Response to 175 CSR 12 Comments

The WVABCA received 4 comments: (1) Comments by attorneys William J. Ihlenfeld, Maximillian Nogay, Alonzo D. Washington and Lexus D. Allen on blank letterhead received on July 21, 2026, at 8:24 a.m., regarding the emergency rule per W. Va. Code §29A-3-15a, not the legislative rule; (2) Comments from Richie Heath of Bowles Rice, on behalf of R.J. Reynolds, received on June 2, 2026, at 1:38 p.m.; (3) Comments from Jamison McDaniels received on July 16, 2026, at 5.39 p.m.; and (4) Comments from RAI Services Company on behalf of R.J. Reynolds and affiliated companies received on July 20, 2026, at 7:46 p.m.

(A) Comments by attorneys William J. Ihlenfeld, Maximillian Nogay, Alonzo D. Washington and Lexus D. Allen – The letter comments on the emergency rule with specific citations to W. Va. Code §29A-3-15a, the emergency status and the authority granted to promulgate rules.

The letter has certain objections to the emergency rule's definitions, licensure, operations, violations and penalties and hearings and appeals.

The letter's requested list of emergency rule changes (which appear contrary to the arguments made by the letter writers):

We respectfully request that the ABCA withdraw the emergency rule and proceed through ordinary rulemaking under W. Va. Code § 29A-3-1 *et seq.* Should it decline, we request that the rule be amended, at a minimum, to:

1. Strike the provisions the Act does not authorize: the campus prohibition, the zoning conditions, the hours restriction, the three-year records requirement, floorplan pre-approval, and the $600 hearing deposit;

2. Conform the definitions to the Act by removing hemp and kratom from "vapor product," and striking "tobacco product and accessories";

3. Replace the floor-space methodology with one that measures the same space on both sides of the ratio and applies the ingress allowance evenhandedly, published with worked examples;

4. Limit the citizenship and age requirements to the persons the Act reaches: the applicant, the manager, and those able to control the applicant;

5. Apply the 300-foot standard prospectively, fix the measuring date at initial licensure, and define "church," "school," and "daycare center";

6. Defer the labeling requirements to no earlier than the rule's effective date, with a sell-through period and a good-faith safe harbor;

7. Permit a licensee to continue operating pending action on an application following a change of ownership or location;

8. Afford a hearing before civil penalties are imposed, and clarify whether the $100 daily penalty runs per stock-keeping unit or per unit; and

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9. Provide a transition period during which the ABCA will not enforce W. Va. Code § 16-9H-3 against establishments filing complete applications within a reasonable time after the rule takes effect.

Response: These comments or objections seem misplaced as the comments could have been sent to the WV Secretary of State or the Attorney General's office. Further the letter writers misstate administrative law, emergency rule requirements and legislative rule requirements. Nevertheless, the WV Secretary of State has already granted the emergency status to the rule 175 CSR 12. Further, a legislative rule and comment period were also filed with the WV Secretary of State.

The Vape Safety Act authorizes the promulgation of rules at W. Va. Code §§16-9H-5(f) and (j), 16-9H-14 and 16-9H-18. One section even states, "The commissioner may propose rules for legislative approval in accordance with the provision of §29A-3-1 *et seq.* of this code as may be necessary to carry out the purposes of this article." The rule is being promulgated within the scope of the broad powers granted to the commissioner by the Vape Safety Act. W. Va. Code §16-9H-7 states, "It shall be the duty of the commissioner to administer and enforce the provisions of the article, except as otherwise provided in this article. (1) The commissioner shall perform the following duties: (I) Administer this article in all respects."

Further, the suggested changes would utilize the same legal authority as what has been drafted, but in the manner preferred by the letter writer.

Response to the requested changes to the emergency rule:

(1) The WVABCA is authorized to administer the article. See W. Va. Code §16-9H-7.
(2) The WVABCA is authorized to administer the article. See W. Va. Code §16-9H-7. The rule's definitions are reasonable.
(3) The floor-space measurement is presented via explanation and formula.
(4) An applicant is a person which is defined in the Vape Safety Act. The Vape Safety Act extends requirements to managers and key personnel. See W. Va. Code §§16-9H-5(a)(4)(A), (B), (C) and (D), and also 16-9H-5(a)(6).
(5) The bill was enacted and effective on June 11, 2026; the WVABCA did not impose the 300-foot requirement until July 1, 2026. The Vape Safety Act does not establish a grandfathering mechanism.
(6) The Vape Safety Act specifies clear dates when various labeling and warning standards are required.
(7) The Vape Safety Act does not permit the sale or transfer of a license. See W. Va. Code §§16-9H-3 and 16-9H-5(g).
(8) The West Virginia Code has a process for challenging a civil penalty, as referenced in the Vape Safety Act.
(9) The bill was enacted and effective on June 11, 2026; the WVABCA did not impose licensure requirement until July 1, 2026. The Vape Safety Act does not prescribe a waiting period

