

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

Form #3

Do Not Mark In This Box

FILED

2015 JUL 31 P 2:15

OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: West Virginia Alcohol Beverage Control Commission TITLE NUMBER: 175

CITE AUTHORITY: W. Va. Code § 60-7-10

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 2

TITLE OF RULE BEING AMENDED: Private Club Licensing

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: July 31, 2015

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

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

Telephone: 304-356-5500

LEGISLATIVE RULE TITLE: 175 CSR 2 Private Club Licensing

1. Authorizing statute(s) citation §60-7-10

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
June 10, 2015

b. What other notice, including advertising, did you give of the hearing?

c. Date of Public Hearing(s) *or* Public Comment Period ended:
July 11, 2015

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

Attached _____ No comments received X

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

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, WVABCA General Counsel

900 Pennsylvania Ave., 4th Floor

Charleston, WV 25302

Telephone: 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:

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 175, Series 2
Legislative Rule
Alcohol Beverage Control Commission

PRIVATE CLUB LICENSING

STATEMENT OF CIRCUMSTANCES

This rule is being amended due to the passage of SB 450 during the 2014 regular Legislative Session, which contained code changes regarding the definition of "public place". This rule amendment would authorize open doors to certain "public places" that are legally demarcated areas.

Where counties or municipalities have enacted outdoor dining or sidewalk dining ordinances and the WVABCA has approved such dining, the WVABCA may grant an open door limited exception to the rules. This limited exception would permit the licensee to open a door or doors that directly access only the outdoor dining or sidewalk dining areas, during the hours of 11:00 a.m. and midnight subject to state and local ordinances affecting noise, peace, good order and quietude of the community. All other doors would remain closed except for ingress and egress of patrons.

**Title 175, Series 2
Legislative Rule
Alcohol Beverage Control Commission**

PRIVATE CLUB LICENSING

SUMMARY OF PROPOSED CHANGES

This legislative rule explains private club licensing.

In section 1.3., changed filing date.

In section 1.4., changed effective date.

In section 4.10., revised in accordance with section 2.15., and added clarifying language

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

175 CSR 2 - Private Club Licensing

Rule Title: _____

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 clarifies language due to code changes from the passage of SB 450 during the 2014 Legislative Session with respect to the definition of "public place" and authorized outdoor areas.

Date: 6-8-15

Signature of Agency Head or Authorized Representative



TITLE 175
LEGISLATIVE RULE
ALCOHOL BEVERAGE CONTROL COMMISSIONER

SERIES 2
PRIVATE CLUB LICENSING

FILED
2015 JUL 31 P 2:15
OFFICE WEST VIRGINIA
SECRETARY OF STATE

§175-2-1. General.

- 1.1. Scope. -- This legislative rule specifies the licensure requirements, reasons for denial of a license, reasons for revocation or sanctioning and/or suspending a license as well as hearing procedures.
- 1.2. Authority. -- W. Va. Code §60-7-10.
- 1.3. Filing Date. -- ~~April 17, 2015.~~
- 1.4. Effective Date. -- ~~April 17, 2015.~~

§175-2-2. Definitions.

As used in this rule and unless the context clearly requires a different meaning, the following terms shall have the meaning ascribed herein, and apply in the singular and in the plural.

- 2.1. "Alcoholic liquor" means alcohol, beer, including barley beer, wine, including barley wine and distilled spirits, and any liquid or solid capable of being used as a beverage, but does not include wine with an alcohol content of fourteen percent (14%) or less by volume, nonintoxicating beer or nonintoxicating beverages.
- 2.2. "Applicant" means a private club applying for a license under the provisions of W. Va. Code §60-7-1 et seq.
- 2.3. "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 or nonintoxicating craft beer.
- 2.4. "Code" means the official Code of West Virginia, one thousand nine hundred thirty-one, as amended.
- 2.5. "Commissioner," "Alcohol Beverage Control Commissioner," or "ABCC" means the West Virginia Alcohol Beverage Control Commissioner (Administrator) or his or her delegate.
- 2.6. Commissioner's Forms: "ABCA" form designation means documents used by ABCC.
- 2.7. "Distilled spirits" means ethyl alcohol, ethanol or spirits, or wine, including all dilutions and mixtures thereof, from whatever source or by whatever process produced, for beverage use including, but not limited to natural spirits, whiskey, brandy, rum, gin, vodka, cordials and liqueurs. Any alcoholic beverage containing more than 24% of alcohol by volume shall be deemed to be distilled spirits.
- 2.8. "Fortified wine" means any wine to which brandy or other alcohol has been added and includes dessert wines, which are not fortified and any wine containing greater than fourteen percent (14%) alcohol by volume.

2.9. "Intoxicated" means having one's faculties impaired by alcohol or other drugs to the point where physical or mental control or both are markedly diminished.

2.10. "Nonintoxicating beer" means any beverage, obtained by the fermentation of barley, malt, hops, or similar products or substitute and 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, with no caffeine infusion or any additives masking or altering the alcohol effect.

2.11. "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.

2.12. "Liquor Control Act" means Chapter 60 of the Code.

2.13. "Market zone" means the geographical area designated as such by the Retail Liquor Licensing Board for the purpose of issuing retail liquor licenses.

2.14. "Person" means an individual, firm, partnership, limited partnership, corporation, limited liability company or voluntary association.

