



**WEST VIRGINIA SECRETARY OF STATE**

**KRIS WARNER**

**ADMINISTRATIVE LAW DIVISION**

**eFILED**

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Office of West Virginia  
Secretary Of State

**NOTICE OF AN EMERGENCY RULE**

AGENCY: Alcohol Beverage Control Commission TITLE-SERIES: 175-12

RULE TYPE: Legislative Amendment to Existing Rule: No

RULE NAME: VAPE OR SMOKE SHOP LICENSURE AND  
ENFORCEMENT

CITE STATUTORY AUTHORITY FOR PROMULGATING EMERGENCY RULE:

W. Va. Code §16-9H-1 et seq.

IF THE EMERGENCY RULE WAS PROMULGATED TO COMPLY WITH A TIME LIMIT ESTABLISHED BY CODE OR FEDERAL STATUTE OR REGULATION, CITE THE CODE PROVISION, FEDERAL STATUTE OR REGULATION AND TIME LIMIT ESTABLISHED THEREIN:

W. Va. Code §16-9H-1 et seq.

PRIMARY CONTACT:

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THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY THE SECRETARY OF STATE OR THE 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST. THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

The Legislature enacted HB 5437 and made it effective June 11, 2026, requiring licensure of vape or smoke shops subject to civil and criminal penalties for failure to be licensed. The WVABCA needs the rule effective immediately so as to begin licensure and enforcement of the Vape Safety Act. Several terms and processes are further explained in the rule versus the statute. Additionally, the bill contemplates the collection of revenue from licenses and specifies certain transfers of the revenue. The rule is needed to accomplish the purposes of the legislation in an expedited and timely manner with licensure period beginning July 1, 2026.

DOES THIS EMERGENCY RULE REPEAL A CURRENT RULE? No

HAS THE SAME OR SIMILAR EMERGENCY RULE PREVIOUSLY BEEN FILED AND OR EXPIRED? No

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

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

The statute will increase the costs of state government through creation of licensing and enforcement for nicotine/tobacco based vape or smoke shops and the associated products. It is difficult to say whether the license fees and fines would be sufficient to cover the expenses of administering the Act.

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

The statute will increase the costs of state government through creation of licensing and enforcement for nicotine/tobacco based vape or smoke shops and the associated products. It is difficult to say whether the license fees and fines would be sufficient to cover the expenses of administering the Act. The license fee revenue collected is split 50-50 with Department of Agriculture.

C. ECONOMIC IMPACT ON THE STATE OR ITS RESIDENTS:

The statute will increase the costs of state government through creation of licensing and enforcement for nicotine/tobacco based vape or smoke shops and the associated products. It is difficult to say whether the license fees and fines would be sufficient to cover the expenses of administering the Act. There is a \$1200 license fee for vape or smoke shops.

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2026 Increase/Decrease (use "-")	2027 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
<b>1. Estimated Total Cost</b>			
<b>Personal Services</b>			
<b>Current Expenses</b>			
<b>Repairs and Alterations</b>			
<b>Assets</b>			
<b>Other</b>			
<b>2. Estimated Total Revenues</b>			

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

The statute will increase the costs of state government through creation of licensing and enforcement for nicotine/tobacco based vape or smoke shops and the associated products. It is difficult to say whether the license fees and fines would be sufficient to cover the expenses of administering the Act. here is a \$1200 license fee for vape or smoke shops that is split 50-50 with the Department of Agriculture who are not involved in the regulation of the Act.

**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 12**  
**VAPE OR SMOKE SHOP LICENSURE AND ENFORCEMENT**

**§175-12-1. 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 for various violations, as well as hearing procedures. The rule also specifies civil penalties and criminal penalties.

1.2. Authority. -- W. Va. Code §16-9H-1 *et seq.*

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Sunset Date. -- This rule shall terminate and have no further force or effect upon August 1, 2032.

**§175-12-2. 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. The “ABCA” refers to the West Virginia Alcohol Beverage Control Administration or Commission.

2.2. "Abandonment" and "abandoned" mean that the use with respect to a premises, regardless of the intent of the user, has ceased or has discontinued for a period of at least 30 days, or the user has made an explicit declaration that it has ceased use with respect to the premises, and that the premises is non-conforming to W. Va. Code §16-9H-1 *et seq.*

2.3. "Adult " means a person who is the age of 21 years or older.

2.4. "Alternative nicotine product" means any non-combustible product containing nicotine that is intended for human consumption, whether chewed, absorbed, dissolved, or ingested by any other means.

2.5. “Applicant” means a person or persons in control who is applying for a vape or smoke shop license.

2.6. "Cigar shop" means a retailer who primarily sells or offers for sale cigars and cigar accessories in 50% of its floor space and may possess as inventory, sell, or offer for sale tobacco products and accessories but does not possess, sell, or offer for sale e-cigarettes, cigarettes, vapes, vapor products, or vapor product accessories. A cigar shop may have a connected cigar lounge for, where permitted, the lawful consumption of cigars.

2.7. “Civil penalty” means a penalty, authorized by the commissioner, and assessed against any distributor, wholesaler, vape or smoke retailer, or any other person or entity, who sells or offers for sale a vapor product in violation of W. Va. Code §16-9H-1 *et seq.* The civil penalty is \$100 per day for each

vapor product offered for sale in violation of W. Va. Code §16-9H-1 et seq., until the offending vapor product is removed from the market or from the floor space.

2.8. "Code" means the official Code of West Virginia, 1931, as amended.

2.9. "Commissioner" or "Alcohol Beverage Control Commissioner" means the commissioner of the West Virginia Alcohol Beverage Control Administration (ABCA or Commission) or his or her delegate.

2.10. "Electronic cigarette" means any product containing or delivering nicotine or any other substance intended for human consumption that can be used by a person to simulate smoking through inhalation of vapor or aerosol from the product. The term "electronic cigarette" includes any such device, whether manufactured, distributed, marketed, or sold as an e-cigarette, e-cigar, e-pipe, e-hookah, or vape pen, or under any other product name or descriptor.

2.11. "Floor space" means total retail floor space utilized by a retailer who sells, or offers for sale tobacco products and accessories, as well as tobacco-derived products and alternative nicotine products or vapor products and accessories. In calculating the percentage of floor space, the commissioner must determine the interior floor space.

