

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

DO NOT WRITE IN THIS BOX

10 Aug 1990

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

AGENCY: NONINTOXICATING BEER COMMISSIONER TITLE NUMBER: 176

CITE AUTHORITY W. VA. CODE §§ 11-16-22 AND 29A-3-1 ET SEQ.

AMENDMENT TO AN EXISTING RULE: YES NO (REPEAL AND REPLACE)

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

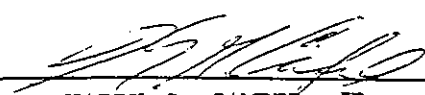
TITLE OF RULE BEING AMENDED: _____

NONINTOXICATING BEER LICENSING AND OPERATIONS PROCEDURES

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

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.


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: Nonintoxicating Beer Commissioner

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.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

There should be no economic impact.

B. Economic Impact on Political Subdivisions; Specific Industries:
Specific groups of citizens.

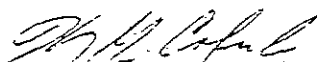
The impact on specific industries cannot be determined and is believed to be nonexistent.

C. Economic Impact on Citizens/Public at Large.

There should be no economic impact.

Date: _____

Signature of Agency Head or Authorized Representative



Harry G. Camper, Jr.
Commissioner



State of West Virginia
Department of Tax and Revenue

GASTON CAPERTON
GOVERNOR

Charleston 25305

CHARLES O. LORENSEN
SECRETARY

CONSENT TO FILE

August 10, 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 the filing of the foregoing rule.

Signed this 10th day of August, 1990.

Charles O. Lorensen
cc Charles O. Lorensen, Secretary
Department of Tax and Revenue



State of West Virginia
Department of Tax and Revenue

GASTON CAPERTON
GOVERNOR

Charleston 25305

CHARLES O. LORENSEN
SECRETARY

August 10, 1990

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE
FROM: HARRY G. CAMPER, JR., NONINTOXICATING BEER COMMISSIONER *HGC*
LEGISLATIVE RULE TITLE: NONINTOXICATING BEER LICENSING AND
OPERATIONS PROCEDURES

-
1. Authorizing statute(s) citation: W. Va. Code §§ 11-16-22 and 29A-3-1 et seq.
 2.
 - a. Date filed in State Register with Notice of Public Comment July 3, 1990
 - b. What other notice, including advertising, did you give of the hearing? None
 - c. Date of public comment period: July 3, 1990 through August 3, 1990
 - d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.
Attached X No comments received _____
 - e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact) August 10, 1990
 - f. Name and phone number of agency person to contact for additional information: John Montgomery - 348-5330
 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: N/A
- c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor? N/A
- d. Attach findings and determinations and reasons:
Attached N/A

FILED

AUG 11 1990

AGENCY APPROVED PROPOSED
WEST VIRGINIA LEGISLATIVE REGULATIONS
NONINTOXICATING BEER COMMISSIONER
DEPARTMENT OF TAX AND REVENUE

TITLE 176
SERIES 1
1990

NONINTOXICATING BEER LICENSING AND OPERATIONS PROCEDURES

Filed: August 10, 1990

§ 176-1-1. General.

1.1 **Type of Regulation.** - These regulations are agency approved proposed legislative regulations as defined in West Virginia Code § 29A-3-1 et seq.

1.2 **Scope.** - These agency approved proposed 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 agency approved proposed legislative regulations are authorized by West Virginia Code §§ 11-16-22 and 29A-3-1 et seq.

1.4 **Filing Date.** - August 10, 1990.

1.5 **Effective Date.** - These agency approved proposed legislative regulations become effective upon being approved by the Legislature.

1.6 **Citation.** - These agency approved proposed 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 or bottling, or 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, or his delegate.

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 person 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.

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 in any licensed retail establishment.

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; Provided, That products purchased from other distributors are not altered or disturbed.

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 of the designated date and after receipt of written acknowledgement from the Commissioner. Failure to put price changes into effect within three (3) working days of the designated date and 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 By advertisements in newspapers, advertising circulars and similar publications that nonintoxicating beer, ale, malt beverages and malt coolers are for sale on the licensed premises.

7.1.4 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.

7.1.4.1 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.

7.1.4.2 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.

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

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

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

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

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

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

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

7.1.4.5 While a licensed retailer is authorized to advertise the sale at the licensed establishment of nonintoxicating beer, ale, malt beverages and malt coolers, the price or brand of such products may not be advertised.

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

7.1.4.7 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.

void the
strike thru
TAC 5/16

~~7.2~~ Posters, placards, mirrors, windows, doors. - All signs advertising brand or pirce of nonintoxicating beer, ale, malt beverages or malt coolers on the windows or doors of licensed retailers are prohibited.

~~7.3~~ Signs. - All exterior signs, including those of an electrical or mechanical construction, advertising a price or 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, lot or 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 vinyl, polyethylene or similar materials 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: Provided, That such franchise agreement must conform to the laws of this State and be approved in writing by the Commissioner. 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 and the distributor does not agree in writing to such termination, the brewer must:

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

13.2.2.2.c.2 After receipt of approval of such termination from the Commissioner, 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 and receipt from the Commissioner of approval of such 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 or 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

State Tax Department
Title 176
Series 1

location or locations involved in the unlawful conduct for which licensure is sanctioned as opposed to all separately licensed locations of such licensee.

RESPONSE TO COMMENTS
NONINTOXICATING BEER LICENSING AND OPERATIONS PROCEDURES

19910 11 107

Following are the responses to comments received relative to the regulations governing Nonintoxicating Beer Licensing and Operations Procedures. The comment or concern expressed will be stated first followed by the agency's response. Where appropriate, comments relative to similar concerns will be combined.

COMMENT: The reference in Section 8.4.3 to the use of pipes made from block tin, gutta percha and other similar products is not appropriate in that useage of those materials for the piping and tubing for nonintoxicating beer has been discontinued.

RESPONSE: The agency is in agreement and appropriate changes have been made within the regulations.

COMMENT: The regulations should clarify the legality of stocking, pricing and merchandising nonintoxicating beer products for the retailer.