2.15. "Public place" means any place, building or conveyance to which the public has, or is permitted to have access, including, but not limited to establishments that provide lodging, places that sell food, for consumption on or off the premises including, but not limited to vessels, parks, airports, and any highway, street, lane, park or place of public resort or amusement; provided that the term "public place" shall not mean or include any of the above-named places or any portion or portions thereof which qualify and are licensed by the Commissioner to sell alcoholic liquors for consumption on the premises, nor shall the term "public place" mean or include any legally demarcated area designated solely for the consumption of beverages and freshly prepared food that directly connects and adjoins any portion or portions of a premises that qualifies and is licensed under the provisions of Chapter 60 of the Code to sell alcoholic liquors for consumption thereupon, which may include certain legally demarcated deck areas or other areas that meet the requirements specified in this proviso and further that legal demarcation includes, but is not limited to: ABCA, local, city, county, state and federal ordinances, zoning and other legal requirements; Americans with Disabilities Act requirements; State Fire Marshal requirements; public safety requirements and so forth: provided, however, that the term "public place" shall also not include a facility constructed primarily for the use of a Division I college that is a member of the National Collegiate Athletic Association, or its successor, and used as a football, basketball, baseball, soccer or other Division I sports stadium and also which holds a special license to sell wine pursuant to the provisions of W.Va. Code §60-8-3, in the designated areas of sale and consumption of wine and other restrictions established by that section and the terms of the special license issued thereunder.

2.16. "Private club" means any corporation, limited liability company or unincorporated association which either:

2.16.1. Belongs to or is affiliated with a nationally recognized fraternal or veterans organization, that is operated exclusively for the benefit of its members and pays no part of its income to its shareholders or individual members; owns or leases a building or other premises such as vessels, parks, and airports. The club admits only duly elected or approved dues paying members in good standing of

such corporation or association and their guests while in the company of a member and does not admit the general public. The club also maintains in said building or premises a suitable kitchen and dining facility with related equipment for serving food to members and their guests; or

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

2.16.3. Is organized and operated for legitimate purposes and has at least one hundred (100) duly elected or approved dues paying members in good standing; 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; admits only duly elected or approved dues paying members in good standing of such corporation or association and their guests while in the company of a member and does not admit the general public; maintains in said building or on said premises a suitable kitchen and dining facility with related equipment and employs a sufficient number of persons for serving meals to members and their guests; or

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

2.17. "Record" means any manner of recording from which a transcript can be made.

2.18. "Retail liquor store" means the establishment where the private club is authorized to purchase alcoholic liquors. Such retail liquor store must be licensed to sell alcoholic liquors in the original package for consumption off the premises, to the public in West Virginia by the Commissioner as authorized by either W. Va. Code §§60-3-1 et seq., or W. Va. Code 60-3A-1 et seq.

2.19. "Sale" means any transfer, exchange of goods or services, in exchange for money, currency, checks, credit cards or barter in any manner or by any means, for a consideration, and shall include all sales made by principal, proprietor, agent or employee.

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

2.21. "Wine" means any beverage obtained by the fermentation of the natural content of fruits, or other agricultural products, containing sugar and includes, but is not limited to, still wines, champagne and other sparkling wines, carbonated wines, imitation wines, vermouth, cider, perry, sake, or other similar beverages offered for sale or sold as wines containing not less than seven percent (7%) nor more than twenty-four percent (24%) alcohol by volume.

§175-2-3. Licensure.

3.1. License application. - The application for license to operate a private club shall include the following:

3.1.1. The name of the applicant.

3.1.2. The place at which such applicant will conduct its operations, whether it is owned or leased by applicant; and if leased, from whom, giving names and addresses of all lessors.

3.1.3. If the applicant be an unincorporated association, the names and addresses of members of its governing board.

3.1.4. If the applicant be a corporation, the names and addresses of its officers and directors. If such person be a limited liability company, the names and addresses of the members and/or managers.

3.1.5. The size and nature of the dining and kitchen facilities operated by applicant and the specific proportions of any structure used in conjunction with other purposes that will constitute the private club.

3.1.6. Arrest record, if any, of the applicant and if the applicant be a corporation, limited liability company, partnership or association the arrest record, if any, of the officers, directors, partners, members and managers or stewards including disposition of same.

3.1.6.a. The Commissioner shall 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 private club 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 private club license pursuant article 7, chapter 60 of the W. Va. Code. The applicant will submit West Virginia Alcohol Beverage Control Administration Release of Information and Waiver of Confidentiality of Records Form on the form provided by the commissioner. The applicant will also submit a full set of fingerprints to facilitate a criminal background check and the ABCC 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.

3.1.6.b. The applicant will reimburse the ABCC for all fees or charges that are incurred by the ABCC for the background investigation.

3.1.7. Residence of applicants. - No licenses shall be given to any applicant who has been a resident of West Virginia for a period of less than two (2) years. If the applicant be a corporation, the officers, directors or managers of the company are not required to be West Virginia residents so long as the on-site manager has been a resident of the state for a period of not less than two (2) years. If the applicant be an association, the same would apply unless a majority of the founders or governing board have been residents for a period of two (2) years. If the applicant be a limited liability company, the members and/or managers of the company are not required to be West Virginia residents so long as the on-site manager has been a resident of the state for a period of not less than two (2) years.

3.1.8. A statement of purpose or purposes for which the club is organized (social, recreation, benevolent, charitable, fraternal or profit).