2.11.1. The total interior floor space or square footage is calculated by measuring the interior proposed premises size using the interior length times interior width in feet. This measurement includes all space in the proposed premises, whether used for retail space (such as soda, chips, or alcohol products), office, storage space, restrooms, limited video lottery, or other purposes which are included in the total interior floor space.

2.11.2. The measurement from 2.11.1., is reduced by the square footage of any spaces used solely for office functions, limited video lottery, or restrooms. Any space (even office, lottery, or restroom space) with shared storage for tobacco products and accessories, as well as tobacco-derived products, alternative nicotine products or vapor products and accessories will be considered as storage space for such products and kept as part of the total interior floor space.

2.11.3. The measurement from 2.11.2., is further reduced by any empty space square footage within the store that is beyond the three feet being added to counters, displays, and wall boards to establish the total interior retail floor space.

2.11.4. Formula. Total interior floor space = interior floor space square footage (See sub-section 2.11.1.) – office space square footage – limited video lottery space square footage – restroom square footage (See Sub-section 2.11.2.) – empty space square footage (See Sub-section 2.11.3.)

2.12. "Hemp" or "industrial hemp" means as defined in W. Va. Code §19-12E-3 and §19-12E-12.

2.13. "Hemp products" means as defined in W. Va. Code §19-12E-3 and §19-12E-12, including but not limited to: leaf, pills, extracts, lotions, or other such products fit for human use or consumption.

2.14. "Improvement" means any building or structure, excluding fence, whether existing on the effective date located on a premises or, if there is a vested right to erect such structure or building, to be located within or upon a premises.

2.15. "Kratom" means as defined in W. Va. Code §19-12F-3.

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

2.17. "Manager" means the individual person whom an applicant for a license has designated to attest to the information in the license application, who meets all the requirements of W. Va. Code 16-9H-1 et seq.

2.18. "Person" means any individual, corporation, limited liability company, general partnership, limited partnership, joint venture, limited liability partnership, trust, estate, or any other legal entity that is duly organized or existing and authorized to transact business in the State of West Virginia.

2.19. "Person who has control of the applicant" means:

2.19.1. Each person associated with a corporate applicant, including any corporate holding company, parent company, or subsidiary company of the applicant, but not including a bank or other licensed lending institution which holds a mortgage or other lien acquired in the ordinary course of business, who has the ability to control the activities of the corporate applicant or elect a majority of the board of directors of that corporation;

2.19.2. Each person associated with a noncorporate applicant who directly or indirectly holds any beneficial or proprietary interest in the applicant or who the commissioner determines to have the ability to control the applicant; and

2.19.3. Key personnel of an applicant, including any executive, employee, or agent, having the power to exercise significant influence over decisions concerning any part of the applicant's business operation.

2.20. "Premises" means a tract or tracts of land, whether containing existing or proposed improvements, within the territorial limits that are identified as a parcel or parcels on a tax district map or maps on file with the office of the county health department. The proposed premises shall comprise a building or proposed building.

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

2.22. "Residence" means a detached or undetached dwelling for one or more persons and in which there is not a predominating commercial or non-housing use, and shall not mean a motel, hotel, inn, or other lodging facility for transient persons.

2.23. "Sale" means any transfer or 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.

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

2.25. "Tobacco product" means any cigarette or any other tobacco or nicotine-based product.

2.26. "Tobacco product and accessories" means any product used to light or ignite a tobacco product, or otherwise used in smoking of tobacco products, including, but not limited to: ashtrays, rolling papers, rolling tips, matches, lighters, butane, electronic lighters, charging cables and power blocks, glass pipes, pipes, bongs, hookahs, e-hookahs, candles, aerosols, knives, and drug paraphernalia as defined in W. Va. Code §47-19-3.

2.27. "Tobacco-derived product" means any product containing, made or derived from tobacco, or

containing nicotine derived from tobacco, that is intended for human consumption, whether smoked, breathed, chewed, absorbed, dissolved, inhaled, vaporized, snorted, sniffed, or ingested by any other means, including but not limited to, cigarettes, pipe tobacco, loose leaf tobacco, snuff, snus, chewing tobacco, nicotine gum, nicotine lozenges, nicotine patches, or other common tobacco-containing products. A "tobacco-derived product" includes electronic cigarettes or similar devices, alternative nicotine products, and vapor products.

2.28. "Vape or smoke retailer" means a retail establishment that sells tobacco products and accessories, as well as tobacco-derived products and alternative nicotine products or vapor products and accessories that are not 33% of the retailer's floor space. These retailers may cater to individuals who use electronic cigarettes (e-cigarettes) or other vaping products and/or devices. These retailers may allow vaping on site. These retailers may also sell other products, such as soda, chips, candy, lottery products, non-vapable hemp and kratom products, and alcohol products, and such other products in the retailer's floor space. When the commissioner determines it is necessary, the commissioner shall conduct the calculation in Sections 2.11., and 2.29., for vape or smoke shop retailers to verify that such retailers are not vape or smoke shops.

2.29. "Vape or smoke shop" means a vape or smoke retailer that devotes at least 33% of its floor space to selling tobacco products and accessories, as well as tobacco-derived and alternative nicotine products or vapor products and accessories. These shops may cater to individuals who use electronic cigarettes (e-cigarettes) or other vaping products and/or devices. These shops may sometimes allow vaping on site.

2.29.1. Upon the Commissioner's determination that a retail location sells, or offers for sale, tobacco products and accessories, as well as tobacco-derived products and alternative nicotine products or vapor products and accessories, then the commissioner will proceed to the floor space calculations.

2.29.2 Calculation: The commissioner must determine two numbers to then calculate the percentage of floor space of the proposed premises of vape or smoke shop. First, the total interior floor space (See Section 2.11.) and second, the vape or smoke shop floor space.

2.29.2.a. Once the commissioner has determined that the shop is selling, or offering for sale, tobacco products and accessories, as well as tobacco-derived products and alternative nicotine products or vapor products and accessories, the commissioner deems any mixed product (tobacco products and accessories, as well as tobacco-derived products and alternative nicotine products or vapor products and accessories mixed with other products) floor space, displays, counters, storage, restrooms, office space, shelving, or wall boards to be counted as a part of the total vape or smoke shop floor space.

