.50) on each barrel of thirty-one (31) gallons, and in like ratio on each part barrel, of nonintoxicating beer which is either manufactured in this State for sale in this State, or manufactured outside of this State and brought into this State for sale in this State.

4.3.1 The brewer manufacturing or producing nonintoxicating beer in this State for sale in this State shall, on or before the tenth (10th) day of each month, file the report prescribed by the Commissioner stating total estimated sales of nonintoxicating beer to distributors in this State during that month and pay the tax on such estimated sales.

4.3.2 The distributor which is the original consignee of nonintoxicating beer manufactured or produced out of this State, or who brings such nonintoxicating beer into this State shall, on or before the tenth (10th) day of each month, file the report prescribed by the Commissioner stating the total estimated purchases of nonintoxicating beer during that month and pay the tax on such estimated purchases.

4.3.3 Any brewer which manufactures or produces nonintoxicating beer outside this State may, upon obtaining approval from the Commissioner, file

the required report and pay the required tax on behalf of the brewer's distributors in this State.

4.3.4 Adjusted monthly reports must be filed by the twenty-fifth (25th) of each reporting month.

4.3.5 Any monthly report reflecting an underestimate of the previous month's tax in an amount of twenty-five (25%) or more, which has not been timely adjusted, will result in a penalty assessment of one percent (1%) of the total taxes due in such prior month.

4.4 **Records management by brewers and distributors.** - Brewers and distributors shall keep all records, which relate to purchase and sales transactions in and for West Virginia, on file in their respective licensed place of business for a period of three (3) years unless approval for earlier disposal is granted in writing by the Commissioner. Such records shall include copies of all invoices covering all purchases, sales invoices, transfers, reports and such other records to completely describe the nonintoxicating beer transactions of such brewers and distributors and such other records as may be determined by the Commissioner to be essential for audit and control purposes.

§ 176.1.5. Reserved For Future Use.

§ 176-1-6. Unlawful Acts.

6.1 The following acts, when performed by a licensed retailer are unlawful.

6.1.1 For any such licensee to sell, give or dispense, or any individual to drink or consume, in or on any licensed premises or in any rooms directly connected therewith, nonintoxicating beer on weekdays between the hours of two o'clock (2:00) a.m. and seven o'clock (7:00) a.m., or between the hours of two o'clock (2:00) a.m. and one o'clock (1:00) p.m., on any Sunday, except in private clubs licensed under the provisions of West Virginia Code article 60-7, where the hours shall conform with the hours of sale of alcoholic liquors;

6.1.2 For any such licensee to sell, furnish or give any nonintoxicating beer to any person visibly or noticeably intoxicated, or to any person known to be insane or known to be a habitual drunkard;

6.1.3 For any such licensee to sell, furnish or give any nonintoxicating beer to any person who is less than twenty-one (21) years of age;

6.1.4 For any such licensee to permit in his premises any lewd, immoral or improper entertainment, conduct or practice;

6.1.5 For any such licensee, except the holder of a license to operate a private club or a holder of a license for a private wine restaurant, to possess a federal license, tax receipt or other permit entitling, authorizing or allowing such licensee to sell liquor or alcoholic drinks other than nonintoxicating beer;

6.1.6 For any such licensee, to obstruct the view of the interior of his premises by enclosure, lattice, drapes or any means which would prevent plain view of the patrons occupying such premises. The interior of all licensed premises shall be adequately lighted at all times: Provided, That provisions of this Section 6.1.6 shall not apply to the premises of a Class B retailer, the premises of a private club or the premises of a private wine restaurant;

6.1.7 For any such licensee to manufacture, import, sell, trade, barter, possess or acquiesce in the sale, possession or consumption of any alcoholic liquors on the premises covered by such license or on premises directly or indirectly used in connection therewith: Provided, That the prohibition contained in this Section 6.1.7 with respect to the selling or possessing, or to the acquiescence in the sale, possession or consumption, of alcoholic liquors shall not be applicable with respect to the holder of a license to operate a private club nor shall the prohibition be applicable to a private wine restaurant insofar as such private wine restaurant is authorized to serve wine;

6.1.8 For any such retail licensee to sell or dispense nonintoxicating beer purchased or acquired from any source other than a distributor, brewer or manufacturer licensed under the laws of this State;

6.1.8.1 Except as otherwise permitted by law, distributors will make no platform deliveries except to persons known to be licensed retail dealers, or upon a signed notarized order from such known retail dealers: Provided, That no more than one (1) keg of nonintoxicating beer may be sold to any one (1) unlicensed person at a time.

6.1.9 For any such licensee to permit loud, boisterous or disorderly conduct of any kind upon the licensed premises or to permit the use of loud musical instruments if either or any of the same may disturb the peace and quietude of the community wherein such business is located: Provided, That no such licensee shall have in connection with the licensed place of business any loudspeaker located on the outside of the licensed premises that broadcasts or carries music of any kind;

6.1.10 For any person whose license to sell nonintoxicating beer has been revoked to obtain employment with any licensed retailer within the period of one (1) year from the date of such revocation, or for any licensed retailer to knowingly employ any such person within such time;

6.1.11 For any such licensee to knowingly violate any rule or regulation lawfully promulgated by the Commissioner;

6.1.12 For any such licensee to knowingly permit any act to be done upon the licensed premises the commission of which constitutes a crime under the laws of this State;

6.1.13 For any Class B licensed retailer to permit the consumption of nonintoxicating beer upon his licensed premises;

6.1.14 For any Class A licensed retailer, to allow, suffer or permit any person less than eighteen (18) years of age to loiter in or upon any

licensed premises; except, however, that the provisions of this Section 6.1.14 shall not apply where such person under the age of eighteen (18) years is in or upon such premises in the immediate company of his or her parent or parents, or where and while such person under the age of eighteen (18) years is in or upon such premises for the purpose of and actually making a lawful purchase of any items or commodities therein sold, or for the purchase of and actually receiving any lawful service therein rendered, including the consumption of any item of food, drink or soft drink therein lawfully prepared and served or sold for consumption on such premises;

6.1.15 For any such licensee to allow each faucet or tap from which beer is drawn from kegs to be identified with a knob showing the brand or name of brewer of the nonintoxicating beer so dispensed to be other than the brand or name of the nonintoxicating beer actually dispensed.

