

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

Form #4

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

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

CITE AUTHORITY: W. Va. Code §§ 60-1-5b, 60-2-16, 60-4-2, 60-4-3, 60-4-3a, 60-6-1 & 60-6-2

AMENDMENT TO AN EXISTING RULE: YES NO


IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 10

TITLE OF RULE BEING PROPOSED: Distilleries and Mini-Distilleries

THE ABOVE PROPOSED LEGISLATIVE RULES, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE, IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.



Authorized Signature

FILED

TITLE 175
LEGISLATIVE RULE
ALCOHOL BEVERAGE CONTROL COMMISSION

2015 NOV -4 P 3: 20

SERIES 10
DISTILLERIES AND MINI-DISTILLERIES

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§175-10-1. General.

1.1. Scope. -- This rule provides the procedure whereby a distillery or mini-distillery located in the State of West Virginia shall comply with bailment procedures, sampling, retail operations, production, retail sales and reporting of activities.

1.2. Authority. -- W.Va. Code §§60-1-5b, 60-2-16, 60-4-2, 60-4-3, 60-4-3a, 60-6-1 & 60-6-2.

1.3. Effective Date. --

1.4. Filing Date. --

§175-10-2. Definitions.

2.1. "Alcoholic Liquor" or "Liquor" means alcohol, beer, fortified wine and distilled spirits, and any liquid or solid (including powdered alcohol) capable of being used as an alcoholic 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. "Bailment" for purposes of this rule means a warehousing method whereby the transfer of possession through actual or constructive delivery but not ownership to the Commissioner, of alcoholic liquors manufactured at a distillery or mini-distillery which is available for purchase by licensed retail outlets or a distillery or mini-distillery with all applicable markups, fees and taxes as provided by the Code and rules. Alcoholic liquors actually possessed by the Commissioner are delivered to retail outlets and distilleries and mini-distilleries located in the state of West Virginia. Constructive bailment may be utilized by distilleries and mini-distilleries located in the state of West Virginia whereby their alcoholic liquor products actually stay at the licensed premises of the distillery or mini-distillery and various forms are completed to account for production, volume, retail sales, sample bottle retail purchases, markups, fees, taxes and any other information required by the Commissioner.

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, including nonintoxicating craft beer, and shall be included in the definition of "liquor" and "alcoholic liquor", as used in chapter eleven, article sixteen of the code: Provided, that in chapter sixty of the West Virginia code, "beer" shall not be construed to include or embrace nonintoxicating beer or nonintoxicating craft beer.

2.4. "Class A retail license" means a retail license permitting the retail sale of West Virginia product or alcoholic liquors at a freestanding liquor retail outlet, subject to the requirements of the rules and code.

2.5. "Class B retail license" means a retail license permitting the sale of West Virginia product or alcoholic liquors at a mixed retail liquor outlet, subject to the requirements of the rules and code.

2.6. "Commissioner" refers to the Commissioner of the West Virginia Alcohol Beverage Control Administration.

2.7. "Distilled spirits" means ethyl alcohol, ethanol or spirits, including all dilutions and mixtures thereof, from whatever source or by whatever process produced, for beverage use, and shall include, but not be limited to, neutral spirits, whiskey, brandy, rum, gin, vodka, cordials and liqueurs. In addition to the foregoing, any alcoholic beverage containing more than twenty-four percent (24%) of alcohol by volume shall be deemed to be distilled spirits.

2.8. "Distillery" or "distiller" means an establishment where alcoholic liquor other than wine and beer is manufactured or in any way prepared and as licensed under Chapter 60 of the Code.

2.9. "Fortified wine" means any wine to which brandy or other alcohol has been added. For purposes of this rule, "fortified wine" includes dessert wines which are not fortified but which have an alcohol content by volume of at least fourteen and one-tenths percent (14.1%) alcohol by volume and not more than sixteen percent (16%) alcohol by volume.

2.10. "Gallon" means the liquid measure equivalent to the volume of 231 cubic inches.

2.11. "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.

2.12. "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.

2.13. "Manufacture" means to distill, rectify, ferment, brew, make, mix, concoct, process, blend, bottle or fill an original package with any alcoholic liquor or wine.

2.14. "Manufacturer" means any person engaged in the manufacture of any alcoholic liquor or wine, among others and including but not limited to, a producer, a broker, processor, bottler, importer, distiller, rectifier, winemaker or brewer.

2.15. "Mini-distillery" means an establishment where in any year no more than twenty thousand gallons of alcoholic liquor is manufactured with no less than twenty-five percent of raw agricultural products being produced by the owner of the mini-distillery on the premises of that establishment in West Virginia, and no more than twenty-five percent of raw agricultural products originating from any source outside this state: Provided, That the maximum allotted production amounts shall not exceed the annual incremental production limitations provided for pursuant to W. Va. Code §60-4-3a, as amended: Provided, however, That a distillery licensed and operating as of July 8, 2005, that

applies for designation by the Commissioner as a mini-distillery, is eligible to be licensed as a mini-distillery without compliance with the requirements for the percentage use of on-premises grown and in-state raw agricultural products.