2.29.2.b. Any floor space separately devoted to the sale of other products (not tobacco products and accessories, as well as tobacco-derived products and alternative nicotine products or vapor products and accessories) only, and not mixed product retail space, will be included in the total interior floor space but not in the vape or smoke shop floor space.

2.29.2.c. The total floor space calculation will account for all floor space, displays, counters, storage, restrooms, office space, shelving, or wall boards containing tobacco products and accessories, as well as tobacco-derived and alternative nicotine products or vapor products and accessories and measure their dimensions and square footage by adding to their length and width an additional three feet to the floor space, displays, counters, shelving, or wall boards measurements for retail patron ingress and egress as part of the vape or smoke shop floor space. If a display, counter, shelving, or wall board is within three feet of the dimensions of the premises, then the measurement will not add three feet, to either length or width as applicable, but the measurement will use the actual measurement as to either the length and the

width, as applicable. In other words, the base formula is:

2.29.2.c.1. Counters, displays, storage, restrooms, office space, shelving, or wall boards containing mixed products that are not tobacco products and accessories, as well as tobacco-derived and alternative nicotine products or vapor products and accessories but are intermixed with such products will be included in the vape or smoke shop floor space.

2.29.2.c.2. Additionally, counters and registers with tobacco products and accessories, as well as tobacco-derived and alternative nicotine products or vapor products and accessories behind the counter or register will still be considered part of the vape or smoke shop floor space, and shall also be included if the products are mixed products with some of the products not being tobacco products and accessories, as well as tobacco-derived and alternative nicotine products or vapor products and accessories.

2.29.2.d. In addition, any lounge, vaping, or smoking areas will be considered part of the vape or smoke shop floor space square footage.

2.29.2.e. The above measurements shall be totaled to determine the total vape or smoke shop floor space. Total vape or smoke shop floor space = Adding all the measurements in Sub-sections 2.29.2.c.1., 2.29.c.2., and 2.29.2.d.

2.29.3. To determine the total floor space percentage calculation, divide the total vape or smoke shop floor space in sub-section 2.29.2., by the total floor space calculated in 2.11., and multiply by 100. This is the percentage of floor space devoted to selling tobacco products and accessories, as well as tobacco-derived and alternative nicotine products or vapor products and accessories:

$$\frac{\text{Total vape or smoke shop floor space square footage}}{\text{total interior floor space (Section 2.11.) square footage}} \times 100$$

2.29.4. Any vape or smoke shop retailer who has 33% or more of the floor space from sub-section 2.29.3., devoted to selling tobacco products and accessories, as well as tobacco-derived and alternative nicotine products or vapor products and accessories shall be required to apply for a vape or smoke shop license in order to conduct such sales.

2.30. "Vapor product" means any non-combustible product containing nicotine that employs a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means, regardless of shape and size, that can be used to produce vapor from nicotine in a solution or other form. A "vapor product" includes any electronic cigarette, electronic cigar, electronic cigarillo, electric pipe, or similar product or device, and any vapor cartridge or other container of nicotine in a solution or other form that is intended to be used with or in an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device which can also include vapable hemp products and kratom products.

2.31. "Vapor products accessories" means any component, part, or add-on intended for use in an electronic smoking device or to enhance the vaping experience, including items sold separately, including but not limited to: vape devices, batteries, chargers, heating elements (coils), batteries, atomizers, mouthpieces, airflow control valves, carrying cases, skins, lanyards, tweezers/tank openers, knives, custom drip tips, airflow rings, glass tubes, vape wire, specialized tools and kits, refillable cartridges, pods, e-juice bottles, and tanks used to deliver vaporized nicotine or other substances.

2.32. "Violation" means the failure to be fully compliant with the requirements of W. Va. Code §16-9H-1 et seq.

**§175-12-3. Licensure.**

3.1. License application. - The application for a license to operate any type of vape or smoke shop shall include the following:

3.1.1. The name, signatures, proof of U.S. citizenship or naturalized citizen, address, and residence of the applicant, including all owners, key personnel, persons in control of the applicant, and manager.

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, and provide a copy of a valid lease.

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

3.1.4. If the applicant is a corporation, the names and addresses of its officers and directors.

3.1.5. If the applicant is a limited liability company, the names and addresses of the members and/or managers.

3.1.6. If the applicant is a trust or estate, the names and addresses of all beneficiaries, trustees, and interested persons as specified in W. Va. Code §44D-1-101 *et seq.*, and as set forth in the disclosed trust instrument. A trust must provide a copy of the written and executed trust instrument and any personally identifiable information will not be disclosed if such a document is requested pursuant to W. Va. Code §29B-1-1 *et seq.*

3.1.7. The size and nature of the exterior and interior of the proposed premises to be operated by applicant by providing a floorplan.

3.1.8. The arrest record, if any, of the applicant, including all owners, key personnel, persons in control of the applicant, and manager, and if the applicant is a corporation, limited liability company, partnership, trust, estate, or association the arrest record, if any, of the officers, directors, partners, members, persons in control of the applicant, key personnel, beneficiaries, trustees, and interested persons, and managers, including disposition of same.

3.1.8.a. The commissioner shall conduct background investigations for the purpose of determining whether the applicant (owners, officers, directors, partners, members, persons in control of the applicant, key personnel, beneficiaries, trustees, and interested persons) or the applicant's manager has been charged with, indicted for, or convicted of a crime that may have bearing upon the applicant (owners, officers, directors, partners, members, persons in control of the applicant, key personnel, beneficiaries, trustees, and interested persons) or the applicant's manager's fitness to hold a vape or smoke shop license. For purposes of this paragraph, "background investigation" means a criminal investigation of an applicant (owners, officers, directors, partners, members, persons in control of the applicant, key personnel, beneficiaries, trustees, and interested persons) and an applicant's manager who has applied for the issuance or renewal of a vape or smoke shop license pursuant to W. Va. Code §16-9H-1 *et seq.* The applicant (owners, officers, directors, partners, members, persons in control of the applicant, key personnel, beneficiaries, trustees, and interested persons) and the applicant's manager will submit a 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 (owners,

officers, directors, partners, members, persons in control of the applicant, key personnel, beneficiaries, trustees, and interested persons) and applicant's manager will obtain a fingerprinting service code from the ABCA. The applicant (owners, officers, directors, partners, members, persons in control of the applicant, key personnel, beneficiaries, trustees, and interested persons) and applicant's manager will contact the current background check service provider to schedule fingerprinting for completion of the background check. The current background check service provider will receive the background check results from the West Virginia State Police and the Federal Bureau of Investigation. The results will be shared with the ABCA through the State Police.