6.1.16 Nothing in this regulation shall prevent or be deemed to prohibit any licensee from employing any person who is at least eighteen (18) years of age to serve in such licensee's lawful employ, including the sale or delivery of nonintoxicating beer. With the prior approval of the Commissioner, a licensee whose principal business is the sale of food or consumer goods or the providing of recreational activities, including, but not limited to, nationally franchised fast food outlets, family-oriented restaurants, bowling alleys, drug stores, discount stores, grocery stores, and convenience stores, may employ persons who are less than eighteen (18) years of age but at least sixteen (16) years of age: Provided, That such person's duties shall not include the sale or delivery of nonintoxicating beer or alcoholic liquors: Provided, however, That the authorization to employ such persons under the age of eighteen (18) years shall be clearly indicated on the licensee's license.

6.2 The following acts, when performed by distributors, manufacturers or brewers are unlawful.

6.2.1 For any distributor to sell or offer to sell, or any licensed retailer to purchase or receive, any nonintoxicating beer, except for cash or a check drawn against the bank account of the licensed retailer who is making the purchase; and no right of action shall exist to collect any claims for credit extended contrary to the provisions of this Section 6.2. Nothing herein contained shall prohibit a licensee from crediting to a purchaser the actual price charged for packages or containers returned by the original purchaser as a credit on any sale, or from refunding to any purchaser the amount paid or deposited for such containers when title is retained by such licensee.

6.2.1.1 All distributors must immediately, and in the regular course of business, deposit in the bank all checks given them by licensed retailers for the purchase of nonintoxicating beer. No distributor shall through himself, his agents or employees, enter into any agreement or understanding with any licensed retailer to hold any checks so given.

6.2.1.2 The repeated giving of worthless checks by the licensed retailer to the distributor or the repeated acceptance of worthless checks from the licensed retailer by the distributor, shall be prima facie evidence of obtaining an extension of credit and shall, in the discretion of the

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

6.2.1.3 Payment for a retail nonintoxicating beer license, or renewal thereof, shall be submitted only in the form of a certified check, cashier's check or money order made payable to the West Virginia Nonintoxicating Beer Commissioner in the exact amount as required by West Virginia Code § 11-16-9.

6.2.2 For any brewer or distributor or his, her, its or their agents, to transport or deliver nonintoxicating beer to any licensed retailer on Sunday.

6.2.3 For any brewer or distributor to give, furnish, rent or sell any equipment including trailers or draft trucks, fixtures, signs or supplies directly or indirectly or through a subsidiary or affiliate to any licensed retailer engaged in selling products of the brewing industry at retail, or to offer any prize, premium, gift or other similar inducement, except advertising matter of nominal value, to either trade or consumer buyers: Provided, That a distributor may offer, for sale or rent, tanks of carbonic gas. Nothing herein contained shall prohibit a brewer from sponsoring any professional or amateur athletic event or from providing prizes or awards for participants and winners in any such events: Provided, however, That no such event shall be sponsored which permits actual participation by athletes or other persons who are minors, unless specifically authorized by the Commissioner.

6.2.3.1 No brewer shall contribute to or support, either directly or indirectly, any baseball, football, bowling or other athletic team or contest (except a recognized professional athletic team or contest) unless at least fifty percent (50%) of the members of the team are employees of such brewer or distributor and such brewer or distributor shall have first obtained written permission from the Commissioner to do so.

6.2.4 Any brewer or distributor, or any salesman, agent or representative of any brewer or distributor, who gives, either directly or indirectly, free goods or discounts to any licensed retailer shall be subject to immediate license revocation, as provided in West Virginia Code § 11-16-18.

6.2.4.1 Free goods, or the giving free of a certain number of cases of nonintoxicating beer, ale, malt beverages or malt coolers for each number or amount purchased is prohibited.

6.2.4.2 No brewer, distributor, salesman or representative shall give to any retailer or any person working for or connected with such retailer, either directly or indirectly, anything of more than nominal value. Brewers or their representatives, and distributors or their representatives, are prohibited from trade spending at retail prices, in any licensed retail establishment, nonintoxicating beer, ale, malt beverages or malt coolers for the consumer.

6.2.4.3 A distributor may rotate, stock and price nonintoxicating beer, ale, malt beverages and malt coolers in a licensed

nonintoxicating beer retail establishment but may not move, rotate, stock or touch any competitor's product.

6.2.5 For any distributor to sell, possess for sale, transport or distribute nonintoxicating beer except in the original container.

6.2.6 For any distributor to sell, offer for sale, distribute or deliver any nonintoxicating beer outside the territory assigned to such distributor by the brewer or manufacturer of such nonintoxicating beer or to sell, offer for sale, distribute or deliver any such nonintoxicating beer to any licensed retailer whose principal place of business or licensed premises is within the assigned territory of another distributor of nonintoxicating beer: Provided, That nothing herein shall be deemed to prohibit sales of convenience between distributors licensed in this State wherein one such distributor sells, transfers or delivers to another such distributor a particular brand or brands for sale at wholesale;

6.2.7 For any brewer or manufacturer, or any other person, firm or corporation engaging in the business of selling nonintoxicating beer, ale, malt beverages or malt coolers to a distributor or wholesaler, to discriminate in price, allowance, rebate, refund, commission, discount or service between distributors or wholesalers licensed in West Virginia. "Discriminate," as used in this section, shall mean granting of more favorable prices, allowances, rebates, refunds, commissions, discounts or services to one West Virginia distributor or wholesaler than to another.