RESPONSE: Section 6.2.4.3 reads as follows: "A distributor may rotate, stock and price nonintoxicating beer, ale, malt beverages and malt coolers in a licensed nonintoxicating beer retail establishment; Provided, That products purchased from other distributors are not altered or disturbed." The agency is of the opinion that the foregoing clause is sufficiently explanatory.

COMMENT: The advertising of beer prices should not be allowed.

RESPONSE: While Section 7.1 of the rule authorizes advertising beer in newspapers, advertising circulars and similar publications, the rule also prohibits the advertising by price or brand of nonintoxicating beer products. It should be noted that the phrase "beer" has always been authorized for advertisement. The agency is not expanding those policies which have been in effect.

COMMENT: The retailer should be authorized to advertise brand and price in newspapers and sales fliers.

RESPONSE: Please see the foregoing response for a partial explanation to this comment. Additionally, it should be noted that if price and brand were to be authorized for advertising purposes, it is entirely feasible that small retailers would be forced out of being able to competitively sell nonintoxicating beer products.

COMMENT: Distributors should be authorized to differentiate price promotions between on and off premises retailers.

RESPONSE: West Virginia Code § 11-16-20 prohibits a distributor from discriminating between retailers insofar as price, allowance, rebate, refund, commission, discount or service is concerned. Therefore, this is a matter for the Legislature to address and is not a matter to be resolved within the rule.

COMMENT: There is no statement as to the facts and circumstances constituting the emergency requiring the need for these regulations.

RESPONSE: The following statement was provided in the Notice of Emergency Rule:

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.

Additionally, the Legislature in 1990, amended several sections of the statutes relating to nonintoxicating beer. For instance, West Virginia Code § 11-16-8(a)(6) was amended to prohibit the issuance of a license to an applicant who has not been convicted during the five (5) years immediately preceding the date of application of a felony; this is substantially different from the prior version of that subsection because there, an applicant could not have ever been convicted of a felony nor a violation of the liquor laws of either federal or state government. Additionally, West Virginia Code § 11-16-23 was substantially rewritten by the Legislature during the 1990 legislative session. Section 11-16-23 relates to the revocation or suspension of a nonintoxicating beer license; monetary penalties; the assessment of costs for hearing; and the establishment of an enforcement fund. These amendments are now reflected in the amended emergency regulations.

COMMENT: New language is not underscored and deleted language is not shown by strike-throughs. This deficiency adds to the difficulty of trying to identify all changes which have been made to existing regulations.

RESPONSE: The rule in question repeals and replaces the previous 176 C.S.R. 1. Therefore, there is no need to underscore and strike-through changes.

COMMENT: Many of the rules are procedural or interpretative rules which do not qualify as emergency regulations.

RESPONSE: West Virginia Code article 29A-3 provides for three (3) types of administrative rules: legislative rules, procedural rules, and interpretative rules. While each rule is separate and distinct from the other, it would be a highly questionable practice to state that a legislative rule would not be able to contain any procedural or interpretative comments or sections. Such a restriction would result in a rule being totally unworkable. As a result, the rule in question does contain appropriate sections to properly address the subject matter.

COMMENT: Some definitions change existing State law.

RESPONSE: There is no intent to change existing State law. What is occurring, however, is to provide necessary clarification of State law through the promulgation of legislative rules. As a result, the definitions are not changed but are merely made responsive to the subject matter. As a result, the definitions include the State law, as well as appropriate references or materials from relevant federal law.

COMMENT: Use of the word "repeated" is capable of misunderstanding. Why not use "the giving of worthless checks on two (2) or more occasions."

RESPONSE: While a bright line rule would be appealing, the use of the word "repeated" allows the necessary flexibility within different types of situations.

COMMENT: Are post-offs discounts?

RESPONSE: Within the industry, a post-off is a discount in price to the distributor.

COMMENT: Rotating and pricing stock for retailers may well constitute a violation of federal law relating to inducements and/or commercial bribery.

RESPONSE: The Nonintoxicating Beer Commissioner disagrees and does not feel that such a practice by a distributor will constitute inducements or commercial bribery.

COMMENT: Section 176-1-6.2.8.1 may well require acts which are violative of federal law relating to price fixing.

RESPONSE: The Nonintoxicating Beer Commissioner disagrees with the concept that requiring the filing of wholesale prices with the Commissioner will result in price fixing. The Commissioner does not fix the price, he only maintains a listing within his office area. This is not price fixing.

1942 APR 10 11:07 AM

IN Re EMERGENCY RULES AND REGULATIONS:

- Title 175, Series 1, Retail Licensing Operations
- Title 175, Series 2, Private Club License
- Title 175, Series 4, Retail Sales of Wine in Grocery Stores, etc.
- Title 175, Series 5, Licensing of Retail Liquor Stores

- Title 176, Series 1, Nonintoxicating Beer Licensing and Operations Procedures

WRITTEN COMMENTS

NOW COMES North Central Distributing Company, The Pantry Stores, and Martin Distributing Company, by counsel, for the purpose of providing written comments relative to certain provisions of the aforementioned Emergency Regulations and to the manner of their filing.

NATURE OF EMERGENCY

W.Va. Code §29A-3-15(g) states than an emergency exists when the promulgation of a rule is necessary for:

1. The immediate preservation of the public peace; or
2. The immediate preservation of the public health; or
3. The immediate preservation of the public safety; or
4. The immediate preservation of the public welfare, or
5. Is necessary to comply with a time limitation established by this code or by a federal statute or regulation; or
6. To prevent substantial harm to the public interest.

W.Va. Code § 29A-3-15 (a) states that only legislative rules may be promulgated on an emergency basis. Implicitly, this means that interpretive

rules and procedural rules shall not be promulgated on an emergency basis. This subsection requires that there be a statement of the facts and circumstances constituting the emergency, with particularity, at the time of the emergency filing. No such statement appears in any of the regulations in question.