3.1.8.b. The commissioner will conduct background investigations for the purpose of determining whether an applicant (owners, officers, directors, partners, members, persons in control of the applicant, key personnel, beneficiaries, trustees, and interested persons) and the applicant's manager has been charged with, indicted for, or convicted of a crime that may have bearing upon the applicant's (owners, officers, directors, partners, members, persons in control of the applicant, key personnel, beneficiaries, trustees, and interested persons) or applicant's manager's fitness to hold a license. For purposes of this paragraph, "background investigation" means a criminal investigation of an applicant (owners, officers, directors, partners, members, persons in control of the applicant, key personnel, beneficiaries, trustees, and interested persons) and the applicant's manager who has applied for the issuance or renewal of a license. The applicant (owners, officers, directors, partners, members, persons in control of the applicant, key personnel, beneficiaries, trustees, and interested persons) and the applicant's manager will submit a West Virginia Alcohol Beverage Control Administration Release of Information and Waiver of Confidentiality of Records Form as provided by the commissioner. The applicant (owners, officers, directors, partners, members, persons in control of the applicant, key personnel, beneficiaries, trustees, and interested persons) and the applicant's manager will obtain a fingerprinting service code from the ABCA. The applicant (owners, officers, directors, partners, members, persons in control of the applicant, key personnel, beneficiaries, trustees, and interested persons) and applicant's manager will contact the current background check service provider to schedule fingerprinting for completion of the background check. The current background check service provider will receive the background check results from the West Virginia State Police and the Federal Bureau of Investigation. The results will be shared with the ABCA.

3.1.8.c. The applicant will reimburse the ABCA for all fees or charges that are incurred by the ABCA for the background investigation, if necessary.

3.1.9. Manager requirement. - No licenses shall be given to any applicant or renewed for any licensee who has not listed a manager on the applicant's license application, or a licensee's renewal application, and further that the manager shall meet all other requirements of licensure, including, but not limited to, United States citizenship or naturalization, passing a background investigation, being at least 21 years of age, meets the background check requirements in Section 3.2.2., being capable of operating a bona fide vape or smoke shop of good reputation in the community, and other requirements, all as set forth in the code and the legislative rules, in order for the manager to be able to meet and conduct any regulatory matters, including, but not limited to: licensure or enforcement matters related to the applicant or licensee. In order to maintain active licensure, any change by a licensee in any manager listed on a license or renewal application shall be made immediately to the commissioner, to verify that the applicant (owners, officers, directors, partners, members, persons in control of the applicant, key personnel, beneficiaries, trustees, and interested persons), licensee, or new manager meets licensure requirements.

3.1.10. List all owners, officers, directors, partners, members, persons in control of the applicant, key personnel, beneficiaries, trustees, interested persons, and managers of the applicant.

3.1.11. Listing a West Virginia Hemp Retailer and Distributor license, if applicable.

3.1.12. Listing a West Virginia Kratom Retailer and Distributor license, if applicable.

3.1.13. Listing a West Virginia Alcohol Beverage Control Administration license, if applicable.

3.1.14. Listing a West Virginia Tax Division drug paraphernalia license, if applicable.

3.1.15. Listing a West Virginia consumers sales tax identification number.

3.1.16. Listing a West Virginia business franchise tax number.

3.1.17. Listing a West Virginia Health Department permit number, if applicable.

3.1.18. Listing a West Virginia Limited Video Lottery license number, if applicable.

3.1.19. Indicate the type of license applied for.

3.1.20. Application shall only be made on the form provided by the commissioner or available on the ABCA website at <https://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.

3.2. Refusal of license.

3.2.1. No license shall be issued by the commissioner to any vape or smoke shop applicant:

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

3.2.1.b. That is located within 300 feet of a church, school, or daycare center. This distance is to be calculated by measuring a straight line from the entrance of the proposed premises to the property line of the nearest church, school, or daycare center;

3.2.1.c. That has non-U.S. Citizens as owners, officers, directors, partners, members, persons in control of the applicant, key personnel, beneficiaries, trustees, interested persons, and managers;

3.2.1.d. That submits an application for a 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 an unsuitable vape or smoke shop applicant where the applicant or its owners, officers, directors, partners, members, persons in control of the applicant, key personnel, beneficiaries, trustees, interested persons, and managers are not 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 vape or smoke shop will involve persons that meets the requirements in Section 3.2.2., and whether the premises to be used by the vape or smoke shop is a suitable place;

3.2.1.f. That fails to have the applicant and manager attest that the information in the application is true and accurate;

3.2.1.g. That involves individuals (owners, officers, directors, partners, members, persons in control of the applicant, key personnel, beneficiaries, trustees, interested persons, and managers) who are

less than 21 years of age;

3.2.1.h. That has had any license revoked under: (i) the alcoholic liquor laws, rules, or regulations, (ii) the nonintoxicating beer laws, rules, or regulations, or (iii) the WV Tax Division (business registration) of any state or the United States within five years next preceding the filing date of the application;

3.2.1.i. That is not the legitimate owner or person who has control of the applicant proposed to be licensed, or has other undisclosed persons who have ownership interests in the business;

3.2.1.j. That fails to disclose all information, including financial data and documents, certifications, consents, waivers, individual history forms, and other materials requested by the commissioner for purposes of determining qualifications for a licensure;

3.2.1.k. That fails to obtain zoning approval; or

3.2.1.l. That fails to pay the license fee or reactivation fee, as applicable.

3.2.2. Background Check review: The commissioner's review must conclude that an applicant (owners, officers, directors, partners, members, persons in control of the applicant, key personnel, beneficiaries, trustees, interested persons, and managers) does not involve as a person or as an individual, such person or individual, whose background, criminal record, if any, reputation, habits, and associations, threatens to:

3.2.2.a. Compromise the public interest of the citizens of the state; or

3.2.2.b. Weaken the effective regulation and control of tobacco derived products or vapor products.

