

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

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OFFICE WEST VIRGINIA
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Form #3

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

AGENCY: West Virginia Alcohol Beverage Control Administration - Beer TITLE NUMBER: 176

CITE AUTHORITY: W. Va. Code §11-16-1 et seq.

AMENDMENT TO AN EXISTING RULE: YES NO


IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

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

IF NO, SERIES NUMBER OF RULE BEING 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.



Authorized Signature

QUESTIONNAIRE

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

DATE: August 1, 2014

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) West Virginia Alcohol Beverage Control Administration
900 Pennsylvania Ave., 4th Floor
Charleston, WV 25302 304-356-5500

LEGISLATIVE RULE TITLE: Nonintoxicating Beer Licensing and Operations Procedures

1. Authorizing statute(s) citation W. Va. Code §§11-16-3, 11-16-17a, 11-16-20, 11-16-21
and HB 4549

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
June 24, 2014

b. What other notice, including advertising, did you give of the hearing?
None

c. Date of Public Hearing(s) or Public Comment Period ended:
July 24, 2014 8:30 a.m.

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 1, 2014

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

Anoop Bhasin, General Counsel
West Virginia Alcohol Beverage Control Administration
Charleston, WV 25302

304-356-5500

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

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

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

b. Date of hearing or comment period:

June 24, 2014 - July 24, 2014

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

d. Attach findings and determinations and reasons:

Attached _____

**Title 176, Series 1
Legislative Rule
Alcohol Beverage Control Commission**

NONINTOXICATING BEER LICENSING AND OPERATIONS PROCEDURES

SUMMARY OF COMMENTS AND AMENDMENTS

The WVABCA received comments from (1) Carenbauer Distributing Corporation - President, Carl Carenbauer; (2) Anheuser-Busch, LLC - Kenneth L. Judd, Associate General Counsel; and (3) the West Virginia Beer & Wine Wholesalers Association - Counsel, Philip A. Reale.

1. Comments by Carenbauer Distributing Corporation - President, Carl Carenbauer dated July 21, 2014 and received on July 23, 2014 via mail at 1:58 p.m., were generally related to HB 4549 and its effect on brewers. The letter did not address anything about the proposed rule edits in 176 CSR 1.

No amendments were made to the rule due to these comments.

2. Comments by Anheuser-Busch, LLC - Kenneth L. Judd, Associate General Counsel dated July 23, 2014 but received on July 24, 2014 via hand delivery at 8:05 a.m., were generally related to issues with HB 4549 and suggesting edits that appear to alter the stated purpose and intent of HB 4549. The comments state that the company believes that the legislation's pricing provisions are anti-competitive. It should be noted that the company operates in others states around the country that require pricing provisions of 90, 180 and even 360 days. The comments go beyond the scope of WVABCA edits taken from HB 4549 by adding language that would permit a brewer to remove a brand from a distributor who refuses to sell such a brand or line extension and give to another distributor within the same assigned territory. This suggested edit would violate the requirements of having a franchise network and an assigned territory. The comments to this rule are directed at issues with HB 4549.

No amendments were made to the rule due to these comments.

3. Comments by the West Virginia Beer & Wine Wholesalers Association ("WVB&WWA") - Counsel, Philip A. Reale received July 23, 2014 at 3:58 p.m., were generally supportive of HB 4549 and the rule changes with 3 particular edits suggested.
 - a. The WVB&WWA proffers that for suppliers (brewers) and wholesalers (distributors) to have to issue pricing on the same date for 90 day notice and a 90 day price would be unfeasible and inequitable. The WVB&WWA suggests that the notice provision for wholesalers should be 60 days (30 days later than for the brewers) so that the wholesalers may receive the pricing from the brewers, weigh the pricing information, make decisions about their prices and filing their prices.

For example, brewers would have to submit prices on July 1 to be effective for October 1, and distributors, under this proposal, would submit their prices August 1 to be effective October 1.

The WVABCA finds this comment reasonable and warranted in order to institute the pricing and let all parties have adequate notice.

The amendment to the proposed rule would take place at 176 CSR 1 §6.3.h.1.A., in the second line of the subsection changing 90 to 60 days.

- b. Similarly, the WVB&WWA proposes to stagger the implementation 90 day price period to allow for inventory adjustments and receipt of inventory at the quarterly price. The proposed staggered 90 day price period is for a date on or before the 15th day of the quarter.

For example, brewers would have to submit prices on July 1 to be effective for October 1, and distributors, under this proposal and (a) above, would submit their prices August 1 to be effective on or before October 1 through October 15.

The WVABCA finds the logic for this comment to be sound that the product must be received at the price for the quarter in order to be sold at the correct price for that quarter. It would be problematic for the WVABCA to enforce pricing merely selected at the discretion of a distributor during some day during October 1 through the 15. In the alternative, the WVABCA would propose that distributor pricing be effective from a certain day and the WVABCA believes that 10 days should be adequate to receive product priced as of October 1 by the brewer. The distributor's price period would be 90 days, the 10th day of the quarter to the 9th day of next quarter.

For example, brewers would have to submit prices on July 1, 2014 to be effective for October 1, 2014 through January 1, 2015, and distributors, under the WVABCA's modification to the proposal and (a) above, would submit their prices August 1, 2014 to be effective on October 10, 2014 through January 9, 2015.

The amendment to the proposed rule would take place at 176 CSR 1 §6.3.h.1.A.

- c. Also related to pricing the WVB&WWA proposes the ability to downward adjust prices based on 14 days notice and a price period of not less than 30 days. The association states, should the downward price period expire prior to the end of the quarter then the price would revert to the distributors posted price for the quarter. The justification offered is to permit distributors the opportunity to pass on a discount to retailers for surplus inventory of a product that has a limited expiration date or for seasonal items that have promotional packaging or novelty artwork that goes out of season. The WVB&WWA refers to this as posting down.

Currently, West Virginia Code provides for price adjustments in certain limited circumstances such as, "closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such stock or commodity," ". . . and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation . . ." (See W. Va. Code §47-11A-8).

§47-11A-8. Sales exempt.

The provisions of this article shall not apply to any sale made:

- (a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such stock or commodity, and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation;
- (b) When the goods are damaged or deteriorated in quality or where merchandise is sold in bona fide clearance sales, and, in each case, merchandise is advertised, marked and sold as such;
- (c) By an officer acting under the orders of any court;
- (d) In an endeavor in good faith to meet the legal prices of a competitor as herein defined selling the same article, product or item of merchandise, in the same locality or trade area;
- (e) For charitable purposes or to relief agencies;
- (f) Where merchandise is sold on contract to departments of the government or governmental institutions.

As required by this code section downward price adjustments exist for limited circumstances that should be documented by a wholesaler or retailer in good faith since there are penalties for violating W. Va. Code §47-11A-1 et seq.

The WVABCA notes that W. Va. Code §47-11A-1 et seq. was not amended or changed by HB 4549 and the provisions of these code sections existed and were available to wholesalers and retailers prior to HB 4549. The code section authorizing price adjustments makes common sense since a wholesaler is purchasing beer from the manufacturer/brewer and the beer is a perishable good; the wholesaler bears the risk of loss as the owner of the beer. If the beer is damaged, stolen or out of date, the wholesaler takes a loss on the product not the brewer. Therefore the ability to adjust the price in limited circumstances, such as when the product is close to its expiration, is beneficial so that the wholesaler can get some value out of a product versus having a total loss if the product expires and is destroyed.

Adding a reference to W. Va. Code §47-11A-1 et seq. in 176 CSR 1 clarifies the timing requirements for price adjustments.

The WVABCA amends 176 CSR 1 §6.3.h.1.A., to add language that references W. Va. Code §47-11A-1 et seq. and that price adjustments pursuant to W. Va. Code §47-11A-8 must be given to the WVABCA with 30 days' notice and will apply for only 30 days and or the distributor's quarterly 90 day pricing period, whichever is sooner. The distributor will have to notify the WVABCA, on a form provided by the Commissioner, of the price adjustments per W. Va. Code §47-11A-1 et seq. and specifically W. Va. Code §47-11A-8.

This amendment provides for a reasonable control regarding price adjustments with sufficient notice to the WVABCA to account for the price adjustment in limited circumstances.



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RECEIVED

Legal Department
One Busch Place
St. Louis, Missouri
63118-1852

July 23, 2014

Anoop Bhasin
General Counsel
WVABCA
900 Pennsylvania Ave, 4th Floor
Charleston, WV 25302
Anoop.K.Bhasin@wv.gov

*Re: Comments of Anheuser-Busch, LLC to Proposed Amendments to 176CSR1,
Nonintoxicating Beer Licensing and Operations Procedures*

Dear Mr. Bhasin:

On behalf of Anheuser-Busch, LLC, we provide the following comments to the proposed amendments to 176CSR1, the rules regarding Nonintoxicating Beer Licensing and Operations Procedures.

We understand that the intent of recent amendments to the West Virginia Nonintoxicating Beer Act as contained in House Bill 4549 was to ensure that brewers offer line or brand extensions to the distributor that is already selling the brand (e.g., Bud Select would need to be offered to the distributor that carried Budweiser) and that new brands be offered to the supplier's established distributors (in Anheuser-Busch's case, our equity distributors). Other than changes to the pricing provisions in Section 11-16-20 (which Anheuser-Busch continues to believe are anticompetitive) and certain other provisions, the majority of Anheuser-Busch's other concerns with the recently passed legislation had more to do with the way certain sections were worded than what we understood to be the intent of the bill. We believe that as they appear in the recently amended statute, certain definitions go beyond what was needed to address the ABC's concerns on new brand and line introductions and may create ambiguities that could end up being used (incorrectly) to suggest conflicts between a supplier's obligations to its established distributors and the agreements the supplier may have with distributors of brands it has acquired.

Section 176-1-2. Definitions. We suggest the following revisions to the proposed definitions in Section 176-1-2 that we believe are consistent with the intent of the statute. Language we propose to add to the rules is underlined; language we propose removing is struck through.

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2.3. **"Brand"** means a nonintoxicating beer product manufactured, brewed, mixed, concocted, blended, bottled or otherwise produced, or imported or transhipped by a brewer or manufacturer that is distinguished by a unique prescribed formula and sold under a different label. Differences in packaging such as different style, type, or size of container are not considered different brands. ~~the labels of which have been registered and approved by the commissioner that is being offered for sale or sold in West Virginia by a distributor who has been appointed in a valid franchise agreement or a valid amendment thereto.~~

Our suggested revisions provide a definition of "Brand" that will be useful for the subsequent portions of the rule that address new brands and line extensions. For example, Budweiser is a separate brand from Michelob because it has different labels and different formulas. We have stricken portions of the definition that have to do with registering brands and valid agreements not because we object to the Commissioner approving labels, but because that is part of Section 11-16-17(a) and really should not have to do with how a brand is defined.

2.15. **"Franchise Agreement"** means the written agreement between a brewer and a distributor ~~that is identical as to terms and conditions between the brewer and all its distributors, which agreement has been approved by the commissioner, whereby the distributor is granted the right to offer and sell a brand or brands of beer sold by the brewer.~~ The franchise agreement binds the parties so that a distributor, appointed by a brewer, may distribute all of the brewer's nonintoxicating beer products; or brands or family of brands listed on the franchise agreement that are imported and offered for sale in West Virginia, including, but not limited to, existing brands, as well as any line extensions and new for such brands all in within the brewer's assigned territory for the distributor. All brands and line extensions being imported or offered for sale in West Virginia must be listed by the brewer in the franchise agreement or a written amendment to the franchise agreement. ~~A franchise agreement may be amended by mutual written agreement of the parties as approved by the commissioner with identical terms and conditions for a brewer and all of its distributors. Any approved amendment to the franchise agreement becomes a part of the franchise agreement. A brewer and a distributor may mutually agree in writing to cancel a franchise agreement. A distributor terminated by a brewer in accordance with the Code and rules no longer has a valid franchise agreement. If a brewer has reached an agreement to cancel a distributor or has terminated a distributor, then a brewer may appoint a successor distributor who accedes to all the rights of the cancelled or terminated distributor.~~

These modifications to the definition of "Franchise Agreement" are suggested in an effort to reflect the reality of the way suppliers distribute beer in West Virginia. Anheuser-Busch already has a uniform agreement with its primary or established network of distributors – the Wholesaler Equity Agreement. Anheuser-Busch has been operating under the same Wholesaler Equity Agreement since 1997. Each distributor that is a party to the Wholesaler Equity Agreement receives an identical contract. The Wholesaler Equity Agreement provides that each distributor receives all line extensions. It has been Anheuser-Busch's practice to give our Equity Agreement distributors all new Anheuser-Busch brands introduced in the state, though that is not an obligation of the agreement. These distributors of Anheuser-Busch's core brands are what the

statute refers to as a brewer's "established franchise distributor network." See W. Va. Code § 11-16-17a(a)(4); Proposed Section 13.2.a.6.

However, Anheuser-Busch has also acquired brands such as Rolling Rock, Stella Artois, Beck's, and Bass from other suppliers. Under West Virginia law, those brands continue to be sold by distributors of the former suppliers. We would prefer these distributors enter into a uniform agreement for such brands, but we cannot force them to do so and not all have agreed to sign the new contracts. Thus, the brands Anheuser-Busch has acquired are distributed pursuant to the terms of agreements entered into between those distributors and their former suppliers. Those distributors may even have different agreements for the same brand depending on when they obtained the right to sell that brand.

As a result, Anheuser-Busch does not have an identical agreement with all distributors and has no way under West Virginia law to achieve that result. We propose striking language in the proposed rule defining "Franchise Agreement" as a contract "that is identical as to terms and conditions between the brewer and all its distributors." That language creates needless ambiguity and could be construed (again, incorrectly) as inconsistent with other provisions in the newly amended statute and proposed rules that make clear that a brewer may have more than one franchise distributor network. Section 13.2.a.1.C, for example, clearly provides an exception to the requirement that a brewer have only one franchise distributor network: a brewer "may . . . utilize the selling brewer's franchise distributor network" for acquired brands. Section 13.2.a.2 provides that a brewer who acquires rights to a brand is "bound by the selling brewer's existing franchise agreement and franchise distributor network." A brewer that distributes its core brands through a franchise distributor network cannot have a contract that is identical across "all its distributors" if it is required to distribute brands it acquires through the selling brewer's franchise distributor network. The intent of the statute and the rules is to ensure that "the correct approved distributors" receive the appropriate brands and line extensions. See Proposed Section 13.2.a (emphasis added). Our suggested revisions are intended to harmonize the definition of "Franchise Agreement" with the intent of the amended statute and rules.