2.16. "Proof Gallons" means a gallon of liquid at 60 degrees Fahrenheit which contains 50 percent by volume of ethyl alcohol having a specific gravity of 0.7939 at 60 degrees Fahrenheit referred to water at 60 degrees Fahrenheit as unity, or the alcoholic equivalent thereof.

2.17. "Retail Outlet" means a specific location or store where West Virginia product or alcoholic liquors may be lawfully sold by a Class A retail license or Class B retail license in the original package for consumption off the premises.

2.18. "West Virginia Product" means all bourbon, brandy, cognac, cordials, gin, grain alcohol, rye, rum, scotch, tequila, vermouth, vodka, whisky, apertifs, pre-mixed cocktails, fortified wines, spirit blends, marsala, sake, sherry and all other liquor types and classes as approved by the Commissioner and maintained on the ABCC retail liquor product list.

2.19. "Wine" means any alcoholic beverage, including table wine, obtained by the natural fermentation of the natural content of grapes, other fruits, or honey or other agricultural products containing sugar to which no alcohol has been added. The term wine does not include fortified wine, nonintoxicating beer or nonintoxicating craft beer. For purposes of this rule, "wine" includes wine coolers and similar beverages containing not less than one-half of one percent nor more than seven percent alcohol by volume. (See subsection 2.1. for alcohol content percentage).

2.20. "Year" for purposes of gallons produced and sold shall mean a calendar year.

§175-10-3. Bailment Policy and Procedures – Actual Bailment and Constructive Bailment.

3.1. The Commissioner must take actual or constructive possession through bailment of all alcoholic liquor manufactured for sale by every distillery or mini-distillery located in the state of West Virginia. The distillery or mini-distillery must follow the requirements for listing alcoholic liquors with the Commissioner as specified in the Code and 175 CSR 6, 175 CSR 1, and 175 CSR 5 as a part of the West Virginia Product list.

3.2. Actual bailment must be utilized for all bailment orders and purchases to retail outlets for a distillery or mini-distillery's liquor products.

3.2.a. Actual bailment shall apply the wholesale markup fee set by the Commissioner and all applicable bailment, delivery, handling and other associated fees and taxes to the distillery or mini-distillery's liquor products as set forth in the Code and the rules at 175 CSR 6, 175 CSR 1 and 175 CSR 5.

3.2.b. Actual bailment shall require the distillery or mini-distillery to comply with all applicable Code and rule requirements.

3.3. Constructive bailment is available only for the alcoholic liquor manufactured at the distillery or mini-distillery located in the state of West Virginia used for serving on-premises as free complimentary samples of its alcoholic liquor products only, and used for retail sales of its alcoholic liquors at the licensed distillery or mini-distillery's premises for off-premises personal consumption only.

3.3.a. Alcoholic liquor products manufactured at a distillery or mini-distillery used for serving on-premises free complimentary samples of its alcoholic liquor products must be reported on a form provided by the Commissioner which will be used to calculate the amount paid by the distillery or

mini-distillery for purchasing the alcoholic liquor product used for free complimentary sampling through constructive bailment. The amount paid to the Commissioner for cases/bottles used by a distillery or mini-distillery shall be the same as paid by a retail outlet with the wholesale markup fee set by the Commissioner, bailment fess and delivery fees included.

3.3.b. Alcoholic liquor products manufactured at a distillery or mini-distillery used for retail sales of its alcoholic liquors at the licensed distillery or mini-distillery's premises for off-premises personal consumption only must be reported monthly on a form provided by the Commissioner which will be used to calculate the amount paid by the distillery or mini-distillery for purchasing the alcoholic liquor product used for these retail sales through constructive bailment. The amount paid to the Commissioner for cases/bottles used by a distillery or mini-distillery for retail sales to consumers for off-premises consumption shall include a 5% wholesale markup fee and a \$.80 per case bailment fee.

3.3.c. A distillery or mini-distillery's alcoholic liquors used for sampling at the distillery or mini-distillery's licensed premises and used for retail sales of its alcoholic liquors at the licensed distillery or mini-distillery's premises for off-premises personal consumption only must be purchased from the Commissioner but may be constructively delivered to the Commissioner and remain on the distillery or mini-distillery's licensed premises without actual delivery to the Commissioner.

3.3.d. A distillery or mini-distillery electing to use constructive bailment shall report all production to the Commissioner, identifying, the amount of alcoholic liquor to remain on premises for purchase by the distillery or mini-distillery for on-premises free complimentary sampling and also purchased for retail sales to consumers for off-premises consumption.

§175-10-4. On-Premises Free Complimentary Sampling; Retail Sales for off-premises personal consumption.

4.1. Free complimentary samples of alcoholic liquor manufactured at the distillery or mini-distillery's licensed premises may not exceed three (3), one (1) ounce servings of liquor, per customer, per day. A distillery or mini-distillery shall not operate a bar or sell, provide or furnish other liquor, wine, beer nonintoxicating beer or nonintoxicating craft beer and shall not be licensed as a private club, private wine restaurant, tavern or any other license permitting on-premises consumption, except for free-complimentary samples.