W.Va. Code § 29A-3-15a places mandatory duties on the Secretary of State regarding emergency rule filings. Regardless of the lack of any criticism about an emergency filing, the Secretary of State is legally bound to make a critical, in-depth analysis of the contents of an emergency filing to determine if it complies with the law. In this regard, §29A-3-15a (b) states:

"(b) The Secretary of State shall disapprove an emergency rule if he determines:
(1) That the agency has exceeded the scope of its statutory authority in promulgating the emergency rule;
(2) That an emergency does not exist justifying the promulgation of the rule; or
(3) That the rule was not promulgated in compliance with the provisions of section fifteen of this article."

In his analysis, the Secretary of State should be ever mindful of the provisions of § 29A-3-15 (a) which states that "an emergency rule shall be effective for no more than fifteen months and shall expire earlier if any of the following occurs ***." This mandate explicitly makes it incumbent upon the Secretary of State to determine if an emergency filing does not pertain to a situation needing a temporary (no more than 15 months) coverage by rules and regulations. Clearly, Title 175, Series 2 and 4 and Title 176, Series 1 cannot survive such a critical analysis. These regulations are patently designed to cover long-range needs of the agencies concerned.

Accordingly, it is submitted that Title 175, Series 2 and 4 and Title 176, Series 1 do not meet the "emergency" status required by the law, and, therefore, do not qualify as emergency regulations.

DEFINITIONS

The definitions of the words "alcohol", "alcoholic liquor", "beer", "nonintoxicating beer", "spirits", "manufacture", "manufacturer", "public place", and "wine" are in place in West Virginia law as a result of a legislative enactment. W.Va. Code § 60-1-5. Likewise, the words "distributor", "fortified wine", "supplier", and "wine" are defined in W.Va. Code § 60-8-2 by operation of law.

One purpose of rule-making is to empower an agency to implement, extend, apply, interpret or make specific the law enforced or administered by it. W.Va. Code § 29A-3-2 (i).

No authority exists, however, for an agency to change or amend any statutory law by rule-making.

Even if the above-mentioned West Virginia legal definitions are not identical with definitions of such words in federal laws or regulations, and, even if an adjudication were to be made that some compelling and overriding federal interest dictated the need to have West Virginia adopt the federal definitions for these words, the matter would have to be accomplished by legislation ... not rule-making.

With regard to alcoholic beverages, the federal government has not preempted the matter. In fact, the Twenty-First Amendment to the United States Constitution grants the highest degree of control to States to regulate alcoholic beverages within their borders. In spite of the lack of preemption, there are times when federal laws and regulations of Congress might squarely conflict with State laws and regulations relative to alcoholic beverages and create a need for judicial inquiry. Courts would then look to whether federal concerns outweigh the State concerns,

In the absence of a real conflict, there is no battle to adjudicate. The difference between existing West Virginia definitions and federal definitions

is not a sudden emergency requiring emergency action. No known problems exist precluding the federal government from enforcing its laws because its definitions are different than those of West Virginia.

If change in definitions proves necessary, the normal legislative function is available to change the definitions. Until this is accomplished, existing definitions in Chapter 60 of the W.Va. Code must remain in place as currently written unless they are invalidated through the judicial process.

Another example is the word "liquor" as defined in Senate Bill No. 337 [§ 60-3A-4 of the Code]. The proposed definition of "liquor" in Title 175, Series 1 and 5 [the authority for which is Senate Bill No. 337] is entirely different from that found in the Senate Bill. A blatant attempt to change the law by rule-making rather than by legislation should not be permitted.

RELEVANCE

Title 175, Series 2 includes definitions which have absolutely no relevance or pertinence to Private Club Licenses and which appear in other articles of Chapter 60. There is no apparent, legitimate need to have "alcoholic liquor", "beer", "distilled spirits", "fortified wine", "non-intoxicating beer", and "wine" defined in this article because those definitions appear in article 1 or 8 of Chapter 60. These definitions change existing law as does the proposed definition of "private club" in Sub-Section 2.14. None of these changes are needed under emergency circumstances.

Similar definitions in the other Emergency Regulations are subject to the same objections. In addition, definition of the word "importer" in Title 175, Series 1 has absolutely no relevance or pertinence to "Retail License Operations" which is the subject matter of Title 175, Series 1.

PRIVATE CLUB LICENSE

Section 175-2-4. Operation of Private Club. This regulation does not address an "emergency" situation. It amends outdated regulations which have been changed, in part, by statute; it makes grammatical changes; it has mistakes in 4.8 and 4.9 in referring to "Section 4.9" when it should refer to "Section 4.7"; and it erroneously requires private clubs to purchase all alcoholic liquor from retail liquor stores (which are not in existence yet). Section 5.1.1.1. a - Guidelines for strippers are unobjectionable in content but there is no need for them on an emergency basis. The Hearing and Appeal Procedure (§175-2-6) is a set of procedural rules which are not subject to being promulgated by emergency regulation. §175.6.4 refers to the wrong address for the "Commission" ["Administrator"?] and uses the words "Public Public" for Notary Public without indicating a signature line for the Notary to use.

NONINTOXICATING BEER LICENSING
AND OPERATIONS PROCEDURES

There is no accompanying statement, with particularity, as to the facts and circumstances constituting the emergency requiring the need for these regulations.

New language is not underscored and deleted language is not shown by strike-throughs. This deficiency adds to the difficulty of trying to identify all changes which have been made to existing regulations.

Many of the rules are procedural or interpretive rules which do not qualify as emergency regulations.

Some definitions in §176-1-2 change existing state law.

§176-1-6.2.1.2 is confusing in that the word "repeated" is capable of misunderstanding. Why not use "the giving of worthless checks on two or more occasions"?

§176-1-6.2.4.1. Are post-offs discounts?

176-1--6.2.4.3 rotating and pricing stock for retailers may well constitute a violation of federal law relating to inducements and/or commercial bribery.

176-1-6.2.8.1 may well require acts which are violative of federal law relating to price fixing.

RETAIL SALE OF WINE IN GROCERY STORES,
WINE SPECIALTY SHOPS and PRIVATE WINE RESTAURANTS

Objectionable because it does not state, with particularity, what the facts and circumstances are which constitute the emergency.