6.2.7.1 Breweries licensed to do business in the State of West Virginia are prohibited from engaging in price discrimination and making any "Secret" deals with distributors in the State of West Virginia.

6.2.7.2 No brewer shall discriminate in price, allowance, rebate, refund, commission, discount or service between wholesaler's purchasing beer, ale, malt beverages, or malt coolers and no brewer can threaten a distributor in order to change or maintain resale prices.

6.2.8 For any brewer or manufacturer, or any other person, firm or corporation engaged in the business of selling nonintoxicating beer, ale, malt beverages or malt coolers to a distributor or wholesaler, to sell or deliver nonintoxicating beer, ale, malt beverages or malt coolers to any licensed distributor or wholesaler unless and until such brewer, manufacturer, person, firm or corporation, as the case may be, shall have filed the brewery or dock price of such beer, ale, malt beverages or malt coolers, by brands and container sizes, with the Commissioner. No price schedule shall be put into effect until fourteen (14) days after receipt of same by the Commissioner: Provided, That any price reductions shall remain in effect not less than thirty (30) days.

6.2.8.1 West Virginia licensed beer distributors shall not sell or deliver nonintoxicating beer, ale, malt beverages or malt coolers to any licensed retailer unless such distributor:

6.2.8.1.a Shall have filed the wholesale price of nonintoxicating beer, ale, malt beverages or malt coolers, by brands and container sizes, with the Commissioner, and

6.2.8.1.b Shall have furnished licensed retailers with a printed, lithographed or mimeographed price list, on or before the effective date, showing the wholesale price of such beer, ale, malt beverages or malt coolers, by brand and container size.

6.2.8.2 To effect any planned change in the price list of beer, ale, or other malt beverages or malt coolers, a distributor must have filed with the Commissioner, in duplicate, the changed price list. A copy will be acknowledged by the Commissioner and returned to such distributor. New prices will then become effective within three (3) working days after receipt of written acknowledgement from the Commissioner. Failure to put price changes into effect within three (3) working days after written acknowledgement from the Commissioner will cause price change to become null and void.

6.3 The following acts, when performed by any person, are unlawful.

6.3.1 Any person under the age of twenty-one (21) years who, for the purpose of purchasing nonintoxicating beer, misrepresents his or her age, or who for such purpose presents or offers any written evidence of age which is false, fraudulent or not actually his or her own, or who illegally attempts to purchase nonintoxicating beer, is guilty of a misdemeanor, and, upon conviction thereof, shall be fined in an amount not to exceed fifty dollars (\$50) or shall be imprisoned in the county jail for a period not to exceed seventy-two (72) hours, or both such fine and imprisonment, or, in lieu of such fine and imprisonment, may, for the first offense, be placed on probation for a period not exceeding one (1) year.

6.3.2 Any person who shall knowingly buy for, give to or furnish nonintoxicating beer to anyone under the age of twenty-one (21) to whom they are not related by blood or marriage is guilty of a misdemeanor and shall, upon conviction thereof, be fined in an amount not to exceed one hundred dollars (\$100) or shall be imprisoned in the county jail for a period not to exceed ten (10) days, or both such fine and imprisonment.

6.3.3 Any person who at any one time transports into the State for their personal use and not for resale, more than six and seventy-five hundredths (6.75) gallons of nonintoxicating beer, upon which the West Virginia barrel tax has not been imposed, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined in an amount not to exceed one hundred dollars (\$100), and shall have all the untaxed nonintoxicating beer in their possession at the time of the arrest confiscated, or imprisoned for ten (10) days in the county jail, or both fined and imprisoned.

§ 176-1-7. Advertising.

7.1 Any West Virginia licensed retailer may advertise nonintoxicating beer products only in the following manner:

7.1.1 By a display or displays of such products and their containers within licensed establishments.

7.1.2 By signs, posters, placards, graphic displays, decorations or other similar advertising matter where the combined area for any one brand of

nonintoxicating beer does not exceed a maximum area of two thousand two hundred (2,200) square inches, including crepe paper or other background or decorative material, signs, placards, posters or other similar advertising matter.

7.1.3 Such advertising matter as in Section 7.1.2 of these regulations may be furnished to a licensed retailer by a brewer or distributor only if such matter has no value to the licensed retailer except as advertisement.

7.1.3.1 No brewer or distributor shall directly or indirectly pay or credit the licensed retailer for displaying any such advertisement or for any expense incidental thereto.

7.1.3.2 These regulations shall not be construed to permit the display of nonintoxicating beer or advertisement in show windows or to prohibit the display of faucet advertising indicating the brand or brands of draft nonintoxicating beer offered for sale.

7.1.3.3 No brewer or distributor shall paint the interior of licensed retailer's licensed premises under the guise of advertising.

7.1.3.4 Any advertisement of nonintoxicating beer may not contain the following:

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

7.1.3.4.b Any statement, device or representative that is obscene or indecent.

7.1.3.4.c Any statement that is false or misleading in any manner.

7.1.3.4.d Any statement concerning the brand of nonintoxicating beer that is inconsistent with any statement on the labeling thereof.

7.1.3.4.e Any statement that may intimate or state that drinking of the advertised product produces good health, affects weight or like statements.

7.1.3.5 While a Class B licensed retailer is authorized to advertise the sale price of nonintoxicating beer, ale, malt beverages and malt coolers, such licensed retailers shall not be required by a brewer, manufacturer or distributor to advertise any such products.