For the same reasons, we suggest removing the requirement that all brands and line extensions be listed on the franchise agreement. The literal wording could be (improperly) construed to require a supplier to list every brand and every line extension that it imports or offers for sale in West Virginia on every agreement regardless of whether the wholesaler to that agreement has the right to every brand. But the statute recognizes that some suppliers may have more than one franchise distributor network. Eliminating this language will harmonize the definition with the rest of the statute and rules and eliminate needless clutter.

2.16. "Franchise Distributor Network" means the distributors who have entered into a binding written franchise agreement, identical as to terms and conditions, with a brewer to distribute the brewer's primary nonintoxicating beer products, brands and line extensions in an assigned territory ~~for a brewer~~. A brewer may only have one franchise distributor network. Provided, That a brewer that has also acquired the manufacturing, importing, bottling or other production rights for the sale of nonintoxicating beer at wholesale from a selling brewer as specified in W. Va. Code §11-16-21(a)(2) shall continue to maintain and be bound by the selling

brewer's separate franchise distributor's network for any of its existing brands, and line extensions and new brands.

We have suggested these revisions to the definition of "Franchise Distributor Network" to clarify that the definition applies only to a brewer's primary network. This makes it possible to include the requirement of a uniform agreement. For the reasons discussed above, if an acquiring brewer is "bound by the selling brewer's separate franchise distributor's network for any of its existing brands," it cannot have an identical agreement with all distributors. By definition, it will have different agreements with those distributors that it is bound to continue to do business with pursuant to Section 13.2.a.2. That section makes clear that the acquiring brewer is "bound by the selling brewer's existing franchise agreement and franchise distributor network" and must continue to distribute the acquired brands and line extensions thereof through the selling brewer's franchise distributor network "unless all parties mutually agree" otherwise.

For the same reason, the phrase "new brands" should be stricken from the last sentence. The language of this proposed rule is ambiguous and some may argue (again, inconsistently with the intent of the statute) that it requires a brewer to offer "new brands" to every distributor in the state who carries any of its brands. We believe the language in 13.2.a.1.C and 13.2.a.2 and 13.2.a.7 clarifies the brewer's obligations with respect to the assignment of brands, and the more general language contained here could be used to suggest ambiguities where none need exist.

2.21. "Line Extension" means any nonintoxicating beer product that ~~is an extension of brand or family of brands that is labeled, branded, advertised, marketed, promoted or offered for sale with the intent or purpose of being manufactured, imported, associated, contracted, affiliated or otherwise related to a brewer's existing brand through the use of a brewer, its subsidiaries, parent entities, contracted entities, affiliated entities or other related entities. In determining whether a nonintoxicating beer product is a line extension, the commissioner may consider, but is not limited to, the following factors: name or partial name; trade name or partial trade name; logos; copyrights; trademarks or trade design; product codes; advertising promotion or pricing incorporates a brand name or brand logo, or a substantial part of an existing brand name or brand logo, of the same manufacturer.~~

Our concern with this definition is that it is so broad and ambiguous that a line extension could mean anything. Our revisions reflect the definition of "line extension" in Texas law. Coupled with the modified definition of "Brand," this provides the brewer and the distributor with certainty as to what constitutes a line extension.

Section 176-1-6. Unlawful Acts. Anheuser-Busch remains opposed to the 90-day post / 90-day hold requirement in Section 11-16-20 and proposed Section 6.3h. We believe these pricing provisions are anticompetitive and reiterate the following concerns: (1) the requirement will significantly impair Anheuser-Busch's ability to make sound pricing and promotional decisions in the West Virginia marketplace; (2) the 180-day post/hold combination severely reduces the flexibility to respond and react to the competitive environment; and (3) the amended law and proposed rules do not include any ability to adjust to changing market conditions during

the 180-day post and hold period. We also note that the proposed rules now impose the same restrictions upon distributors in addition to brewers; this language is not contained in the statute.

We suggest the following modification to the proposed amendment to Section 6.3h. These revisions mirror the language in the ABC's April 28, 2014 Memorandum to brewers regarding H.B. 4549.

6.3.h. A brewer or manufacturer, or any other person, firm or corporation engaged in the business of selling nonintoxicating beer to a distributor or wholesaler, may not sell or deliver nonintoxicating beer to any licensed distributor or wholesaler unless and until the brewer, manufacturer, person, firm or corporation, as the case may be, has filed the brewery or dock price of the beer, by brands and container sizes, with the Commissioner. No price schedule shall be put into effect until 90 days after receipt of the same by the Commissioner and shall be submitted on or before the following quarterly dates of January 1, April 1, July 1 and October 1 of the calendar year to be effective for the next successive quarterly period on a form provided by the Commissioner. Prices will be in effect for 90 days and are effective on the 1st day of the applicable quarterly period. If there is no change in pricing for a nonintoxicating beer product, by brand or container size, filing a quarterly price is not required. Prices will revert back to the base price filed per subsection 6.3.g.3., as noted on the form provided by the Commissioner. For example, a brewer or manufacturer would submit prices, by brands and container sizes, on or before January 1, for the prices to be effective for the quarterly period from April 1 through June 30 (90 day pricing period) and so forth. ~~Upon submission and approval of a new nonintoxicating beer product or new packaging or container sizes for existing nonintoxicating beer product which does not coincide with a quarterly pricing filing date or which occurs during a quarterly price period, the new pricing will be valid until the next quarterly price filing date for which the new price must thereafter be filed as noted this subsection. Upon submission and approval of a new product or new packaging of an existing product and its pricing, the new pricing will be valid until the next required quarterly price filing date. Thereafter, the product's pricing must be in compliance with the quarterly filing dates. For example, a new product approved on September 1 would have its initial pricing effective from September 1 to September 30 and carried through to October 1 through December 31. On this product, any new pricing or price promotions for January 1 through March 31 of the following year must be submitted on or before October 1.~~

Section 176-1-13. Brewers, Qualification, Shipment Into State, Bond, Contract.

Anheuser-Busch suggests the following revisions to Sections 176-1-13.2.a to conform to its proposed revisions to certain definitions.

13.2.a. A brewer may not transfer or deliver to a distributor any nonintoxicating beer without first having entered into an equitable franchise agreement with the distributor: Provided, that the franchise agreement must conform to the laws of this state and be approved in writing by the Commissioner. A franchise agreement as defined in subsection 2.15 is the agreement that binds a brewer and a distributor so that an appointed distributor may distribute all of the brewer's nonintoxicating beer products ~~or, brands or family of brands, including line extensions, listed on the franchise agreement that are imported and offered for sale in West Virginia, including, but not limited to, existing brands, new brands and as well as any line extensions for such brands~~

~~within in the brewer's approved franchise distributor network and to a distributor's assigned territory for the distributor.~~ However, any brands sold or transferred pursuant to subsection 13.2.a.2, shall remain in the selling brewer's franchise distributor network. ~~All of a brewer's nonintoxicating beer products, brands or family of brands, including line extensions that are imported or offered for sale in West Virginia must be listed in the franchise agreement or an amendment to the franchise agreement subject to the Commissioner's approval.~~ A franchise agreement may be amended by mutual written agreement of the parties, as approved by the Commissioner with identical terms and conditions for a brewer and all of its distributors. The Commissioner shall approve: all brewers' franchise agreements, any amendments to franchise agreements and all brewers' franchise distributor networks, which shall be in writing and identical as to terms and conditions with all other franchise agreements between the brewer and its other distributors in this state, a brewer's existing brands, line extensions and new brands are assigned by the brewer to the correct approved distributors in established and approved territories for the brewer's brands or line extensions; and the registration of the brewer's labels per section 4, and it shall contain a provision in substance or effect as follows.

These revisions make clear that the established franchise distributor network is to receive new brands and line extensions and that a selling brewer's brands remain with the selling brewer's existing network of distributors. The sentence in the middle has been deleted because all brands cannot be listed on a single franchise agreement for Anheuser-Busch. Rather, Anheuser-Busch has the Wholesaler Equity Agreement with its established franchise distributor network and an assortment of contracts with the distributors of brands that Anheuser-Busch has acquired over the years. The sentence we suggest deleting creates needless ambiguity, particularly in light of the fact that other sections (e.g., 13.2.a.2) clarify this issue.

13.2.a.1. The brewer recognizes that the distributor is free to manage his or her business in the manner the distributor considers best, and that this prerogative vests in the distributor, subject to the provisions of W. Va. Code §11-16-1 et seq., the exclusive right: (i) to establish the distributor's selling prices; (ii) to have the distribution rights to the brands and line extensions of nonintoxicating beer products that are bound by franchise agreements specifying a distributor's assigned territory and that are assigned to a franchise distributor network, and, further, that the distributor may determine which brands and line extensions of nonintoxicating beer products he or she wishes to handle; provided, however, that if such distributor refuses to sell a brand or line extension, then the brewer is free to sell such brand or line extension to another distributor within the same assigned territory; and to determine the efforts and resources which the distributor will exert to develop and promote the sale of the brewer's nonintoxicating beer products handled by the distributor.

Our proposed revisions to this section ensure that a brewer will be able to make a brand or line extension available for sale in West Virginia in the event that a distributor refuses to sell that brand or line extension within its territory. Without this language, Anheuser-Busch would be left with no way to get our product to the market, a result that would not be good for retailers or consumers.

We also suggest removing section 13.2.a.4 and its requirement that all brands and line extensions be listed on the franchise agreement. The rule's language could be improperly construed to require a supplier to list every brand and every line extension that it imports or offers for sale in West Virginia on every agreement regardless of whether the wholesaler to that agreement has the right to every brand. But the statute recognizes that some suppliers may have more than one franchise distributor network. We believe the language in 13.2.a.1.C and 13.2.a.2 and 13.2.a.7 clarifies the brewer's obligations with respect to the assignment of brands, and the more general language contained here could be used to suggest ambiguities where none need exist.

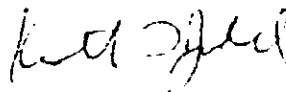
13.2.a.5. At the time of licensure, a brewer must list all its registered brands to be distributed in West Virginia that it imports and will offer for sale in its franchise agreements ~~and such brands must be appointed to its approved franchise distributor network.~~ A brewer shall file amendments, subject to the Commissioner's approval, to its approved franchise agreements ~~in its approved franchise distributor network~~ for any new brands or line extensions to be imported, distributed and offered for sale in West Virginia.

Anheuser-Busch suggests the above revision to proposed Section 13.2.a.5, in order to harmonize the rule with other provisions in the regulations (e.g., Section 13.2.a.2) that require a brewer to offer line extensions to the selling brewer's franchise distributor network in the event of a brand acquisition.

With regard to proposed Section 13.2.a.10, we reiterate our objection to placing the burden of proof in any hearing on the brewer. We continue to believe that the burden of proof in an administrative hearing should be on the Commissioner.

We would welcome the opportunity to discuss these suggested revisions to the proposed rule. If you have any questions, please feel free to contact me at 314-577-7104.

Sincerely,



Kenneth L. Judd
Associate General Counsel

COMMENTS OF THE WEST VIRGINIA BEER & WINE WHOLESALERS ASSOCIATION
IN RE: PROPOSED LEGISLATIVE RULE, TITLE 176, SERIES 1, "NONINTOXICATING BEER
LICENSING AND OPERATIONS PROCEDURES"

SUBMITTED BY THE WEST VIRGINIA ALCOHOL BEVERAGE CONTROL COMMISSION

The West Virginia Beer & Wine Wholesalers Association (hereinafter referred to as WVB&WWA or the Association) is a non-profit corporation organized under the laws of the State of West Virginia. Its purpose is to develop and maintain a representative organization of distributors of beer and wine products in order to actively promote the common interests of the membership of the Association with respect to state and local governmental agencies, the general public, retailers, consumers and suppliers in a manner consistent with sound business practices, compliance with laws and regulations, and fair and ethical trade practices. The Association consists of thirty distributors of beer and/or wine products with warehouses and facilities situated throughout the State of West Virginia.

The WVB&WWA appreciates the opportunity to make comments in relationship to the proposed Legislative Rule Title 176, Series 1, "Nonintoxicating Beer Licensing and Operations Procedures." Further, the Association understands the underlying circumstances for which the proposed rule has been promulgated, i.e. to reflect changes in state law created by the passage of House Bill 4549, enacted in the 2014 Regular Session of the West Virginia Legislature. Although various members of the Association also distribute wine products, the comments herein shall be confined to the topic of nonintoxicating beer licensing and operation procedures.

By way of background and introduction, distributors of beer are, in various ways, an enabler in the oversight of the supply, distribution and retail sale of beer in West Virginia. This is true of distributors in many other jurisdictions throughout the country. Beer distributors are licensed and they are accountable to the WVABCA for the local implementation of and compliance with laws which preserve public safety in terms of quality of product. They make sure that distribution of products are made only to licensed retailers, ensure the collection of state and local taxes associated with the product, and provide accountability in terms of tracking product with detailed records which make transparent the chain of custody of beer from supplier to retailer. West Virginia distributors are mindful and respectful of the obligation they have to the State of West Virginia and her people. They pursue their duties professionally and with integrity, while creating and maintaining jobs in the local communities they serve, reinvesting money not only in their operations and facilities, but also in their local communities for a variety of charitable, civic and benevolent purposes.

The three-tier system of beer regulation has a distinct role for distributors beyond that which was described in the preceding paragraph. The work of distributors adds commercial value to both suppliers and retailers. They do so by providing access to

market for all brewers and importers by delivering product to thousands of licensed retail accounts in West Virginia. They do so by helping brewers maximize sales and establish brand identity via store level merchandising, product promotion, implementing marketing initiatives and sponsoring local events. They do so by creating predictable product availability for retailers through warehousing, inventory management, timely delivery of product, and aiding in the management of retail space. They do so by educating retailers and even consumers about new products. And they do so by managing product quality and integrity to facilitate consumer safety.

In terms of the provisions of Title 176, Series 1 amendments as proposed by the WVABCA, the Association is generally supportive and appreciative of the same as proper and mete in terms of implementation of the changes in code caused by the passage of House Bill 4549. The Association will not comment on each proposed modification, but will comment on selected ones.

Sections 176-1-2.3, 2.4, 2.5, 2.15 and 2.21, taken collectively, are appropriate and provide clarity and certainty of regulatory oversight of the elements of supply, distribution and retail sale of nonintoxicating beer. Not only do the changes provide definitional certainty in conformity with past actual agency practices as relates to the terms "brand," "brewer," or "manufacturer," "franchise agreement," "franchise distributor network," and "line extension," but they reinforce the obligation of the WVABCA to exercise its express and imputed authority over the regulation of the supply, distribution and sale of nonintoxicating beer under clear guidelines and authority. The statement of clear and distinct policy facilitated by these modified sections works to the benefit of all who operate under WVABCA regulatory oversight, allowing each an improved opportunity to conform their business actions in a way that is compliant with law.