Objectionable because it contains interpretive and procedural rules which are not subject to emergency regulation.

Objectionable because it changes definitions of "alcoholic liquor", "distributor", "fortified wine", "manufacturer", "nonintoxicating beer", "supplier", and "wine". In addition, it adds definitions for "importer" and "distilled spirits" which are not germane to the regulation.

Objectionable because it does not underscore additions to current regulations or strike-through deletions making it very difficult to determine what changes have been made to existing regulations.

RETAIL LICENSEE OPERATIONS

Objectionable because it changes legal definitions of "alcoholic liquor", "beer", "distilled spirits", "fortified wine", "manufacturer", "nonintoxicating beer", and "wine"; and because it adds a definition for "importer" which is not germane to the regulation.

175-1-3.2 "may" in the last sentence should be changed to "shall".

175-1-3.3 "may" in the first line should be changed to "shall".

LICENSING OF RETAIL LIQUOR STORES

Objectionable because it changes the definitions of "alcoholic liquor", "distilled spirits", "fortified wine" and "wine".

CONCLUSION

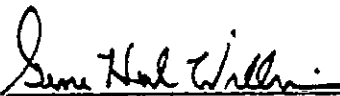
In consideration of the foregoing comments, the Secretary of State is respectfully requested to take the action which he deems necessary after applying the analysis which he is required to make pursuant to the provisions of W.Va. Code § 29A-3-15a regarding the Emergency Regulations in issue.

Counsel is authorized to state that the foregoing remarks and written comments have been made upon behalf of the West Virginia Wine Distributors Association, Inc. except as they relate to nonintoxicating beer regulations.

Respectfully submitted,

North Central Distributing Company,
West Virginia Wine Distributors
Association, Inc., The Pantry Stores
and Martin Distributing Company

By Counsel



GENE HAL WILLIAMS

P. O. Box 8553

South Charlestin, WV 25303

GENE HAL WILLIAMS

Attorney at Law

401 HIGHLAND AVENUE
SOUTH CHARLESTON, W. VA. 25303
(BY APPOINTMENT ONLY)

REPLY TO:
P. O. BOX 8553
SOUTH CHARLESTON, W. VA. 25303
TELEPHONE (304) 744-2940

August 3, 1990

Honorable Harry G. Camper, Jr.
Administrator, WVABCA
322 70th Street, S.E.
Charleston, WV 25304

Re: Emergency Regulations

Dear Mr. Camper:

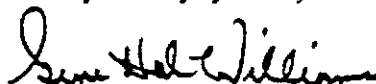
Enclosed is a copy of a seven page document containing written comments submitted on behalf of my clients to the Secretary of State of West Virginia relative to five sets of Emergency Regulations which were recently filed by your two offices.

It is requested that you consider this letter and enclosure as an official request to your agencies to take appropriate action, as may be necessary, after the Secretary of State performs his duties, as prescribed by W.Va. Code § 29A-3-15a.

If my presentation to you needs to be in a different format, please bring it to my attention at your convenience.

With every good wish and kindest regards, I am

Very truly yours,



GENE HAL WILLIAMS

GHW/km

Enclosure

PARKERSBURG DISTRIBUTING Co.

P.O. Box 65 • PARKERSBURG, WEST VIRGINIA 26102-0065

(304) 422-0531

FAX (304) 428-5035

RECEIVED

JUL 25 1990

WV BEER COMMISSION
CHARLESTON, W.V. 25305

23 July 1990

Harry G. Camper, Jr., Commissioner
WV Nonintoxicating Beer Commission
Capitol Building
Charleston, WV 25305

Dear Sir,

With reference to the proposed revised rules and regulations for the Commission, I do have one suggested revision.

Para. 176-1-8. Sanitation
Sub-para. 8.4.3. Pipe lines and equipment:

This wording has been around since the flood! The use of block tin, gutta percha and other similar products has been discontinued for years. The standard piping/tubing is now vinyl or polyethylene. You may wish to revise the wording in this paragraph to at least include vinyl and polyethylene tubing as acceptable materials.

Thanks for your consideration.

Sincerely,



DAVID C. RITCHIE
President

Paula M. Cunningham

ATTORNEY AT LAW

P.O. BOX J
GASSAWAY, WEST VIRGINIA 26624-0399

03 August 1990

The Honorable Harry G. Camper, Jr.
Non-Intoxicating Beer Commissioner
322 - 70th Street
Charleston, West Virginia 25305

Re: Proposed Rule Amendment Authorizing Beer Advertisement
Title 176 - Rule 7.1.3.5

Dear Commissioner Camper,

Enclosed please find written comment relative to the
above subject matter.

I am available to discuss this matter further at your
convenience.

Very truly yours,

Paula M. Cunningham

PAULA M. CUNNINGHAM
Attorney at Law

Enclosures: Letters from Go-Mart, Inc.
Glen Long and Paul Gaughan

cc: Honorable Ken Heckler, Secretary of State
John Heater, President of Go-Mart, Inc.

PMC/msl

FILED

RECEIVED
AUG 10 1990

August 3, 1990

The Honorable Harry G. Camper, Jr.
Non-Intoxicating Beer Commissioner
322 70th Street
Charleston, West Virginia 25305

Re: Proposed Rule Amendment
Authorizing Beer
Advertisement
Title 176 Rule 7.1.3.5

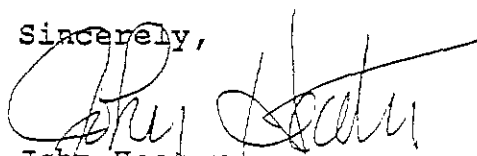
Dear Commissioner Camper,

For and on behalf of Go-Mart, Inc., I hereby register opposition to allowing increased beer advertisements.

The Notice of an Emergency Rule was apparently promulgated upon your representation that the changes are necessary to remove public confusion. There is no confusion about the current prohibition. Advertising beer prices is simply not allowed. Perhaps you should consider prohibiting price advertising on alcoholic beverages instead.