7.1.3.6 Advertising gifts of nominal value may be given if prior written approval of the Commissioner has been obtained.

7.1.3.7 The brewers and distributors furnishing the aforementioned advertisements and the retailer in whose establishment or grounds same are located shall be held equally responsible for the displaying of such advertising as is herein prohibited.

7.2 Posters, placards, mirrors, windows, doors. - All signs advertising beer, ale, malt beverages or malt coolers on the windows or doors of licensed retailers are permitted but may not be required by brewers, manufacturers or distributors. However, window displays of nonintoxicating beer products are not authorized.

7.3 Signs. - All exterior signs, including those of an electrical or mechanical construction, advertising a specific brand of beer, ale, malt beverages or malt coolers on the premises of a licensed retailer, are prohibited.

7.3.2 Premises, as used herein, shall be construed to be the licensed premises, as defined in the application submitted by the retail licensee, and any building or lot of ground which the licensed premises are a part.

§ 176-1-8. Sanitation.

8.1 Health Permits. - A Class A nonintoxicating beer license, authorizing the sale of nonintoxicating beer for consumption on the licensed premises, will not be issued to any person, partnership, firm, association or corporation, unless the applicant shall have a permit from the West Virginia Health Department to operate a tavern in the premises set out and described in such applicant's application, nor will a license be transferred to a new location unless such licensee shall have a permit from the West Virginia Health Department to operate a restaurant (tavern) in the new location, as described in licensee's application for transfer.

8.2 Health, sanitation, toilets. - Taverns must be kept in a sanitary condition, as required by the West Virginia Health Department. Tavern operators shall maintain separate toilets for each sex, properly labeled and conveniently located.

8.3 Sanitation schools, classes and demonstrations. - Brewers and distributors, either jointly or severally, with the cooperation of the Commissioner, may hold classes for the instruction of tavern operators and employees in the proper method of cleansing and sterilization of glasses and other equipment used in the serving or dispensing of nonintoxicating beer, ale, malt beverages or malt coolers to the public: Provided, That no refreshments shall be served except nonintoxicating beer for demonstration as to the impairment of its quality and taste by the use of improper cleansing and sterilization methods of such glasses and equipment.

8.4 Cleansing beer bottles, pipe lines, registration:

8.4.1 Cleansing of beer bottles and bottling. - Beer bottle soakers and cleansers shall be of such mechanical construction and operation as to entirely eliminate manual handling or contact with the bottles from the point the same are placed in the soaker until filled with beer and crowned. Soakers and cleansers used must be so equipped as to provide, at the least, one (1) outside and two (2) inside brushings, and five (5) individual rinsings of each bottle, using properly decreasing alkali solution, or equivalent, and at proper temperature, until the bottles reach the fresh water compartment.

8.4.2 **Cleansing of beer pipe lines and barrel tubes.** - Beer pipe lines and barrel tubes must be cleansed simultaneously, not less than twice each week (approximately ninety (90) hour intervals) by the use of hydraulic pressure mechanism, hand pump suction or force cleaner, in conjunction with a suitable detergent, or detergent and sterilizer combined, or any other apparatus approved by the Commissioner. When coils are cleansed in either of the foregoing manner, the detergent must be permitted to remain in the line not less than ten (10) minutes, and may lie still or be agitated. After cleansing, lines shall be rinsed with clear water until all chemicals have been removed. All compounds used for cleansing beer pipe lines and barrel tubes must be approved by the West Virginia Department of Health.

8.4.3 **Pipe lines and equipment.** - The use of any tubing or pipes through which nonintoxicating beer flows or is forced, other than tubing or pipes made of block tin, gutta percha and other similar products, is hereby prohibited; and the use of rubber hose or tubing or any kindred products in connection with draft nonintoxicating beer is prohibited.

8.4.4 **Nonintoxicating Beer may be gassed by any of the following methods.** - By the use of carbonic gas (carbon dioxide), or by the use of electrical, hydraulic or mechanical pumps. In the event pumps are used, the intake for such pumps shall be from the outside of the building where fresh and clean air is available, and such intake must be protected by a suitable filter or filters.

8.4.5 **Cleansing and sterilizing of receptacles in which nonintoxicating beer is served.** - All glasses and similar containers used in serving nonintoxicating beer shall, after each use and before being used again, be thoroughly cleansed and sterilized:

8.4.5.1 **Cleansing:** Cleansing shall be effected by washing glasses and containers in hot water containing effective cleansing agent.

8.4.5.2 **Sterilization:** Sterilization shall be effected by either of the following methods:

8.4.5.2.a Method 1 - Immerse each glass or container for not less than one minute in clean water containing not less than one hundred (100) parts per million (1,000,000) of available chlorine. The glass or container shall be rinsed free from the washing solution. After the sterilizing operation, the chlorine odor may be eliminated by draining the glass for a period or rinsing in clean water.

The most practical and effective arrangement for complying with Method 1 is to provide a small three (3) compartment vat. Each compartment should be provided with a means of draining. Hot and cold running water should be piped to the vat if available. The first compartment should contain the hot alkaline wash water; the second compartment clean rinse water, and the third compartment the chlorine sterilizing solution.

8.4.5.2.b Method 2 - Immerse each glass or container for not less than two (2) minutes in clean hot water maintained at a temperature of at least one hundred seventy (170°) degrees F.

8.4.6 **Registration.** - Every person, firm or corporation conducting a business in the State of West Virginia which involves the cleansing of beer coils and barrel tubes shall register with the Department of Health and the Commissioner's office by providing the businesses' name, address and the method and chemicals used in the cleansing of such beer pipe lines and barrel tubes. Licensed retailers who do their own cleansing shall register as in the case of a person, firm or corporation.