B. Comments from Richie Heath of Bowles Rice, on behalf of R.J. Reynolds – The email states that R.J. Reynolds generally supports HB 5437's "cracking down on illegal or illicit vape". However, the email proffers that New York has permitted product label disclosures, instead of on product packaging, to be located on a public facing website perhaps via a QR code.

Response: While the packaging and size of vape products are quite small, the Vape Safety Act clearly intended for label disclosures and warnings to be located on the package itself, its packaging or perhaps on an additional piece of packaging attached to the product packaging. A labeling and warning disclosure change to a website or QR Code may require legislative action.

C. Comments from Jamison McDaniels – The email's applicable question is "Does a business operating only vape vending machines, without a physical vape or smoke shop, require a WVABCA Vape or Smoke Shop license?"

Response: Essentially, a vape/tobacco vending machine that is located in a Class A license is subject to the requirements set forth in 175 CSR 9 and would qualify as a vape or smoke shop if it meets the 33% requirements of its products being tobacco products and accessories, tobacco derived products, alternative nicotine products and vapor products and accessories, including vape-able hemp and kratom. The rule will be amended to account for this un-manned vape or smoke shop. The vape/tobacco vending machine owner will need to obtain a license for each vending machine, and the vape/tobacco vending machine owner and the Class A license holder would bear joint responsibility and/or liability.

D. Comments from RAI Services Company on behalf of R.J. Reynolds affiliated companies – Generally, the letter is concerned with possible conflicts between the WV statute and federal law and WV specific disclosure requirements. Here is RAI's summary of the recommended changes:

SUMMARY OF RECOMMENDATIONS

- First, ABCA should implement HB 5437 consistent with legislative intent and should adopt the least burdensome disclosure mechanisms that achieve the State's youth-prevention and consumer-information objectives.
- Second, the Rule should be clarified to avoid West Virginia-specific product labeling or packaging requirements. If the Rule is read to require state-specific label content, it would be preempted by the TCA's express preemption provision, and would create substantial compliance burdens for manufacturers to comply with its one-of-a-kind requirements.
- Third, ingredient disclosure should be implemented through a confidential and flexible disclosure framework. Reynolds does not oppose appropriate disclosure, but the mechanism should not unnecessarily require package-label modifications or compel public disclosure of confidential formulation information. The requirement to put an ingredient list on the label likely violates the First Amendment. Allowing a non-label ingredient disclosure method will help avoid these Constitutional concerns.
- Fourth, the Rule's prohibition on references to smart watches, phones, video games, or phone application integration features should be narrowed to preserve compliance-supporting technology. A broad prohibition may inadvertently discourage age verification, adult-user authentication, device security, product authentication, and similar technologies that can help prevent youth access.
- Fifth, ABCA must supplement its economic-impact analysis to consider private-sector costs associated with West Virginia-specific labeling, inventory segregation, distribution tracking, product withdrawals, technology redesign, confidential-information review, and retailer/distributor compliance.
- Finally, ABCA should provide guidance, cure rights, a sell-through period and enforcement discretion for good-faith compliance issues during a reasonable implementation period, while prioritizing enforcement against youth access violations, illicit products, youth-oriented marketing, false statements, and intentional misconduct.

Response: (1) The Vape Safety Act does not suggest or provide a least burdensome alternative for disclosure. This would require a legislative change.

(2) The Vape Safety Act has specific product and package labeling requirements. This would require a legislative change.

(3) The Vape Safety Act has specific ingredient labeling requirements. This would require a legislative change.

(4) The Vape Safety Act's prohibitions are specific. This would require a legislative change.

(5) No private sector costs or analyses were provided during the public comment period.

(6) The Vape Safety Act did not provide these options. It was passed March 13, 2026, approved by the Governor on Apri 1, 2026, effective June 11, 2026, and the license period began July 1, 2026.

