



WEST VIRGINIA
ALCOHOL BEVERAGE CONTROL ADMINISTRATION
FREDRIC L. WOOTON, COMMISSIONER

August 20, 2024

VIA EMAIL

Grant Martin, Esq.
MAG Industries
One West Fourth Street
Winston-Salem, NC 27101
Email: gheath@towlesrka.com
Re: Proposed Rule 175 CSR 9

Dear Mr. Martin:

The WVABCA received your letter and comments on July 29, 2024, via email, for the Hemp and Kratom Proposed rule.

In response to your suggestion to add language to Question E on the fiscal impact of the rule, the WVABCA Commissioner, the WV Agriculture Commissioner and the WV Tax Commissioner have not set a hard percentage of enforcement in regard to the Agriculture's hemp and kratom permittees, and further the WVABCA does not have enough data to state that the enforcement will exactly cost \$325,000 (that number is an estimate). The WVABCA as administrative officers have jurisdiction via the WV Department of Agriculture over their permittees. The rule (See §6.1.) does indicate a willingness to work with law enforcement and county prosecutors with respect to business without permits, especially if they have a WVABCA license. In this instance, no change will be made.

In your 2nd and 3rd response, you again address the regulation of unpermitted retailers. See response above, no change will be made.

In your 4th response, the list is generated by the WV Department of Agriculture. The WVABCA does not have control over the WV Department of Agriculture assembly of the list. Perhaps provide a comment on WV Department of Agriculture's rule. No change will be made.

In your 5th response, the WVABCA is assisting with enforcement of the Hemp and Kratom statutes and rules, the WV Department of Agriculture issues the permits and handles the administrative side of permittees and complaints, and the publicizing of these issues. See WV Department of Agriculture's rule. No change will be made.

Your 6th response, the typo will be changed.

In your 7th and 8th responses The WVABCA has not received the training to determine that all hemp or kratom products are registered. The WVABCA receives a list of chemical components but relies on the WV Department of Agriculture to determine whether products are registered or meet registration

August 20, 2024

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requirements. No change will be made. In the future, this could be accomplished with an MOU between the agencies.

The WVABCA appreciates your comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Anoop Bhasin', with a stylized flourish at the end.

Anoop Bhasin
WVABCA General Counsel

Cc: Ritchie Heath, Bowles Rice, lobbyist for MAG Industries



MAG Industries Ltd.
14 S. Plant Road
Buckhannon, WV 26201
Attn: Legal Department

July 26, 2024

WV Alcohol Beverage Control Administration
900 Pennsylvania Ave., 4th Floor
Charleston, WV 25302
Attn: Anoop Bhasin, Legal Division

Re: In-State Manufacturer's Comments to Hemp & Kratom Proposed Rules

Dear WV Alcohol Beverage Control Administration,

We represent MAG Industries Ltd. ("MAG"), which is one of West Virginia's largest (if not the largest) manufacturer and distributor of compliant hemp and kratom products. MAG is a family-owned and operated company partnered with nearly every major WV-based convenience and tobacco chain, including Little General, BFS, Smoker Friendly, Gumby's, and more.

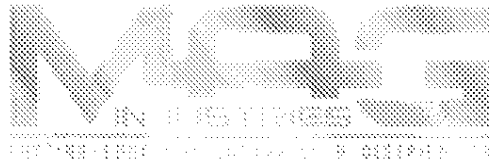
Thanks to West Virginia's commonsense and business-friendly laws in this industry, MAG intends to continue to expand its manufacturing operations in the state – creating more good jobs and tax revenue and providing the highest-quality and safest products to consumers.

Some of MAG's brands include Cloud 8® Delta 8, Wicked THC™, and Element Kratom™. These are some of the most popular brands in West Virginia, but unfortunately, the black market – especially at unregistered "pop up," or independent, smoke and vape shops -- is causing a great deal of harm to the responsible WV family-owned retailers and manufacturers.