8.4.6.1 All persons, firms or corporations engaged in the business of cleansing beer coils and barrel tubes shall furnish, without cost, to each licensed retailer a record card, which shall be approved by the Commissioner's office. Upon such record card shall be shown the date of each cleansing, the method used and shall be signed by the person who performed such cleansing. Such card shall provide for a period of six (6) months, and at the end of each six (6) months, shall be signed by the licensed retailer, notarized and forwarded immediately to the Commissioner's office. The card in use shall be kept upon the licensed premises and shall be available at all times for inspection by sanitary engineers of the Department of Health and agents and employees of the Commissioner's office.

§ 176-1-9. Reserved for Future Use.

§ 176-1-10. Deposit for Packages, Container Deposits, Rebates.

10.1 **Container deposits, rebates.** - On all wholesale and retail sales of nonintoxicating beer, ale, malt beverages or malt coolers in returnable bottles of any size, there shall be a minimum cash deposit charge of seventy-five cents (\$.75) per case, regardless of case size.

10.1.1 Each brewer, distributor or retailer authorized by the Commissioner to sell, ship or deliver nonintoxicating beer, ale, malt beverages or malt coolers in West Virginia shall be prohibited from buying, selling, renting, lending, giving or offering to buy, sell, rent, lend or give returnable bottles upon which a deposit charge has been paid. Such bottles of the same type, color and size shall be returned for rebate to the brewer or distributor to whom the deposit charge was paid in the cases in which originally sold or delivered.

10.1.2 Each brewer, distributor or retailer authorized by the Commissioner to sell, ship or deliver nonintoxicating beer, ale, malt beverages or malt coolers in West Virginia, shall accept for rebate all usable, returnable bottles upon which a deposit charge was made when sold or delivered, if such bottles are the same type, color and size and in the cases in which originally sold or delivered, and shall pay rebates in an amount equal to the deposit charge.

§ 176-1-11. Chipped or Broken Bottles.

11.1 No allowances shall be made by any distributor to any licensed retailer on account of chipped bottles. Replacement may be made by any distributor to any licensed retailer on account of broken bottles, where crown and neck are intact. Breweries may share equally with distributors in replacement of broken bottles where crown and neck are intact.

§ 176-1-12. Flat Beer.

12.1 No allowance shall be made by any brewer or distributor to any licensed retailer, nor shall any brewer make any allowance to any distributor on account of any claim for "flat" beer in excess of a ratio of one (1) bottle to five hundred (500) bottles in any one (1) calendar month, except with the written approval of the Commissioner.

12.1.1 Any allowances made in excess of the rate of one (1) bottle to five hundred (500) bottles on account of claims for "flat" beer will subject the offending parties to a revocation of their licenses.

§ 176-1-13. Brewers, Qualification, Shipment into State, Bond, Contract.

13.1 West Virginia distributors shall not purchase, receive or distribute any nonintoxicating beer, ale, malt beverages or malt coolers from any brewer, whether situate in or out of the State of West Virginia, unless such brewer is qualified for the manufacture or shipment into the State of nonintoxicating beer, ale, malt beverages, or malt coolers by posting bond with the Commissioner. The bond must be conditioned upon the faithful observance of West Virginia Code article 11-16 and the regulations promulgated thereunder, and obtaining a license as described in West Virginia Code article 11-16 which shall provide:

13.1.1 For the filing of such written reports as may be required by the Commissioner.

13.1.2 For the payment on behalf of its distributors, of the beer excise (barrel) tax in monthly advance payments, or as may be otherwise directed by regulation or statute;

13.1.3 For the delivery, upon request, to the office of the Commissioner, such brewer's records, papers and accounts, for the purpose of inspecting and auditing the same, or the payment of the expense of an auditor(s) of the Commissioner while so inspecting and auditing such records in the office of the brewer; and

13.1.4 For the posting of bond, with surety, in the amount of twenty-five thousand dollars (\$25,000) conditioned upon the compliance by the brewer with all rules, regulations and laws of the State of West Virginia relating to nonintoxicating beer.

13.2 Brewer - distributor franchise agreement and its termination.

13.2.1 A brewer may not transfer or deliver to a distributor any nonintoxicating beer, ale, malt beverages or malt coolers without first having entered into an equitable franchise agreement with such distributor. The franchise agreement shall be in writing, shall be identical as to terms and conditions with all other franchise agreements between such brewer and its other distributors in this State, and it shall contain a provision in substance or effect as follows:

13.2.1.1 The brewer recognizes that the distributor is free to manage his business in the manner the distributor deems best, and that this prerogative vests in the distributor, subject to the provisions of West Virginia Code article 11-16, the exclusive right to establish the distributor's selling prices, to select the brands of nonintoxicating beer the distributor wishes to handle, and to determine the efforts and resources which the distributor will exert to develop and promote the sale of the brewer's products.

13.2.1.1.a As brewer's products handled by the distributor will not be sold by others in the territory assigned to the distributor, the brewer is dependent upon the distributor for the sale of such products.

13.2.1.1.b The distributor must therefore competitively price the brewer's products, devote reasonable effort and resources to the sale of such products and maintain a satisfactory sales level.

13.2.1.2 A brewer may sell to another brewer the manufacturing, bottling or other production rights for the sale of nonintoxicating beer at wholesale. When such a sale occurs, the franchised distributor of the selling brewer will be entitled to continue distributing the selling brewer's nonintoxicating beer products as authorized in the distributor's existing franchise agreement, the acquiring brewer shall continue to market all the selling brewer's nonintoxicating beer products through said franchised distributor as though the acquiring brewer had made the franchise agreement, and the acquiring brewer may terminate the franchise agreement only in accordance with West Virginia Code § 11-16-21(b)(2) and Section 13.2.2.2 of these regulations. The acquiring brewer may continue to distribute any of its other nonintoxicating beer products through its duly authorized franchises in accordance with all other provisions of this section.