3.2.2.c. Further, the commissioner's review of the applicant must not show that the applicant has been convicted of perjury, false swearing, or any crime punishable by imprisonment in excess of one year under the applicable law of this state or in any other state or foreign country;

3.2.2.c.1. Except as otherwise set forth in this rule, the commissioner may not disqualify an applicant from initial licensure because of a prior criminal conviction that remains unreversed, unless that conviction is for a crime that bears a rational nexus to the activity requiring licensure. In determining whether a criminal conviction bears a rational nexus to a profession or occupation requiring licensure, the commissioner shall consider at a minimum:

3.2.2.c.1.A. The nature and seriousness of the crime for which the individual was convicted;

3.2.2.c.1.B. The passage of time since the commission of the crime;

3.2.2.c.1.C. The relationship of the crime to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the profession or occupation requiring licensure; and

3.2.2.c.1.D. Any evidence of rehabilitation or treatment undertaken by the individual.

3.2.2.c.2. Except as otherwise set forth in this rule, if an applicant is disqualified from licensure because of a prior criminal conviction, the commissioner shall permit the applicant to apply for

initial licensure if:

3.2.2.c.2.A.. A period of five years has elapsed from the date of conviction or the date of release from incarceration subject to meeting all requirements for release, whichever is later;

3.2.2.c.2.B. The individual has not been convicted of any other crime during the period of time following the disqualifying offense; and

3.2.2.c.2.C. The conviction was not for an offense of a violent or sexual nature: Provided, that a conviction for an offense of a violent or sexual nature may subject an individual to a longer period of disqualification from licensure, to be determined by the commissioner at his or her discretion.

3.2.3. No license shall be issued by the commissioner to any type of vape or smoke shop if the place to be occupied by the applicant:

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

3.2.3.b. Is so located that violations of W. Va. Code §16-9H-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. The commissioner may refuse to issue a license if the applicant does not meet zoning requirements:

3.2.4.a. Any person applying for a license to operate a vape or smoke shop 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 ABCA website at <https://abca.wv.gov>, with the clerk or recorder of the municipality at least 10 calendar days prior to filing an application for a vape or smoke shop license with the ABCA.

3.2.4.b. Any person applying for a license to operate a vape or smoke shop that is not within a municipality, must submit a letter from the county commission stating that the location of the vape or smoke shop is in compliance with zoning ordinances for that county.

3.2.5. 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. The commissioner may request such other information as the commissioner may reasonably require of the applicant, manager, person in control or key personnel which shall include, but not be limited to, all pecuniary or financial interest in the applicant and the criminal records, if any, of each member of the applicant.

3.2.6. Upon receipt of a completed application with the accompanying fee, the commissioner shall conduct an investigation to determine the accuracy of the matters contained in such completed application and whether applicant is a bona fide vape or smoke shop of good reputation in the community in which it shall operate. For the purpose of conducting such investigation, the commissioner will endeavor to grant or refuse to grant the license for a period not to exceed 10 working days (excluding weekends and holidays) or until the applicant has completed the conditions set forth in the code, all as determined by the commissioner. The commissioner may issue a license authorizing the applicant to sell tobacco products and accessories, as well as tobacco-derived and alternative nicotine products or vapor

products and accessories if it appears that the applicant is a bona fide vape or smoke shop of good reputation in the community in which it shall operate and that the applicant and the manager listed in the application or renewal application have not made any false statement, material misrepresentation, or omissions; have no hidden ownership or undisclosed pecuniary interests; and have complied with all applicable requirements in the West Virginia Code and Code of State Rules, which are all subject to investigation by the commissioner and as determined by the commissioner.

3.3. Type of license. - The commissioner, upon a decision to grant a license, will issue said license in one category:

Type I. - This is for a vape or smoke shop.

3.4. Fees, license, and limitations.

3.4.1. The annual fee shall be effective for the license period of July 1, 2026, through June 30, 2027, and for every fiscal year licensing period thereafter, for a vape or smoke shop license issued under the provisions of W. Va. Code §16-9H-1 et seq. shall be as follows:

3.4.1.a. For a vape or smoke shop, \$1,200.00. The fee for any license issued following the first day of January of any year, to expire on the 30th day of June of each year, will be 1/2 of that previously prescribed. Such fee shall be made payable to the “West Virginia Alcohol Beverage Control Administration Commissioner” and paid by certified check, cashier's check, business check, personal check, or money order, or by credit card paid only on the ABCA website at <https://abca.wv.gov>. All payments must accompany or be made simultaneously with the filing of an application.

3.4.2. Reactivation fee. - A licensee that fails to complete a renewal application and make payment of its annual license fee in renewing its license on or before June 30 of any subsequent year, after initial application, shall be charged an additional \$150.00 reactivation fee. The fee payment may not be prorated or refunded. The reactivation fee must be paid prior to the processing of any renewal application and payment of the applicable full year annual license fee. A licensee who continues to operate upon the expiration of its license is subject to all fines, penalties, and sanctions available in W. Va. Code §16-9H-1 et seq., all as determined by the commissioner.

3.4.3. The license and reactivation fees shall be deposited, as the remittance (See W. Va. Code §16-9H-6(d)) directed by the West Virginia State Treasurer’s office, to the WVABCA Enforcement Fund. Once a month, the commissioner will transfer half of any collected vape or smoke shop license fees or reactivation fees only to the Agriculture Fees Fund as set forth in W. Va. Code §16-9H-1 et seq., as directed by the West Virginia State Treasurer’s office and wvOASIS.