In an era of increased realization of the effects of media on the young, I believe the State of West Virginia's current prohibition is the more prudent position. I am available to elaborate upon my concerns at your convenience.

Sincerely,



John Heater
President

cc: Honorable Ken Heckler
Secretary of State

JH/ddg

Glen Long
Progress Route
Gassaway, WV 26624

August 1, 1990

Harry G. Camper, Jr., Commissioner
West Virginia Nonintoxicating Beer Commissioner
322 - 70th Street
Charleston, WV 25305

Dear Commissioner Camper:

As a convenience store Marketing Representative marketing the sale of beer in our state, I am concerned with the proposed rule change regarding advertising the prices of beer, magazines and newspapers.

I believe that this law would be unfair to the vast majority of small businesses, to bear the substantial cost of advertising.

I urge you to be mindful of the adverse affect these regulations will have on the competition in the market place.

Thank you for your attention to this letter.

Very truly yours,



Glen Long
Marketing Representative

GL/ddg

Paul A. Gaughan
109 Chestnut Street
Sutton, West Virginia 26601

01 August 1990

Harry G. Camper, Jr., Commissioner
Nonintoxicating Beer Commission
322 - 70th Street
Charleston, West Virginia 25305

Dear Mr. Camper:

I would like to take this opportunity to voice my opinion AGAINST the advertising beer prices in the State of West Virginia.

I sincerely believe that we do not need this type of advertising. As a parent and also as a General Manager of a medium-size business, I am quite upset that we try to teach our children to have the very best morals, yet we are advertising FOR the very thing that we are trying to teach our children not to do. Our children are confused enough today without adding the burden of bargain basement beer and alcohol ads. Increased advertising will only entice people to consume greater quantities of alcoholic beverages.


Thank you very much for your consideration of my thoughts on this matter.

Sincerely,


PAUL A. GAUGHAN

CERTIFICATE OF SERVICE

I, PAULA M. CUNNINGHAM, do hereby certify that I have hand delivered a true and exact copy of the foregoing correspondence, upon Ken Heckler, Secretary of State of West Virginia, at his offices in the State Capitol Building, Charleston, WV 25305, on the 3rd day of August, 1990.



PAULA M. CUNNINGHAM
Attorney at Law
P.O. Box J
Gassaway, WV 26624



MAGNOLIA DISTRIBUTING COMPANY

July 23, 1990

12 Rose Street
New Martinsville, WV 26155
(304) 455-2581

RECEIVED

JUL 24 1990

WV BEER COMMISSION
CHARLESTON, W.V. 25305

Mr. Harry G. Camper, Jr.
W. Va. Nonintoxicating Beer Commission
State Capitol Building
Charleston, WV 25305

Dear Commissioner Camper:

After reviewing the proposed Nonintoxicating Beer Licensing and Operation Procedures, I would like to once again request two additional provisions. The first is a provision to permit retailers to advertise brand and price in newspapers and sales flyers. The reasoning for this request is to help generate sales (and needed tax revenue) and to "take the monkey off of the distributors' back."

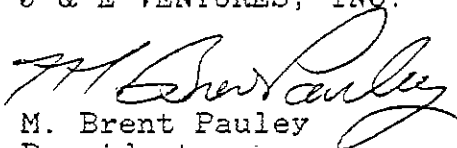
As the rules are now, when we price price promote the retailer has no motivation to pass the discount along to the consumer. As a result, we, the distributors, are accused of artificially keeping the beer prices high, when, in fact, we are price promoting to the retailer. Once one retailer advertises his sale price, his competition would be more likely to price promote as well in order to remain competitive.

The price promotion situation leads to my next request as well. As I mentioned above, fewer retailers are passing discounts along to the consumer. If you breakdown our retailers, none of the on-premise retailers pass along the discount and approximately 30 % of our off-premise pass along the discount. Therefore, I would like to see a provision which permits the distributor to differentiate price promotions between on and off premise retailers. This action was upheld by the Illinois Supreme Court and a copy of their decision is enclosed.

Price promotions are an everyday fact in the beer industry today and the provisions that I have requested are just two ways to help make price promoting more manageable for the distributor. Should you wish to discuss these requests or have any questions, please feel free to contact me. Your time and attention in these requests has been greatly appreciated.

Sincerely,

J & E VENTURES, INC.


M. Brent Pauley
President

Ted Sharpenter, Inc. vs. Illinois Liquor Control Commission

Question:

How does the Sharpenter decision affect a distributor's marketing of beer?

Answer:

The Sharpenter decision rendered by the Illinois Supreme Court allows limited preferential price discounts to be offered to off-premise licensees without requiring the same discount to be offered to on-premise licensees.

The following are guidelines for consideration by distributors if they elect to adopt the preferential price discount program:

1. The Sharpenter decision applies only to promotional discount programs.

ABDI Comment: Many distributors have continuous and on-going volume discount programs namely a licensee who purchases a fixed volume receives a certain price discount. The Sharpenter case refers only to promotional discount programs. It is the opinion of ABDI that on-going volume discount programs must continue to be offered equally to licensees in a given market area.

2. Preferential discount programs permitted to be offered to off-premise licensees and not to on-premise licensees must be periodic and designed to promote and highlight the product.

ABDI Comment: Sharpenter ran his promotional program 8 to 9 times a year with approximately one to two weeks duration for each such promotional program.

3. The off-premise licensee must also promote the product thus a earned discount.

ABDI Comment: In the Sharpenter case, the off-premise retailer engaged in good faith promotions

such as newspaper advertising, in-store advertising and lowering the price of the product in line with the discount received from the distributor.

4. On-premise retail licensees should receive a discount but of a limited nature.

ABDI Comment: The Sharpenter program gave on-premise licensees a discount two or three times a year at a less discount than the off-premise retailers. For example, in the Sharpenter case the on-premise licensees received a discount of \$1.10 per case while the limited on-premise discount was only \$.50 per case.

5. The promotional discount should also include a quantity/volume program.

ABDI Comment: The Sharpenter promotional discount program was tied to a volume requirement on the part of the off-premise licensee.

6. The program cannot be used to gain control or secure advantage over the retailer or to obtain exclusive sales of its product.