13.2.2 A brewer or distributor is prohibited from:

13.2.2.1 Coercing or persuading, or attempting to coerce or persuade, any licensee to enter into any contracts or agreements, whether written or oral, or to take any other action, which will violate or tend to violate any provision of West Virginia Code article § 11-6 or any of the rules, regulations, standards, requirements or orders of the Commissioner; or

13.2.2.2 Cancelling, terminating or rescinding without due regard for the equities of such brewer or distributor, and without just cause, any oral franchise agreement entered into on or before June 11, 1971, or any written franchise agreement entered into on, before or subsequent to July 1, 1971.

13.2.2.2.a The cancellation, termination or rescission of any franchise agreement shall not become effective for at least ninety (90) days after written notice of such action has been served on the affected party and the Commissioner by certified mail, return receipt requested.

13.2.2.2.b The ninety (90) day period and said notice of cancellation, termination or rescission shall not apply if action is agreed to in writing by both the brewer and the distributor involved.

13.2.2.2.c. If a brewer seeks to terminate dealings with a distributor, the brewer must:

13.2.2.2.c.1 Notify the Commissioner and the West Virginia distributor in writing of the brewer's termination of dealings with the distributor;

13.2.2.2.c.2 Offer to purchase all marketable nonintoxicating beer, ale, malt beverages or malt coolers manufactured by the brewer in the possession of the West Virginia distributor as of the date of termination at the then existing brewery platform price, plus transportation; and

13.2.2.2.c.3 Refrain from making any statement, or performing or causing to be performed, any act (other than such termination) detrimental to the distributor or to the distributor's business.

After receipt from a brewer of such written notice of termination, the distributor must:

13.2.2.2.c.4 Sell to the brewer all marketable nonintoxicating beer, ale, malt beverages or malt coolers manufactured by the brewer and in the possession of the distributor as of the date of such termination at the then existing brewery platform price, plus transportation; and

13.2.2.2.c.5 Refrain from making any statement, or perform or cause to be performed, any act detrimental to the brewer or to the brewer's product or business.

13.2.2.2.d. If a distributor seeks to terminate dealings with a brewer, the distributor must:

13.2.2.2.d.1 Notify the Commissioner and the brewer, in writing, of the distributor's termination of dealings with the brewer;

13.2.2.2.d.2 Offer to sell to the brewer all marketable nonintoxicating beer, ale, malt beverages or malt coolers manufactured by the brewer in the possession of the West Virginia distributor as of the date of the termination at the then existing brewery platform price, not including transportation; and

13.2.2.2.d.3 Refrain from making any statement, or performing or causing to be performed, any act (other than such termination) detrimental to the brewer or to the brewer's product or business.

After receipt from a West Virginia distributor of such a written notice of termination, the brewer must:

13.2.2.2.d.4 Purchase from the distributor all marketable nonintoxicating beer, ale, malt beverages or malt coolers manufactured by the brewer and in the possession of the distributor as of the

date of such termination at the then existing brewery platform price, not including transportation; and

13.2.2.2.d.5 Refrain from making any statement, or perform or cause to be performed, any act detrimental to the distributor or to the distributor's business.

13.2.2.2.e **Hearing.** - If the Commissioner has grounds to believe that there has occurred a violation of this regulation by either a brewer or a distributor, the Commissioner may in his discretion order a hearing to determine whether or not a violation has occurred. If such a hearing is ordered by the Commissioner, the same shall be held in the office of the Commissioner within thirty (30) days after the termination in question. Any such hearing shall be conducted in the manner described in the West Virginia Code article 11-16, and the burden of proving that a violation has been committed shall rest upon the brewer or distributor, as the case may be, against whom the termination has been effected. The Commissioner shall, within ten (10) days after the close of any such hearing, make his determination and issue an appropriate order of findings as to whether or not a violation of this Regulation has occurred.

13.2.3 A distributor seeking to sell or transfer the distributor's franchise must give to the brewer at least sixty (60) days notice in writing of such impending sale or transfer, the identity of the person, firm or corporation to whom such sale or transfer is to be made, and any other information the brewer may reasonably request. Such notice shall be made upon forms and contain such additional information as the Commissioner by rule or regulation shall prescribe. A copy of such notice shall be forwarded to the Commissioner.

13.2.3.1 The brewer must be given sixty (60) days to approve or disapprove of such sale or transfer. If the brewer neither approves nor disapproves of the sale or transfer within sixty (60) days of the date of the receipt of such notice, the sale or transfer shall be deemed to be approved.

13.2.3.2 In the event the brewer disapproves of the sale or transfer, such brewer must give written notice to the distributor, setting forth the reasons for such disapproval.

13.2.3.2.a Approval of the sale or transfer must not be unreasonably withheld. The fact that the prospective franchisee, transferee or purchaser has not had prior experience in the nonintoxicating beer business or beer business is not be deemed sufficient reason for a valid disapproval; however, such lack of experience may be considered in conjunction with other adverse factors in supporting the position of the brewer.

13.2.3.2.b The brewer may not impose requirements which are more stringent or restrictive than those currently demanded of or imposed upon the brewer's other distributors in the State of West Virginia.

13.2.3.3 A copy of such notice of disapproval must be forwarded to the Commissioner and to the prospective franchisee, transferee or purchaser. If the issue is not resolved within twenty (20) days from the date of such

disapproval, any of the parties may demand arbitration and so notify the other parties and the Commissioner.

13.2.3.3.a The matter must be submitted to a board of three (3) arbitrators in the county in which the distributor's principal place of business is located; the request for arbitration shall name one arbitrator. The party receiving such notice for arbitration shall, within ten (10) days after receipt, by notice name the second arbitrator.

13.2.3.3.b If the party receiving notice fails to name the second arbitrator, the appointment may be made by the chief judge of the circuit court of the county in which the distributor's principal place of business is located if such action is requested by the party requesting arbitration in the first instance.