Specifically, many unregistered stores are importing unregistered foreign or West Coast products that – most of the time – are unsafe for consumers, noncompliant with THC limits, and in some cases even uniquely appealing to minors. Moreover, these are generally the same stores that are evading taxes and selling to minors.

Although the West Virginia Legislature and Department of Agriculture have done an outstanding job of supporting local businesses and consumers by establishing the hemp & kratom regulatory program, enforcement has undeniably been lacking – to the benefit of bad actors, and to the detriment of good actors.

For example, earlier this year, the West Virginia Department of Agriculture announced that THC-A flower was not able to be registered, due to the department's view that it is unlawful under statute. However, without proper enforcement, only responsible retailers stopped selling



THC-A, and it remains in independent “smoke shops” *all over the state*. As you may know, THC-A flower is – in reality – the same as highly-potent marijuana flower.

The result is that registered, compliant WV-made hemp products -- like Cloud 8 and Wicked -- are losing to this new black market and hurting WV manufacturing and job creation. Moreover, responsible retailers are losing foot traffic and customers to unscrupulous retailers who are blatantly disrespecting authorities and cheating in an uneven playing field.

Therefore, I believe that I speak on behalf of all responsible West Virginia retail businesses, hemp and kratom entrepreneurs, and even most consumers when I say that we are thrilled to have the assistance of the ABCA. Specifically, we are hopeful that your involvement will put an end to this unfair, uneven playing field in an important emerging industry.

We are now respectfully requesting that you consider our proposed changes to your rules, which will give the ABCA clearer authority and more effective enforcement capabilities, without inhibiting the growth of responsible businesses.

This markup, or redline (attached), was carefully prepared by our lawyers who have years of hands-on experience in this specific industry. We would be more than happy to set up a time to discuss our proposals and share any information about what is happening in the industry. MAG has boots on the ground all over the state, and they are all highly-motivated to help you do your job.

We look forward to working with you.

Regards,

A handwritten signature in cursive script that reads 'Grant Martin'.

Grant Martin, Esq.

Co-founder, MAG Industries Ltd.



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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6/28/2024 4:54:07 PM

Office of West Virginia
Secretary Of State

NOTICE OF PUBLIC COMMENT PERIOD

AGENCY: Alcohol Beverage Control Commission TITLE-SERIES: 175-11
RULETYPE: Legislative Amendment to Existing Rule: No Repeat of existing rule: No
RULE NAME: Retail Enforcement of Select Plant-Based
Derivatives and Derivative Products: Hemp and
Kratom
CITE STATUTORY AUTHORITY: W. Va. Code §11-16-23, §60-7-13, §19-12E-12; and §19-12F-1 et seq.

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 07/30/2024 10:00 AM

COMMENTS MAY BE MAILED OR EMAILED TO:

NAME: Anoop Bhasin

ADDRESS: 900 Pennsylvania Ave., 4th Floor

Charleston, WV 25302

EMAIL: andrea.e.cummings@wv.gov

PLEASE INDICATE IF THIS FILING INCLUDES:

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

INCORPORATED BY REFERENCE: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

PROVIDE A BRIEF SUMMARY OF THE CONTENT OF THE RULE:

With the passage of SB 679 in 2024, the Legislature empowered the WVABCA to assist Agriculture in the retail enforcement of hemp and kratom. This rule addresses the WVABCA's role in the process of hemp and kratom retail enforcement.

SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN THE RULE AND A STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE:

With the passage of SB 679 in 2024, the Legislature empowered the WVABCA to assist Agriculture in the retail enforcement of hemp and kratom. This rule addresses the WVABCA's role in the process of hemp and kratom retail enforcement. Agriculture is administratively responsible for the permitting and sanctioning of their permittees.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

SB 679 generates a 11% tax and greater enforcement should increase revenue to the state as permittees comply with the law. Agriculture may have numbers on permittees and potential revenue.