Additionally, §176-1-2.15, "Franchise Agreement," provides much needed documentation of policy in relationship to the contractual obligations between suppliers and distributors of nonintoxicating beer. It represents a more concrete statement of what is expected by WVABCA in the way of a Franchise Agreement, the application of such agreements to line extensions and new brands in a distributor's assigned territory, and the essential requirement that such agreement be approved by the Commissioner. These provisions will eliminate much of the potential for misunderstanding between brewers and the agency, brewers and distributors, and distributors and the agency. All parties should have a better understanding of their duties and obligations with respect to having and maintaining Franchise Agreements as a condition to doing business in West Virginia in this space.

The provisions of §176-1-2.21 relating to "Line Extension" embrace current and prior practice. Its articulation of the meaning of "Line Extension" will serve to avoid many circumstances which might lead to debate and perhaps even litigation over what constitutes a "Line Extension." The authority of the Commissioner is provided with a set of factors by which one may make a determination as to whether a particular product

is a line extension subject to existing franchise agreements. The WVB&WWA applauds the WVABCA for making this and other definitional improvements.

Throughout various sections of the proposed rule modifications, provisions have been made which capture in text the custom, usage and prior practice of the WVABCA in relation to a number of circumstances. The WVB&WWA is genuinely supportive of the increased clarity and certainty this provides for those who must conform business conduct to the practiced policies of the WVABCA, whether the same were succinctly set forth in writing or merely established through practice and usage.

One area of concern in which the WVB&WWA believes there should be a change in the proposed language of Title 176, Series 1 is in §176-1-6.3.h.1.A. The proposed language must be read in conjunction with the proposed language of §176-1-6.3.h, which generally provides that a supplier or brewer must provide the brewery or dock price 90 days in advance of the date it is to become effective and then have it remain in effect for 90 days beginning invariably on January 1, April 1, July 1 and October 1. In §176-1-6.3.h.1.A, the equivalent provision is stated for distributors. It requires distributors to likewise provide 90 days of advance notice to retailers of the price to be effective to them from the distributors. However, the pairing of the two obligations – one for suppliers to distributors and the WVABCA to provide 90 day notice of a price to be effective on a date certain and one for distributors to retailers and the WVABCA effective on the same date certain – creates an unfeasible operational requirement for distributors.

If the supplier offers its notice of pricing at the last possible moment to the distributor/wholesaler, then it is a virtual impossibility for the wholesaler to be compliant with the proposed standard that it too provide 90 day advance notice of an effective price for January 1, April 1, July 1, or October 1 as the case may be. Evidence of such a circumstance is appended hereto as Exhibit 1. Exhibit 1 is a photocopy of a transmittal from MillerCoors, a supplier, to one or more West Virginia distributors of MillerCoors products, wherein on July 1 at 4:59 p.m. notice of pricing to take effect 90 days thereafter on October 1, 2014 was communicated. The effect of which left no time for the distributor to comply with the proposed requirement to provide notice to its retailers and the WVABCA 90 days in advance of October 1, 2014.

It is perceived that there can be inequitable circumstances which arise in relationship to the effective dates of supplier prices and delivery of inventory to be distributed to retailers at wholesale prices reflective of the supplier delivered price. At the end of a quarter, a wholesaler will have inventory for distribution that was delivered under supplier prices for the current quarter. That same inventory may then be subject to distribution at the outset of the new quarter and, theoretically, expected to be priced to retailers at a price reflective of the new quarter supplier nominated pricing. In some instances, the supplier nominated pricing for the new quarter may be lower to reflect discounts or special package promotions. In some cases it may be higher based on market conditions. Either scenario has the potential to result in adverse economic considerations for suppliers, distributors or retailers. It is also appreciated that in some

circumstances the first day of the quarter may not embody the preferences of retailers for the purpose of launching a special promotion or special package promotion.

There is no requirement in code for 90 days advance notice by distributors to retailers of wholesale prices to become effective at the start of the next quarter. Nevertheless, current rule provides that a distributor shall file its wholesale prices with the Commissioner no less than 14 days prior to being effective for a 30 day period. There is no mandate in the provisions of recently enacted House Bill 4549 specifying the number of days advance notice to be given of wholesale prices. However, there is such a mandate for suppliers to nominate their prices to wholesalers.

In order to achieve reasonable measures of operational harmony and achieve what is believed to be the desire of WVABCA to facilitate 90 day quarterly pricing from suppliers to distributors, the WVB&WWA recommends that the 90 day notice provision proposed in §176-1-6.3.h.1.A, from wholesalers to retailers be reduced to a 60 day notice provision. It is contended that a 60 day notice of a price to be maintained for a period of time beginning on or before the 15th day of the next calendar quarter and extending until such time as the next ensuing quarterly price becomes effective, be implemented subject to the authority of the Commissioner under Section 22, Article 16 of Chapter 22 of the Code of West Virginia as amended, to allow for temporary wholesale price changes downward or discounts. The effect of this is to both create a lag in time within the quarterly pricing framework proposed and to allow for downward price adjustments and discounts to benefit West Virginia retailers and consumers. It is contemplated provision should be made in the rule for temporary downward price adjustments as discussed below.

The key operative provision is to provide for a mechanism to allow for temporary wholesale price downward adjustments or discounts within the active quarter. It is suggested that provisions be provided in the proposed rule to allow wholesaler to retailer downward price adjustments with a 14 day notice and to be effective for a period of not less than 30 days. Should the period of special adjustment expire prior to the end of the pricing quarter, then wholesaler prices would revert to those which were articulated in the original 60 day notice to retailers.

The WVB&WWA believes this is adequate to protect retailer interests while fostering the desire of WVABCA to create increased price certainty and ease of administration of price changes for nonintoxicating beer products. It is noted that retailers desire to be able to promote discounted prices for periods of time less than 90 days in many instances. In other words, a consistent price for the entire quarter will not conform to the business model of most retailers which prefer periodic short term discount or promotional prices to meet competitive circumstances.

A multitude of competitive considerations would seem to justify adjustments to the wholesale price afforded retailers. Maintaining a firm price from wholesaler to retailer throughout the quarter conceivably prevents wholesalers from allowing retailers to take advantage of downward price adjustments should a wholesaler have an abundant

inventory on hand with a limited expiration date on the product and wish to allow a lower price to the retailer to move that inventory. It also may restrain the ability to provide for special seasonal items such as special packaging or novelty artwork on cans or bottles. In some instances it may be necessary for wholesalers to try to assist retailers in meeting the market pressure of price promotions in boarder states, the timing of such promotions not capable of being forecasted a quarter in advance. In some cases, the flexibility to have limited promotions is essential to meet market pressure due to competitor influences. Whatever the case, it is hoped West Virginia retailers and consumers will not be disadvantaged by mandating a firm price for 90 days at a time.

In view of these circumstances the WVB&WWA would respectfully recommend that in addition to the suggested 60 day notice modification, that a more reasonable and equitable manner of establishing an effective date for the price to be provided by distributor to retailer would be to build in flexibility to allow for market driven circumstances which may not be conveniently addressed for all parties if prices from distributors to retailers must be effective on the first day of a quarter. To that end, it is suggested that the effective date for prices nominated by wholesalers to retailers be effective within the discretion of the wholesaler/distributor at the time of nomination (60 days prior) on a date certain on or before the fifteenth day of the next quarter. Once effective, the price would remain effective to the retailer until the effective date of the next quarter's nominated prices or any downward adjustment of prices permitted under authority of the Commissioner's powers in Section 22, Article 16 of the Code of West Virginia as amended as discussed below..

In the interest of a myriad of circumstances in which it may be desirable for wholesalers and retailers to make downward price adjustments during a given quarterly period, the WVB&WWA recommends exercise of the rulemaking authority of the Commissioner under Section 22, Article 16 of the Code of West Virginia by modifying the proposed rule to include provisions allowing for a change of wholesale prices of a temporary nature to allow for downward price changes or price discounts, sometimes referred to as "post downs" or "posting down" to effect a temporary price reduction to the benefit of retailers and/or consumers during a quarterly period. Without doing so, wholesalers are restrained from working collaboratively with retailers to meet unique market forces and extend lower prices to consumers within the quarterly period. It is noted that this flexibility in serving retailers and, vicariously, consumers, will also be of benefit to suppliers in generating the sale of more product. The WVB&WWA represents to the WVABCA that it stands willing to collaborate with the agency in developing specific language to incorporate these recommendations into rule.

Regardless, the WVB&WWA appreciates the need for WVABCA to have a systemic approach to management of pricing of nonintoxicating beer products that is predictable for those who must participate in such a system, provides for ease of administration, facilitates the nuances of retailer marketing and advertising and is reliable to all parties, including the consuming public. We believe all of these objectives are achieved if the recommended change from 90 days advance notice by distributors of

wholesale prices is reduced to 60 days, with the increased flexibility in price nomination as stated above, and for the ability to occasionally provide discounts or downward price adjustments to retailers.

The WVB&WWA duly notes that §176-1-13.2 thru 13.2.a.11 are appreciated as an articulation of provisions providing increased certainty and clarity of current and past operating standards and procedures of the WVABCA. They serve to sanctify the rights of wholesalers under franchise agreements to distribute products properly assigned to their operations and eliminate doubt in terms of distributing new supplier products or line extensions. Additionally the lines of authority of the Commissioner to oversee the relationships between suppliers, distributors and retailers are reaffirmed as they should be, again, embracing current practice.

However, a close reading of the text of §176-1-13.2.a.1.C (page 24 of the proposed rule) suggests that in the fourth line thereunder, following the word "and" and prior to the word "continue", the word "shall" should be inserted. This would be in keeping with the intent of the remaining portions of the section and cause the paragraph to read with improved consistency of message.

The WVB&WWA truly appreciates the effort of the WVABCA and its staff to generate a legislative rule which responsibly implements the provisions of House Bill 4549 and looks forward with hope that the suggestions for modifications to the proposed rule made herein are accepted. It has been our design to offer them as constructive suggestions to improve the rule while maintaining the integrity of its fundamentals.

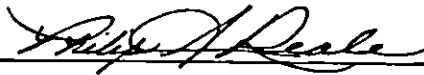
The proposed rule does much to preserve the sanctity of the role of the distributor which serves as insulation between retailers and consumers with multinational suppliers. The rule facilitates a circumstance wherein the middle tier of the three-tier system can be effective in performing that role. Contemporary knowledge tells us that the beer industry is in a state of dramatic transformation with consolidation occurring in both the supplier tier and the retailer tier. With consolidation and mega size organizations resulting, challenges to state laws have become common rather than rare. West Virginia has experienced this first hand. The effort to minimize the role of independent local distributors is not unnoticed. The work of the WVABCA to protect against these incursions into the viability of the three-tier system has been remarkable.

The aggregate impact of the proposed rule is one of firming the tried and tested three-tier system, reinforcing a regulatory system known to protect the consumer in multiple ways, known to promote public safety and known to keep in motion policies and procedures which allow for responsible oversight of the activities of supplying beer, distributing beer and selling of beer at the retail level. The net effect is that consumers are the real winners when effective establishment and oversight of the three-tier system occurs. Consumers see new products in the marketplace. They have a wide choice of products at competitive prices and they can be assured of the potable quality of the product on the shelf in their local stores. None of this happens without responsible

government agency oversight, utilization of distributors as means of regulation itself and control of the system – all of which have been reaffirmed and clarified as a consequence of the proposed rule.

With the minor exceptions discussed in the body hereof, the WVB&WWA endorses the proposed rule and looks forward to working with the WVABCA going forward.

Respectfully Submitted,
WV Beer & Wine Association

By: 

Philip A. Reale, Counsel

WV Bar ID #3029

RECEIVED
2014 JUL 23 PM 3:00
[Illegible stamp]

Jim Henry

To: Ron Koontz, Jim & 12 more...

**MillerCoors Pricing for
Oct/Nov/Dec**

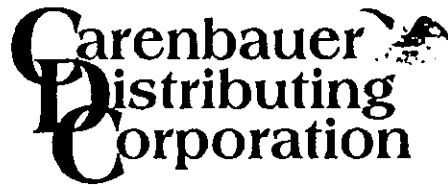
July 1, 2014 at 4:59 PM

MillerCoors Distributors,

I have attached pricing for Oct/Nov/Dec.

I have also attached a distributor price form that I will need filled out and completed by July 28th.

I know many of you are used to the pricing taking effect on the 7th of the previous month from the Miller side and the 16th of the previous month on the Coors side.



1900 Jacob Street
Wheeling, WV 26003
(304) 232-3000
www.carenbauers.com

July 21, 2014

RECEIVED
2014 JUL 23 P 11:00
COMMUNICATIONS SECTION

WVABCA
900 Pennsylvania Avenue, 4th floor
Charleston, WV 25302

To whom it may concern:

I am writing to file comments on proposed legislative rule 176-1, which is being amended to reflect changes brought about by enactment of H.B. 4549 earlier this year. In particular, I would like to express my concern with the pricing aspects of the bill.

Prior to the passage of the bill, brewers were required to give a 14 day notice to the state when changing prices and had to maintain that price for a period of 30 days. I believe that was adequate and served the system well for many years. With the onslaught of brands and packages in the beer industry, I can understand the ABCA's frustration with keeping up on all the price changes. However, changing it to a 90 day notice and demanding brewers keep that price on for another 90 days is very prohibitive and lessens the competitive nature of the beer business in this state, especially in areas bordering other states with less restrictive pricing requirements.

I believe any business would find this legislation harmful to act and react to competitive situations as they arrive in the state of West Virginia.

I understand and see the need for regulations pertaining to businesses in West Virginia but feel this legislation has gone overboard as it relates to pricing matters pertaining to the beer business. Perhaps a change was needed for the 14/30 day rule but a compromise would be better in my opinion-- somewhere between 14/30 and 90/90.

In order to avoid placing West Virginia distributors and retailers businesses at a competitive disadvantage in adjacent states, I recommend that the agency study and report on the pricing laws and regulations in adjacent states, and work with distributors



Carenbauer Distributing Corporation



1900 Jacob Street
Wheeling, WV 26003
(304) 232-3000
www.carenbauers.com

2014 JUL 23 11:00 AM
RECEIVED

and brewers on legislation that will insure that West Virginia businesses will not be at a competitive disadvantage.

Because of the uncertainty of this legislation, I would suggest that the Commissioner exercise some discretion to the brewers in this state and put out a policy statement or emergency rule to allow the 14/30 rule stand until it can be addressed again in the next legislative session.

Please note that I would be more than willing to discuss this further if need be.

Thank you for your attention to this matter!