13.2.3.3.c The two (2) arbitrators so appointed must name the third, or failing to do so within ten (10) days after appointment of the second arbitrator, the third arbitrator may be appointed by such chief judge upon request of either party.

13.2.3.4 The arbitrators must promptly hear and determine the questions submitted pursuant to the procedures established by the American Arbitration Association. The decision must be rendered with all reasonable speed and dispatch but in no event later than twenty (20) days after the conclusion of evidence. The decision must include findings of fact and conclusions of law and it must be based upon the justice and equity of the matter. Each party shall be given notice of the decision.

13.2.3.5 If the decision of the arbitrators approves the proposed sale of transfer, the brewer shall forthwith agree to the same and shall immediately transfer the franchise, unless notice of intent to appeal such decision is given the arbitrators and all other parties within ten (10) days of notification of such decision. If any such party deems himself aggrieved thereby, such party shall have a right to bring an appropriate action in circuit court. Any and all notices shall be given to all parties by certified or registered mail, return receipt requested.

13.2.4 The violation of any provision of this Section 13.2 by any brewer shall constitute grounds sufficient for the forfeiture of the bond furnished by such brewer in accordance with West Virginia Code § 11-16-12. Moreover, any circuit court of the county in which a distributor's principal place of business is located shall have the jurisdiction and power to enjoin the cancellation, termination or rescission of any franchise agreement between a brewer and such distributor, and, in granting an injunction to a distributor, the court shall provide that the brewer so enjoined shall not supply the customers or territory of the distributor while the injunction is in effect.

13.3 Brewers and distributors interceding for licensed retailers. - No brewer, distributor will be permitted to intercede on behalf of any licensed retailer with respect to a refusal or revocation of a license.

13.4 Brewers and distributors territorial assignments. - All brewers are required to submit to the Commissioner, in duplicate, a written description

showing the assigned territories by brewers to each distributor. The description shall bear the signature of the brewer or its authorized agent and the distributor involved.

13.4.1 Duly assigned territories shall then become the responsibility of the brewer and distributor. No distributor shall sell any nonintoxicating beer, ale, malt beverages or malt coolers to any licensed retailer not located within the distributor's assigned territory, and no licensed retailer shall purchase any nonintoxicating beer, ale, malt beverages or malt coolers except from duly authorized distributors in whose assigned territory the licensed retailer is located. The brewer or duly authorized agent shall be responsible for submitting, by registered mail, to the office of the Commissioner, two (2) copies of any new written description showing any proposed change of territory, including signatures of brewer or authorized agent or distributor. Such new territorial assignments will then become effective upon receipt by the parties of a written acknowledgement by the Commissioner.

§ 176-1-14. Revocation or Suspension of License.

14.1 Upon a determination by the Commissioner that a licensed retailer has violated the provisions of West Virginia Code § 11-16-18, acted in such a way as would have precluded initial or renewal licensure, or violated any rule or order promulgated by the Commissioner, the Commissioner may:

14.1.1 Revoke the licensed retailer's license;

14.1.2 Suspend the licensed retailer's license;

14.1.3 Place the licensed retailer on probationary status for a period not to exceed twelve (12) months; and/or

14.1.4 Impose a monetary penalty not to exceed one thousand dollars (\$1,000) for each violation where revocation is not imposed.

14.2 In addition to the grounds for revocation, suspension or other sanction of a license set forth in subsection (a) of this section, conviction of the licensee of any offense constituting a violation of the laws of this State or of the United States relating to nonintoxicating beer or alcoholic liquor shall be mandatory grounds for such sanctioning of a license.

§ 176-1-15. Hearing on Sanctioning of License.

15.1 The Commissioner shall not revoke nor suspend any license issued pursuant to West Virginia Code article 11-16 or impose any civil penalties authorized thereby unless and until a hearing shall be held after at least ten (10) days' notice to the licensee of the time and place of such hearing, which notice shall contain a statement or specification of the charges, grounds or reasons for such proposed contemplated action, and which shall be served upon the licensee as notices under the West Virginia rules of civil procedure or by certified mail, return receipt requested, to the address for which license was issued. At the time and place designated in the notice, the licensee shall have the right to appear and produce evidence in his behalf, and to be represented by counsel.

15.2 The Commissioner shall have authority to summon witnesses in the hearings before him, and fees of witnesses summoned on behalf of the State in proceedings to sanction licenses shall be treated as a part of the expenses of administration and enforcement. Such fees shall be the same as those in similar hearings in the circuit courts of this State. The Commissioner may, upon a finding of violation, assess a licensee a sum, not to exceed one hundred fifty dollars (\$150) per violation, to reimburse the Commissioner for expenditures for witness fees, court reporter fees and travel costs incurred in holding the hearing.

15.3 If, at the request of the licensee or on his motion, the hearing shall be continued and shall not take place on the day fixed by the Commissioner in the notice, such licensee's license shall be suspended until the hearing and decision of the Commissioner. In the event the license is revoked or suspended, upon hearing before the Commissioner, the licensee may not sell nonintoxicating beer pending an appeal of the Commissioner's decision. Any person continuing to sell nonintoxicating beer after his license has been suspended or revoked, is guilty of a misdemeanor and shall be punished as provided in West Virginia Code § 11-16-19.

15.4 The action of the Commissioner in revoking or suspending a license shall be subject to review by the Circuit Court of Kanawha County, West Virginia, in the manner provided in West Virginia Code Chapter 29A. Petition for such review must be filed with said circuit court within a period of thirty (30) days from and after the date of revocation or suspension by the Commissioner. Any licensee obtaining an order for such review shall pay the costs and fees incident to transcribing, certifying and transmitting the records to the circuit court. An application to the Supreme Court of Appeals of West Virginia for a writ of error from any final order of the circuit court in any such matter shall be made within thirty (30) days from and after the entry of such final order.