4.2. No person while on the premises of any mini-distillery shall break the seal on any package of alcoholic liquor, other than the licensee, for the limited purpose of on-premises sampling.

4.3. Prior to permitting any on-premises liquor sampling, a distillery or mini-distillery shall verify that each person being served, furnished or consuming samples are twenty-one (21) years of age or over and are not noticeably or visibly intoxicated at any point during the consumption of on-premises samples.

4.4. The retail price charged by a distillery or mini-distillery for off-premises retail sales of alcoholic liquor manufactured at the distillery or mini-distillery may not be less than one hundred ten percent (110%) of the wholesale cost of the product as contained in the Commissioner's Wholesale Spirits Catalog which sets the uniform price (in accordance with W. Va. Code §60-3A-17) to a retailer.

4.5. Retail sales of alcoholic liquor manufactured at the distillery or mini-distillery are for off-premises personal consumption by the purchaser and resale by the purchaser is prohibited.

§175-10-5. Market zone fee payment and taxes.

5.1. Each distillery or mini-distillery shall submit to the Commissioner two (2%) percent of the gross sales price of each retail liquor sale for the value of all sales at the distillery or the mini-distillery each month and the sales, information and calculation shall be submitted to the Commissioner on a form provided by him or her.

5.1.a. The market zone fee payment shall be collected by the Commissioner and distributed, at least quarterly, to each market zone retail outlet located in the distillery or mini-distillery's market zone, proportionate to each market zone retail outlet's annual gross prior year's pretax value sales.

5.1.b. The maximum amount of the market zone fee payments made by a distillery or mini-distillery is \$15,000 per annum.

5.2. Alcoholic liquors sold at retail for off-premises personal consumption by a distillery or mini-distillery are subject to a six percent (6%) retail sales tax and a five percent (5%) municipal tax (See also W. Va. Code §§60-3-9d and 60-3A-21).

§175-10-6. Licensing.

6.1. Licenses are issued on an annual basis and must be displayed on the premises in a prominent location.

6.2. The license fee for a distillery license is one thousand five hundred dollars (\$1,500.00) and a mini-distillery license fee is fifty dollars (\$50.00) for the license period and may not be pro-rated.

6.3. A licensed distillery or mini-distillery located in the state of West Virginia will be assigned a limited retail outlet number to account for limited retail sales for off-premises personal consumption of its alcoholic liquors.

6.4. No more than one distillery or mini-distillery license may be issued to a single person or entity and no person may hold both a distillery and a mini-distillery license.

6.5. A distillery or mini-distillery shall not be licensed as a private club, private wine restaurant, or tavern.

6.6. Following receipt of a completed application for a distillery or mini-distillery license containing additional or 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 distillery or mini-distillery license. The Commissioner may request any additional information necessary to complete a review of an applicant's application.

6.6.a. 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 a West Virginia Alcohol Beverage Control Administration Release of Information and Waiver of Confidentiality of Records Form for this purpose. The applicant will submit a full set of fingerprints to facilitate a criminal background check and the Commissioner will request the state police or its designee 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 Alcohol Beverage Control Commission.

6.6.b. The applicant will reimburse the West Virginia Alcohol Beverage Control Commission for all fees or charges that are incurred by the West Virginia Alcohol Beverage Control Commission for a background investigation undertaken pursuant to this subsection.

6.6.c. The applicant must verify that it is a United States citizen of good moral character and, if a naturalized citizen, when and where naturalized; and, if a corporation organized and authorized to do business under the laws of West Virginia, when and where incorporated, with the name and address of each officer; that each officer is a citizen of the United States and a person of good moral character; and if a firm, association, partnership or limited partnership, that each member is a citizen of the United States and, if a naturalized citizen, when and where naturalized, each of whom must sign the application.

6.6.d. The Commissioner, after initial examination and evaluation of the application may determine that an Initial Inspection Report is warranted and, accordingly, have one made by a staff person using the "Initial Inspection Report".

6.6.e. Upon completion of any investigation of an applicant, the Commissioner shall inform such applicant in writing whether the application has been approved or denied.

6.7. No distillery or mini-distillery may be located within the immediate vicinity of a school or church.

6.8. A distillery or mini-distillery applicant shall not falsify, make material misrepresentations or omit any material facts in its application for licensure. Such actions may be considered by the Commissioner as additional grounds for determining an unsuitable person or applicant.

6.9. A distillery or mini-distillery shall provide all federal tax stamp, federal licensure approval and federal registrations to the Commissioner for review.

6.10. A distillery or mini-distillery license is not transferable, but with the permission of the Commissioner the location of the business may be amended.

6.11. Forms for licensing and renewal may be obtained on the West Virginia Alcohol Beverage Control Commission web site accessible at www.abca.wv.gov or contacting the offices at 304-356-5500.

6.12. The Commissioner shall refuse a license if he or she finds that: (a) the applicant is not a suitable person; (b) the place to be occupied by the applicant is not a suitable place; or (c) a sufficient number of licenses have already been issued in the area where the applicant proposes to locate its premises.

§175-10-7. Reports.