3.4.4. Limitations on licensees.

3.4.4.a. Beginning March 1, 2027, and thereafter, a manufacturer of a vapor product may not sell, either directly or through a distributor or wholesaler, vape or smoke retailer, vape or smoke shop, or similar intermediary or intermediaries, a vapor product in this state that uses, in the name of the product, the labeling of the product, the packaging of the product, or the marketing of the product any of the following terms or references:

3.4.4.a.1. "Candy", “candies”, or variants in spelling such as “kandy” or “kandeez”;

3.4.4.a.2. "Bubble gum”, “cotton candy”, “gummy bear”, “gummy worm”, “lollipop”, or other variant of these terms;

3.4.4.a.3. Cartoons, cartoon characters, superheroes, television shows, video games, movies, or other similar characters or references;

3.4.4.a.4. References to or utilization of trade dress, trademarks, or other regulated imagery that imitate or replicate trade dress, trademarks, or other imagery of food brands or products that have been primarily marketed to minors such as brands of breakfast cereals, cookies, juice drinks, soft drinks, ice creams, and frozen pops; or

3.4.4.a.5. References to or utilization of trade dress, trademarks, or other related imagery that imitate or replicate trade dress, trademarks, or other imagery of school supplies such as USB drives or highlighters, smart phones or smart watches, headphones, any item of clothing, any toy, video game devices, or phone app integration features.

3.4.4.b. Beginning July 1, 2027, and thereafter, a person, vape or smoke retailer, or other entity may not conduct any advertising or promotional activities: Provided, That the person, vape or smoke retailer, or vape or smoke shop may display a sign on the exterior of the establishment to identify the shop as a vape or smoke shop which sign is of uniform size and design, no greater than 18 inches by 18 inches: Provided, however, that a vape or smoke shop shall upon renewal of their license in 2027 or issuance of a license in 2027 shall attest to compliance with the signage requirements. The sign shall additionally conform to the following guidelines:

3.4.4.b.1. The sign shall be affixed in one location on the outside of the retail location;

3.4.4.b.2. The sign may be double sided;

3.4.4.b.3. The font shall be Helvetica or Arial and said font cannot exceed three inches in height or width per character;

3.4.4.b.4. The sign can be illuminated but shall not have a flashing light or intermittent light. An illuminated sign must be turned off when the retail location is closed.

3.4.4.c. Beginning, June 11, 2026, and thereafter, any vapor product sold or available for sale must include labeling, at a minimum, that has:

3.4.4.c.1. A warning of the potential harmful effects of the vapor product;

3.4.4.c.2. The required age, of 21 years of age or older, for an individual to legally purchase or attempt to purchase the vapor product;

3.4.4.c.3. The prohibition against selling or furnishing, by purchase, gift, or other means, the vapor product to a minor (person not 21 years of age or older);

3.4.4.c.4. A warning to keep the vapor products away from minors;

3.4.4.c.5. A disclosure of the common or usual names of each ingredient used in the manufacture of such product, listed in descending order or predominance; and

3.4.4.c.6. The name, physical address, website, and principal mailing address of the manufacturer or the person responsible for distributing such product.

3.5. License not transferable. - A license issued under the provision of this rule will be valid only for the entity named to conduct a vape or smoke shop on the proposed or licensed premises and is not transferable.

3.5.1. If there is a change in ownership, then the new owners must close the business and then make application subject to the licensure process in this rule.

3.5.2. If there is a change of location, then the previous licensed premise must be closed, and a new license must be applied for and paid for, subject to licensure requirements in this rule.

3.5.3. If a vape or smoke shop applicant or licensee would continue to operate with a change of ownership or location, then such violation is grounds for revocation of their license that they are then operating or a denial of licensure.

3.6. Proposed or Licensed premises used as a residence.

3.6.1. No person may use, occupy, or permit the use or occupancy of any applicant or licensed vape or smoke shop premises as a residence, dwelling place, or location for human habitation.

3.6.2. Notwithstanding any provision of this code to the contrary, a violation of W. Va. Code §16-9H-8(a) of this code shall constitute grounds for the immediate suspension of operations at a licensee's licensed premises by the commissioner until the violation is remedied and may be grounds for denial of an applicant's licensure.

3.7. License application form. - The application form for a license to operate as any vape or smoke shop type is available from the commissioner or on the ABCA website at <https://abca.wv.gov>.

3.8. Rounding. To administer this rule, the standard rule of rounding numbers to the nearest whole number shall apply. When the unit of measurement results in a fraction less than one-half or less than .5, the fraction shall be disregarded. When the unit of measurement results in a fraction of one-half or more, or .5 or over, the number shall be rounded up to the next nearest whole number.

3.9. Cigar shops are not subject to this rule or W. Va. Code §16-9H-1 *et seq.*

#### **§175-12-4. Operation of vape or smoke shops.**

4.1. Sales. – A licensee may conduct lawful sales of tobacco products and accessories, as well as tobacco-derived products and alternative nicotine products or vapor products and accessories, to patrons who are verified to be 21 years of age or older during lawful hours of operation.

4.2. Age for purchases. - No licensee shall sell, give, or furnish, or cause to be sold, given, or furnished any tobacco products and accessories, as well as tobacco-derived products and alternative nicotine products or vapor products and accessories, to individuals below the age of 21 years. The licensee must verify an individual's age by requiring proof of age from at least one of the following documents certifying the age and depicting the identity of the holder of the document:

4.2.1. A valid West Virginia driver's license showing that the holder is at least 21 years of age and the photograph on the license matches the holder.

4.2.2. A valid West Virginia Commercial Driver's license (CDL) showing that the holder is at least 21 years of age and the photograph on the license matches the holder.

4.2.3. A valid West Virginia Department of Motor Vehicles (WV DMV) identification or a valid West Virginia Mobile ID issued by the WV DMV showing that the holder is at least 21 years of age and the photograph on the identification or WV Mobile ID matches the holder.

4.2.3.a. In order to accept a valid West Virginia Mobile ID, a licensee must download a West Virginia DMV approved reader/verifier application or "APP". Approved WV DMV reader/verifier APP vendors include, but are not limited to Credence mID, Idemia (Mobile ID Verify), TapID, and any other WV DMV approved reader/verifier APP vendors. Note, any other digital identification or any other photograph/copy of an identification is not an acceptable form of identification.

4.2.3.b. Utilizing a WV DMV approved reader/verifier APP that has age verification, the licensee must first confirm the validity of a holder's WV Mobile ID. A holder would need to share data with the licensee which at minimum includes their name, photo, and birthdate to complete the validation process. If a holder chooses to not share the pertinent data with the licensee, then the licensee cannot complete a sale of any tobacco products and accessories, as well as tobacco-derived products and alternative nicotine products or vapor products and accessories using the WV Mobile ID.