ABDI Comment: The promotional program cannot be utilized for special treatment of the distributor's product other than the pricing and promotional efforts. This represents an inherent danger of preferential pricing. The distributor should take caution when adopting preferential pricing to avoid BATF or the Illinois Liquor Control Commission provisions on inducement or securing of exclusive sales benefits.

7. The promotional program must be established for competitive reasons and to increase sales volume.

ABDI Comment: In the Sharpenter case all off-premise licensees were treated equally including the combos. Sharpenter defined a combo licensee to be both off and on-premise licensees namely, locations that consisted both of tavern and package sales. The court made particular note of the fact that combos were included to the extent of its sales being off-premise in the discounting program.

The guidelines furnished above by ABDI represent its opinion based upon a review of the Sharpenter case. These guidelines are only intended to advise the membership of the court's decision. It is uncertain as to how the Liquor Control Commission will seek to apply or enforce the provisions of the Sharpenter case. In establishing the above guidelines, ABDI recognizes that each distributor may wish to vary or deviate somewhat from the Sharpenter discount program, however, ABDI cautions each distributor that in doing so the distributor may wish to contact their attorney to ensure that whatever program is adopted that it falls within the Sharpenter case. A failure to do so may result in complaints being filed by retailers or being subjected to regulatory examination. The Illinois Supreme Court in allowing preferential pricing discount programs, found that the Illinois Liquor Control Act, Sec. 6-5 was not written sufficiently broad to prohibit such discounting program. In doing so, the Illinois Supreme Court neither recommended or discouraged such pricing program, it merely interpreted Illinois law.

Supreme Court Opinion

No. 64579—Agenda 25—September 1987.

TED SHARPENTER, INC., Appellant, v. THE ILLINOIS LIQUOR CONTROL COMMISSION *et al.*, Appellee.

JUSTICE MORAN delivered the opinion of the court:

In November of 1983, Patrick Burke, Richard Erzen, James McCue, Ronald Nichols and George Zobrest filed a complaint with the Illinois Liquor Commission (Commission) charging that Ted Sharpenter, Inc.'s, practice of offering preferential price discounts violated the Liquor Control Act of 1934 (the Act) (Ill. Rev. Stat. 1983, ch. 43, par. 93.9 *et seq.*). A hearing was subsequently held and the Commission found that Sharpenter's pricing policy violated sections 6-5 and 6-17 of the Act (Ill. Rev. Stat. 1983, ch. 43, pars. 122, 133). Thereafter, Sharpenter (plaintiff) filed a complaint for administrative review against the Commission and named individuals (defendants) in the circuit court of Kane County and the court reversed, holding that the plaintiff's pricing practices did not violate either section 6-5 or 6-17 of the Act. The appellate court reversed, holding that plaintiff's pricing practices violated section 6-5. (148 Ill. App. 3d 936.) We granted leave to appeal. 107 Ill. 2d R. 315.

Several issues are raised on appeal; however, because of our disposition of the case it is only necessary that we consider the following issue: whether plaintiff's practice of offering preferential price discounts violates section 6-5 of the Act, which prohibits distributors from giving "anything of value" to retailers.

Plaintiff is a wholesale beer distributor and the exclusive distributor of G. Heilman Brewing Company products within its designated four-county sales territory. Exclusive distributorships such as plaintiff's are permitted by statute (Ill. Rev. Stat. 1983, ch. 43, par. 301 *et seq.*). Any retailer located within plaintiff's sales territory who wishes to sell Heilman products must purchase them from plaintiff. Plaintiff, in turn, may not sell Heilman products to retailers located outside of its sales territory. Ill. Rev. Stat. 1983, ch. 43, par. 305(5).

Plaintiff has been the exclusive distributor of Heilman products for the past 50 years. Over the past 20 years, plaintiff has maintained a preferential discount system based upon the type of retail operation. Plaintiff divides

FILED

DEC 21 1987

CLERK SUPREME COURT
ILLINOIS

its 350 retail accounts into three categories: "off-premise" accounts are retailers which sell beer for off-premise consumption such as liquor stores and packaged-goods stores; "on-premise" accounts consist of bars and taverns; and "combo" accounts are retailers which sell beer for both on and off-premise consumption such as a tavern with an adjoining liquor store.

Under plaintiff's preferential discount system, off-premise retailers are offered larger and more frequent discounts than on-premise retailers. These large discount programs are only offered to off-premise retailers if they agree to both purchase a minimum quantity of beer and engage in "good faith" promotional efforts. Plaintiff broadly defines "good faith" promotional efforts to include such practices as newspaper advertising, in-store advertising or any other activity which might emphasize the discounted item. These discount programs are offered eight or nine times per year and are from one to two weeks in duration.

Two or three times per year plaintiff offered a lesser discount to on-premise retailers. These discounts were not contingent upon a minimum purchase or promotional efforts. On-premise retailers received a discount of \$.50 per case, while off-premise retailers received a \$1.10-per-case discount. Retailers who operated combo stores generally received both types of discounts in relation to the percentage of their business which was on-premise and that which was off-premise.

Plaintiff's president, Robert Sharpenter, testified at the hearing before the Commission that he maintains his dual discounting system because of differences in the nature of on-premise and off-premise beer retailing. Sharpenter explained that off-premise retailers compete in a very price-sensitive market so that when discounts are given, they in turn, lower the price of the item and this lower price, when coupled with promotional efforts, results in substantial increases in sales. Plaintiff therefore receives substantial volume increases by offering these discounts to off-premise retailers. Sharpenter stated that these discounts generate from 2 to 20 times the normal volume of sales. By contrast, Sharpenter explained, beer sales for on-premise consumption is not as price sensitive. On-premise beer consumers are motivated more by product loyalty than by price and, in addition, most brands of beer are sold at standard prices.

Consequently, when on-premise retailers receive a discount they do not lower the price or promote the beer and as a result there is no increase in sales. Thus, as Sharpenter testified, "he gets the discount and we only get our normal volume." According to Sharpenter, the purpose of discounts to on-premise retailers is only to create good will.