Richie Heath <rheath@bowlesrice.com> Tue, Jun 2, 2026 at 1:38 PM
To: "Anoop.k.bhasin@wv.gov" <Anoop.k.bhasin@wv.gov>
Cc: Mark Adkins <madkins@bowlesrice.com>

Anoop,

I hope all is well!

On behalf of RJ Reynolds, I wanted to reach out with respect to H.B. 5437, which was passed by the Legislature earlier this year. We worked on H.B. 5437 during the regular session as Reynolds' was supportive of the bill's overall goal of cracking down on illegal and illicit vapor products. I saw the article this past week as to ABCA's efforts to build out the regulatory framework and thought that we would reach out on one aspect of that to the extent it is helpful as you all evaluate things.

As you may have already found in your research of other state regulatory frameworks, the State of New York has ingredient disclosure requirements that went into effect in July 2020 and are similar as to what is included in H.B. 5437. Given the difficulty that can oftentimes accompany putting all necessary disclosures on a product's packaging, New York requires manufacturers to disclose information regarding vaping product ingredients on public-facing web sites that are shared with consumers accordingly. This also helps alleviate issues that national manufacturers can often run into when different states are requiring differing packaging/labeling information.

To the extent it is helpful, I've included the guidance that the New York Department of Health has promulgated on this front, as well as an example of the disclosures that RJ Reynolds makes in accordance with New York law. We would be happy to discuss further as you and others at ABCA have any thoughts or questions on this front.

https://www.rjrvapor.com/nydisclosures/

https://www.health.ny.gov/prevention/tobacco_control/docs/vape%20_product_disclosure_guidance.pdf

Richie Heath
Bowles Rice LLP
rheath@bowlesrice.com
600 Quarrier Street | Charleston, WV 25301
Tel: | Fax:
Bio | vCard

Bowles Rice

From: **Jamison McDaniels** <jamisonmcdaniels2@gmail.com>
Date: Thu, Jul 16, 2026 at 5:39 PM
Subject: Licensing- Vape Vending Machine In 21+ Establishments
To: shawn.e.smith@wv.gov <shawn.e.smith@wv.gov>

Shawn Smith Director of Licensing and Education
WVABC Administration

Dear Mr. Smith,

I hope you are doing well.

My name is Jamison McDaniels, and I am in the early stages of developing a business that would operate age-verified vape vending machines throughout West Virginia. Our business model would not include a traditional vape or smoke shop. Instead, we plan to place vending machines exclusively in adult-only establishments, such as 21-and-over bars and similar venues where access by individuals under the age of 21 is prohibited.

Before moving forward, I wanted to reach out to ensure we fully understand the licensing and regulatory requirements applicable to this business model.

Specifically, I was hoping you could provide guidance on the following:

Does a business operating only vape vending machines, without a physical vape or smoke shop, require a WVABCA Vape or Smoke Shop license?

If a separate license is required, what is the application and approval process?

Are there any additional permits, registrations, or inspections required for vape vending machine operators?

Does the responsibility for licensing and compliance rest with the vending machine owner, the establishment hosting the machine, or both?

Are there any specific requirements regarding age-verification technology or machine placement beyond the requirement that the machines be located in adult-only establishments?

Our goal is to ensure we are fully compliant with all West Virginia laws and regulations before investing in equipment and beginning operations.

I appreciate any guidance you can provide. If it would be easier to discuss by phone, I would be happy to schedule a call at your convenience.

Thank you for your time, and I look forward to hearing from you.

Sincerely,

Jamison McDaniels

From: **Frye, Charlie** <Charles.Frye@wbd-us.com>
Date: Mon, Jul 20, 2026 at 7:46 PM
Subject: Comment Regarding "Vape or Smoke Shop Licensure and Enforcement," 175 C.S.R. 12
To: anoop.k.bhasin@wv.gov <anoop.k.bhasin@wv.gov>

Good evening,

Attached please find RAI Services Company's comments on the proposed rule entitled "Vape or Smoke Shop Licensure and Enforcement," 175 C.S.R. 12. We would appreciate confirmation of receipt of this email and the attached.