Sincerely,

Carl Carenbauer
President
Carenbauer Distributing Corp.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 175 CSR 2 - Private Club Licensing

Type of Rule: Legislative Interpretive Procedural

Agency: West Virginia Alcohol Beverage Control Administration

Address: 900 Pennsylvania Ave., 4th Floor
Charleston, WV 25302

Phone Number: 304-356-5500 Email: Anoop.K.Bhasin@wv.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

No significant impact.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services			
Current Expenses			
Repairs & Alterations			
Assets			
Other			
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: 175 CSR 2 - Private Club Licensing

Rule Title: _____

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

No significant impact.


MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

This rule adds and changes from HB 4549 and some clarification from the code.

Date: August 1, 2014

Signature of Agency Head or Authorized Representative



Title 176, Series 1
Legislative Rule
Alcohol Beverage Control Commission

NONINTOXICATING BEER LICENSING AND OPERATIONS PROCEDURE

STATEMENT OF CIRCUMSTANCES

This rule is being amended per the passage of HB 4549 during the regular session and adds and clarifies certain language to definitions and various authority provisions of the rule with respect to franchise laws and agreements. This amendment to the rule reflects the statutory changes at W. Va. Code §§11-16-3, 11-16-17a, 11-16-20, and 11-16-21.

SB 4549 contains changes to the code regarding the definition of "brand", "brewer or manufacturer", "franchise agreement", "franchise distributor network" and "line extension" and clarifies the Commissioner's authority.

Additional clarification is added for a growler's capacity and composition, a limited liability company with respect to licensing requirements and a resident brewer's ability to operate a private club.

**Title 176, Series 1
Legislative Rule
Alcohol Beverage Control Commission**

**NONINTOXICATING BEER LICENSING AND OPERATIONS PROCEDURES
SUMMARY OF PROPOSED CHANGES**

This legislative rule explains nonintoxicating beer licensing and operations procedures.

In section 1.3., changed filing date

In section 1.4., changed effective date

In section 2., renumbered various sub-sections

In section 2.3., added the definition of "Brand"

In section 2.4., renumbered sub-section and updated definition of "Brewer" or "Manufacturer"

In section 2.5., renumbered sub-section and updated definition of "Brewer's License"

In section 2.6., renumbered sub-section

In section 2.7., renumbered sub-section

In section 2.8., renumbered sub-section

In section 2.9., renumbered sub-section

In section 2.10., renumbered sub-section

In section 2.11., renumbered sub-section

In section 2.12., renumbered sub-section

In section 2.13., renumbered sub-section

In section 2.14., renumbered sub-section

In section 2.15., renumbered sub-section and added the definition of "Franchise Agreement"

In section 2.16., renumbered sub-section and added the definition of "Franchise Distributor Network"

In section 2.17., renumbered sub-section

In section 2.18., renumbered sub-section and clarified definition of “Growler”

In section 2.19., renumbered sub-section

In section 2.20., renumbered sub-section

In section 2.21., renumbered sub-section and added the definition of “Line Extension”

In section 2.22., renumbered sub-section

In section 2.23., renumbered sub-section

In section 2.24., renumbered sub-section

In section 2.25., renumbered sub-section

In section 2.26., renumbered sub-section

In section 2.26.a., renumbered sub-section

In section 2.26.a.1., renumbered sub-section

In section 2.26.a.2., renumbered sub-section

In section 2.26.a.3., renumbered sub-section

In section 2.26.a.4., renumbered sub-section

In section 2.26.a.5., renumbered sub-section

In section 2.26.b., renumbered sub-section

In section 2.26.b.1., renumbered sub-section

In section 2.26.b.2., renumbered sub-section

In section 2.26.b.3., renumbered sub-section

In section 2.26.b.4., renumbered sub-section

In section 2.26.b.5., renumbered sub-section

In section 2.26.c., renumbered sub-section

In section 2.26.c.1., renumbered sub-section

In section 2.26.c.2., renumbered sub-section

In section 2.26.d., renumbered sub-section

In section 2.26.d.1., renumbered sub-section

In section 2.26.d.2., renumbered sub-section

In section 2.26.d.3., renumbered sub-section

In section 2.27., renumbered sub-section

In section 2.27.a., renumbered sub-section

In section 2.27.b., renumbered sub-section

In section 2.27.c., renumbered sub-section

In section 2.28., renumbered sub-section

In section 2.28.a., renumbered sub-section

In section 2.28.b., renumbered sub-section

In section 2.28.c., renumbered sub-section

In section 2.29., renumbered sub-section

In section 2.29.a., renumbered sub-section

In section 2.29.b., renumbered sub-section

In section 2.29.c., renumbered sub-section

In section 2.30., renumbered sub-section

In section 3.6.a.2., added clarifying language for limited liability company

In section 3.7., added clarifying language for resident brewers

In section 3.12., added clarifying language

In section 4.1., added clarifying language

In section 4.1.a., added clarifying language

In section 4.1.b., added sub-section

In section 6.3.g.3., added sub-section

In section 6.3.h., added clarifying language and removed language

In section 6.3.h.1.A., added clarifying language and removed language

In section 6.3.h.1.C., added clarifying language

In section 6.3.h.3., removed sub-section

In section 13.2., added clarifying language

In section 13.2.a., added clarifying language

In section 13.2.a.1., added clarifying language and removed language

In section 13.2.a.1.A., added clarifying language

In section 13.2.a.1.B., added clarifying language

In section 13.2.a.1.C., added sub-section

In section 13.2.a.1.D., added sub-section

In section 13.2.a.2., added clarifying language

In section 13.2.a.3., added clarifying language

In section 13.2.a.4., added sub-section

In section 13.2.a.5., added sub-section

In section 13.2.a.6., added sub-section

In section 13.2.a.7., added sub-section

In section 13.2.a.8., added sub-section

In section 13.2.a.9., added sub-section

In section 13.2.a.10., added sub-section

In section 13.2.a.11., renumbered sub-section

In section 13.2.b., added clarifying language

In section 13.4., added clarifying language

In section 13.5., added clarifying language

TITLE 176
LEGISLATIVE RULE
ALCOHOL BEVERAGE CONTROL COMMISSION - BEER

FILED
2014 AUG -1 A 11:49
OFFICE WEST VIRGINIA
SECRETARY OF STATE

SERIES 1
NONINTOXICATING BEER LICENSING AND OPERATIONS PROCEDURES

§176-1-1. General.

1.1. Scope. -- These legislative rules repeal and replace 176CSR1 and establish rules for the West Virginia Alcohol Beverage Control Commissioner relating to nonintoxicating beer and affecting manufacturers, brewers, distributors, retailers and consumers.

1.2. Authority. -- W. Va. Code §11-16-1 et seq.

1.3. Filing Date. -- June 6, 2014.

1.4. Effective Date. -- June 6, 2014.

§176-1-2. Definitions.

As used in these rules and unless the context clearly requires a different meaning, the following terms shall have the meaning ascribed in this section.

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. "Beer" means any beverage obtained by the fermentation of barley, malt, hops or any other similar product or substitute and containing more alcohol than that of nonintoxicating beer, including nonintoxicating craft beer, and shall be included in the definition of "liquor" and "alcoholic liquor", as used in chapter eleven, section sixteen and in chapter sixty of the West Virginia code shall not be construed to include or embrace nonintoxicating beer or nonintoxicating craft beer.

2.3. "Brand" means a nonintoxicating beer product manufactured, brewed, mixed, concocted, blended, bottled or otherwise produced, or imported or transhipped by a brewer or manufacturer, the labels of which have been registered and approved by the commissioner that is being offered for sale or sold in West Virginia by a distributor who has been appointed in a valid franchise agreement or a valid amendment thereto.

2.34. "Brewer" or "Manufacturer" means any person, firm, association, partnership or corporation, including agents and employees, who is manufacturing, brewing, mixing, concocting, blending, bottling or otherwise producing or bottling, or importing, or transshipping from a foreign country nonintoxicating beer or nonintoxicating craft beer for sale at wholesale to any licensed distributor. Brewer or manufacturer may be used interchangeably. A brewer, its subsidiaries, parent entities, contracted entities, affiliated entities or other related entities, may obtain only one brewer's license for its nonintoxicating beer or nonintoxicating craft beer. Upon review of a brewer's licensure, the Commissioner, may, but is not limited to, consider the percentage of ownership of subsidiaries, parent entities, contracted entities, affiliated entities or other related entities.

2.45. "Brewer's License" means a license issued by the Commissioner to a brewer or manufacturer of nonintoxicating beer which authorizes that person to engage in brewing or manufacturing activities of a

brewer in this state.

2.56. "Brewer's Products" means all malt based beverages produced or imported by a brewer and offered for sale in the state of West Virginia.

2.67. "Brewpub" means a place of manufacture of nonintoxicating beer or nonintoxicating craft beer owned by a licensed resident brewer, subject to federal and state regulations and guidelines, a portion of which premises are designated for retail sales of nonintoxicating beer or nonintoxicating craft beer by the resident brewer owning the brewpub.

2.78. "Class A License" means the license issued by the Commissioner which authorizes a retailer to sell at retail nonintoxicating beer for consumption either on the premises where sold or off the 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.

2.89. "Class B License" means the license issued by the Commissioner which authorizes the retailer 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.

2.910. "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 at other special events approved by the Commissioner.

2.1011. "Commissioner" means the West Virginia Alcohol Beverage Control Commissioner or his delegate.

2.1112. "Distributor" means any person, including that person's agents or employees, jobbing or distributing nonintoxicating beer or nonintoxicating craft beer to licensed retailers at wholesale and whose warehouse and chief place of business is located within this state. For the purposes of a "distributor" only, the term "person" means and includes an individual firm, trust, partnership, limited partnership, limited liability company, association or corporation. Any trust licensed as a distributor or any trust that is an owner of a distributor licensee, and the trustee or other persons in active control of the activities of the trust relating to the distributor license, is liable for acts of the trust or its beneficiaries relating to the distributor license that are unlawful acts or violations of W.Va. Code §11-16-1 et seq., notwithstanding the liability of trustees in W.Va. Code §44D-10-1001 et seq.

2.1213. "Distributor License" means a license issued by the Commissioner to a distributor which authorizes the distributor to engage in the commercial activities described in section 2.11 above.

2.1314. "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, coca and coca 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, oleo, margarine, shortening, gelatins, baking and cooking ingredients, mushrooms, spreads, relishes, desserts, flavorings, edible seeds, nut and berries: Provided, that the terms "food" and "food for meals" does not include medicines, vitamins and dietary supplements whether in liquid, powdered, granular, tablet, capsule, lozenge, or pill form; spirituous, 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.

2.15. "Franchise Agreement" means the written agreement between a brewer and a distributor that is identical as to terms and conditions between the brewer and all its distributors, which agreement has been approved by the commissioner. The franchise agreement binds the parties so that a distributor, appointed by a brewer, may distribute all of the brewer's nonintoxicating beer products, brands or family of brands imported and offered for sale in West Virginia, including, but not limited to, existing brands, line extensions and new brands all in the brewer's assigned territory for the distributor. All brands and line extensions being imported or offered for sale in West Virginia must be listed by the brewer in the franchise agreement or a written amendment to the franchise agreement. A franchise agreement may be amended by mutual written agreement of the parties as approved by the commissioner with identical terms and conditions for a brewer and all of its distributors. Any approved amendment to the franchise agreement becomes a part of the franchise agreement. A brewer and a distributor may mutually agree in writing to cancel a franchise agreement. A distributor terminated by a brewer in accordance with the Code and rules no longer has a valid franchise agreement. If a brewer has reached an agreement to cancel a distributor or has terminated a distributor, then a brewer may appoint a successor distributor who accedes to all the rights of the cancelled or terminated distributor.

2.16. "Franchise Distributor Network" means the distributors who have entered into a binding written franchise agreement, identical as to terms and conditions, to distribute nonintoxicating beer products, brands and line extensions in an assigned territory for a brewer. A brewer may only have one franchise distributor network. Provided, That a brewer that has acquired the manufacturing, bottling or other production rights for the sale of nonintoxicating beer at wholesale from a selling brewer as specified in W. Va. Code §11-16-21(a)(2) shall continue to maintain and be bound by the selling brewer's separate franchise distributor's network for any of its existing brands, line extensions and new brands.

2.1417. "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 includes 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.

2.1518. "Growler" means a glass, ceramic or metal container or jug not more than one-two gallons in size, capable of being securely sealed, utilized by a licensed resident brewer's brewpub for purposes of off-premises sales of nonintoxicating beer or nonintoxicating craft beer for personal consumption not on a licensed premises and not for resale. Any container or jug not made of glass, ceramic or metal may be submitted to the Commissioner for review and approval/denial on a case-by-case basis.

2.1619. "Licensed Retailer" means any person, including the person's agents and employees selling, servicing or otherwise dispensing nonintoxicating beer and all products regulated by W. Va. Code §11-16-1 et seq., including, but not limited to, any malt beverages or malt coolers, at the retailer's established and licensed place of business or premises.

2.1720. "Licensee" means any person licensed in accordance with W. Va. Code §11-16-1 et seq. to brew, manufacture, distribute, or sell, at wholesale or retail, any nonintoxicating beer.

2.21. "Line Extension" means any nonintoxicating beer product that is an extension of brand or family of brands that is labeled, branded, advertised, marketed, promoted or offered for sale with the intent or purpose of being manufactured, imported, associated, contracted, affiliated or otherwise related to a brewer's existing brand through the use of a brewer, its subsidiaries, parent entities, contracted entities, affiliated entities or other related entities. In determining whether a nonintoxicating beer product is a line extension, the commissioner may consider, but is not limited to, the following factors: name or partial name; trade name or partial trade name; logos; copyrights; trademarks or trade design; product codes; advertising promotion or pricing.

2.1822. "Nonintoxicating Beer" means all natural 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 nonintoxicating craft beers with no caffeine infusion or any additives masking or altering the alcohol effect containing at least one half of one percent (.5%) alcohol by volume, but not more than nine and six-tenths percent (9.6%) of alcohol by weight, or twelve percent (12%) by volume, whichever is greater. The word "liquor" as used in W. Va. Code §60-1-1 et seq., does not include or embrace nonintoxicating beer nor any of the beverages, products, mixtures or preparations included within this definition. For the purposes of this definition "infusion" means and includes to artificially add, input or otherwise deliver caffeine or any other additive, not a true flavoring or coloring, that would mask or alter the alcohol effect in nonintoxicating beer.

2.1923. "Nonintoxicating craft beer" means any beverage obtained by the natural fermentation of barley, malt, hops or any other similar product or substitute and containing not less than one half of one percent (.5%) by volume and not more than twelve percent (12%) alcohol by volume or nine and six tenths (9.6%) percent alcohol by weight with no caffeine infusion or any additives masking or altering the alcohol effect. For the purposes of this definition "infusion" means and includes to artificially add, input or otherwise deliver caffeine or any other additive, not a true flavoring or coloring, that would mask or alter the alcohol effect in nonintoxicating craft beer.