4.2.3.c. Upon a holder sharing the data set forth in section 4.2.3.b., a licensee using a WV DMV approved reader/verifier APP with age verification shall confirm the holder's WV Mobile ID is valid. Simultaneously, the WV DMV approved reader/verifier APP with age verification will verify if the holder is 21 years of age or over, or that the holder is not 21 years of age or over. Additionally, the licensee must verify the photograph on the WV Mobile ID matches the holder before completing the sale of any tobacco products and accessories, as well as tobacco-derived products and alternative nicotine products or vapor products and accessories to a holder that is 21 years of age or older. If a holder's purported WV Mobile ID is not confirmed as valid or the holder is not 21 years of age or older, then the licensee cannot complete the sale of any tobacco products and accessories, as well as tobacco-derived products and alternative nicotine products or vapor products and accessories. Note, the licensee using a WV DMV approved reader/verifier APP with age verification remains responsible to confirm the proper age and identity of the holder, as with any other valid form of identification.

4.2.4. A valid driver's license from another state showing that the holder is at least 21 years of age and the photograph on the license matches the holder may be accepted if there is no indication or evidence that the license has been altered.

4.2.5. Other valid means of satisfactory proof with picture identification showing the holder to be at least 21 years of age and the photograph on the document matches the holder, such as a valid government issued passport, United States military identification, United States VISA documents, or a United States issued permanent resident card.

The failure to produce satisfactory proof of age with a valid form of identification upon demand requires the licensee to refuse to sell tobacco products and accessories, as well as tobacco-derived products and alternative nicotine products or vapor products and accessories, to the individual

4.3. 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 the commissioner's or his or her agents' credentials, the licensee will cooperate fully with the commissioner or his or her agents, comply with their instructions, and allow 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 licensee that harasses the commissioner or an agent or delays an inspection or compliance check may be sanctioned for such conduct.

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

4.4. Posting license, door markers, and signage. - Each licensee shall post:

4.4.1. All licenses issued to the licensee pursuant to W. Va. Code §16-9H-1 et seq., in a conspicuous area inside the licensed premises.

4.4.2. The human trafficking notice required by W. Va. Code §15A-2-5.

4.4.3. An 8.5” by 11”, notice, written in English, on the main entry door that states “Persons under 21 years of age may not purchase tobacco products, tobacco-derived products, alternative nicotine products, or vapor products”. The WVABCA will post the notice form on its website at <https://abca.wv.gov>.

4.5. Licensee's purchases of tobacco products and accessories, as well as tobacco-derived products and alternative nicotine products or vapor products and accessories. – The Licensee shall retain 3 years’ worth of records, subject to audit by the commissioner, of all purchases of tobacco products and accessories, as well as tobacco-derived products and alternative nicotine products or vapor products and accessories, from manufacturers or distributors.

4.6. Hours for sale. - No licensee shall sell tobacco products and accessories, as well as tobacco-derived products and alternative nicotine products or vapor products and accessories, on any licensed premises or in any rooms directly connected therewith between the hours of midnight and 8:00 a.m. Any licensee that has a WV Lottery limited video lottery license or a WVABCA license may operate those functions per the hours of operation set by the WV Lottery and the WVABCA, however the vape or smoke shop operations must comply with the vape or smoke shop hours of operation.

4.7. No residence. No person may reside or spend the night in the licensed premises. The commissioner may direct the Licensee and its staff to remove beds, couches, pillows, blankets, and etc., from the licensed premises or the licensee shall face immediate suspension of its license by the commissioner.

#### **§175-12-5. Civil, Criminal, and Administrative Violations.**

5.1. Civil penalties.

5.1.1. A distributor, wholesaler, vape or smoke shop licensee, vape or smoke retailer, or any other person or entity, who sells or offers for sale a vapor product in violation of W. Va. Code §16-9H-1 et seq., and this rule shall be subject to a civil penalty of \$100 per day for each vapor product offered for sale in violation of said code and rule until the offending vapor product is removed from the market.

5.1.1.a. Civil penalties shall be issued in accordance with the West Virginia Rules of Civil Procedure, as amended, or the West Virginia Magistrate’s Rules of Civil Procedure, as amended.

5.1.1.b. Service. If the commissioner finds that any of the provisions of W. Va. Code §16-9H-1 et seq., and this rule are violated, whether reported by any person or by any commission, board, agency, officer, or employee of the county commission, or by his or her own observation, he or she shall notify in

writing the manager of the vape or smoke retailer. Service of the written notice shall be deemed complete upon sending the notice by certified mail to the last known address of the manager or by personal service to a distributor, wholesaler, vape or smoke shop, vape or smoke retailer or any other person or entity by the office of the county sheriff or county health department personnel. The notice shall include the following:

5.1.1.b.1. The street address or legal description of the property involved;

5.1.1.b.2. A statement indicating the nature of the violation and the specific section of W. Va. Code §16-9H-1 *et seq.*, and this rule that has been violated;

5.1.1.b.3. A description of the action required to correct the violation;

5.1.1.b.4. A statement indicating the time within which compliance with W. Va. Code §16-9H-1 *et seq.*, and this rule must be accomplished; and

5.1.1.b.5. A statement advising that upon failure to comply with the requirements within said time, that penalties will apply.

5.1.1.c. All civil penalties collected by the commissioner shall be used by the commissioner for administration and enforcement of W. Va. Code §16-9H-1 *et seq.*, and this rule, and shall be deposited in the WVABCA Enforcement Fund for the commissioner's use only.

## 5.2. Criminal Penalties.

5.2.1. Any manufacturer, distributor, wholesaler, or vape or smoke retailer that sells vapor products in this state in violation of the provisions of W. Va. Code §16-9H-10(a) or W. Va. Code §16-9H-14 (See Section 3.4.4., of his rule also) shall be guilty of a misdemeanor for each violation.

5.2.2. Any person who, by himself or herself or acting through another, directly or indirectly, violates any of the provisions of W. Va. Code §16-9H-1 *et seq.*, for which no other penalty is provided, shall, for the first offense, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$2,500 or confined in jail for not more than 30 days, or both fined and confined.