7.1. The distillery or mini-distillery located in the state of West Virginia shall report monthly to the Commissioner the total retail sales of alcoholic liquors sold at the licensed premises.

7.1.1. Total retail sales information shall be submitted on forms provided by the Commissioner or in a manner approved by the Commissioner.

7.1.2. The distillery or mini-distillery shall submit to the Commissioner, with this report, two percent (2%) of the total retail liquor sales at the distillery or mini-distillery each month.

7.1.3. Total gross sales reports and payment of the two percent of the total retail liquor sales shall be submitted by the distillery or mini-distillery to the Commissioner on or before the 15th day of the month following the month for which the report is made.

7.2. The distillery or mini-distillery shall report monthly to the Commissioner the total gallons of alcoholic liquor produced at the distillery or mini-distillery. For the purpose of this report gallons will mean proof gallons.

7.2.1. Total production information shall be submitted on forms provided by the Commissioner or in a manner approved by the Commissioner. The distillery or mini-distillery may provide a true copy of the Monthly Report of Processing Operations filed with the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms (ATF F 5110.28), in lieu of the Commissioner's report.

7.2.2. Total production information shall be submitted by the distillery or mini-distillery to the Commissioner on or before the 15th day of the month following the month for which the report is made.

7.3. A distillery or mini-distillery shall maintain its records for all productions and sales and all reports provided to the Commissioner.

§175-10-8. Informational Signs.

8.1. Any distillery or mini-distillery conducting tours, on-premises samples and off-premises retail sales shall post notices to the public related to the possible danger of birth defects which may result from the consumption of alcohol during pregnancy which shall be displayed in plain view at the main entrance to areas where alcohol is sold for off-premises consumption and tasting areas. This form is available on the Commissioner's website, www.abca.wv.gov.

8.2. Any distillery or mini-distillery conducting tours, on-premises samples and off-premises retail sales shall post a blood-alcohol chart, provided by the Commissioner, which shall be posted in an open and prominent place within the distillery or mini-distillery. This chart is available on the Commissioner's website, www.abca.wv.gov.

8.3. Any advertisements utilized by a distillery or mini-distillery shall not encourage intemperance or underage consumption.

§175-10-9. Days and hours distillery or mini-distillery may conduct off-premises retail sales for personal consumption and serve on-premises free complimentary samples.

9.1. A distillery or mini-distillery may not sell alcoholic liquors for retail sales for off-premises consumption or offer alcoholic liquors for on-premises free complimentary sampling on Sundays or Christmas Day.

9.2. A distillery or mini-distillery may not sell alcoholic liquors for retail sales for off-premises consumption or offer alcoholic liquors for on-premises free complimentary sampling between the hours of midnight, 12:00 a.m., and 8:00 a.m. on weekdays and Saturdays.

§175-10-10. Limitations.

10.1. No distillery or mini-distillery may sell more than three thousand (3,000) gallons of product at the distillery or mini-distillery licensed premises during the the initial two years of licensure.

10.2. The distillery or mini-distillery may increase sales at the distillery or mini-distillery location by two thousand (2,000) gallons following the initial 24-month period of licensure and may increase sales at the distillery or mini-distillery location each subsequent 24-month period by two thousand (2,000)

gallons, not to exceed ten thousand (10,000) gallons a year of total sales at the distillery or mini-distillery location.

10.3. No licensed mini-distillery may produce more than twenty thousand (20,000) gallons per calendar year at the mini-distillery location.

§175-10-11. Manufacturer, distillery and mini-distillery prohibitions.

11.1. Improper inducements. -- Federal and state law prohibits a distillery or mini-distillery from providing inducements, directly or indirectly, to any retail outlet to purchase alcoholic liquors from the manufacturer to the exclusion, in whole or in part, of products sold or offered for sale by another manufacturer. Prohibited inducements include:

11.1.a. Acquiring or holding any interest in any license with respect to the retail outlet or any other premises which is owned, occupied or used in any manner by the licensed retailer or his or her immediate family;

11.1.b. Acquiring any interest in real or personal property which is owned, occupied, or in any manner used by the licensed retailer or his or her immediate family in the conduct of the retail outlet or any other of his or her businesses;

11.1.c. Furnishing, giving, renting, lending, or selling to the licensed retailer or his or her immediate family any equipment, fixtures, exterior signs, supplies, money, services or other things of value, except that a manufacturer may furnish to a licensed retailer items of nominal value for in-store display or sales purposes for use only within the licensed retail outlet;

11.1.d. Paying or crediting the licensed retailer or his or her immediate family for any advertising, display, or distribution services;

11.1.e. Guaranteeing any loan for the repayment of any financial obligation of the licensed retailer or his or her immediate family; or

11.1.f. Requiring the licensed retailer to take and dispose of a certain quota of any distilled spirits.