3.1.9. How long the club has been in existence prior to the date of the application.

3.1.10. What national organization it is affiliated with, if any, and the date of affiliation and

nature thereof.

3.1.11. Number of employees.

3.1.12. Number of members of the applicant.

3.1.13. West Virginia consumers sales tax identification number.

3.1.14. West Virginia business franchise tax number.

3.1.15. West Virginia Health Department permit number to operate a restaurant.

3.1.16. Type of license applied for.

3.1.17. Application shall only be made on the form provided by the Commissioner or available on the ABCC website at www.abca.wv.gov. This form must be completed in its entirety and failure to complete all questions shall constitute grounds for refusal to grant a license.

3.1.18. Is the applicant the holder of a federal gambling stamp.

3.1.19. Is the applicant the holder of a retail liquor dealer special tax stamp.

3.2. Refusal of license.

3.2.1. No license shall be issued by the Commissioner to any club:

3.2.1.a. That is located on any college campus, State university campus or branch thereof.

3.2.1.b. That is the holder of a federal gambling stamp or whose manager or employee is a holder of a federal gambling stamp.

3.2.1.c. A license cannot be refused based on discrimination. Other than those specified in W. Va. Code §§60-7-2(a)(1) and W. Va. Code 60-7-2(a)(2), that discriminate against any person or group of persons.

3.2.1.d. That submits an application for license that contains any false statement, and any statement found to be false after granting of said license shall be grounds for revocation or suspension of said license.

3.2.1.e. That is not a bona fide private club of good reputation in the community in which it operates. For purposes of making such a determination, the Commissioner shall take into consideration whether the ownership and management of the private club will involve suitable persons and whether the premises to be used by the private club is a suitable place.

3.2.2. The Commissioner may refuse to grant any license if he or she has reasonable cause to believe any of the following exist, as indicated by documented evidence, that the applicant, or any officer, director or manager thereof, or shareholder owning twenty percent (20%) or more of its capital stock, beneficial or otherwise, or other person conducting or managing the affairs of the applicant or of the proposed licensed premises, in whole or part:

3.2.2.a. Is not a person of good moral character or repute;

3.2.2.b. Has maintained a noisy, loud, disorderly or unsanitary establishment;

3.2.2.c. Has demonstrated, either by his or her police record or by his record as a former licensee under W. Va. Code §§11-16-1 et seq., or 60-1-1 et seq., a lack of respect for law and order, generally, or for the laws and rules governing the sale and distribution of alcoholic beverages or nonintoxicating beer;

3.2.2.d. Has the general reputation of drinking alcoholic beverages or nonintoxicating beer to excess, or is addicted to the use of controlled substances;

3.2.2.e. Has misrepresented a material fact in applying to the Commissioner for a license.

3.2.3. For purposes of this rule, the Commissioner shall refuse to grant any license if he or she has reasonable cause to believe, as indicated by documented evidence that the applicant, or any officer, director or manager thereof, or shareholder owning twenty percent (20%) or more of its capital stock, beneficial or otherwise, or other person conducting or managing the affairs to the applicant or of the proposed licensed premises, in whole or part:

3.2.3.a. Is not twenty-one (21) years of age or older;

3.2.3.b. Has been convicted of a felony or other crime involving moral turpitude, and upon such conviction the applicant will not be eligible for licensure within five (5) years next preceding successful completion of all conditions of probation, discharge from parole supervision or expiration of sentence;

3.2.3.c. Has been convicted of violating any alcoholic liquor laws, rules or regulations, or any beer laws, rules or regulations of any state or the United States, and upon such conviction the applicant shall not be eligible for licensure within five (5) years next preceding successful completion of all conditions of probation, discharge from parole supervision or expiration of sentence;

3.2.3.d. Has had any license revoked under the alcoholic liquor laws, rules or regulations, or the beer laws, rules or regulations of any state or the United States within five (5) years next preceding the filing date of the application;

3.2.3.e. Is not the legitimate owner of the business proposed to be licensed, or other persons have ownership interests in the business, which have not been disclosed;

3.2.3.f. Is a person to whom alcoholic beverages may not be sold under the provisions of W. Va. Code §60-1-1 et seq.;

3.2.3.g. Has been adjudicated an incompetent;

3.2.3.h. Is an officer or employee of the Alcohol Beverage Control Commissioner of West Virginia; or

3.2.3.i. Is violating or allowing the violation of any provision of W. Va. Code §§60-1-1 et seq., 61-1-1 et seq., or 11-16-1 et seq., in its establishment at the time its application for a license is pending or at any time during either the current licensed period or the immediately preceding licensing period.

3.2.4. No license shall be issued by the Commissioner to a private club if the place to be occupied by the applicant:

3.2.4.a. Does not conform to the requirements of applicable laws of the State with respect to sanitation, health, construction or equipment, or to any similar requirements established by the rules of the Commissioner.

3.2.4.b. Is so located that violations of W. Va. Code §60-1-1 et seq., or of the rules of the Commissioner, or the laws of this State relating to peace and good order would result from the issuance of such license and operation by the applicant.

3.2.4.c. Is so situated with respect to any church, hospital, school, college or university, public or private playground or other similar recreational facilities, or any state, local or federal government-operated facility, that operation under the license will adversely affect or interfere with normal, orderly conduct of the affairs of such facilities or institutions.

3.2.4.d. Is so situated with respect to any residence or residential area that its operation will adversely affect real property values or substantially interfere with the usual quietude and tranquility of the residential area.