Individual defendants are all on-premise and combo retailers located within plaintiff's sales territory. Each testified that they had attempted to obtain the greater discount from plaintiff for on-premise sales but were refused. Each stated that they would be willing to buy the minimum quantity and promote the product in order to obtain the greater discount. Several testified that plaintiff was their only distributor who maintained a dual-discount policy based upon the type of retail operation; however, they also stated that other distributors offered varying discounts based upon volume.

Section 6-5 of the Act provides in pertinent part:

"Except as provided below, it is unlawful for any manufacturer or distributor or importing distributor to give or lend money or anything of value, or otherwise loan or extend credit (except such merchandising credit) directly or indirectly to any retail licensee or to the manager, representative, agent, officer or director of such licensee." (Emphasis added.) Ill. Rev. Stat. 1983, ch. 43, par. 122.

Defendants claim that plaintiff's dual-discounting policy constitutes a proscribed thing "of value" under section 6-5. They assert that the larger discounts given to off-premise retailers bestows a thing of value upon such retailers. They claim that while section 6-5 does not prohibit all discounts, it does prohibit those which do not operate equally upon all retailers since any special advantage given to a retailer or class of retailers would constitute a thing of value.

Plaintiff asserts that section 6-5 was not intended to reach the pricing policies of distributors. It argues that the phrase "anything of value," when read in context, was only meant to prohibit the giving of such things as equipment, money or credit since these things would permit a distributor to acquire an interest in the retail outlet and thereby exercise dominion over it. As so understood, it contends that section 6-5 was not violated here as there was no evidence that its discount policy led to the domination of any retailer.

Section 6-5 was intended to remedy a competitive abuse in the beer industry referred to as the "tied house." By the granting of gifts and loaning of money to retailers, distributors could effectively "tie" themselves to retailers to the point of excluding all competitors. This form of vertical integration between beer distributing and retailing allowed the distributor to exercise almost complete control over the retailers. "The interest of a particular brewery in promoting its product in a given area went to the point of determining location, asserting control over the licensee, and, through the power of credit and the use of equipment, it was, in fact, in the practical retail sale of beer." (*Weisberg v. Taylor* (1951), 409 Ill. 384, 390.) Tied houses became associated with such evils as political corruption, intemperance and the irresponsible ownership of taverns (*National Distributing Co. v. United States Treasury Department, Bureau of Alcohol, Tobacco, & Firearms* (D.C. Cir. 1980), 626 F.2d 997, 1009), and the legislature therefore sought to prohibit the gifts and loans which made them possible. "The evils of the 'tied house' have long been recognized and most, if not all, of the States, including our own, have prohibited the furnishing by manufacturers or distributors of buildings, bars, equipment, or loans of money to a retailer." *Weisberg v. Taylor* (1951), 409 Ill. 384, 388.

Defendants contend that the phrase "anything of value" must be construed so as to prohibit plaintiff from offering differing discounts based upon the nature of the retail operation. They argue, in effect, that the phrase should be read so as to prohibit discriminatory pricing. We disagree. Nothing in the phrase indicates to us that it was intended to create a blanket prohibition against price discrimination. Rather, as previously noted, the legislature merely sought to proscribe the giving of things of value in order to prevent tied houses and all of their attendant evils. While price discrimination in this context may not necessarily be desirable, section 6-5 simply does not proscribe it. (*Accord Burger Brewing Co. v. Thomas* (1975), 42 Ohio St. 2d 377, 329 N.E. 2d 693; cf. *Lake County Beverage Co. v. 21st Amendment, Inc.* (Ind. App. 1982), 441 N.E.2d 1008 (wherein the court interpreted an Indiana statute which provides: "It is unlawful for a permittee in a sale or contract to sell alcoholic beverages to discriminate between purchasers by granting a

price, discount, allowance, or service charge which is not available to all purchasers at the same time." (Ind. Code 7.1-5-5-7 (1980)).) Moreover, we find it significant that while defendants urge that section 6-5 prohibits price discrimination, they do not argue that volume discounts should be proscribed even though such discounts are discriminatory in the sense that they disfavor retailers unable to purchase in large quantity.

In *National Distributing Co. v. United States Treasury Dept.* (D.C. 1980), 626 F.2d 997, the court construed similar language in the Federal tied house statute. That statute provides in relevant part:

"(b) 'Tied house'.

To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce ***.

(3) by furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other thing of value ***. (Emphasis added.) (27 U.S.C. 205(b) (1982).)

National, a wine distributor, had sold wine at below its own cost to retail outlets throughout a particular county. The Bureau of Alcohol, Tobacco and Firearms argued that below-cost sales, without justification, constituted the furnishing of a "thing of value" as the difference between what the distributor paid and the price it was sold to the retailer. After thoroughly reviewing the legislative history, the court concluded that the "giving *** [of] other thing [sic] of value, 27 U.S.C. §205(b)(3), when read in the context of the statute as a whole, does not prohibit below-cost pricing." (*National Distributing Co. v. United States Treasury Department, Bureau of Alcohol, Tobacco, & Firearms*, 626 F.2d 997, 1020.) The court reasoned that "[i]n the absence of any indication that *National's* price cut had the purpose or effect of gaining control over retail outlets in Leon County, we doubt whether the Act can have any application." 626 F.2d 997, 1004.

Defendants point to certain language in *National* that only nondiscriminatory and unconditional below-cost sales do not constitute the giving of a thing of value. By inference, they argue that *National* is support for their

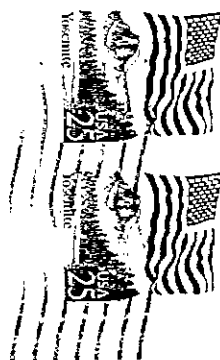
position inasmuch as the plaintiff's discount policy discriminated against off-premise retailers and was conditioned upon the purchase of a minimum quantity and promotional efforts. A closer reading of *National*, however, indicates that the court was only referring to price discriminations and conditions which were instituted for the purpose of, or had the effect of, obtaining control over retail outlets. The court stated that "[p]rice cuts are prohibited by the Act only when they are coupled with an agreement or understanding that a retailer will buy other products of the wholesaler or producer to the exclusion of competitors, or when they lead to domination and control of a retail outlet by the wholesaler or producer." (626 F.2d 997, 1020.) As such, *National* cannot be read as authority for the proposition that preferential discount policies which are enacted, as here, solely in order to increase sales, constitutes the giving of a thing of value.