2.2024. "Original Container" means the container used by the brewer at the place of manufacturing, bottling or otherwise producing nonintoxicating beer for sale at wholesale.

2.2125. "Person" means and includes an individual, firm, partnership, limited partnership, limited liability company, association or corporation.

2.2226. "Private Club" means any corporation or unincorporated association licensed in accordance with W. Va. Code §60-7-1 et seq. which:

2.2226.a. belongs to or is affiliated with a nationally recognized fraternal or veteran's organization, which:

2.2226.a.1. is operated exclusively for the benefit of its members;

2.2226.a.2. pays no part of its income to its shareholders or individual members;

2.2226.a.3. owns or leases a building or other premises;

2.2226.a.4. admits only duly elected or approved dues paying members in good standing of the corporation or association and their guests while in the company of a member, and does not admit the general public; and,

2.2226.a.5. maintains in the building or on the premises a suitable kitchen and dining facility with related equipment for serving food to members and their guests.

2.2226.b. is a nonprofit social club, which:

2.2226.b.1. is operated exclusively for the benefit of its members;

2.2226.b.2. pays no part of its income to its shareholders or individual members;

2.2226.b.3. owns or leases a building or other premises;

2.2226.b.4. admits only duly elected or approved dues paying members in good standing of

the corporation or association and their guests while in the company of member, and does not admit the general public; and,

2.2226.b.5. maintains in the building or on the premises a suitable kitchen and dining facility with related equipment for serving food to members and their guests.

2.2226.c. 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:

2.2226.c.1. 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; and,

2.2226.c.2. maintains in the building or on the 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.

2.2226.d. is organized for legitimate purposes and which:

2.2226.d.1. owns or leases a building or other limited premises in any state, county, or municipal park or at any airport, in which a club has been established;

2.2226.d.2. admits only duly elected and approved dues paying members in good standing and their guests while in the company of a member, and does not admit the general public; and,

2.2226.d.3. maintains in connection with the club a suitable kitchen and dining facility and related equipment and employs a sufficient number of persons for serving meals in the club to the members and their guests.

2.2327. "Private wine bed and breakfast" means any business, such as a hotel motel or other establishment properly zoned in accordance with local ordinances, with the sole purpose of providing, in a residential or country setting lodging and meals which:

2.2327.a. is a partnership, limited partnership, corporation, unincorporated association or other business entity which provides meals on its premises to its members and their guests;

2.2327.b. is licensed under the provisions of W. Va. Code §60-8-1 et seq. to serve up to two glasses of wine on its premises to its members and their guests when the sale accompanies the serving of food or meals; and,

2.2327.c. 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.

2.2428. "Private Wine Restaurant" means a restaurant licensed in accordance with W. Va. Code §60-8-1 et seq. which:

2.2428.a. is a partnership, limited partnership, corporation, unincorporated association or other business entity which has its principal purpose the business of serving meals on its premises to its members and their guests;

2.2428.b. is licensed under the provisions of W. Va. Code §60-8-1 et seq. 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 the sale accompanies the serving of food or meals; and,

2.2428.c. 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.

2.2529. "Private wine spa" means any business with the sole purpose of providing commercial facilities devoted especially to health, fitness, weight loss, beauty, therapeutic services and relaxation, including a licensed massage parlor or salon with licensed beauticians or stylists, and which:

2.2529.a. is a partnership, limited partnership, corporation, unincorporated association or other business entity which provides meals on its premises to its members and their guests;

2.2529.b. is licensed under the provisions of W. Va. Code §60-8-1 et seq. to serve up to two glasses of wine on its premises to its members and their guests when the sale accompanies the serving of food or meals; and,

2.2529.c. 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.

2.2630. "Resident Brewer" means and includes any brewer or manufacturer of nonintoxicating beer or nonintoxicating craft beer whose principal place of business and manufacture is located in the State of West Virginia and which does not brew or manufacture more than 25,000 barrels of non-intoxicating beer or nonintoxicating craft beer annually, and does not self-distribute more than 10,000 barrels thereof in the State of West Virginia annually. For purposes of this rule, a barrel is 31 gallons of nonintoxicating beer or nonintoxicating craft beer.

§176-1-3. Licenses.

3.1. General License Requirement: Each person seeking to manufacture, sell, possess for sale, transport or deliver nonintoxicating beer in the state of West Virginia must first be licensed in accordance with W. Va. Code §11-16-5. Such licenses shall be valid for one (1) year for the period of July 1 through June 30 of the following year.

3.1.a. Following receipt of a completed application for a license containing supplemental information as the Commissioner may require, the Commissioner may conduct such investigation of an applicant as deemed necessary or desirable in determining whether the applicant is qualified to receive a license.

3.1.b. The Commissioner will conduct background investigations for the purpose of determining whether an applicant has been charged with, indicted for, or convicted of a crime that may have bearing upon the applicant's fitness to hold a retail liquor license. For purposes of this paragraph, "background investigation" means a security, criminal and credit investigation of an applicant who has applied for the issuance or renewal of a retail liquor license. The applicant will submit West Virginia Alcohol Beverage Control Administration Release of Information and Waiver of Confidentiality of Records Form as provided by the Commissioner. The applicant will submit a full set of fingerprints to facilitate a criminal background check and the commissioner will request the state police to submit the fingerprints and identifying information to the Federal Bureau of Investigation for a national criminal history record check. The results of the fingerprint check will be returned to the West Virginia Lottery Commission and the Alcohol Beverage Control Commission.

3.1.c. The applicant will reimburse the ABCC for all fees or charges that are incurred by the ABCC for a background investigation undertaken pursuant to subdivision 3.1.b. of this rule.

3.1.d. A person may be licensed in only one capacity as a brewer, distributor or licensed retailer

and there shall be no connection or interest, direct or indirect, between such persons.

3.2. Brewer and Resident Brewer License: The annual license fee for a brewer or resident brewer with a principal place of business located in this state is \$1,500.00 for each place of manufacture.

3.2.a. If the period of the original license for the principle place of business or for a warehouse commences on or after January 1 of any year, the license fee for the facility is \$750.00.

3.2.b. No brewer or manufacturer shall offer for sale, sell, consign, ship or deliver nonintoxicating beer into this state except to a duly licensed distributor for delivery at the distributor's place of business.

3.2.c. A resident brewer may act as a distributor in a limited capacity for up to 10,000 barrels of his or her own products produced at its brewery or place for manufacturing. However, a distributor's license is required for that person to distribute nonintoxicating beer from a place other than where it is brewed or manufactured. Nothing in this subdivision shall prevent a resident brewer or brewer from using the services of licensed distributors as specified in W. Va. Code §11-16-1 et seq. and this rule.

3.2.d. License Application: An applicant shall submit a verified application (provided by the commissioner) to the commissioner, which shall state:

3.2.d.1. the name of the applicant, where incorporated and the date incorporated;

3.2.d.2. the applicant's federal identification number or social security number;

3.2.d.3. the address of the applicant's main office;

3.2.d.4. the names and respective addresses of the applicant's partners, members, owners, shareholders or for a corporation, its officers and directors;

3.2.d.5. the date the applicant qualified to transact business in this state and a copy from the West Virginia Secretary of State authorizing the applicant to transact business in the state; and,

3.2.d.6. any other information required by the Commissioner.

3.2.e. Bonds:

3.2.e.1. A brewer shall provide the commissioner with a surety bond in an amount not less than \$5,000.00 nor more than \$25,000.00 payable to the state of West Virginia and conditioned upon the payment of any and all taxes accruing during the license period and faithfully observing the provisions of W. Va. Code §11-16-1 et seq., this rule, regulations and orders of the commissioner and of any other laws of the State of West Virginia relating to the sale, transportation, storage and distribution of nonintoxicating beer and nonintoxicating craft beer, in a form provided by the Commissioner.

3.2.e.2. A resident brewer shall provide the commissioner with a surety bond in an amount not less than \$5,000.00 nor more than \$10,000.00 payable to the state of West Virginia and conditioned upon the payment of any and all taxes accruing during the license period and faithfully observing the provisions of W. Va. Code §11-16-1 et seq., this rule, regulations and orders of the commissioner and of any other laws of the State of West Virginia relating to the sale, transportation, storage and distribution of nonintoxicating beer and nonintoxicating craft beer, in a form provided by the Commissioner.

3.2.f. A resident brewer and brewer shall meet the requirements in subsection 3.6 of this rule where applicable.

3.3. 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 shall state:

- 3.3.a. the name of the corporation and the state where incorporated;
- 3.3.b. the date incorporated;
- 3.3.c. the address of the corporation's main office;
- 3.3.d. the names and respective addresses of the corporation's officers and directors;
- 3.3.e. the date the corporation qualified to transact business in this state; and,
- 3.3.f. any other information required by the Commissioner.

3.4. A foreign corporation seeking a West Virginia brewer's license shall meet the requirements in subsection 3.6 of this rule and also provide the following to the Commissioner:

3.4.a. A surety bond in an amount not less than \$5,000.00 nor more than \$25,000.00 payable to the state of West Virginia and conditioned upon the payment of any and all taxes accruing during the license period and faithfully observing the provisions of W. Va. Code §11-16-1 et seq., this rule, regulations and orders of the commissioner and of any other laws of the State of West Virginia relating to the sale, transportation, storage and distribution of nonintoxicating beer and nonintoxicating craft beer, in a form provided by the Commissioner;

3.4.b. A certified copy of the certificate of authority issued by the Secretary of State authorizing the corporation to transact business in this state; and,

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

3.5. The annual license fee for a brewer's license for a foreign corporation selling nonintoxicating beer in this state, regardless of where its principle place of business is located, is \$1,500.00.

3.5.a. If the period of the original license commences on or after January 1 or any year, the license fee is \$750.00.

3.6. Distributor, Class A and Class B Licenses: The following information must be provided on the application form provided by the Commissioner for a distributor, Class A or Class B license:

3.6.a. The name, residence and certification of the applicant;

3.6.a.1. If the applicant is 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 immediately preceding the date of application;

3.6.a.2. If the applicant is a firm, association, partnership, limited partnership, limited liability company or corporation, the application shall include the residence of the members or officers for the two (2) year period immediately 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: Provided further, that if a limited liability company applies for a Class A or Class B license, the 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;

3.6.a.3. If the application is for a distributor license, the application shall state that the person, or for a firm, partnership, limited partnership, limited liability company, association, corporation or trust or has a trust as an owner, the members, officers, trustees or other persons in active control of the activities of the limited liability company, association, corporation or trust relating to the license have each been a bona fide resident of West Virginia for the four (4) years immediately preceding the date of application;

3.6.a.4. If the applicant for a distributor's license is a trust or has a trust as an owner, the trustees or other persons in active control of the activities of the trust relating to the license shall provide a certification of trust as described W. Va. Code §44D-10-1013. This certification of trust shall include the excerpts described in W. Va. Code §44D -10-1013(e) and shall further state, under oath, the names, addresses, Social Security numbers and birth dates of the beneficiaries of the trust and certify that the trustee and beneficiaries are 21 years of age or older. If a beneficiary is not 21 years of age, the certification of trust must state that such beneficiary's interest in the trust is represented by a trustee, parent or legal guardian who is 21 years of age and who will direct all actions on behalf of such beneficiary related to the trust with respect to the distributor license until the beneficiary is at least 21 years of age. Any beneficiary who is not 21 years of age or older shall have his or her trustee, parent or legal guardian include in the certification of trust and state under oath his or her name, address, Social Security number and birth date.

3.6.b. The 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;

3.6.b.1. If the applicant is a corporation, the application must state when and where incorporated, the name and address of each officer, and that each officer is a United States citizen and a person of good moral character;

3.6.b.2. If the applicant is a firm, association, limited liability company, partnership, limited partnership, trust or has a trust as an owner, the application shall provide the place of birth of each member of the firm, association, limited liability company, partnership, or limited partnership and the trustees, beneficiaries or other persons in active control of the activities of the trust relating to the license and that each member or trustee, beneficiary or other persons in active control of the activities of the trust is a United States citizen and if naturalized, when and where, and each member must qualify and sign the application;

3.6.c. The particular place for which the license is desired and a detailed description of the place, the description shall include the size and nature of the facilities operated by the applicant and the specific proportions of any structure used in conjunction with other purposes that will constitute the licensed premises;

3.6.d. The name of the owner of the building and if the owner is not the applicant, that a statement that the applicant is the actual and bona fide lessee of the premises;

3.6.e. Verification that the place or building in which the proposed business will be located:

3.6.e.1. conforms to all applicable health, fire, safety, and zoning regulations;

3.6.e.2. is a safe and proper place or building; and,

3.6.e.3. is not within three hundred (300) feet of a church or school, measured from front door to front door, along the street or streets; Provided:

3.6.e.3.A. that this requirement does not apply to Class B license, or any place occupied by a licensed retailer so long as that place is continuously so occupied; and,

3.6.e.3.B. that this requirement does 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;

3.6.f. That the applicant is not incarcerated and has not been convicted of a felony or other crime involving moral turpitude. An applicant who has been convicted of a felony or other crime involving moral turpitude shall not be eligible for licensure until five (5) years after successfully completing all conditions of probation, discharge from parole supervision, or expiration of sentence;

3.6.g. That the applicant is and shall remain for the license period the only person with a pecuniary interest in the business to be licensed, and no other person is pecuniarily interested during the license period;

3.6.h. That the applicant has not during the five (5) years preceding the application date had a nonintoxicating beer license revoked.

3.6.i. In the case of an applicant for a distributor license that is a trust or has a trust as an owner, a distributor license may be issued only upon submission by the trustees or other persons in active control of the activities of the trust relating to the distributor license of a true and correct copy of the written trust instrument to the commissioner for his or her review. Notwithstanding any provision of law to the contrary, the copy of the written trust instrument submitted to the commissioner pursuant to this rule is confidential and is not a public record and is not available for release pursuant to the West Virginia Freedom of Information Act, W. Va. Code §29B-1-1 et seq.

3.7. Brewpub is a Class A license available to only resident brewers for on-premises sales. All applicants must meet the requirements of a Class A license applicant under section 3 of this rule. Further, a resident brewer who is also licensed as a brewpub may apply separately and, if qualified under the Code and rules, be licensed as a private club per the requirements of W. Va. Code §60-7-1 et seq.