Sincerely,

Charlie

Charles Frye

Associate

Womble Bond Dickinson (US) LLP

d: One West Fourth Street

m: Winston-Salem, NC 27101

e: Charles.Frye@wbd-us.com

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4 attachments

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Comment Re Vape or Smoke Shop Licensure and Enforcement, 175 CSR 12.pdf 358K

REYNOLDS
A BETTER TOMORROW

Andrew T. Mikac
Vice President & Assistant General Counsel – Regulatory
RAI Services Company
mikaca@rjrt.com
t:

July 20, 2026

RECEIVED JUL 21 REC'D

VIA E-MAIL

West Virginia Alcohol Beverage Control Administration
900 Pennsylvania Avenue, 4th Floor
Charleston, West Virginia 25302

Re: Proposed Legislative Rule, Vape or Smoke Shop Licensure and Enforcement, 175 C.S.R. 12

Dear Commissioner and Staff:

RAI Services Company ("RAIS" or "Reynolds") and its affiliated companies appreciate the opportunity to comment on the West Virginia Alcohol Beverage Control Administration's proposed legislative rule, *Vape or Smoke Shop Licensure and Enforcement*, 175 CSR 12 (the "Rule").[1] Reynolds supports West Virginia's interest in preventing youth access to tobacco and vapor products, promoting responsible retail practices, ensuring that enforcement resources are directed toward unlawful and youth-oriented products, and requiring effective age-verification practices to prevent underage sales. Reynolds further supports efforts to remove from the marketplace products that are unlawfully sold or marketed in a manner that appeals to youth.

Certain provisions of the Rule, if read broadly, could impose product labeling obligations unique to West Virginia that conflict with federal requirements, require public disclosure of confidential formulation information, and counterproductively restrict age-verification technologies that directly advance the State's youth-prevention objectives. This would make West Virginia the only state in the country with such requirements. Reynolds therefore encourages ABCA to adopt targeted clarifications and implementation guidance that preserve the Rule's

[1] RAIS submits this comment on its own behalf and on behalf of its affiliated companies. RAIS coordinates regulatory compliance for the subsidiary companies of Reynolds American Inc. ("RAI"), including R.J. Reynolds Tobacco Company; American Snuff Company, LLC; Santa Fe Natural Tobacco Company, Inc.; R.J. Reynolds Vapor Company; and Modoral Brands Inc. References to RAIS, Reynolds, or "the Company" in this letter may refer to RAIS itself and/or its affiliated RAI subsidiaries, as applicable. "Rule" refers to both the legislative proposed rule and the emergency rule already in effect.

youth-prevention objectives while avoiding legal, operational, and constitutional concerns associated with state-specific labeling requirements, disclosure of confidential information, and restrictions on compliance-supporting technology. Reynolds supports disclosure of appropriate information but believes the disclosure objective can be achieved through mechanisms other than mandatory state-specific package labeling.

The Tobacco Control Act ("TCA") gives the U.S. Food and Drug Administration ("FDA") comprehensive authority over tobacco-product labeling, premarket review, adulteration, misbranding, tobacco-product standards, registration, good manufacturing standards, and modified-risk tobacco products.[2] At the same time, the TCA preserves significant state authority over sales, access, advertising, promotion, minimum-age restrictions, and measures directed to youth access. Reynolds does not question West Virginia's authority to regulate retail licensing, youth access, and enforcement against unlawful products. But the Rule should be carefully implemented so that it does not operate as a state-specific labeling or product-standard regime.

A balanced approach is readily available. ABCA can clarify that required information may be provided through flexible disclosure mechanisms—such as websites, QR codes, package inserts, retailer-accessible materials, or confidential submissions—rather than through West Virginia-only labels. ABCA can also clarify that restrictions on references to phones or app integration are aimed at youth-oriented marketing features and do not prohibit age verification, identity verification, product authentication, device security, lock/unlock controls, or other device functionality features not directed to minors.

SUMMARY OF RECOMMENDATIONS

- First, ABCA should implement HB 5437 consistent with legislative intent and should adopt the least burdensome disclosure mechanisms that achieve the State's youth-prevention and consumer-information objectives.
- Second, the Rule should be clarified to avoid West Virginia-specific product labeling or packaging requirements. If the Rule is read to require state-specific label content, it would be preempted by the TCA's express preemption provision, and would create substantial compliance burdens for manufacturers to comply with its one-of-a-kind requirements.
- Third, ingredient disclosure should be implemented through a confidential and flexible disclosure framework. Reynolds does not oppose appropriate disclosure, but the mechanism should not unnecessarily require package-label modifications or compel public disclosure of confidential formulation information. The requirement to put an ingredient list on the label likely violates the First Amendment. Allowing a non-label ingredient disclosure method will help avoid these Constitutional concerns.
- Fourth, the Rule's prohibition on references to smart watches, phones, video games, or phone application integration features should be narrowed to preserve compliance-supporting technology. A broad prohibition may inadvertently discourage age verification, adult-user authentication, device security, product authentication, and similar technologies that can help prevent youth access.