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

SB 679 generates a 11% tax and greater enforcement should increase revenue to the state as permittees comply with the law. Agriculture may have numbers on permittees and potential revenue.

C. ECONOMIC IMPACT OF THE RULE ON THE STATE OR ITS RESIDENTS:

SB 679 generates a 11% tax and greater enforcement should increase revenue to the state as permittees comply with the law. Agriculture may have numbers on permittees and potential revenue.

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2024 Increase/Decrease (use "-")	2025 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	162500	325000	325000
Personal Services			
Current Expenses			
Repairs and Alterations			
Assets			
Other			
2. Estimated Total Revenues	400000	400000	400000

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

Please explain increases and decreases in personal services, current expenses, repairs and alterations, assets, other costs and revenues, including assumptions and data sources and delineation between start-up and ongoing costs. Please also include a long-range schedule of costs and revenues if fiscal impact is expected to vary in future years.

SB 220 from 2023 passed and created a hemp cannabinoid product tax and a kratom tax at 11%. That bill created revenues from the tax. The changes in this bill do not create any revenue. SB 220's tax has generated a quarter of revenue and conservative yearly estimate would be \$400,000 to the WVABCA. Again, there is not a full year of data collected yet. With more enforcement, hemp and kratom tax revenue could be negatively impacted.

The changes in the bill that affect WVABCA would impact costs of the agency with respect to enforcement of administrative penalties on various Department of Agriculture hemp and kratom retail licensees.

License numbers provided Department of Agriculture indicate that there are 816 hemp retail licensees and 204 kratom retail licensees. It is unclear at this time if there is some overlap between the hemp and kratom licensees or if there are some stand alone licensees. Further it is not clear if there is overlap with WVABCA licensees as well.

Note, more kratom licensees are expected after January 1, 2025, when kratom law becomes effective.

Some assumptions being made, if there a 1000 separate licensees. The WVABCA will develop

goal of a percentage of licensees to visit (working with Agriculture and Tax). If that number is 50%, then the WVABCA would visit 500 retail licensees either during regular hours and some overtime hours. At a 50% goal the cost would likely be approximately \$325,000. Again, the cost factor could vary based on the salary of the agents used and whether during regular time or overtime hours worked by the agents and underage operatives. This is a rough estimate as the number of actual licensees is not well known at this time. At this time, it is unclear whether additional agent positions would need to be requested. This fiscal note does not account for Agriculture's or Tax's fiscal impact.

Commented [R288]: The enforcement plan described in this cost analysis focuses exclusively on visits to licensed retailers, with no funds allocated to - and no apparent mechanism for - enforcement against unpermitted retailers. Rather than cleaning up the market, we are concerned that this approach will further incentivize bad actors to try and "fly under the radar," while disadvantaging businesses that are trying to do the right thing by obtaining a permit.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Anoop Bhasin -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 175
LEGISLATIVE RULE
ALCOHOL BEVERAGE CONTROL ADMINISTRATION

SERIES 11

Retail Enforcement of Select Plant-Based Derivatives and Derivative Products: Hemp and Kratom

§175-11-1. General.

1.1. Scope. -- This legislative rule provides for the retail enforcement conducted by the WVABCA of Select Plant-Based Derivative Products: Hemp and Kratom sold at retail in the State of West Virginia.

1.2. Authority. -- W. Va. Code §11-16-23, §60-7-13, §19-12E-12, and §19-12F-1 *et seq.*

1.3. Citing Date. --

1.4. Effective Date.

1.5. Sunset Date. -- This rule shall terminate and have no further force or effect on August 1, 2030.

§175-11-2. Definitions.

2.1. "Alcohol Beverage Control Administration Commissioner" means the West Virginia Alcohol Beverage Control Administration Commissioner or his or her designees.

2.2. "Agriculture Commissioner" means the Commissioner of Agriculture or his or her designees.

2.3. "Contaminated" means as defined in W. Va. Code §19-12E-12 and W. Va. Code §19-12F-3.