3.8. Refusal of License: The Commissioner shall refuse to issue a brewer, resident brewer, brewpub, foreign corporation brewer, distributor, Class A or Class B license if the applicant fails to satisfy any of the requirements of section 3 or if in the Commissioner's opinion the applicant has engaged in conduct declared to be unlawful by W. Va. Code §11-16-1 et seq. or is an unsuitable person to be licensed.

3.9. Additional Requirements and Investigation: The Commissioner may require any additional information from an applicant for a brewer, resident brewer, brewpub, foreign corporation brewer, distributor, Class A or Class B license and may conduct any investigation of the applicant or the proposed place of business as is determined necessary.

3.10. Annual License Fees: Annual license fees are as follows:

3.10.a. Class A licensee: \$150.00 for each place of business;

3.10.b. Class A licensee: for each social, fraternal or nonprofit club in continuous operation for two (2) or more years immediately preceding the application date -- \$150.00;

3.10.c. Class A licensee: for each railroad dining, club or buffet car in which nonintoxicating beer will be dispensed -- \$10.00 for each car;

3.10.d. Class B licensee: \$150.00 for each place of business;

- 3.10.e. Distributor: \$1,000.00 for each place of business;
- 3.10.f. Brewer: \$1,500.00 for each location;
- 3.10.g. Foreign Corporation Brewer: \$1,500.00 for each location;
- 3.10.h. Resident Brewer: \$1,500.00 for each location; and
- 3.10.i. Brewpub: \$1,000.00 for each location.

3.11. Class S License.

3.11.a. An applicant shall submit the application, as provided by the Commissioner, for a Class S license 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 notify in writing all distributors in the area where the fair, festival or special event will occur in order that all distributors are provided the opportunity to participate.

3.11.b. The Commissioner may issue a Class S license for a term of no longer than 10 consecutive days.

3.11.c. The license fee for a Class S license is \$250.00.

3.12. Brewery Representatives, Permits, Fee, Term, Suitability: No person shall act as agent, representative, solicitor or salesman in the state of West Virginia for any brewer or manufacturer of nonintoxicating beer until that person has obtained a permit to act as an agent, representative, solicitor or salesman, from the Commissioner.

3.12.a. Application: An application for a permit, shall be accompanied by a photograph (2 inches by 3 inches) of the applicant, and shall be made on a form prescribed and furnished by the Commissioner.

3.12.b. Fee: The fee for a permit to act as an agent, representative, solicitor or salesman is \$50.00.

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

3.12.d. Suitability: The Commissioner shall issue a permit to any suitable person upon showing that he or she:

3.12.d.1. Is a citizen of the United States of America;

3.12.d.2. Is at least eighteen (18) years of age;

3.12.d.3. Has not been convicted of a felony within the five (5) years immediately preceding the application for a permit and has completed all conditions of probation, been discharged from parole supervision or the sentence has expired;

3.12.d.4. Has not been convicted of a violation of federal or state liquor or beer law within the five (5) years immediately preceding the application for a permit;

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

3.12.d.6. Is a person of good morals and reputation; and,

3.12.d.7. Is employed by a nonintoxicating beer manufacturer or brewer qualified to sell or ship nonintoxicating beer into the state of West Virginia.

3.12.e. Bond: In order to receive a permit the applicant shall file with the Commissioner a bond, with a solvent surety company approved by the Commissioner and registered to do business in this state, in the penalty of \$500.00, conditioned upon the observance of the West Virginia Nonintoxicating Beer Act and Rules promulgated under the Act.

3.12.f. Suspension or Revocation: Permits may be suspended or revoked by the Commissioner for noncompliance with the West Virginia Nonintoxicating Beer Act and rules promulgated under the Act, or for false or fraudulent representations made in securing the permits. However, the Commissioner shall not revoke or suspend any permit unless and until a hearing shall be held after ten (10) days' notice, in writing, to the licensee. Such notice shall contain a statement of the charge or charges against the permittee and the time and place of hearing. Furthermore, such notice shall be served upon the permittee by registered mail, addressed to the office of the permittee's principal, as set out in the application.

3.13. Transfer: Nonintoxicating beer licenses are not transferable from one person to another; however, with the consent of the Commissioner, endorsed on the face of the license, a license may be transferred from one location to another.

3.13.a. A licensee shall not transfer a license from one (1) location to another before the transfer is approved by the Commissioner.

3.13.b. A licensee shall apply for a transfer of a license on the regular license application form.

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

3.13.d. The Commissioner will not approve the transfer of a license before the letter from the surety company accepting liability on the new location is received.

3.14. Abandonment, Leasing or Loaning: No licensee shall abandon, loan, rent or lease his or her license.

3.14.a. Upon the sale of an outlet, the licensee shall remove his or her license from the premises and file it with the Commissioner.

3.14.b. 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 them for violations of the W. Va. Code §11-16-1 et seq.

3.15. Establishment: The following businesses and locations are generally not suitable for the retail sale of beer and, depending upon the circumstances, the Commissioner may refuse to issue a license to an applicant who intends to operate in:

3.15.a. 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;

3.15.b. Establishments in predominantly residential districts of any city, town, or village;

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

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

3.15.e. Premises on which there is an existing nonintoxicating beer license unless the applicant for a new license for the premises and the owner of the building submit notarized statements to the Commissioner to verify that substantial efforts were made to recover and surrender the existing license.

3.16. Any person whose nonintoxicating beer license has been revoked shall not be eligible for a nonintoxicating beer license until after the revocation has been in effect for a period of five (5) years.

3.17. Posting License: The license granted in accordance with these Rules must be kept posted in a conspicuous place on the licensed premises.

3.18. Posting of Blood-Alcohol Chart: A blood alcohol chart, as prescribed by W. Va. Code §60-6-24, shall be posted in every establishment in West Virginia which sells or offers for sale nonintoxicating beer.

3.18.a. Every private club licensed in accordance with W. Va. Code §60-7-1 et seq. with a nonintoxicating beer license shall prominently post the blood-alcohol chart. The chart shall be posted so as to be readily accessible and easily readable by the members and guest of the licensed private club.

3.18.b. Every licensed retailer licensed to sell nonintoxicating beer pursuant to the provisions of W. Va. Code §11-16-1 et seq. 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 the licensed retailer. In the event the licensed retailer has nonintoxicating beer displayed for sale at more than one location within the licensed premises, or has multiple points of sale, or multiple points of ingress and egress from the licensed premises, then the licensed retailer may be required to display additional blood-alcohol charts at or near the displays, points of sale or store exits.

3.18.c. The licensed retailer is responsible for the prudent care of the blood-alcohol chart and for assuring that the chart is displayed in accordance with the provisions of this rule.

3.19. All persons licensed to sell nonintoxicating beer at retail either for consumption off-premises or on-premises, or both, shall display signs provided by the Commissioner warning of the possible danger of birth defects which may result from the consumption of alcohol during pregnancy as prescribed by W. Va. Code §60-6-25.

§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 container manufactured, imported, sold or to be sold in this state. Labels must be submitted by all breweries or importers in duplicate to the Commissioner who must approve the labels before they can be used on any container sold or to be sold in this state.

4.1.a. No label may be affixed to any nonintoxicating beer container, manufactured, imported, sold or for sale in this state, which bears any design, picture or wording indicating that the contents of the 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.

4.1.b. No nonintoxicating beer product or brand may be sold, offered for sale or transported to West Virginia by any person, brewer, resident brewer, distributor or retailer unless it has first been registered and approved by the Commissioner.

4.2. Serving Bottled Beer From Which Labels Have Been Removed: No licensed retailer of beer shall serve to any customer any bottle of nonintoxicating beer from which the label has been removed unless the retailer exhibits the bottle with crown intact, to the customer prior to opening the bottle.

4.3. Brewer's Reports, Taxation: A tax is imposed and levied by W. Va. Code §11-16-13 in the amount of \$5.50 on each barrel of 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.a. A 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 the estimated sales.

4.3.b. The distributor which is the original consignee of nonintoxicating beer manufactured or produced out of this state, or who brings the 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 the estimated purchases.

4.3.c. 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.d. Brewers and Distributors must file adjusted monthly reports by the twenty-fifth (25th) day of each reporting month.

4.3.e. Any monthly report reflecting an underestimate of the previous month's tax in an amount of twenty-five percent (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 the 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 the state of West Virginia, on file in their respective licensed places of business for a period for three (3) years unless approval for earlier disposal is granted in writing by the Commissioner. The 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 the 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. It shall be unlawful:

6.1.a. for any licensee, his, her, its or their servants, agents or employees to sell, give or dispense, or to allow any individual to drink or consume, in or on any licensed premises or in any rooms directly connected with the licensed premises, 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 W. Va. Code §60-7-1 et seq., where the hours shall conform with the hours of sale of alcoholic liquors;

6.1.b. for any licensee, his, her, its or their servants, agents or employees, 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.c. for any licensee, his, her, its or their servants, agents or employees, to sell, furnish, permit the consumption of, or give any nonintoxicating beer to any person who is less than twenty-one (21) years of age;

6.1.d. for any licensee to permit in his or her premises any lewd, immoral or improper entertainment, conduct or practice;

6.1.e. for any licensee except the holder of a license to operate a private club issued under the provisions of W. Va. Code §60-7-1 et seq., or a holder of a license for a private wine restaurant issued under the provisions of W. Va. Code §60-8-1 et seq., to possess a federal license, tax receipt or other permit entitling, authorizing or allowing the licensee to sell liquor or alcoholic drinks other than nonintoxicating beer;

6.1.f. for any licensee to obstruct the view of the interior of his or her premises by enclosure, lattice, drapes or any means which would prevent plain view of the patrons occupying the premises. The interior of all licensed premises shall be adequately lighted at all times: Provided, that provisions of this section shall not apply to the premises of a Class B licensee, and the premises of a private club or the premises of a private wine restaurant;

6.1.g. for any 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 the license or on premises directly or indirectly used in connection therewith: Provided, that the prohibition contained in this section with respect to the selling or possessing, or to the acquiescence in the sale, possession or consumption, of alcoholic liquors is not applicable with respect to the holder of a license to operate a private club nor is the prohibition applicable to a private wine restaurant insofar as the private wine restaurant is authorized to serve wine;

6.1.h. for any retail licensee to sell or dispense nonintoxicating beer purchased or acquired from any source other than a distributor, brewer, resident brewer acting in a limited capacity as a distributor of his or her own product as specified in the code, or manufacturer licensed under the laws of this state;

6.1.h.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 the known retail dealers.

6.1.i. for any 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 they may disturb the peace and quietude of the community where the business is located: Provided, that no 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.j. for any person whose license has been revoked, to obtain employment with any licensed retailer within the period of one (1) year from the date of the revocation, or for any licensed retailer to knowingly employ that person within that time;

6.1.k. for any licensee or any agent, servant or employee of any such licensee to knowingly violate any rule lawfully promulgated by the Commissioner;

6.1.l. for any 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.m. for any Class B licensee to permit the consumption of nonintoxicating beer upon his or her licensed premises;

6.1.n. for any Class A licensee to 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 shall not apply where the person under the age of eighteen (18) years is in or upon the premises in the immediate company of his or her parent or parents, or is in or upon the premises for the purpose of 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.o. for any Class A licensee to allow faucets or taps from which beer is drawn from kegs to be identified with a knob showing the brand or name of the brewer of the nonintoxicating beer dispensed to be other than the brand or name of the nonintoxicating beer actually dispensed; and,

6.1.p. for any person to manufacture, sell, transport, deliver, furnish, purchase, consume or possess any nonintoxicating beer except as provided by the laws of this state or rules lawfully promulgated by the Commissioner.

6.1.q. for any retail license to permit nonintoxicating beer in an open container to be carried into or out of any licensed premises; provided that a brewpub may lawfully sell up to 2 sealed growlers per customer for personal consumption off of the licensed premises and not for resale.

6.2. Nothing in this rule shall prevent or be considered to prohibit any licensee from employing any person who is at least eighteen (18) years of age to serve in the 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 the person's duties shall not include the sale or delivery on nonintoxicating beer or alcoholic liquors: Provided, however, that the authorization to employ persons under the age of eighteen (18) years shall be clearly indicated on the licensee's license.

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

6.3.a. A distributor may not sell or offer to sell, or a licensed retailer may not purchase or receive, any nonintoxicating beer, except for electronic transfer of funds, cash or a check drawn against the bank account of the licensed retailer who is making the purchase. The distributor may accept electronic transfer of funds if it is initiated by an irrevocable payment order on the invoiced amount for the nonintoxicating beer. The retailer will pay the cost of the EFT and the distributor must initiate the transfer by noon within one day of delivery as prescribed by W. Va. Code §11-16-18(a)(4). No right of action shall exist to collect any claims for credit extended contrary to the provisions of this section.

Nothing in this section prohibits 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 the containers when title is retained by the licensee.

6.3.a.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, or his agents or employees, enter into any agreement or understanding with any licensed retailer to hold any checks given in payment for nonintoxicating beer.

6.3.a.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, is prima facie evidence of obtaining an extension of credit and shall, in the discretion of the Commissioner, be grounds for revocation or suspension of the retailer's or distributor's license.

6.3.a.3. Payment for a retail nonintoxicating beer license, or renewal of a license, shall be submitted only in the form of a certified check, cashier's check or money order made payable to the West Virginia Alcohol Beverage Control Commissioner in the exact amount as required by W. Va. Code §11-16-9.

6.3.b. A brewer or distributor or his or her agents, may not transport or deliver nonintoxicating beer to any licensed retailer on Sunday.

6.3.c. A brewer or distributor may not 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 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 in this section prohibits a brewer from sponsoring any professional or amateur athletic event or from providing prizes or awards for participants and winners in 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.

6.3.c.1. No brewer or distributor 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 the brewer or distributor has first obtained written permission from the Commissioner to do so.

6.3.d. 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 is subject to immediate license revocation, as provided in W. Va. Code §11-16-18.

6.3.d.1. Free goods, or the giving of a certain number of free cases of nonintoxicating beer, for each number or amount of cases of nonintoxicating beer purchased is prohibited.

6.3.d.2. No brewer, distributor, salesman or representative shall give to any retailer or any person working for or connected with the 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.

6.3.d.3. A distributor may rotate, stock and price nonintoxicating beer in a licensed nonintoxicating beer retail establishment, except on Sundays; Provided, that products purchased from other distributors are not altered or disturbed.

6.3.e. A distributor may not sell, possess for sale, transport or distribute nonintoxicating beer except in the original container.

6.3.f. A distributor may not sell, offer for sale, distribute or deliver any nonintoxicating beer outside the territory assigned to the distributor by the brewer or manufacturer of such nonintoxicating beer or sell, offer for sale, distribute or deliver any 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 in this section prohibits sales of convenience between distributors licensed in this state where one distributor sells, transfers or delivers to another distributor a particular brand or brands for sale at wholesale.