15.5 All such hearings, upon notice to show cause why the license should not be revoked or suspended shall be held in the offices of the Commissioner unless otherwise provided in such notice, or agreed upon between the licensee and the Commissioner. When such a hearing is held elsewhere than in the Commissioner's office, the licensee may be required to make deposits of the estimated costs of such hearing.

15.6 Whenever any licensee has been convicted of any offense constituting a violation of the laws of this State or of the United States relating to nonintoxicating beer, or alcoholic liquor, and such conviction has become final, the clerk of the court in which such licensee has been convicted shall forward to the Commissioner a certified copy of the order or judgment of conviction if such clerk has knowledge that the person so convicted is a licensee, together with the certification of such clerk that the conviction is final.

15.7 In the case of a Class B licensee with multiple licensed locations, the Commissioner may, in his or her discretion, revoke suspend or otherwise sanction, as provided in West Virginia Code § 11-16-23, only the license for the location or locations involved in the unlawful conduct for which licensure is sanctioned as opposed to all separately licensed locations of such licensee.

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

ROBERT E. WILKINSON
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STATE OF WEST VIRGINIA

SECRETARY OF STATE

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Special Assistant

(Plus all the volunteer
help we can get)

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE August 7, 1990
ADMINISTRATIVE LAW DIVISION

August 7, 1990

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Nonintoxicating Beer Commissioner

RULE: Amendments, Series 1, Nonintoxicating Beer Licensing and Operations Procedures

DATE FILED AS AN EMERGENCY RULE: July 3, 1990

DECISION NO. 26-90

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

A handwritten signature in cursive script that reads "Ken Hechler".

KEN HECHLER
Secretary of State

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

ROBERT E. WILKINSON
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DECISION EMERGENCY RULE DECISION
(ERD 26-90)

AGENCY: Nonintoxicating Beer Commissioner
RULE: Amendments, Series 1, Nonintoxicating Beer Licensing
and Operations Procedures
FILED AS AN EMERGENCY RULE: July 3, 1990

- par. 1 The Nonintoxicating Beer Commissioner (Commissioner) has filed the above emergency amendments to an existing rule.
- par. 2 West Virginia Code §29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [29A-3-15a(a)].
- par. 4 (A) Procedural Compliance: WV Code 29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The Commissioner filed this emergency rule with supporting documents with the Secretary of State on July 3, 1990 and with the LRMRC on July 3, 1990.

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

par. 8 (B) Statutory Authority -- WV Code §11-16-22 reads:

§11-16-22. Powers of the commissioner; rules or orders.

(a) In addition to all other powers conferred upon the commissioner and in order to effectively carry out the provisions, intent and purposes of this article, the commissioner shall have the power and authority to adopt, promulgate, repeal, rescind and amend, in accordance with the provisions of §29A-1-1 et seq. of this code, rules, standards, requirements and orders, including, but not limited to, the following:

(1) Prescribing records and accounts, pertaining to the manufacture, distribution and sales of nonintoxicating beer, to be kept by the licensee and the form thereof;

(2) Requiring the reporting of such information by licensees as may be necessary for the effective administration of this article;

(3) Regulating the branding and labeling of packages, bottles or other containers in which nonintoxicating beer may be sold; and in his discretion, requiring the collection of all taxes provided for under §11-16-13;

(4) Prohibiting shipment into the state and sale within the state of low grade or under-standard nonintoxicating beer;

(5) Referring to licenses and the issuance and revocation of the same;

(6) Establishing the suitability of businesses and locations for licensure, and requiring licensees to keep their places of business where nonintoxicating beer is sold at retail, and the equipment used in connection therewith, clean and in a sanitary condition;

(7) The establishment of advertising guidelines, prohibitions and prior permissions generally, including, but not limited to, (i) the use of posters, placards, mirrors, windows, doors or indoor and outdoor signs generally, and print and electronic advertising of retail licensees specifically, (ii) the sponsoring of athletic events or contests by licensees and restrictions relating thereto, (iii) the use of equipment, fixtures or supplies in advertising, (iv) false advertising with respect to any product of or sold by any licensee, including, but not limited to, draft beer and coolers and (v) the extent, if any, to which free goods and other inducements may be utilized by any licensee;

(8) Wholesale prices or price changes, including, but not limited to, the regulation and extent, if any, of any temporary price markoff or markdown, temporary wholesale price change downward or price discount, sometimes referred to as "post downs" or as "posting down" or any other price reduction, as well as the duration of time during which such temporary price reduction is to remain in effect;

(9) Restrictions upon West Virginia distributors and other licensees with respect to the purchase of any nonintoxicating beer or malt coolers from manufacturers or brewers whether within or without the state who have failed to qualify for manufacture or shipment of any such product in the state; and

(10) Regulating, restricting or prohibiting a distributor from selling, offering for sale, distributing or delivering nonintoxicating beer to any retailer whose principal place of business, residence or licensed premises is located without or beyond the assigned territory of such distributor of such nonintoxicating beer.

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

par. 10 (C) Emergency: WV Code 29A-3-15(g) defines "emergency" as follows:

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

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

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

These regulations provide for the licensing of brewers, distributors and retailers, and give substantial guidance on brewer and distributor prohibitions, advertising and hearings. The regulations were not updated when the nonintoxicating beer statutes were substantially amended in 1986. As a result, these regulations now conform to the law. These regulations are necessary to remove public confusion.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of emergency for "time limitation" and changes in the law.

par. 14 This decision shall be cited as Emergency Rule Decision 26-90 or ERD 26-90 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Nonintoxicating Beer Commissioner, the Attorney General and the Legislative Rule Making Review Commission.



KEN HECHLER
SECRETARY OF STATE

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE August 7, 1990
ADMINISTRATIVE LAW DIVISION

Entered _____