3.2.5. The Commissioner may refuse to issue a license if he or she has reasonable ground to believe that the number of licenses existent in the locality is such that the issuance of an additional license would be detrimental to the interests, morals, safety or welfare of the public, and, in reaching his or her conclusion in this respect, the Commissioner may consider the character, population and number of similar licensees in the particular town, city or county and the immediate neighborhood concerned, and the effect which a new license may have on such town, city, county or neighborhood in conforming with the purposes of the Liquor Control Act.

3.2.5.a. Any person applying for a license to operate a private club at any location within a municipality must file a notice of such intention using the zoning form provided by the Commissioner or available on the ABCC website at www.abcc.wv.gov, with the clerk or recorder of the municipality at least ten (10) days prior to filing an application for a private club license with the ABCC as required by W. Va. Code §60-7-4a.

3.2.5.b. Any person applying for a license to operate a private club that is not within a municipality, must submit a letter from the county commissioner stating that the location of the club is in compliance with zoning ordinances for that county.

3.2.6. In the process of determining whether or not a license should be issued, the Commissioner must investigate the accuracy of all allegations, that could lead to denial of the license.

3.3. Type of license. - The Commissioner, upon a decision to grant a license, will issue said license in one (1) of two (2) categories:

Type I. - This is for a private club license issued to a nationally recognized fraternal or veterans organization, and or any other nonprofit social club, all of the same being operated exclusively for the benefit of its members and pays no part of its income to shareholders or individual members, and maintains on its premises a suitable kitchen and dining facility with related equipment for serving food to members and their guests.

Type II. - This is for social organizations or corporations operated for legitimate purposes and for

profit, that pays part of its income to shareholders or individual members, and maintains on its premises a suitable kitchen and dining facility with related equipment, and employs a sufficient number of persons for the serving of meals to members and their guests at all times during the hours of operation.

As to each of the categories above, a license will only be granted upon a certification that the general public is not and will not be admitted on the premises, and only duly elected or approved dues paying members in good standing, and their guests, while in the company of a member, are permitted to enter said premises.

3.4. Annual license fee. - The annual fee for licenses issued under the provisions of W. Va. Code §60-7-1 et seq., shall be as follows:

3.4.1. For a fraternal or veterans organization or a nonprofit social club, seven hundred fifty dollars (\$750.00).

3.4.2. For a private club other than a private club of the type specified in W. Va. Code §60-7-6(a) of this section, one thousand dollars (\$1,000.00) if determined by the Commissioner that such private club has less than one thousand (1,000) members and two thousand five hundred dollars (\$2,500.00) if such private club has one thousand (1,000) or more members. The fee for any license issued following the first day of January of any year, to expire on the thirtieth day of June of each year, will be one half (1/2) of that previously prescribed. Such fee shall be payable to the West Virginia Alcohol Beverage Control Commissioner by certified check, cashier's check or money order and must accompany the application.

3.5. Bond. - No license will be issued until the applicant has executed a bond in the penal sum of five thousand dollars (\$5,000.00), payable to the State of West Virginia. The surety on the bond shall be executed by a corporate surety authorized to transact business in the State of West Virginia, which bond will be conditioned on the payment of all fees prescribed by law and on the faithful performance of, and compliance with the provisions of W. Va. Code §60-7-1 et seq., and this rule duly promulgated thereunder, and the same shall be done on Alcohol Beverage Control Commissioner's Form No. ABCA 193. Also required is a bond in the penal sum of one thousand dollars (\$1,000.00), payable to the State of West Virginia for the same surety as above for Nonintoxicating Beer Bond and will be submitted on Alcohol Beverage Control Commissioner's Form No. ABCA-194 Nonintoxicating Beer Bond.

3.6. License not transferable. - A license issued under the provision of this rule will be valid only for the organization named to conduct a private club on the premises thereon described, and is not transferable. If there is a change in ownership, the new owners must make application as prescribed, then such violation shall constitute grounds for revocation of their license that they are then operating under.

3.7. License application form. - The application form for a license to sell alcoholic liquors by private clubs is available from the commissioner or on the ABCC website at www.abca.wv.gov.

§175-2-4. Operation of Private Club.

4.1. Sale to members and guests. - No licensee is authorized to sell alcoholic liquor or nonintoxicating beer for consumption on the premises of said licensee except to its members and their guests, while in the company of a member, and said alcoholic liquors must have been purchased from the West Virginia Alcohol Beverage Control Commissioner. No open container or mixed drink, including nonintoxicating beer and wine, may be carried into or out of a private club or any premises licensed by the Commissioner.

4.2. Age for purchase of alcoholic beverages. - No licensee shall sell any alcoholic beverage or

nonintoxicating beer to individuals below the age of twenty-one (21) years. The licensee must require proof of age by way of at least one (1) of three (3) documents certifying the age of the individual, one (1) shall be a valid drivers license, chauffeur's license or Department of Motor Vehicles identification card showing that the holder is at least twenty-one (21) years of age. The following are considered to be valid proofs of age.

4.2.1. A valid West Virginia driver's license showing that the holder is at least twenty-one (21) years of age.

4.2.2. A valid West Virginia chauffeur's license showing that the holder is at least twenty-one (21) years of age.

4.2.3. A West Virginia Department of Motor Vehicles identification card showing that the holder is at least twenty-one (21) years of age.

4.2.4. A driver's license from another state may be accepted if there is no indication or evidence that the license has been altered.