2.4. "Department" or "Department of Agriculture" means the West Virginia Department of Agriculture.

2.5. "Final product" means as defined in W. Va. Code §19-12E-12 and W. Va. Code §19-12F-3.

2.6. "Grower" means as defined in W. Va. Code §19-12E-12 and W. Va. Code §19-12F-3.

2.7. "Hemp-derived cannabinoid" means as defined in W. Va. Code §19-12E-12.

2.8. "Hemp-derived cannabinoid product" or "hemp product" means as defined in W. Va. Code §19-12E-12.

2.9. "Kratom" means as defined in W. Va. Code §19-12E-3.

2.10. "Kratom product" means as defined in W. Va. Code §19-12E-3.

2.11. "Non-naturally occurring derivative" means as defined in W. Va. Code §19-12E-12.

2.11. "Processor" or "manufacturer" means a person or entity as defined in W. Va. Code §19-12E-12 and W. Va. Code §19-12F-3.

2.12. "Retailer" or "seller" means a person or entity who has obtained a permit from the Commission ~~that offers for sale or sells hemp-derived cannabinoids, hemp-derived cannabinoid products, kratom, or kratom products at retail or from a retail facility to persons for personal consumption.~~

Commented [MMZ]: In the pertinent statutes, "seller" is defined to include any person or entity that "distributes, offers for sale, or sells" hemp-derived products or kratom products to persons for personal consumption. See W. Va. Code §19-12E-12(c)(11) and W. Va. Code §19-12F-3(p).

By contrast, here "seller" is defined as a *permitted seller* - which means the enforcement provisions throughout the rule are generally limited to permitted businesses. As explained in the preceding comment, focusing enforcement exclusively on permitted sellers will not only allow the most egregious violations to continue, but it will further incentivize bad actors to try and evade scrutiny by avoiding registration altogether.

2.13. "Retail sales" means as defined in W. Va. Code §19-12E-12, and the sale of kratom products in a commercial setting by a permitted retailer or seller as determined and set forth in rules promulgated by the Agriculture Commissioner.

2.14. "Tax Commissioner" means the Commissioner of the West Virginia State Tax Division or his or her designee.

2.15. "WVABCA" means West Virginia Alcohol Beverage Control Administration or its commissioneer.

Additional definitions may be referenced in the Agriculture Commissioner's legislative rule 61 CSR 30 and the Tax Commissioner's legislative rule 110 CSR 99.

§175-11-3. Retail enforcement authority.

3.1. Pursuant to W. Va. Code §19-12E-12(d)(5), (d)(7), (f) and W. Va. Code §19-12F-4(g) and W. Va. Code §19-12F-8(f), the Agriculture Commissioner shall periodically provide the WVABCA an accurate updated list of registered hemp and kratom products that are legally registered for retail sale in West Virginia: the initial list including all products for which an annual registration application has been timely submitted will be provided no later than January 15, and products for which registration is ultimately denied will be noted on subsequent versions of the list;

3.2. Pursuant to W. Va. Code §19-12E-12(d)(7), (d)(7), (f), and W. Va. Code §19-12F-4(g) and W. Va. Code §19-12F-8(f), the Agriculture Commissioner shall periodically provide the WVABCA an updated and accurate list of Agriculture Commissioner permitted hemp product retailers and kratom product retailers to the WVABCA.

3.2.1. The WVABCA will organize the provided list in section 3.2, by county and assign a permit number, if such information is not provided by the Agriculture Commissioner, and will provide the Agriculture Commissioner an editable copy of the revised list. The WVABCA requests that the Agriculture Commissioner provide all future lists in this same format but notating which hemp product retailers and kratom product retailers are newly added to the list and any retailers that were removed.

3.2.2. The permit number shall be used by WVABCA as reference to correlate the retail facility to a location, WVABCA license number, if applicable, and to complete administrative citations to be delivered to the Agriculture Commissioner.