11.2. Interest in the retail outlet. -- A distillery or mini-distillery may not acquire or hold any interest in any license required to be obtained by the licensed retailer or his or her immediate family, with respect to the retail outlet or any other premises which are owned, occupied or in any manner used by the licensed retailer or his or her immediate family. This prohibition applies equally to:

11.2.a. The licensed retailer's officers, partners, employees, other representatives, and their immediate family;

11.2.b. Any separate corporation in which the manufacturer or its officers, partners, employees or other representatives, and their immediate family hold any ownership interests or with which such persons are otherwise affiliated.

11.3. Interest in real or personal property of the licensed retailer.

11.3.a. A distillery or mini-distillery may not acquire or hold any interest in real or personal property which is owned, occupied, or in any manner used by the licensed retailer or his or her immediate family in the conduct of the retail outlet or of other businesses of the licensee and his or her immediate family. This prohibition also applies to:

11.3.a.1. Any interest acquired by the distillery or mini-distillery's corporate officials, partners and employees or other representatives, or their immediate family; and

11.3.a.2. To any interest which is acquired by a separate corporation in which the distillery or mini-distillery or its officers, partners, employees or other representatives, or their immediate family hold any ownership interest or in which they are otherwise affiliated.

11.3.b. A distillery or mini-distillery may not acquire a mortgage on a licensed retailer's real or personal property or on the real or personal property of the licensed retailer's immediate family.

11.3.c. A distillery or mini-distillery may not rent display space or shelf space at a retail outlet.

11.4. Furnishing things of value.

11.4.a. A distillery or mini-distillery may not furnish, give, rent, or lend to a licensed retailer or his or her immediate family any equipment, fixtures, exterior signs, supplies, money, services or other things of value. The prohibition does not apply to sales of goods by a distillery or mini-distillery to a licensed retailer of goods that are to be resold to the general public and which are not alcoholic liquors so long as the licensed retailer pays the normal sales price for the goods.

11.4.a.1. This prohibition also applies to any similar activity which occurs through a third party, such as a retailer association or display company, where the benefits resulting to the licensed retailer may be considered as providing the licensed retailer with a thing of value without the payment of an appropriate purchase price.

11.4.a.2. This prohibition does not apply to signs and other display-related materials that are of negligible monetary value as long as the distillery, mini-distillery or retailer has prior written approval from the Commissioner.

11.4.b. A distillery or mini-distillery must sell any equipment, supplies or fixtures to a licensed retailer at the current market value and may not provide a special price advantage for purchasing from one manufacturer as opposed to another manufacturer.

11.4.c. A distillery or mini-distillery may not provide any assistance (financial, legal, administrative or influential) to a licensed retailer in acquiring the license required to operate a licensed retail outlet.

11.4.d. A distillery or mini-distillery may not furnish any exterior advertising signs, but may provide interior signs to the licensed retailer. The distillery or mini-distillery may advertise by billboards which display alcoholic liquors, wine or nonintoxicating beer, but may not identify any licensed retailer in or on the advertisement.

11.4.e. A distillery or mini-distillery may not furnish things of value to the licensed retailer at less than the normal sale price, such as nonalcoholic mixers and pouring racks which the licensed retailer may market or sell in his or her business.

11.5. Paying for advertising, display or distribution service. A distillery or mini-distillery may not provide a licensed retailer with free advertisement, exterior display or distribution services, or any similar types of services.

11.6. Quota sales. A licensed retailer may not be required to purchase any alcoholic liquors in order to purchase nonalcoholic liquors or other products from a distillery or mini-distillery.

11.7. Other.

11.7.a. A distillery or mini-distillery may not touch, disturb or otherwise interfere with the product or displays of another manufacturer.

11.7.b. No person except a licensed representative may contact a licensed retailer, or any employee thereof, or enter a retail outlet for the purpose of:

11.7.b.1. Selling or offering to sell;

11.7.b.2. Soliciting, negotiating or promoting the sale of alcoholic liquor or distilled spirits; or

11.7.b.3. Conducting a survey, study or similar activity pertaining to the sale, distribution or availability of alcoholic liquors or distilled spirits.

§175-10-12. Advertising.

12.1. General prohibition. -- All advertising of West Virginia product or alcoholic liquor which encourages intemperance, makes the consumption of alcoholic liquor appear to be glamorous, is lewd or obscene, induces minors to purchase, or tends to deceive or misrepresent, is prohibited. Federal law which provides guidelines relative to acceptable and prohibited advertising of alcoholic liquors must be followed.

12.2. Permissible media. -- Printed advertising of West Virginia product or alcoholic liquor shall be limited to billboards, newspapers, magazines and similar publications. Radio and television may not be utilized to advertise alcoholic liquors.

12.3. Application. -- No person engaged in business as a producer, processor, broker, manufacturer (distillery or mini-distillery), bottler, importer, wholesaler or retailer of alcoholic liquors or wine, directly or indirectly or through an affiliate, may publish or disseminate or cause to be published or disseminated in any billboard, newspaper, magazine or similar publication any advertisement of alcoholic liquors or wine, unless the advertisement is in conformity with this rule. This prohibition does not apply to the publisher of a newspaper, magazine or similar publication or the standardized outdoor advertising company which owns a billboard, unless such publisher or outdoor advertising company is engaged in business as a producer, manufacturer (distillery or mini-distillery), bottler, importer, wholesaler or retailer of alcoholic liquors or wine, directly or indirectly or through an affiliate.