4.2.5. Any other valid means of satisfactory proof with a picture I.D. showing the individual to be at least twenty-one (21) years of age.

The failure to produce satisfactory proof of age upon demand entitles the licensee to refuse to sell alcoholic beverages to the individual.

4.3. Age of manager. - No licensee whose manager is under the age of twenty-one (21) years shall be eligible for license.

4.4. Inspection. - The licensee shall at reasonable times permit the immediate inspection of the licensed premises by the Commissioner, in order to ensure that the laws and rules of the State of West Virginia are enforced. Upon the presentation of credentials the licensee will allow the Commissioner immediate access to the licensed premises, and there shall be no occasion for delay in the conduct of such inspection. No licensee shall personally or by an agent or employee hinder or interfere with an inspection of the licensed premises nor shall any licensee allow patrons or others to hinder or interfere with the inspection.

Any evidence of a violation found during an inspection will be seized and impounded by the Commissioner and shall be admissible into evidence to prove such violation.

4.5. Door marker and posting license. - Each licensee shall have at the main entrance to its private club facility in letters no higher than six (6) inches, a statement "ABCC License No. _____." The licenses granted under W. Va. Code §60-7-1 et seq., and these rules must be kept posted in a conspicuous place in the club premises. Each licensee shall also post in an open and prominent place a blood-alcohol chart in the form prescribed by W. Va. Code §60-6-24 as provided by the commissioner; and also post in an open and prominent place the fetal alcohol syndrome warning of birth defects in the manner prescribed by W. Va. Code §60-6-25 in the form as provided by the commissioner.

4.6. Licensee's purchases of alcoholic liquors. - After the granting of a private club license, each holder shall purchase alcoholic liquors for resale from a retail liquor store. A private club may purchase alcoholic liquors only from the retail liquor store in whose market zone it is located or from a retail liquor store located in a market zone that is contiguous to the market zone in which the private club is located. Upon a showing of good cause to the Commissioner, a private club will be authorized to purchase

alcoholic liquors from any retail liquor store within the State. Whenever the ABCC continues to operate a retail liquor store in a market zone for which no private retail liquor store license has been issued, all private clubs located in that same market zone are required to purchase all alcoholic liquors from such ABCC liquor store.

4.7. Hours for sale of alcoholic beverages. - No licensee shall sell, give or dispense alcoholic liquor or nonintoxicating beer, or permit the consumption thereof, on any licensed premises or in any rooms directly connected therewith between the hours of three o'clock a.m. (3:00 AM) and one o'clock p.m. (1:00 PM) on any Sunday; nor shall any licensee sell, give or dispense alcoholic liquors or nonintoxicating beer, or permit the consumption thereof, on any licensed premises or in any rooms directly connected therewith, between the hours of three thirty a.m. (3:30 AM) and seven a.m. (7:00 AM) on any weekday.

4.8. Hours of operation - The licensed premises of all private clubs shall be closed for operation and cleared of all persons, including employees, thirty (30) minutes after the hours of sale of alcoholic liquors and nonintoxicating beer have expired. Licensed premises shall not be occupied by persons any sooner than one-half (1/2) hour prior to the hours of sale of alcoholic liquors and nonintoxicating beer; provided that the licensed premise may be open for food sales at nine a.m. (9:00 AM) on any Sunday.

4.9. Cessation of entertainment. - All entertainment, both live and mechanical, the latter to include juke boxes, shall cease and abate on the licensed premises one-half (1/2) hour prior to the expiration of the hours for sale of alcoholic liquors and nonintoxicating beer as specified in Section 4.8 of this rule.

4.10. ~~Entranceways~~ Doors. - During the hours for sale of alcoholic liquors and nonintoxicating beer, all doors to and from the licensed premises shall be closed except for the ingress and egress of the members and their guests. However, for legally demarcated deck or other outdoor area of a licensed private club in good standing with the State and the ABCC and that meets the requirements of sub-section 2.15., the Commissioner may approve, on a case-by-case basis, a limited exception for doors that access only the legally demarcated deck or other outdoor area to be open during the hours of 11 a.m. to midnight. All other doors of entrance and exit of a private club obtaining this privilege would still remain closed except for ingress and egress of patrons. Prior to any consideration of this open door limited exception by the Commissioner, the county or municipality where the private club is located must have authorized this open door limited exception within an ordinance, zoning or other written authorization by the governing body of a county or municipality. Any private club violating this sub-section's requirements shall be subject to the penalties in the Code and rules and cancellation of this privilege, and further all private clubs operating under this open door limited exception shall be in compliance with all state, county and local noise ordinances and all ordinances or requirements affecting the peace, good order and quietude of the community. Further, the open door limited exception may be cancelled for any private club that fails to stay in good standing with the State and ABCC or has other violations of the Code and the rules.

4.11. Suitability of kitchen and dining facilities.

4.11.1. Prior to the issuance of a private club license, all kitchen and dining facilities are to be checked by agents or employees of the Commissioner for their suitability in serving food to their members and their guests. Equipment in the kitchen shall be capable of preparing a freshly cooked meal on the licensed premises. In addition, licensees shall have at least enough food to serve one fourth (1/4) the number of seats in the private club at any one (1) time.