6.3.g. A brewer or manufacturer, or any other person, firm or corporation engaging in the business of selling nonintoxicating beer to a distributor or wholesaler, may not discriminate in price, allowance, rebate, refund, commission, discount or service between distributors or wholesalers licensed in the state of West Virginia. "Discriminate", as used in this section, means the granting of more favorable prices, allowances, rebates, refunds, commissions, discounts or services to one West Virginia distributor or wholesaler when compared to another.

6.3.g.1. Breweries licensed to do business in the state of West Virginia may not engage in price discrimination or make any secret deals with distributors in the state of West Virginia.

6.3.g.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.

6.3.g.3. A brewer shall file with the Commissioner during the month of December a complete price listing along with UPC Codes of each nonintoxicating beer product by package size and brand sold to licensed distributors. This filing is in addition to any other filing required pursuant to these rules.

6.3.h. A brewer or manufacturer, or any other person, firm or corporation engaged in the business of selling nonintoxicating beer to a distributor or wholesaler, may not sell or deliver nonintoxicating beer to any licensed distributor or wholesaler unless and until the brewer, manufacturer, person, firm or corporation, as the case may be, has filed the brewery or dock price of the beer, by brands and container sizes, with the Commissioner. No price schedule shall be put into effect until fourteen (14) 90 days after receipt of the same by the Commissioner and shall be submitted on or before the following quarterly dates of January 1, April 1, July 1 and October 1 of the calendar year to be effective for the next successive quarterly period on a form provided by the Commissioner. Prices will be in effect for 90 days and are effective on the 1st day of the applicable quarterly period. If there is no change in pricing for a nonintoxicating beer product, by brand or container size, filing a quarterly price is not required. Prices will revert back to the base price filed per subsection 6.3.g.3., as noted on the form provided by the Commissioner. For example, a brewer or manufacturer would submit prices, by brands and container sizes, on or before January 1, for the prices to be effective for the quarterly period from April 1 through June 30 (90 day pricing period) and so forth: Provided, that any price reductions shall remain in effect not less than thirty (30) days. Upon submission and approval of a new nonintoxicating beer product or new packaging or container sizes for existing nonintoxicating beer product which does not coincide with a quarterly pricing filing date or which occurs during a quarterly price period, the new pricing will be valid until the next quarterly price filing date for which the new price must thereafter be filed as noted this subsection.

6.3.h.1. West Virginia licensed beer distributors shall not sell or deliver nonintoxicating beer to any licensed retailer unless the distributor:

6.3.h.1.A. Shall have filed with the Commissioner ~~fourteen (14) days prior to the~~

effective date the wholesale price of the nonintoxicating beer, by brands and container sizes, 60 days on or before the following quarterly dates of January 1, April 1, July 1 and October 1 of the calendar year to be effective for the next successive quarterly period on a form provided by the Commissioner. Wholesale prices will be in effect for 90 days and are effective on the 10th day of the applicable quarterly period through the 9th day of the next quarterly period. If there is no change in pricing for a nonintoxicating beer product, by brand or container size, filing a quarterly price is not required. Wholesale prices will revert back to the base price filed per subsection 6.3.h.1.C., as noted on the form provided by the Commissioner. For example, a licensed beer distributor would submit wholesale prices, by brands and container sizes, on the form provided by the Commissioner on or before February 1, for the wholesale prices to be effective for the quarterly period from April 10 through July 9 (90 day pricing period) and so forth. The prices shall be the same for all retail licensees in a geographical area, the geographical area to be no smaller than a county. Upon submission and approval of a new nonintoxicating beer product or new packaging or container sizes for existing nonintoxicating beer product which does not coincide with a distributor's quarterly pricing filing date or which occurs during a distributor's quarterly price period, the new pricing will be valid until the distributor's next quarterly price filing date for which the new price must thereafter be filed as in this subsection. Furthermore, distributor's are permitted to make price adjustments during a distributor's quarterly pricing period in accordance with W. Va. Code §47-11A-1 et seq., and specifically W. Va. Code §47-11A-8, but must provide the Commissioner with 30 days' notice of the price adjustment, all on a form provided by the Commissioner. Any distributor price adjustment per W. Va. Code §47-11A-8 will be reviewed, and if approved shall expire in 30 days or the end of the distributor's quarterly pricing period, whichever is sooner, and revert back to the distributor's quarterly price for its 90 day period or expire.

6.3.h.1.B. Shall have furnished licensed retailers with a price list delivered to the licensed retailers via mail, fax, scan or e-mail, on or before the effective date, showing the wholesale price of the nonintoxicating beer by brands and container sizes; and,

6.3.h.1.C. Shall file with the Commissioner during the month of December a complete price listing along with UPC Codes of each nonintoxicating beer product by package size and brand carried by the distributor. This filing is in addition to any other filing required pursuant to these rules.

6.3.h.2. In no case shall a distributor file with the Commissioner prices which would reflect quantity discounts.

~~6.3.h.3. To effect any planned change in the price list of nonintoxicating beer, 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 the 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. If a distributor fails to put price changes into effect within three (3) working days of the designated date and after written acknowledgement from the Commissioner the price change is null and void.~~

6.3.i. No brewer, resident brewer or foreign corporation brewer may, in any manner either directly or indirectly, own or operate a licensed distributor, except that a resident brewer may act as a distributor in a limited capacity for his or her own product up to 10,000 barrels from such resident brewery, place of manufacture or bottling.

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

6.4.a. Any person under the age of twenty-one (21) years who, for the purpose of purchasing nonintoxicating beer, misrepresents his or her age, or 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

\$50.00 or shall be imprisoned in the county jail for a period not to exceed seventy-two (72) hours, or both fined and imprisoned, or, in lieu of a fine and imprisonment, may, for the first offense, be placed on probation for a period not exceeding one (1) year.

6.4.b. Any person who knowingly buys for, gives to or furnishes 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 \$100.00 or shall be imprisoned in the county jail for a period not to exceed ten (10) days, or both fined and imprisoned.

6.4.c. 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, is guilty of a misdemeanor and shall, upon conviction thereof, be fined in an amount not to exceed \$100.00, and shall have all the untaxed nonintoxicating beer in his or her 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.a. By a display or displays of such products and their containers within licensed establishments.

7.1.b. Within licensed establishments 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.c. By advertisements in newspapers, advertising circulars and similar publications that nonintoxicating beer is for sale on the licensed premises.

7.2. Advertising matter as in section 7.1.b. of these rules may be furnished to a licensed retailer by a brewer or distributor only if it has no value to the licensed retailer except as advertisement.

7.2.a. No brewer or distributor shall directly or indirectly pay or credit the licensed retailer for displaying any advertisement or for any expense incidental to the advertisement.

7.2.b. These rules 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.

7.2.c. No brewer or distributor shall paint the interior or exterior of a licensed retailer's licensed premises under the guise of advertising.

7.3. Any advertisement of nonintoxicating beer may not contain the following:

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

7.3.b. Any statement, device or representation that is obscene or indecent;

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

7.3.d. Any statement that may intimate or state that drinking of the advertised product produces good health, affects weight or similar statements.

7.4. Advertising gifts not exceeding \$25.00 in value, may be given if prior written approval of the Commissioner has been obtained.

7.5. The brewers and distributors furnishing the advertisements and the retailer in whose establishment or on whose grounds the advertisements are located are equally responsible for the displaying of the advertising prohibited in this rule.

7.6. Posters, placard, mirrors, windows, doors: All signs advertising the brand or the price of nonintoxicating beer on the windows or doors of licensed retailers are prohibited.

7.7. Point of Sale Materials: Materials used for point of sale of an electrical or mechanical construction are prohibited.

§176-1-8. Sanitation.

8.1. Health Permits: The Commissioner shall not issue a Class A license, authorizing the sale of nonintoxicating beer for consumption on the licensed premises, to any person, partnership, firm, association or corporation, unless the applicant has a permit from the Health Department in the county where the establishment is located. Such health permit must authorize the applicant to operate a tavern in the premises set out and described in the applicant's application. The Commissioner will not transfer a license to a new location unless the licensee has a permit from the appropriate Health Department to operate a tavern in the new location, as described in licensee's application for transfer.

8.2. Health, Sanitation, Toilets: Class A licensed establishments must be kept in a sanitary condition, as required by the appropriate Health Department. Class A licensees 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 Class A licensees and their employees in the proper method of cleansing and sterilizing glasses and other equipment used in the serving or dispensing of nonintoxicating beer 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 sterilizing of glasses and equipment.

8.4. Cleansing Beer Bottles, Pipe Lines, Registration:

8.4.a. 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 bottles 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 an equivalent, and at proper temperature, until the bottles reach the fresh water compartment.

8.4.b. 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 a 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 these manners, 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 Health Department in the county where the establishment is located.

8.4.c. 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 prohibited; and the use of rubber hose or tubing or any kindred products in connection with draft nonintoxicating beer is prohibited.

8.4.d. Gassing of nonintoxicating beer: Nonintoxicating beer may be gassed 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 the pumps shall be from the outside of the building where fresh and clean air is available, and the intake must be protected by a suitable filter or filters.

8.4.e. 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.e.1. Cleansing: Glasses and containers shall be washed in hot water containing an effective cleansing agent.

8.4.e.2. Sterilization: Glasses shall be sterilized by either of the following methods:

8.4.e.2.A. Method 1: Each glass or container shall be immersed 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; and,

8.4.e.2.B. Method 2: Each glass or container shall be immersed for not less than two (2) minutes in clean hot water maintained at a temperature of at least one hundred seventy (170) degrees Fahrenheit.

8.4.f. 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 Health Department in the county in which the establishment is located and the Commissioner's office by providing the business's name and address, and the method and chemicals used in the cleansing of the 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.f.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. The record card shall show the date of each cleansing, the method used and be signed by the person who performed the cleansing. The 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 Health Department in the county in which the establishment is located 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 \$.75 per case, regardless of case size.

10.1.a. Each brewer, distributor or retailer authorized by the Commissioner to sell, ship or deliver nonintoxicating beer in the state of West Virginia shall not buy, sell, rent, lend, give or offer to buy, sell, rent, lend or give returnable bottles upon which a deposit charge has been paid. 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.b. Each brewer, distributor or retailer authorized by the Commissioner to sell, ship or deliver nonintoxicating beer in the state of West Virginia, shall accept for rebate all usable, returnable bottles upon which a deposit charge was made when sold or delivered, if the bottles are the same type, color, and size and in the cases in which originally sold or delivered, and shall pay rebates in the 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 for chipped bottles. Replacement may be made by any distributor to any licensed retailer as a result of broken bottles, where the crown and neck are intact. Breweries may share equally with distributors in replacement of broken bottles where the 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 as a result 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.a. Any allowances made in excess of the rate of one (1) bottle to five hundred (500) bottles as a result 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 from any brewer, whether situate in or out of the state of West Virginia, unless the brewer is qualified to manufacture or ship nonintoxicating beer into the state by posting bond with the Commissioner. The bond must be conditioned upon the faithful observance of W. Va. Code §11-16-1 et seq. and the rules promulgated thereunder, and obtaining a license as described in W. Va. Code §11-16-1 et seq. which shall provide:

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

13.1.b. 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 rule or statute;

13.1.c. For the delivery, upon request, to the office of the Commissioner, the 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 inspecting and auditing records in the office of the brewer; and

13.1.d. For the posting of bond, with surety, in the amount of \$25,000.00 conditioned upon the compliance by the brewer with all rules and laws of the state of West Virginia relating to nonintoxicating beer.

13.2. Brewer-Distributor Franchise Agreement, Brand, Line Extensions, Sales, Transfers, Withdrawals and Its Termination.

13.2.a. A brewer may not transfer or deliver to a distributor any nonintoxicating beer without first having entered into an equitable franchise agreement with the distributor: Provided, that the franchise agreement must conform to the laws of this state and be approved in writing by the Commissioner. A franchise agreement as defined in subsection 2.15., is the agreement, that binds a brewer and a distributor so that an appointed distributor may distribute all of the brewer's nonintoxicating beer products, brands or family of brands, including line extensions, imported and offered for sale in West Virginia, including, but not limited to: existing brands, new brands and line extensions in the brewer's approved franchise distributor network and to a distributor's assigned territory. However, any brands sold or transferred pursuant to subsection 13.2.a.2., shall remain in the selling brewer's franchise distributor network. All of a brewer's nonintoxicating beer products, brands or family of brands, including line extensions that are imported or offered for sale in West Virginia must be listed in the franchise agreement or an amendment to the franchise agreement subject to the Commissioner's approval. A franchise agreement may be amended by mutual written agreement of the parties, as approved by the Commissioner with identical terms and conditions for a brewer and all of its distributors. The Commissioner shall approve: all brewers' franchise agreements, any amendments to franchise agreements and all brewers' franchise distributor networks, which shall be in writing, shall be and identical as to terms and conditions with all other franchise agreements between the brewer and its other distributors in this state, a brewer's existing brands, line extensions and new brands are assigned by the brewer to the correct approved distributors in established and approved territories for the brewer's brands or line extensions; and the registration of the brewer's labels per section 4, and it shall contain a provision in substance or effect as follows:

13.2.a.1. The brewer recognizes that the distributor is free to manage his or her business in the manner the distributor considers best, and that this prerogative vests in the distributor, subject to the provisions of W. Va. Code §11-16-1 et seq., the exclusive right; (i) to establish the distributor's selling prices; (ii) to have the distribution rights to the brands and line extensions of nonintoxicating beer products that are bound by franchise agreements specifying a distributor's assigned territory and that are assigned to a franchise distributor network, and, further, that the distributor may determine which brands and line extensions of nonintoxicating beer products he or she 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 nonintoxicating beer products handled by the distributor;

13.2.a.1.A. As a brewer's nonintoxicating beer products, brands and line extensions shall only be handled by the distributor with a franchise agreement for a certain territory in West Virginia as a part of the brewer's overall franchise distributor network in West Virginia and will not be sold by others in the territory assigned to the distributor, the brewer is dependent upon the distributor alone for the sale of such products in the distributor's assigned territory; and,

13.2.a.1.B. The distributor must therefore competitively price the brewer's nonintoxicating beer products handled by the distributor, devote reasonable effort and resources to the sale of such products and maintain a satisfactory sales level.

13.2.a.1.C. Upon licensure, brewers must select distributors to be included in brewers' franchise distributor network via an approved franchise agreement. A brewer shall only have one

franchise distributor network and only one brewer's license. However, a brewer may have nonintoxicating beer products, brands or family of brands, including line extensions, which were acquired from another brewer and continue to utilize the selling brewer's franchise distributor network for those acquired nonintoxicating beer products, brands or family of brands, including line extensions, as specified in sub-section 13.2.a.2. Any changes to the brewer's entity shall bind all the successor entities to the brewer's approved franchise distributor network. The brewer's franchise agreement with a distributor binds the parties and all successor brewers, unless the parties mutually agree in writing to any change resulting from a sale or transfer of the distributor's business, or unless the brewer terminates the distributor as provided in the West Virginia Code and this rule.