12.4. Mandatory statements.

12.4.a. Responsible advertiser. -- An advertisement for alcoholic liquors shall state the name and address of the producer, manufacturer (distillery or mini-distillery), bottler, importer or wholesaler responsible for its publication.

12.4.b. Class, type and distinctive designation. -- An advertisement for alcoholic liquors shall contain a conspicuous statement of the class and type or other designation of the product corresponding with the complete designation which appears on the brand label of the product.

12.4.c. Alcoholic content. -- An advertisement shall state the alcoholic content of the product advertised in the manner and form the information appears on the label.

12.4.d. Percentage of neutral spirits and name of commodity. -- An advertisement of distilled spirits (other than cordials, liqueurs and specialties) produced by blending or rectification, if neutral spirits, shall state the percentage of neutral spirits used and the name of the commodity from which the neutral spirits have been distilled in substantially the manner and form in which the information appears on the labels of the product advertised. An advertisement of neutral spirits or of gin produced by a process of continuous distillation, shall state the name of the commodity from which the neutral spirits or gin have been distilled substantially in the manner and form in which the information appears on the label.

12.4.e. "Line" or "Brand" advertisements. -- An advertisement that does not mention a specific product but merely refers to a class of distilled spirits such as "Whiskey" or refers to several classes of distilled spirits (such as "Whiskey," "Brandy," "Rum," "Gin," "Liquor," etc.) marketed under a single brand, the only information required by subsection is the name and address of the responsible advertiser.

12.5. Lettering. -- Statements required by this rule to be stated in any written, printed or graphic advertisement shall appear in lettering or type of a size, kind and color sufficient to render them both conspicuous and readily legible. In particular:

12.5.a. Required information shall be stated against a contrasting background and in type or lettering that is at least the equivalent of eight (8) point type.

12.5.b. Required information shall be stated as to appear to be a part of the advertisement and shall not be separated in any manner from the remainder of the advertisement.

12.5.c. Where an advertisement relates to more than one product, the required information shall appear in a manner as to clearly indicate the particular products to which it is applicable.

12.5.d. Required information may not be buried or concealed in unrequired descriptive matter or decorative designs.

12.6. Prohibited statements. -- Generally.

12.6.a. Restrictions. -- An advertisement may not contain:

12.6.a.1. Any statement that is false or misleading in any material particular. For example, the reproduction of medals or facsimiles of awards that were not given on a competitive or comparative basis is prohibited;

12.6.a.2. Any statement that is disparaging of a competitor's product. For example, an advertisement may not contain statements such as "Contains no neutral spirits or alcohol" or "This rum will not turn dark in the bottle;"

12.6.a.3. Any statement, design, device or representation that is obscene, lewd or indecent;

12.6.a.4. Any statement, design, device or representation of, or relating to, analyses, standards or tests, regardless of truth, which is likely to mislead the consumer; for example, an advertisement may not contain a statement such as "Analyzed by the laboratory and found to be pure and free from deleterious ingredients," or "Tested and approved. Signed by the Research Institute;"

12.6.a.5. Any statement, design, device or representation of, or relating to, any guaranty, regardless of truth, that is likely to mislead the consumer. However, nothing in this section prohibits the use of any enforceable guaranty in substantially the following form:

“We will refund the purchase price to the purchaser if he is in any manner dissatisfied with the contents of this package.”

(Blank to be filled in with the name of person making guaranty.)

12.6.a.6. Any statement that the product is produced, blended, made, bottled, packed or sold under or in accordance with any authorization, law or regulation of any municipality, county or state, federal or foreign government unless the such statement is required or specifically authorized by the laws or regulations of such government; if a municipality, county, state or federal permit number is stated, the permit number may not be accompanied by any additional statement relating thereto.

12.6.b. Statements inconsistent with labeling. -- An advertisement may not contain any statement concerning a brand or lot of distilled spirits that is inconsistent with any statement on the labeling;

12.6.c. Curative and therapeutic effects. -- An advertisement may not contain any statement, design or device representing that the use of any distilled spirits has curative or therapeutic effects, if such statement is untrue in any particular or tends to create a misleading impression. For example, advertisements may not contain statements such as “_____ is good for you” or “Conducive to well-being;”

12.6.d. Place of origin. -- An advertisement may not represent that the distilled spirits were manufactured in, or imported from, a place or country other than that of their actual origin, or were produced or processed by one who was not in fact the actual producer.

12.6.e. Flags, seals, coats of arms, crests and other insignia. -- No advertisement may contain any statement, design, device or pictorial representation of, or relating to, or capable of being construed as relating to the armed forces of the United States, or of the American Flag, any state flag or any emblem, seal, insignia or decoration associated with any such flag or entity. No advertisement may contain any statement, device, design or pictorial representation of or concerning any flag, seal, coat of arms, crest or other insignia, likely to falsely lead the consumer to believe that the product has been endorsed, made or used by, or produced for under the supervision of, or in accordance with the specifications of the government, organization, family or individual with whom such flag, seal, coat of arms, crest or insignia is associated.