4.11.2. A suitable kitchen shall contain equipment as follows:

4.11.2.a. One (1) range with oven and no fewer than two (2) burners, or a microwave oven

which has a variable control and a separate range with two (2) burners;

4.11.2.b. One (1) sink with hot and cold running water;

4.11.2.c. One cold storage unit or refrigerator at least seventeen (17) cubic feet in size; and

4.11.2.d. Cooking utensils and pots and pans sufficient for preparation of the required meals.

4.11.3. A suitable dining facility shall include the following: Plates (other than of paper or similar construction), metal knives, forks and spoons, and drinking glasses and cups, in sufficient quantities to serve no fewer meals than one-fourth (1/4) the number of seats in the club.

4.11.4. A meal may consist of one (1) item or any combination of items. For example, fresh, canned and packaged chili, soup, spaghetti, fresh salad, fresh or prepackaged sandwiches, freshly prepared meats and vegetables and TV dinners are acceptable or items which, by themselves, do not qualify as adequate are packaged potato chips and similar products; packaged crackers; packaged nuts; packaged desserts (fruit pies, cakes, cookies, etc.), and bar sausages and similar products. The key word in the definition of meals is preparation.

4.11.5. Meals shall be available from opening of the club until closing. Limited menus will be acceptable after ten p.m. (10:00 PM). Cold sandwiches which can be prepared in advance and refrigerated for use after ten p.m. (10:00 PM) is one example of an acceptable limited menu.

4.12. Age of membership. - No licensee shall admit to membership any individual below the age of twenty-one (21) years, and no individual below the age of eighteen (18) years shall be permitted on the licensed premises of a licensee as a guest unless accompanied by the individual's parent or legal guardian.

4.13. Lighting of licensed premises. - The interior of all licensed premises shall be adequately lighted at all times while the licensee is conducting business or has employees on such premises.

4.14. Purchase and delivery of alcoholic beverages.

4.14.1. Retail Liquor Stores Payments For Purchases - When a duly licensed private club purchases alcoholic liquors from a retail liquor store authorized by W. Va. Code §60-3-1 et seq., money orders, certified checks, cashier's checks, traveler's checks and cash are acceptable for payment of a purchase. In addition, a personal check from a duly licensed private club will be treated as cash if a guaranty bond issued from a bonding company licensed to do business in West Virginia is posted in advance with the Commissioner in a sum sufficient to bond the total amount of such purchase(s); provided that such purchase(s) do not exceed the total of the bond and in this regard, purchases, insofar as the bond is concerned shall be treated as cumulative until such time as the check(s) clears and is honored by the bank upon which the check is drawn.

4.14.1.a. A duly licensed private club may, in addition to the method provided above, purchase by personal check if a line of credit issued by a duly organized national or State banking institution is posted in advance with the Commissioner; provided that such purchase(s) not exceed the total of the posted line of credit and in this regard, purchases, insofar as the line of credit is concerned, shall be treated as cumulative until such time as the check(s) clear and be honored by the making bank or the bank upon which the check(s) is drawn.

4.14.1.b. Application for the purpose of purchasing by personal check when guaranteed by a guaranty bond or line of credit shall be obtainable from the Commissioner at his office in Charleston,

West Virginia.

4.14.1.c. In the event that any check is returned for insufficient funds then the Commissioner shall notify the bonding company or bank issuing the line of credit and make demand for payment and they shall be charged a handling fee of \$15.00, such sum to be charged in addition to the amount shown due on the face of the subject check.

4.14.2. Credit by retail liquor stores to private clubs forbidden. W. Va. Code §60-3A-1 et seq. - A retail liquor store is authorized to establish its policy of the instruments allowed to be utilized for payment of purchases by a duly licensed private club. No credit may be extended by the retail liquor store to the duly licensed private club.

4.14.3. A duly licensed private club may, by contract approved by the Commissioner, receive deliveries of alcoholic liquor from a retail liquor store. For the purposes of this activity the provisions of W. Va. Code §§60-6-12 and 60-6-13 are not applicable.

§175-2-5. Violations.

5.1. Prohibited acts.

5.1.1. No licensee, nor any agent, employee or member thereof, shall on such licensee's premise:

5.1.1.a. Sell, or offer for sale, any alcoholic liquor, or nonintoxicating beer other than from the original package or container.

5.1.1.b. In so far as these activities are prohibited by law, authorize or permit any disturbance of the peace, or any obscene, lewd, immoral or improper entertainment, conduct or practice.

5.1.1.b.1. Guidelines for strippers.

5.1.1.b.1.A. Entertainers in "a state of undress" must be apart and separate from patrons.

5.1.1.b.1.B. There can be no physical contact during a performance between the entertainers and the patrons or employees of the club. This means no patron or employee may touch a performer.

5.1.1.b.1.C. Actions by the entertainers may not include the actual accomplishment of any sexual acts, which would be considered inappropriate for public view by the public generally.

5.1.1.b.1.D. All acts during which entertainers are in a state of undress will take place on stage, which must be separate and apart from patrons and/or employees. Upon leaving the stage, entertainers must go directly to the assigned dressing room where he or she must dress adequately by covering himself or herself prior to mingling among patrons and other employees.

5.1.1.c. Sell, give away or permit the sale of, gift to, consumption of or the procurement of any alcoholic liquors or nonintoxicating beer, for any person under the age of twenty-one (21) years, any mental incompetent, or person who is visibly physically incapacitated due to the consumption of alcoholic liquor or nonintoxicating beer, or the use of any controlled substance as specified in W. Va. Code §60A-1-1 et seq.