13.2.a.1.D. Resident brewers may select distributors to be included in its franchise distributor network via an approved franchise agreement. A resident brewer shall only have one franchise distributor network and only one resident brewer's license. However a resident brewer may have nonintoxicating beer products, brands or family of brands, including line extensions, which were acquired from another resident brewer and continue to utilize the selling resident brewer's franchise distributor network for those acquired nonintoxicating beer products, brands or family of brands including line extensions, as specified in sub-section 13.2.a.2. Any changes to the resident brewer's entity shall bind all the successor entities to the resident brewer's approved franchise distributor network. The resident brewer's franchise agreement with a distributor shall bind the parties and all successor resident brewers or brewers, unless the parties mutually agree in writing to any change resulting from a sale or transfer of the distributor's business, or unless the resident brewer terminates the distributor, all as further provided in subsection 13.5, the West Virginia Code and this rule.

13.2.a.2. A brewer may sell or transfer to another brewer or a resident brewer may sell or transfer to another resident brewer the manufacturing, bottling or other production rights for the sale of nonintoxicating beer at wholesale. In sub-section 13.2.a., where the term brewer is used the same requirements or authority apply to resident brewer when reading section 13 as a whole, where applicable and where not contradicted by specific statements in this rule. When a sale occurs, the franchised distributor of the selling brewer is entitled to continue distributing the selling brewer's nonintoxicating beer products, brands or family of brands, including line extensions, as authorized in the distributor's existing franchise agreement. The acquiring brewer, any successor brewers or successor entities are all bound by the selling brewer's existing franchise agreement and franchise distributor network and shall continue to market all the selling brewer's nonintoxicating beer products, brands or family of brands, including line extensions, through the franchised distributor as though the acquiring brewer had made the franchise agreement, unless all the parties mutually agree, in writing, to change or cancel the existing franchise agreement and franchise distributor network and or the acquiring brewer may terminate the franchise agreement only in accordance with W. Va. Code §11-16-21(b)(2) and section 13.2.b.2 of this rule. The acquiring brewer may continue to distribute any of its other nonintoxicating beer products, brands or family of brands, including line extensions, through its duly authorized franchises in accordance with all other provisions of this section.

13.2.a.3. In the event a brewer ~~withdraws~~ withdraws his products from the state and subsequently reintroduces his the products to the state at a later date, that brewer or his any successor brewer shall offer the territorial franchise distribution rights for those withdrawn products to such the distributors who had a franchise agreement with the brewer in effect at the time of the original withdrawal of the brewer's nonintoxicating beer products.

13.2.a.4. A brewer must list every nonintoxicating beer brand and line extension it has registered, imports and offers for sale in West Virginia in its approved franchise agreements or in an approved amendment to the franchise agreement.

13.2.a.5. At the time of licensure, a brewer must list all its registered brands to be distributed in West Virginia that it imports and will offer for sale in its franchise agreements and such brands must be

appointed to its approved franchise distributor network. A brewer shall file amendments, subject to the Commissioner's approval, to its approved franchise agreements in its approved franchise distributor network for any new brands or line extensions to be imported, distributed and offered for sale in West Virginia.

13.2.a.6. In the process of investigating and reviewing: (i) any franchise agreement; (ii) any amendments to a franchise agreement; (iii) registration of container labels; (iv) registration of all brands and line extensions; (v) appointment of all brands or line extensions to a brewer's established franchise distributor network and to a distributor's assigned territory; and (vi) appointment of all brands or line extensions as an acquiring brewer, successor brewer and also any successor entities to the selling brewer's established franchise distributor network and to a distributor's assigned territory, the Commissioner may include in his investigation and review, but is not limited to: the brewer, its subsidiaries, parent entities, contracted entities, affiliated entities, associated entities or other related entities, the brewer's corporate structure, the nature of the relatedness of various entities, ownership, trade names or partial trade names, logos, copyrights, trademarks or trade design; product codes, marketing and advertising, promotion or pricing.

13.2.a.7. The Commissioner shall review franchise agreements and any amendments to verify that brands and line extensions are offered to the correct distributors in a brewer's established franchise distributor network and territories. The Commissioner may approve franchise agreements or amendments to franchise agreements for any brands or line extensions a brewer offers to the correct distributors as determined by the Commissioner, as the facts and circumstances dictate. The Commissioner may deny franchise agreements or amendments to franchise agreements for any brands or line extensions a brewer offers to the incorrect distributors as determined by the Commissioner, as the facts and circumstances dictate.

13.2.a.8. Any nonintoxicating beer product denied as a brand or as a line extension may not be sold in the West Virginia, and further any illegal sale, distribution or transportation of such a product would subject the brewer, distributor or retailer to the penalties in Section 14 of this rule.

13.2.a.9. Any brewer adversely affected by a denial per subsection 13.2.a.6., subdivision (iii) or (iv) only, may request, in writing a final written determination from the commissioner.

13.2.a.10. Per subsection 13.2.a.9., the brewer, upon receipt of a final determination from the Commissioner, may request a hearing per W.Va. Code §11-16-24 and Section 15 of this rule by filing a written petition and a \$1,000 deposit via certified check or money order to cover the costs of the hearing. Such certified check or money order shall be made payable to the Commissioner. Further, in any brewer requested hearing, the brewer has the burden of proof and the standard of review in the administrative hearing is by a preponderance of the evidence.

13.2.a.11. The provisions of this rule and W. Va. Code §11-16-1 et. seq. shall be part of all franchise agreements subject to the provisions of W. Va. Code §11-16-21 and may not be altered by the parties.

13.2.b. A Brewer, Resident Brewer or Distributor Shall Not:

13.2.b.1. Coerce or persuade, or attempt 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 W. Va. Code §11-6-1 et seq. or any of the rules, standards, requirements or orders of the Commissioner; or

13.2.b.2. Cancel, terminate or rescind without due regard for the equities of the 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.b.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 the action has been served on the affected party and the Commissioner by certified mail, return receipt requested.

13.2.b.2.B. The ninety (90) day period and the 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.b.2.C. If a brewer seeks to terminate dealings with a distributor and the distributor does not agree in writing to the termination the brewer must:

13.2.b.2.C.1. Notify the Commissioner and the distributor in writing of the brewer's intent to terminate dealings with the distributor;

13.2.b.2.C.2. After receipt of approval of the termination from the Commissioner, offer to purchase all marketable nonintoxicating beer manufactured by the brewer in the possession of the distributor as of the date of termination at the then existing brewery platform price, plus transportation costs; and

13.2.b.2.C.3. Refrain from making any statement, or performing or causing to be performed, any act (other than the termination) detrimental to the distributor or to the distributor's business.

13.2.b.2.D. After receipt from a brewer of a written notice of termination and receipt from the Commissioner of approval of the termination, the distributor must:

13.2.b.2.D.1. 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 the termination at the then existing brewery platform price, plus transportation; and

13.2.b.2.D.2. Refrain from making any statement, or performing or causing to be performed, any act detrimental to the brewer or to the brewer's product or business.

13.2.b.2.E. If a distributor seeks to terminate dealings with a brewer, the distributor must:

13.2.b.2.E.1. Notify the Commissioner and the brewer, in writing, of the distributor's termination of dealings with the brewer;

13.2.b.2.E.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.b.2.E.3. Refrain from making any statement, or performing or causing to be performed, any act (other than the termination) detrimental to the brewer or to the brewer's product or business.

13.2.b.2.F. After receipt from a distributor of a written notice of termination, the brewer must:

13.2.b.2.F.1. Purchase from the distributor all marketable nonintoxicating beer

manufactured by the brewer and in the possession of the distributor as of the date of the termination at the then existing brewery platform price, not including transportation; and

13.2.b.2.F.2. Refrain from making any statement, or performing or causing to be performed, any act detrimental to the distributor or to the distributor's business.

13.2.b.2.G. Hearing: If the Commissioner has grounds to believe that there has occurred a violation of section 13.2 of this rule by either a brewer or a distributor, the Commissioner may in his or her discretion order a hearing to determine whether or not a violation has occurred. If a hearing is ordered by the Commissioner, the hearing shall be held in the office of the Commissioner within thirty (30) days after the termination in question. Any hearing shall be conducted in the manner described in the W. Va. Code §11-16-1 et seq., and the burden of proving that a violation has been committed rests 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 hearing, make his or her determination and issue an appropriate order of findings as to whether or not a violation of this rule has occurred.

13.2.c. 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 the 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. The notice shall be made upon forms and contain such additional information as the Commissioner prescribes by rule. A copy of the notice shall be forwarded to the Commissioner.

13.2.c.1. The brewer must be given sixty (60) days to approve or disapprove the 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 the notice, the sale or transfer shall be considered approved.

13.2.c.2. In the event the brewer disapproves of the sale or transfer, the brewer must give written notice to the distributor, setting forth the reasons for the disapproval.

13.2.c.2.A. The brewer may not unreasonably withhold approval of the sale or transfer. The fact that the prospective franchisee, transferee or purchaser has not had prior experience in the nonintoxicating beer business or beer business is not considered sufficient reason for a valid disapproval; however, lack of experience may be considered in conjunction with other adverse factors in supporting the position of the brewer.

13.2.c.2.B. The brewer may not impose requirements which are more stringent or restrictive than those currently demanded or imposed upon the brewer's other distributors in the state of West Virginia.

13.2.c.3. A copy of the 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 the disapproval, any of the parties may demand arbitration and shall notify the other parties and the Commissioner of the demand for arbitration.

13.2.c.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 party requesting arbitration shall name one arbitrator. The party receiving the notice for arbitration shall, within ten (10) days after receipt, by notice name the second arbitrator.

13.2.c.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.c.3.C. The two (2) appointed arbitrators must name the third, or if they fail to do so within ten (10) days after appointment of the second arbitrator, the third arbitrator may be appointed by the chief judge upon request of either party.

13.2.c.4. The arbitrators shall promptly hear and determine the questions submitted pursuant to the procedures established by the American Arbitration Association. The arbitrators shall render the decision 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 conclusion of law and it must be based upon the justice and equity of the matter. The arbitrators shall give each party shall be given notice of the decision.

13.2.c.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 the decision is given the arbitrators and all other parties within ten (10) days of notification of the decision. If any party considers himself or herself aggrieved by the decision, that party has 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.d. The violation of any provision of this subsection by any brewer constitutes grounds sufficient for the forfeiture of the bond furnished by the brewer in accordance with W. Va. Code §11-16-12. Moreover, any circuit court of the county in which a distributor's principal place of business is located has the jurisdiction and power to enjoin the cancellation, termination or rescission of any franchise agreement between a brewer and the 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 or distributor may 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 shall 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. A territorial assignment shall bind the distributor and brewer, and its successors, unless both parties mutually agree in writing to a change in territory as specified in sub-section 13.4.a.

13.4.a. Duly assigned territories shall then become the responsibility of the brewer and distributor. No distributor shall sell any nonintoxicating beer to any licensed retailer not located within the distributor's assigned territory, and no licensed retailer shall purchase any nonintoxicating beer except from duly authorized distributors in whose assigned territory the licensed retailer is located. The brewer or duly authorized agent is 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 the brewer or his or her authorized agent or the distributor. The new territorial assignment then becomes effective upon receipt by the parties of the written approval of the Commissioner.

13.5. Resident brewers who are producing his or her own product over 10,000 barrels or who are using the services of licensed distributors must appoint distributors, utilize franchise agreements and be subject to those requirements and violations in the manner provided in the code and this rule. For the purpose of appointing distributors and utilizing and enforcing franchise agreements, a resident brewer must meet and abide by the requirements in the Code and this rule for brewers in that respect.

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

14.1. Upon a determination of the Commissioner that a licensee has violated the provisions of West Virginia Code §11-16-1, et seq. 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.a. Revoke the licensee's license;

14.1.b. Suspend the licensee's license;

14.1.c. Place the licensee on probationary status for a period not to exceed twelve (12) months; and/or,

14.1.d. Impose a monetary penalty not to exceed \$1,000.00 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 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 sanctioning of a license. Conviction of the licensee of any violation of the laws of this state or of the United States relating to prostitution or the sale, possession or distribution of narcotics or controlled substances shall be mandatory grounds for revocation of the licensee's license for a period of at least one (1) year.

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

15.1. The Commissioner shall not revoke nor suspend any license issued pursuant to W. Va. Code §11-16-1 et seq. or impose any civil penalties authorized by the code unless and until a hearing is held after at least ten (10) days' notice to the licensee of the time and place of the hearing, unless the suspension is for failure to meet or maintain licensing requirements or the suspension is based on the Commissioner's belief that public safety will be adversely affected by the licensee's continued operation, and then the suspension shall be immediate and the licensee must cease all operations. The notice shall contain a statement or specification of the charges, grounds, or reasons for the proposed action, and 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 the license was issued. At the time and place designated in the notice, the licensee has the right to appear and produce evidence on his or her behalf, and to be represented by counsel.

15.2. The Commissioner has the authority to summon witnesses in the hearings, 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 of W. Va. Code §11-16-1 et seq. The 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 \$150.00 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 or her motion, the hearing is continued and does not take place on the day fixed by the Commissioner in the notice, the Commissioner shall suspend the licensee's license 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 or her license has been suspended or revoked, is guilty of a misdemeanor and is subject to the penalties provided in W. Va. Code §11-16-19.

15.4. The action of the Commissioner in revoking or suspending a license is subject to review by the

Circuit Court of Kanawha County, West Virginia, or in the manner provided in W. Va. Code § 11-16-24. The licensee shall file a petition for review with the circuit court within a period of thirty (30) days from the date of revocation or suspension by the Commissioner. Any licensee obtaining an order for review shall pay the costs and fees incident to transcribing, certifying and transmitting the records to the circuit court. A licensee shall apply 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 within thirty (30) days from the entry of the final order.

15.5. All hearings regarding the proposed revocation or suspension of a license shall be held in the offices of the Commissioner unless otherwise provided in notice, or agreed upon between the licensee and the Commissioner. When a hearing is held elsewhere than in the Commissioner's office, the licensee may be required to make deposits of the estimated costs of the 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 the licensee has been convicted shall forward to the Commissioner a certified copy of the order or judgment of conviction if the clerk has knowledge that the person convicted is a licensee, together with certification of the 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 W. Va. Code §11-16-23, only the license for the location or locations involved in the unlawful conduct as opposed to all separately licensed locations of the licensee.