12.7. Prohibited statements. -- Distilled spirits.

12.7.a. Restrictions. -- An advertisement for distilled spirits may not contain:

12.7.a.1. The words “Bond,” “Bonded,” “Bottled In Bond,” “Aged In Bond” or phrases containing these or synonymous terms, unless the words or phrases appear upon the label of the distilled spirits advertised and are stated in the advertisement in the manner and form as they appear upon the label; and

12.7.a.2. Statements of age. -- An advertisement for distilled spirits may not contain any statement, design or device directly or by implication concerning age or maturity of any brand or lot of distilled spirits unless a statement of age appears on the label of the advertised product. When any statement, design or device concerning age or maturity is contained in any advertisement, it shall include (in direct conjunction and with substantially equal conspicuousness) all parts of the statement concerning

age and percentages, if any, which appear on the label. However, an advertisement for any whiskey or brandy which does not bear a statement of age on the label or an advertisement for rum that is four (4) years or more old may contain general inconspicuous age, maturity or other similar representations, e.g., "Aged In Wood," "Mellowed In Fine Oak Casks."

§175-10-13. Transportation.

13.1. A distillery or mini-distillery located in the state of West Virginia may sell and ship alcoholic liquors for wholesale sales, which are for re-sale, outside the state of West Virginia, subject to other states or jurisdiction's requirements. A distillery or mini-distillery may not ship alcoholic liquors via U. S. mail or another mail or package service.

13.2. Transportation permits. Any person, including any common carrier hired by a manufacturer, distillery or mini-distillery who transports, for hire, any alcoholic liquors to be sold commercially in quantities in excess of one (1) gallon within, into or through the State of West Virginia, shall first give a surety bond, approved by the Attorney General as to form and execution, and by the Commissioner as to sufficiency, payable to the State of West Virginia in the penalty of one thousand dollars (\$1,000.00) on condition that the person will exercise the privileges granted by the permit in conformity with the provisions of the Liquor Control Act and the rules of the Commissioner. A bonded person who defaults on condition of the surety forfeits to the state school fund the sum of one hundred dollars (\$100.00) for each breach, recoverable by the ABCC upon motion with ten (10) days notice in any court having jurisdiction of the parties. Each person transporting alcoholic liquors, in addition to the bond aforesaid, shall pay the Commissioner an annual fee of ten dollars (\$10.00) for the first permit and one dollar (\$1.00) for each duplicate permit issued. In the case of motor carriers for hire, a permit issued by the Commissioner under seal showing that the required bond has been given and the fee paid shall accompany the alcoholic liquors at all times during transportation. In the case of air carriers and rail carriers for hire, a permit issued by the Commissioner under seal showing that the required bond has been given and the fee paid shall be filed in the principal office of such carrier in this state. Any person holding a transportation permit who transports any alcoholic liquors in violation of this rule and the code is subject to all penalties available in the code for each violation. Further, any person holding a transportation permit who transports product for an unlicensed distillery or mini-distillery and who fails to verify that the distillery or mini-distillery is licensed in West Virginia prior to shipment is subject to all penalties available in the code for each violation.

13.3. Any representative licensed under W. Va. Code §60-4-22, may by virtue of his or her license, transport within West Virginia any alcoholic beverages that are deemed to be transported in connection with the purpose for which such license was granted without a transportation permit issued by the Commissioner.

13.4. A licensed distillery or mini-distillery may deliver or, upon picking up alcoholic liquors at the ABCC warehouse, may transport them to the distillery or mini-distillery in order to use the alcoholic liquors for either on-premises free complimentary samples or for off-premises retail sales for personal consumption and not for resale. The receipt provided by the ABCC warehouse is the written approval provided by the ABCC.

13.5. All permits provided for in this rule shall be issued for the period of the calendar year, and the fee therefor shall not be prorated.

13.6. A person may transport in this state up to ten (10) gallons of alcoholic liquors not for resale. Any amount of alcohol to be transported that is in excess of ten (10) gallons requires prior written authorization of the Commissioner.

§175-10-14. Violations, Penalties and Hearings.

14.1. A distillery or mini-distillery may not:

14.1.a. Sell or permit the sale of more than ten (10) gallons of alcoholic liquors to a person for off-premises personal consumption at one time without approval of the Commissioner.

14.1.b. Sell or offer to sell or permit the sale or offer to sell any alcoholic liquor in other than the original package or container.

14.1.c. Sell, give or procure, or permit the sale, gift, or procurement of any alcoholic liquor for or to any person under age twenty-one (21) or who is visibly intoxicated.

14.1.d. Permit the consumption of any alcoholic liquors on the distillery or mini-distillery's licensed premises by any person, except for free complimentary samples to any person over the age of twenty-one (21) or who is not visibly intoxicated.

14.1.e. Alter, change or misrepresent or permit the alteration, change or misrepresentation of the quality, quantity or brand name of any alcoholic liquor.

14.1.f. Permit any person under age eighteen (18) to sell, furnish or give alcoholic liquor to any other person.