5.1.1.d. Permit the consumption by, or serve to, on the licensed premises, any alcoholic liquors or nonintoxicating beer, to any person under the age of twenty-one (21) years.

5.1.1.e. With the intent to defraud, alter, change, or misrepresent the quality, quantity or brand name of any alcoholic liquor or nonintoxicating beer.

5.1.1.f. have a drive-through (including, but not limited to a window, pass through, garage or etc.) or sell or permit the sale of alcoholic liquors, including wine, and nonintoxicating beer through such a drive-through;

5.1.2. No licensee, nor any agent, servant or employee of said licensee, may at any time violate any of the foregoing provisions. Any violation by said licensee, agent, servant or employee shall be grounds for revocation or suspension of its private club license.

5.1.3. Any holder of a private club license who has its license suspended shall cease and desist from any and all operation as a private club during the period of suspension.

5.2. Public nuisance. - If it is determined by law that any club which is licensed pursuant to W. Va. Code §60-7-1 et seq. and this rule constitutes a public nuisance to any church, school, hospital, public institution or otherwise, then such license may be revoked or suspended, the same being at the sound discretion of the Commissioner, until such nuisance is abated.

§175-2-6. Hearing and Appeal Procedure.

6.1. Order refusing license, suspending or revoking same. - If the Commissioner refuses to issue a license or suspends or revokes a license, he or she shall make and enter an order to that effect and mail by certified mail, return receipt requested, a copy of the order to the licensee, or serve it as provided for the service of legal process in accordance with the West Virginia Rules of Civil Procedure.

6.2. Petition for hearing. - Any applicant or licensee adversely affected by an order of the Commissioner, shall have the right to a hearing before the Commissioner or a person designated by him or her as hearing examiner. A petition in writing requesting a hearing must be served upon the Commissioner within ten (10) days following the receipt by the applicant or licensee of the order.

6.3. Petition requirements. - The petition for a hearing shall be in writing. An original and one (1) copy of the petition shall be served upon the Commissioner. It shall be complete in itself so as to fully state the issues. No telegram, facsimile transmission, electronic mail, telephone call, letter or similar communication will be regarded as a petition. The petition must contain the following:

6.3.1. A clear and concise assignment of each error that the petitioner alleges to have been committed by the Commissioner in the determination of a licensee's violation or denial of application for license, with each assignment of error being shown in separately numbered paragraphs.

6.3.2. A clear and concise statement of fact upon which the petitioner relies as sustaining its assignment of error.

6.3.3. A prayer setting forth the relief sought.

6.3.4. The signature of the petitioner or its officers signing such petition.

6.3.5. A verification by the petitioner.

6.4. Form for petition. - A petition for hearing shall be in the form set forth below.

Petition for Hearing

To: West Virginia
Alcohol Beverage Control Commissioner
900 Pennsylvania Avenue, 4th Floor
Charleston, WV 25302

(For Commission Use Only)

Docket No. _____
Date of Order of Suspension or Revocation
or Denial of Application for License:
Whether Suspension or Revocation
or Denial of Application for License
In the Matter of: Petitioner's Business Name
Petitioner's ABCC License No.
Address

The above named against whom you have issued an order of (Revocation or Suspension or Denial of Application for License), and in support of such petition avers as follows:

First: Your petitioner admits as true and correct all of the determinations made by the Commissioner and set forth in the above order and basis thereof, except the following: (Specify here each error which the petitioner alleges to have been made by the Commissioner.)

Second: (Set forth clear and concise statements of fact upon which the petitioner relies as sustaining the assignment of error.)

Wherefore, your petitioner prays (insert relief sought, i.e., this order be set aside).

State of _____)
Business Name _____)
SS Signature of Affiant _____)
County Of _____)

Title _____, being duly sworn according to law, deposes and says that the facts alleged in this petition, including any sheets attached hereto, are true and affiant is the petitioner or is duly authorized to represent the petitioner.

By: _____

Sworn to and subscribed before me this _____ day of _____, 20__ at _____.

Notary Public

My commission expires _____
Notary Public

175CSR2

6.5. Hearings. - Cost deposit. - The person demanding a hearing shall give security for the cost of the hearing in the amount of three hundred dollars (\$300.00). The cost deposit will be advanced by certified check, cashier's check or money order and shall accompany the petition demanding a hearing.

6.6. Subpoenas and subpoenas duces tecum. - In all hearings held under W. Va. Code §60-7-1 et seq., and this rule, the evidence of witnesses and the production of documentary evidence may be required through the use of subpoenas and subpoenas duces tecum. Such subpoenas or subpoenas duces tecum may be issued at the request of the Alcohol Beverage Control Commissioner or by the licensee, the same to be issued by either the Commissioner or his duly appointed hearing examiner.

6.6.1. Every such subpoena and/or subpoena duces tecum shall be served at least five (5) days before the return date thereof, either by personal service made by any person eighteen (18) years of age or older or by registered mail, but a return acknowledgment signed by the person to whom the subpoena or subpoena duces tecum is directed shall be required to prove service by registered or certified mail.

6.6.2. All subpoenas and subpoenas duces tecum will be issued in the name of the Alcohol Beverage Control Commissioner, but any party requesting their issuance must see that they are properly served. Service of subpoenas and subpoenas duces tecum issued at the insistence of the Alcohol Beverage Control Commissioner are to be the responsibility of the Commissioner. Any person who serves any such subpoena or subpoena duces tecum is entitled to the same fee as sheriffs who serve witness subpoenas for the circuit courts of this State, and fees for the attendance and travel of witnesses shall be the same as for witnesses before the circuit courts of this State W. Va. Code §55-1-1 et seq.