3.3. Upon receiving periodic training from the Agriculture Commissioner, the WVABCA will work with the Agriculture Commissioner and the Tax Commissioner to conduct retail enforcement on the Agriculture Commissioner's permitted hemp product retailers' retail facilities and kratom product permitted retailers' retail facilities. Additionally, the WVABCA will work with the Agriculture Commissioner to establish and publicize a procedure for businesses and consumers to submit complaints regarding non-compliance and otherwise non-compliant retailers, and to ensure that inspections of such retailers are conducted on a priority basis. To facilitate efficient inspections, the list of retailers who are the subject of complaints will be organized by county in the same manner as the list of permitted sellers.

3.4. The WVABCA's retail enforcements shall include conducting underage hemp/kratom compliance checks in accordance with WVABCA Policy No. E-106 (and all Hemp/Kratom Compliance Check forms) and utilizing funds received W. Va. Code §19-12E-12(f)(6) and W. Va. Code §19-12F-7(b)(4) at the permitted retailer facilities.

3.5. The WVABCA will upon entering a permitted retailer's retail facility check that it has its Agriculture Commissioner permit displayed, and if not displayed the WVABCA will note in its report. If

Commented [BMM3]: In the pertinent statutes, "retail sales" is defined to include the sale of hemp-derived products and kratom products in any commercial setting. See W. Va. Code §19-12E-12(e)(10) and W. Va. Code §19-12F-3(9).

Moreover, it is this definition - covering the entire retail market - which governs the scope of WVABCA's enforcement authority. See W. Va. Code §19-12E-12(j) ("The provisions of this section related to retail sales shall be enforced by the [Agriculture] commissioner with the assistance of the Alcohol Beverage Control Administration Commissioner.")

While recognizing that WVABCA cannot directly impose criminal sanctions against unpermitted retailers it identifies, we respectfully request that this rule be revised to provide for inspections across the entire market, with a specific procedure for referral to state or local law enforcement where warranted.

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Commented [BMM4]: Dept. of Agriculture regulations explicitly states that a registration application is "due by January 1." 61 CSR 30, sec. 4.4. Accordingly, registration applications submitted by this date are timely, but practical experience has shown that WVDA staff may need additional time to review all of the applications received.

To help avoid creating issues for retailers during the review period, we respectfully request that ABCA be equipped to take into consideration whether an application for registration has been timely submitted.

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Commented [BMM5]: If you publicize this reporting procedure, it will allow MAG, retailers, and others to easily report non-compliance to you, making your job easier and expediting clean up of the market. We just ask that you establish a system to do that, and that you make enforcement a priority against those who get reported.

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Yes.

WVABCA determines upon entering a retail facility that the retailer is selling hemp and kratom products without a current and valid permit, it will promptly notify the law enforcement agency with jurisdiction to facilitate enforcement of W. Va. Code §19-12E-12(m) and W. Va. Code §19-12F-11(a).

3.6. The WVABCA will upon entering a retail facility check that all hemp and kratom products available for sale are registered with the Department of Agriculture. The WVABCA may conduct buys of unregistered hemp products or unregistered kratom products utilizing funds received per W. Va. Code §19-12E-12(h)(3) and W. Va. Code §19-12F-7(d)(4) at a permitted retailer or an unpermitted retailer, but only with the assistance, supervision, and cooperation of state or local law enforcement. Upon receiving training and assistance from the Agriculture Commissioner, the WVABCA will check for proper and accurate labeling for hemp products and kratom products per W. Va. Code §19-12E-12(a) and (b) and W. Va. Code §19-12F-9.

§175-11-4. Retail enforcement citations and evidence.

4.1. The WVABCA will conduct retail enforcement as set forth in section three, W. Va. Code §19-12E-12 and W. Va. Code §19-12F-1 *et seq.*, at permitted hemp product and kratom product retailers, who will be cited if violations of 61 CSR 30, W. Va. Code §19-12E-12 and W. Va. Code §19-12F-1 *et seq.*, occur at their retail facilities, and unpermitted hemp product and kratom product retailers, who will be reported to the law enforcement agency with jurisdiction.