[2] *See* 21 U.S.C. §§ 387a, 387d, 387g, 387j, 387p.

- Fifth, ABCA must supplement its economic-impact analysis to consider private-sector costs associated with West Virginia-specific labeling, inventory segregation, distribution tracking, product withdrawals, technology redesign, confidential-information review, and retailer/distributor compliance.
- Finally, ABCA should provide guidance, cure rights, a sell-through period and enforcement discretion for good-faith compliance issues during a reasonable implementation period, while prioritizing enforcement against youth access violations, illicit products, youth-oriented marketing, false statements, and intentional misconduct.

I. The Rule Should Be Clarified to Avoid West Virginia-Specific Labeling Requirements.

Reynolds supports providing adult consumers and regulators with appropriate information. But neither the Rule nor the statute it implements should require manufacturers to create West Virginia-specific product labels or packaging. State-specific labeling and packaging would be preempted by the TCA's express preemption provision, which preempts state requirements "different from, or in addition to" federal requirements relating to tobacco-product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified-risk tobacco products.[3] Further, West Virginia-specific product labels and packaging would create substantial compliance burdens, as West Virginia's labeling requirements would be one-of-a-kind across the nation.

The TCA preserves state authority over many important areas, including sales, distribution, possession, information reporting to the State, fire-safety standards, access to tobacco products, and restrictions on youth access or youth-oriented advertising.[4] But the labeling requirements imposed by the Rule do not fit within the TCA's framework. The TCA's preservation clause does not authorize a State to impose state-specific label content that functions as a labeling or product-standard requirement different from federal law. ABCA can avoid these problems by clarifying that required information may be provided through websites, QR codes, retailer-accessible materials, inserts, confidential submissions to ABCA, or other non-product-label mechanisms.

Such a mechanism would still be allowed under the statute the Rule seeks to implement. HB 5437 requires ABCA to promulgate rules for "labeling standards" but does not define that term in a way that requires every item of information to be printed on every package distributed in West Virginia. The Legislature chose the phrase "labeling standards," not package "labeling requirements," "printed package disclosures", or "on-package ingredient lists" reinforcing a distinction between disclosure and packaging and printed labels. ABCA should give effect to the Legislature's disclosure objective by allowing consumers and regulators to access required information electronically or through other readily accessible formats, while clarifying that manufacturers need not create West Virginia-specific packaging for products lawfully distributed in interstate commerce.

[3] 21 U.S.C. § 387p(a)(2)(A).
[4] 21 U.S.C. § 387p(a)(1).

A West Virginia-specific labeling requirement would impose burdens that extend far beyond the cost of printing a label. Manufacturers distribute lawful products through national manufacturing, warehousing, distribution, and retail channels. State-specific label content can require packaging redesign, legal and regulatory review, regulatory submission, new artwork, SKU segregation, inventory controls, distributor tracking, retailer training, recall or withdrawal of existing inventory, and measures to ensure that West Virginia-specific products do not move into other states. Those burdens are especially significant where the same disclosure objective can be achieved through less burdensome alternatives.

Accordingly, ABCA should adopt a safe harbor or clarification providing that a product bearing federally required tobacco-product labeling may satisfy the Rule if the additional information required by West Virginia is made available through an accessible non-label pathway. To avoid the issues described above, Reynolds suggests the following language be added to the Rule:

> A vapor product shall be deemed compliant with this subsection if the product bears labeling required under applicable federal law and if the information required by this subsection is made available to consumers through product labeling, packaging, an insert, a QR code, a website, retailer-accessible materials, a submission to the Commissioner, or another readily accessible electronic disclosure method. Nothing in this subsection shall be construed to require a manufacturer to create West Virginia-specific packaging or labeling for products lawfully distributed in interstate commerce.

II. Ingredient Disclosure Should Be Implemented Through a Confidential and Flexible Disclosure Framework.

The Rule appears to require ingredient disclosure on the label of vapor products sold in West Virginia. Ingredient lists, flavor systems, component compositions, product design information, and formulation details may reveal commercially sensitive information.[5] Public disclosure could provide competitors with non-public formulation information, design features, and regulatory development work product. Further, manufacturers may risk breach of contract suits if they are under confidentiality obligations with their suppliers. Reynolds therefore requests a confidential submission pathway and a public disclosure alternative using generic or categorical terms where appropriate.