6.6.3. All such fees shall be paid by the Commissioner if the subpoena or subpoena duces tecum is issued, without the request of an interested party, at the insistence of the Commissioner.

6.6.4. All such fees related to any subpoenas or subpoena duces tecum issued at the insistence of a licensee shall be paid by the licensee who asks that such subpoena or subpoena duces tecum be issued, out of the hearing deposit.

6.6.5. All requests by the licensee or the Commissioner for subpoena and subpoena duces tecum shall be in writing and shall contain a statement acknowledging that the requesting party agrees to pay such fees.

6.6.6. Any person receiving a subpoena or subpoena duces tecum issued hereunder shall honor the same as though it was issued by a circuit court of the State, and shall appear as witness and/or produce such books, records or papers in response to the subpoena or subpoena duces tecum. In case of disobedience or neglect of any subpoena or subpoena duces tecum served on any person or the refusal of any witness to testify to any matter regarding which he or she may be lawfully interrogated, the circuit court of the county in which the hearing is being held or the judge thereof in vacation, upon application by the Commissioner, shall compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena or subpoena duces tecum issued from such circuit court or a refusal to testify therein.

6.7. Stay of suspension or revocation order. - The service of a petition for hearing upon the Commissioner shall operate, other than herein provided, to suspend the execution of any revocation of suspension of a private club license with respect to which a hearing is being demanded except:

6.7.1. An order suspending a license for failure of said license to keep the bond, required by W. Va. Code §60-7-4 in full force and effect.

175CSR2

6.7.2. A suspension or revocation order issued pursuant to Section 4.2. of this rule, and

6.7.3. A suspension order suspending a license in the interest of public safety, as specified in W. Va. Code §60-7-13a.

6.8. Hearing date. - The Commissioner shall set a date for any hearing demanded and notify the person demanding the hearing of the date and time of the hearing.

6.9. Place of hearing. - Hearings will be held in Charleston, West Virginia, unless the Commissioner determines otherwise.

6.10. Continuances. - Hearings will not be delayed by a motion for continuance, unless it is timely made and sets forth good and sufficient cause. Conflicting engagements of counsel or the employment of new counsel will never be regarded as good ground for a continuance, unless set forth in a motion filed promptly after the notice of hearing has been mailed, or unless extenuating circumstances are shown which the Commissioner deems adequate.

6.11. Absence of petitioner, counsel or his representative. - The absence of the petitioner, his legal counsel or his representative at a hearing, after service of notice of time, place and date, shall not be the occasion for delay or continuance. The hearing shall proceed and the case be regarded as having been submitted for decision on the part of the absent petitioner or petitioners.

6.12. Hearing. - The Alcohol Beverage Control Commissioner may designate an examiner to conduct the hearing.

6.12.1. The petitioner may appear individually, or by legal counsel, or by duly authorized representative. In the absence of the petitioner, written evidence of a representative's agent's authority must be presented to the satisfaction of the Commissioner.

6.12.2. The petitioner, his or her duly authorized representative or agent, may with the approval of the Commissioner, waive the right to a hearing and agree to submit the case for decision upon the petition and record, with or without a written brief. Such waivers and agreements are to be in writing or upon the record.

6.13. Argument and briefs. - Petitioners will be given an opportunity for argument within the time limits fixed by the Commissioner following submission of evidence. The Commissioner may accept briefs in lieu of argument. Briefs must be filed within ten (10) days after the hearing.

6.14. Evidence admissible at hearing. - The Commissioner may admit any relevant evidence, except that he or she shall observe the rules of privilege recognized by law relating to communications and topics. A finding is to be supported by the kind of evidence commonly relied upon by reasonably prudent men in the conduct of their affairs, whether or not the evidence would be admissible before a jury. The Commissioner may exclude any evidence, which is irrelevant, unduly repetitious, or lacking in substantial probative effect.

6.15. Record of proceedings. - There shall be a record made at all hearings held pursuant to W. Va. Code §60-7-1 et seq., and this rule.

6.16. Commissioner's decision. - After the conclusion of the hearing or within ten (10) days of receipt of the transcript, the person designated by the Commissioner as hearing examiner shall prepare a recommended decision supported by findings of fact and conclusions of law affirming, modifying or

175CSR2

vacating the earlier order of the Commissioner. Thereafter, the Commissioner within ten (10) days of receipt of the recommended decision, shall either accept or reject the recommended decision. If he or she accepts the decision, he or she shall sign and acknowledge the same as his or her own after having reviewed the transcript and all exhibits attached and affixed thereto. If he or she rejects the decision, he or she shall within ten (10) days of receipt of the recommended decision prepare a decision setting forth his or her own findings of fact and conclusions of law. In either event, the order signed by the Commissioner shall be final unless vacated or modified upon judicial review. A copy of the order shall be served upon each party to the hearing and attorneys of record, if any, in person or by registered or certified mail.

6.17. Appeal to circuit court. - An appeal may be taken by the applicant or licensee to the Circuit Court of Kanawha County, West Virginia, or as specified W. Va. Code §60-7-13a, if filed within thirty (30) days after the charge upon which the party received notice of the final order of the Alcohol Beverage Control Commissioner.