4.2. The WVABCA will complete administrative citations and provide the citations along with any seized evidence to the Agriculture Commissioner in order for the Agriculture Commissioner to apply the administrative sanctions set forth in 61 CSR 30, W. Va. Code §19-12E-12 and W. Va. Code §19-12F-1 *et seq.* Note, the administrative citations contain personal protected information regarding WVABCA agents and underage operatives, and this information should be redacted pursuant to any FOIA request per W. Va. Code §22B-1-4.

4.3. The WVABCA will transfer the evidence via an evidence chain of custody document, bag, or box to the Agriculture Commissioner upon delivering the administrative citations to the Agriculture Commissioner.

§175-11-5. Hearings and sanctions.

5.1. The Agriculture Commissioner is solely responsible for levying administrative sanctions and conducting administrative hearings regarding retail enforcement as set forth in 61 CSR 30, W. Va. Code §19-12E-12 and W. Va. Code §19-12F-1 *et seq.*

5.2. As set forth in sub-section 4.2, the Agriculture Commissioner, if necessary, shall conduct administrative hearings for any permittee that objects to the administrative sanctions imposed by the Agriculture Commissioner as set forth in 61 CSR 30, W. Va. Code §19-12E-12 and W. Va. Code §19-12F-1 *et seq.*

5.3. The WVABCA will make all reasonable attempts to have its agents available to testify for any hearings scheduled in advance and with proper notice of the hearings.

5.4. Upon completion of a sanction or a hearing, the Agriculture Commissioner will reasonably notify the WVABCA about the sanction or outcome of the hearing, so the WVABCA may maintain accurate records and determine any additional sanctions or penalties for a WVABCA licensee.

§175-11-6. Memorandum of Understanding, Cooperative Enforcement, and Reports.

6.1. If necessary, the Agriculture Commissioner, the Tax Commissioner, and the WVABCA may enter into a memorandum or memoranda of understanding to facilitate the enforcement of W. Va. Code §19-12E-12 and W. Va. Code §19-12F-1 *et seq.* Topics of the Agriculture Commissioner, the Tax Commissioner,

Commented [MM6]: Under the statute, authority and responsibility for reviewing labels to be used on hemp-derived cannabinoid products and kratom products resides solely with the Dept. of Agriculture. See W. Va. Code §19-12E-12(9)(2) and §19-12F-9(a).

With all due respect, checking labeling compliance requires a detailed review that does not lend itself to being conducted during an in-store inspection; moreover, the Dept. of Agriculture is, as required by the statute, already performing this review as part of the registration process.

To more effectively and consistently enforce *all* applicable requirements, ABCA agents should instead focus their efforts on confirming that a product is registered with the Dept. of Agriculture. For example, an ABCA agent looking only to verify that the required labeling elements are present would not be able to identify a product that is labeled appropriately, but nonetheless unregistrable and unlawful for sale because it contains a prohibited concentration of a certain cannabinoid (e.g., tetrahydrocannabinolic acid, or THCA).

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and the WVAEC's memorandum include the following:

6.1.1. To assist each other in enforcement of W. Va. Code §19-12E-12 and W. Va. Code §19-12E-1 *et seq.*

6.1.2. To assist each other in training and sensitizing with State and local law enforcement to develop a state-wide plan for implementing the provisions of W. Va. Code §19-12E-12 and W. Va. Code §19-12E-1 *et seq.*

6.1.3. To confer among themselves and law enforcement about enforcement of W. Va. Code §19-12E-12 and W. Va. Code §19-12E-1 *et seq.* on a monthly basis; and

6.1.4. To jointly compile a report to be submitted to the Joint Committee on Government and Finance on or before January 1, 2025, as to actions undertaken to enforce W. Va. Code §19-12E-12 and W. Va. Code §19-12E-1 *et seq.* and the results.