5.2.3. Any person who, by himself or herself or acting through another, directly or indirectly, and for the second and each subsequent violation of any of the provisions of W. Va. Code §16-9H-1 *et seq.*, for which no other penalty is provided, he or she shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$5,000 or confined in jail for not more than six months, or both fined and confined. The penalties provided for in this subsection shall be in addition to the revocation of the offender's license.

5.2.4. A retailer who commits an act in violation of W. Va. Code §16-9H-10 and the labeling requirements of W. Va. Code §16-9H-1 *et seq.*, shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not less than \$1,000 or confined in jail not more than one year: Provided, That a retailer who commits a second violation of W. Va. Code §16-9H-10 of this code and the labeling requirements of this article, shall be guilty of a felony and, upon conviction thereof, be fined not less \$5,000 or confined in jail not more than two years: Provided, however: That a retailer who commits a third violation of W. Va. Code §16-9H-10 of this code and the labeling requirements of this article, shall be guilty of a felony and, upon conviction thereof, be fined not less \$10,000 or confined in jail not more than three years: Provided further, That upon each subsequent conviction after a third conviction, such

individual shall be guilty of a felony and shall be imprisoned for not less than 10 years nor fined more than \$100,000.

5.3. Administrative Violations. A vape or smoke shop licensee, any agent, employee, manager, person in control, key personnel, or member shall not:

5.3.1. Possess, give, furnish, sell, or offer for sale a product with a label inconsistent with the requirements set forth in this rule, in W. Va. Code §16-9H-1 *et seq.*, or that contains an inaccurate or misleading product label;

5.3.2. Permit any person manufacturing, processing, distributing, offering for sale, or selling any vape or vapor products in this state to sell, give, or furnish, or cause to be sold, given, or furnished, any vape product, in any form, to any person younger than 21 years of age, which shall be verified by a valid identification set forth in Section 4.2.;

5.3.3. Permit improper advertising or signage as prohibited in this rule and W. Va. Code §16-9H-1 *et seq.*;

5.3.4. Possess, give, furnish, sell, or offer for sale a product with packaging or marketing inconsistent with the requirements set forth in this rule or W. Va. Code §16-9H-1 *et seq.*, or that contains inaccurate or misleading product packaging or marketing;

5.3.5. Fail to post required signage in this rule;

5.3.6. Change its submitted and approved floorplan for operations without re-submitting any revised floorplan for the WVABCA's approval; or

5.3.7. Violate any provision of this rule or W. Va. Code §16-9H-1 *et seq.*

5.4. Any licensee charged with any criminal violation enumerated in W. Va. Code §16-9H-1 *et seq.* or this rule, in addition to such criminal penalties imposed, the commissioner may impose administrative sanctions including, but not limited to:

5.4.1. Permanent revocation of any one or more permits held by the violator;

5.4.2. Revocation of one or more permits held by the violator licensee for a period of time to be determined by the commissioner;

5.4.3. Suspension of one or more permits held by the violator licensee for a period of time to be determined by the commissioner, the commissioner may suspend the license forthwith upon finding someone residing in a licensed premises;

5.4.4. Fine or fines to any one or more permits held by the violator licensee not to exceed \$1,000 per each violation, as determined by the commissioner; or

5.4.5. Non-issuance of a permit upon application of a violator licensee or applicant. Any such entity with outstanding violations shall not be issued a license or renewal of a license.

5.4.6. For purposes of section 5.4., administrative sanctions may be imposed by the commissioner upon or against any alter ego, agent, representative, or person or entity acting on behalf of, or in the interest of, a violator licensee.

5.5. The commissioner may impose the administrative sanctions in W. Va. Code §16-9H-15(d)(1) upon any licensee under indictment for any of the criminal violations during, and during the pendency of, a criminal trial therefor.

5.6. 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 vape or smoke shop license.

5.7. Any licensee who has its license suspended shall cease and desist from any and all vape or smoke shop operations during the period of suspension. Failure to do so is grounds for revocation of the license and criminal penalties.

5.8. Underage Operatives. Nothing in this rule or W. Va. Code §16-9H-1 *et seq.*, prohibits the commissioner, his or her agents, or a person who is at least 18 years of age from entering a premises and purchasing or possessing tobacco products and accessories, as well as tobacco-derived products and alternative nicotine products or vapor products and accessories when he or she is acting upon the request of, or under the direction and control of any member of a state, federal, or local law-enforcement agency, or the commissioner while the agency is conducting an investigation or other activity relating to the criminal or administrative enforcement of this rule or W. Va. Code §16-9H-1 *et seq.*

5.9. Public nuisance. - If it is determined by law that any vape or smoke shop licensee which is licensed pursuant to W. Va. Code §16-9H-1 *et seq.* and this rule constitutes a public nuisance under local law 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.

#### **§175-12-6. 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 30 calendar days following the receipt of the order by the applicant or licensee.

6.3. Petition requirements. - The petition for a hearing shall be in writing. An original and one 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 Administration Commissioner  
900 Pennsylvania Avenue, 4<sup>th</sup> 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 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

6.5. Hearings. - Cost deposit. - The person demanding a hearing shall give security for the cost of the hearing in the amount of \$600.00. 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 §16-9H-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 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 calendar days before the return date thereof, either by personal service made by any person 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 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 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. 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.

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

6.9. 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.

6.10. Absence of petitioner, counsel, or his or her 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.

6.11. Hearing. - The commissioner may designate a hearing examiner to conduct the hearing.

6.11.1. 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.

6.11.2. The petitioner or 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.

6.12. 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 10 calendar days after receipt of the record of the hearing or as otherwise specified by the commissioner or the designated hearing examiner, or as otherwise agreed to by the parties.

6.13. 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.

6.14. Record of proceedings. - There shall be a record made at all hearings held pursuant to W. Va. Code §16-9H-1 *et seq.*, and this rule.

6.15. Commissioner's decision. - After the conclusion of the hearing or within 10 calendar 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 vacating the earlier order of the commissioner. Thereafter, the commissioner, within 10 calendar 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 10 calendar 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.

6.16. Appeal to court. - An appeal may be taken by the applicant or licensee to the Intermediate Court of Appeals as set forth in W. Va. Code §51-11-4(a)(4), if filed within 30 calendar days after the charge upon which the party received notice of the final order of the commissioner.