Plaintiff contends that a distributor's pricing practices can never constitute a violation of section 6-5. We disagree. There is, in our view, always the potential that a distributor may offer a preferential discount in order to gain control over the advantaged retailers. A distributor might furtively grant large discounts to impermissibly influence retailers and therefore violate section 6-5. In this respect, we agree with the court in *National* that "[i]n some circumstances a pricing arrangement might be used as a 'subterfuge' to disguise a grant of financial assistance given to create a tied house, or to obtain an exclusive sales agreement." (*National*, 626 F.2d at 1004.) Here, however, all of the testimony before the Commission indicates that plaintiff maintained its preferential discount policy for competitive reasons. There was no suggestion that plaintiff's discount policy was anything but an exercise of business judgment to increase sales. There was no evidence that a tied house relationship between plaintiff and any of its retailers had been either attempted or created. We therefore hold that section 6-5 is inapplicable here where plaintiff maintains a preferential discount policy not to create a tied house but only to increase the volume of sales. Accordingly, we reverse the judgment of the appellate court and affirm the order of the trial court.

*Appellate court reversed;
circuit court affirmed.*

JUSTICE SIMON took no part in the consideration or decision of this case.

agnolia Distributing Company
Rose Street
Martinsville, WV 26155



Mr. Harry G. Campor, Jr.
W. Va. NonIntoxicating Beer Commission
State Capitol Building
Charleston, WV 25305



Paula M. Cunningham

ATTORNEY AT LAW

P.O. BOX J
GASSAWAY, WEST VIRGINIA 26624-0399

03 August 1990

The Honorable Harry G. Camper, Jr.
Non-Intoxicating Beer Commissioner
322 - 70th Street
Charleston, West Virginia 25305

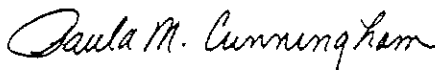
Re: Proposed Rule Amendment Authorizing Beer Advertisement
Title 176 - Rule 7.1.3.5

Dear Commissioner Camper,

Enclosed please find written comment relative to the
above subject matter.

I am available to discuss this matter further at your
convenience.

Very truly yours,



PAULA M. CUNNINGHAM
Attorney at Law

Enclosures: Letters from Go-Mart, Inc.
Glen Long and Paul Gaughan

cc: Honorable Ken Heckler, Secretary of State
John Heater, President of Go-Mart, Inc.

PMC/msl

FILED

REC AUG -3 PM 3:43

SECRETARY OF STATE

August 3, 1990

The Honorable Harry G. Camper, Jr.
Non-Intoxicating Beer Commissioner
322 70th Street
Charleston, West Virginia 25305

Re: Proposed Rule Amendment
Authorizing Beer
Advertisement
Title 176 Rule 7.1.3.5

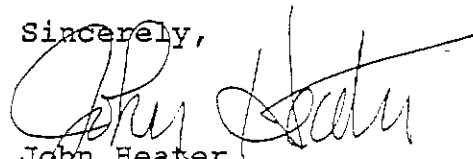
Dear Commissioner Camper,

For and on behalf of Go-Mart, Inc., I hereby register opposition to allowing increased beer advertisements.

The Notice of an Emergency Rule was apparently promulgated upon your representation that the changes are necessary to remove public confusion. There is no confusion about the current prohibition. Advertising beer prices is simply not allowed. Perhaps you should consider prohibiting price advertising on alcoholic beverages instead.

In an era of increased realization of the effects of media on the young, I believe the State of West Virginia's current prohibition is the more prudent position. I am available to elaborate upon my concerns at your convenience.

Sincerely,



John Heater
President

cc: Honorable Ken Heckler
Secretary of State

JH/ddg

Glen Long
Progress Route
Gassaway, WV 26624

August 1, 1990

Harry G. Camper, Jr., Commissioner
West Virginia Nonintoxicating Beer Commissioner
322 - 70th Street
Charleston, WV 25305

Dear Commissioner Camper:

As a convenience store Marketing Representative marketing the sale of beer in our state, I am concerned with the proposed rule change regarding advertising the prices of beer, magazines and newspapers.

I believe that this law would be unfair to the vast majority of small businesses, to bear the substantial cost of advertising.

I urge you to be mindful of the adverse affect these regulations will have on the competition in the market place.

Thank you for your attention to this letter.

Very truly yours,



Glen Long
Marketing Representative

Gl/ddg

Paul A. Gaughan
109 Chestnut Street
Sutton, West Virginia 26601

01 August 1990

Harry G. Camper, Jr., Commissioner
Nonintoxicating Beer Commission
322 - 70th Street
Charleston, West Virginia 25305

Dear Mr. Camper:

I would like to take this opportunity to voice my opinion AGAINST the advertising beer prices in the State of West Virginia.

I sincerely believe that we do not need this type of advertising. As a parent and also as a General Manager of a medium-size business, I am quite upset that we try to teach our children to have the very best morals, yet we are advertising FOR the very thing that we are trying to teach our children not to do. Our children are confused enough today without adding the burden of bargain basement beer and alcohol ads. Increased advertising will only entice people to consume greater quantities of alcoholic beverages.


Thank you very much for your consideration of my thoughts on this matter.

Sincerely,


PAUL A. GAUGHAN

CERTIFICATE OF SERVICE

I, PAULA M. CUNNINGHAM, do hereby certify that I have hand delivered a true and exact copy of the foregoing correspondence, upon Ken Heckler, Secretary of State of West Virginia, at his offices in the State Capitol Building, Charleston, WV 25305, on the 3rd day of August, 1990.



PAULA M. CUNNINGHAM
Attorney at Law
P.O. Box J
Gassaway, WV 26624