14.1.g. Purchase or otherwise obtain its or any other alcoholic liquors in any manner other than that authorized in Code and rules.

14.1.h. Permit any person to break the seal on any package or bottle of alcoholic liquor, except for the limited purpose of on-premises free complimentary samples.

14.1.i. Permit any person other than a distillery or mini-distillery licensee or a regular employee thereof to unpack, shelve, arrange, shift, or otherwise manipulate bottles or other receptacles containing distilled spirits, except for the purpose of purchasing same.

14.1.j. Sell or permit the sale of its alcoholic liquors purchased from the Commissioner, via actual or constructive bailment, at a price which is less than one hundred ten percent (110%) of the wholesale cost of the West Virginia product. For the purposes of determining the minimum price, the distillery or mini-distillery shall multiply the Commissioner's wholesale cost of the product contained in the Quarterly Spirits Price List or the ABCC Tradeshow Catalog, available on the ABCC website at www.abca.wv.gov, by one hundred ten percent (110%) (See also 175 CSR 1 and 175 CSR 5).

14.1.k. Sell or permit the sale of its alcoholic liquors through a window at a drive-in or drive-through retail establishment.

14.1.l. Sell or permit the sale of its alcoholic liquors on Sunday, Christmas day or other than during the hours permitted for sale of alcoholic liquors.

14.2. Violations of this section, this rule or Chapter 60 of the Code are subject to an assessment by the Commissioner of a civil penalty which shall not be more than one thousand dollars (\$1,000.00) for each violation. Each violation shall constitute a separate offense. The Commissioner shall consider the distillery or mini-distillery's history of previous violations, the appropriateness of such penalty to the size of such business, the gravity of the violations and the demonstrated good faith of the distillery or mini-distillery charged in attempting to achieve rapid compliance after notification of the violation.

14.3. A civil penalty shall be assessed by the Commissioner only after giving at least ten days' notice to the licensed distillery or mini-distillery. Notice shall be in writing, shall state the reason for the proposed civil penalty and the amount, and shall designate a time and place for a hearing where the licensed distillery or mini-distillery may show cause why the civil penalty should not be imposed. Notice shall be sent by certified mail to the address for which the licensed distillery or mini-distillery was issued. The licensed distillery or mini-distillery may, at the time designated for the hearing, produce evidence in his or her behalf and be represented by counsel.

14.4. The hearing and the administrative procedures prior to, during and following the hearing are governed by and shall be conducted in accordance with the provisions of article five, chapter twenty-nine-a of the code.

14.5. Notwithstanding the provisions of subsection (b), section four, article five, chapter twenty-nine-a of the code, any person adversely affected by a final order entered following the hearing has the right of judicial review by the circuit court of Kanawha County or the circuit court in the county where the proposed or licensed premises is located and will or does conduct sales: Provided, That in all other respects, such review shall be conducted in the manner provided in chapter twenty-nine-a of the code. The petition for the review must be filed with the circuit court within thirty days (30) following entry of the final order issued by the commissioner. An applicant or licensee obtaining the review is required to pay the costs and fees incident to transcribing, certifying and transmitting the records pertaining to the matter to circuit court.

14.6. The judgment of the circuit court reviewing the order of the commissioner is final unless reversed, vacated or modified on appeal to the Supreme Court of Appeals in accordance with the provisions of section one, article six, chapter twenty-nine-a of the code.

§175-10-15. Revocation, hearing and appeals.

15.1. The Commissioner may revoke a license upon a finding that: (a) the a distillery or mini-distillery is not a suitable person or involves unsuitable persons; (b) the place occupied by the distillery or mini-distillery is not a suitable place; (c) the distillery or mini-distillery has violated a provision of Chapter 60 of the Code, this rule or any rule made by the commissioner under the authority of Chapter 60 of the Code; or (d) the distillery or mini-distillery has failed to comply with the spirit and intent of Chapter 60 of the Code by encouraging intemperance, the unlawful consumption of alcoholic liquors, or otherwise.

15.2. The Commissioner shall give the distillery or mini-distillery at least ten days' notice prior to a revocation. The notice shall be in writing, state the reason for revocation and designate a time and place when the distillery or mini-distillery may show cause why the license should not be revoked. Notice shall be sent by certified mail or other express mail to the current address for which the license was issued. The distillery or mini-distillery may, at the time designated for the hearing, produce evidence in his or her behalf and be represented by counsel. On the final revocation of a license or licenses the Commissioner shall immediately take over the stocks of liquors possessed by the distillery or mini-distillery, and pay to the licensee the amount paid by him or her to the state for such stocks less the amount necessary to defray the costs incurred by the Commissioner in the revocation proceedings and hearing.

15.3. A final decision of the Commissioner granting or revoking, or refusing to grant or to revoke a license authorized by Chapter 60 of the Code shall be subject to judicial review in the circuit court of Kanawha County or the circuit court in the county where the proposed or licensed premises is located and will or does conduct sales upon the appeal of a distillery or mini-distillery or an applicant for a license, but in any such judicial review only the legality of the decision of the Commissioner under the constitution and laws of this state and the United States shall be determined.