FDA already regulates tobacco-product labeling, ingredient reporting, PMTA submissions, and product standards through a comprehensive federal framework. Premarket tobacco product applications must include, among other things, a full statement of components, ingredients, additives, and properties.[6] Manufacturers also submit ingredient information under other TCA provisions.[7] A state disclosure program should avoid duplicating federal review in a way that

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[5] W. Va. Code R. 175-12-3.4.4.c.5.

[6] *See* 21 U.S.C. § 387j(b)(1)(B).

[7] 21 U.S.C. § 387d.

compels product-specific labeling changes, disrupts national distribution systems, or requires public disclosure of trade secrets.

A requirement to print exhaustive ingredient lists on product packaging would also create practical problems. Vapor products have limited package space, and printed disclosure of all ingredients, including potentially confidential proprietary flavoring agents, may not be feasible to present in a legible and consumer-friendly format. Requiring extensive technical ingredient information on a small package may divert attention from warnings and information ABCA views as most important, like the federally mandated warning regarding nicotine. A website, QR code, package insert, retailer-accessible disclosure, or confidential submission to ABCA would better serve the objective of meaningful disclosure.

Any state disclosure program should protect confidential commercial information and trade secrets at least as robustly as federal law protects such information under FOIA.[8] Where public-facing disclosure is required, ABCA should permit generic or categorical descriptions where necessary to avoid disclosure of confidential formulation information. For example, a public-facing disclosure can provide meaningful consumer transparency while protecting proprietary flavor systems, formulation percentages, supplier information, and other competitively sensitive details.

HB 5437 requires ABCA to promulgate rules for "labeling standards" to include "disclosure" of the common or usual names of each ingredient used. The statute certainly does not require printing every ingredient on every package sold in West Virginia. ABCA can satisfy the Legislature's disclosure objective by requiring manufacturers to make ingredient information available through alternative disclosure mechanisms without requiring physical package labeling modifications.

Practical alternatives already exist that provide robust ingredient transparency without requiring West Virginia-specific package modifications or disclosure of proprietary information. New York's ingredient-disclosure approach provides a useful model because it allows consumers to access ingredient information on a public website, rather than requiring every relevant disclosure to appear on a physical product label.[9] Reynolds would welcome a similar approach in West Virginia that provides meaningful transparency while protecting confidential proprietary information and avoiding unnecessary package modifications. To this end, Reynolds suggests the following language be added to the Rule:

> A manufacturer may designate ingredient, formulation, component, design, or related information as confidential commercial information or trade-secret information. The Commissioner shall protect such information from public disclosure to the fullest extent permitted by law. Public-facing disclosures may use

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[8] *See* 5 U.S.C. § 552(b)(4).

[9] *See* R.J. Reynolds Vapor, Ingredient Disclosures for Vapor Products and E-Cigarettes. https://www.rjrvapor.com/nydisclosures/ (demonstrating a website-based ingredient disclosure framework).

generic or categorical descriptions where necessary to avoid disclosure of confidential formulation information.

A vapor product shall be deemed compliant with the ingredient disclosure requirement if the required information is provided through one or more of the following mechanisms: product labeling; package insert; QR code linking to manufacturer disclosures; manufacturer website; information submitted to and maintained by the Commissioner; retailer-accessible disclosures; or other Commissioner-approved disclosure methods.

III. The Phone/App Restriction Should Be Narrowed to Fit the Statute's Purpose

The Rule prohibits labeling, packaging, advertising, or marketing from including references to smart watches, phones, video games, or phone application integration features among other youth-appeal restrictions.[10] Reynolds commends the Rule's intent to combat youth use of vapor products. The Rule should, however, distinguish between youth-oriented references used by illegally imported vapor products and compliance and functionality-supporting technology.

A broad interpretation of phone or app integration marketing and labeling could inadvertently prohibit or discourage technology that serves the same youth-prevention objective that West Virginia is trying to advance. The Rule should distinguish between youth-oriented features versus functionality and compliance-supporting features. West Virginia can prohibit youth-appealing references to phones, games, toys, cartoons, entertainment, and similar features without prohibiting identity verification, adult-user authentication, product authentication, device security, lock/unlock controls, battery or device-status information, compliance controls, or other application functions not directed at minors.

FDA recently recognized app-connected age-verification technology as a youth-use mitigation measure. The Rule should not be interpreted to prohibit technologies that further the same youth-prevention objectives that HB 5437 seeks to advance. In its May 5, 2026 market authorization of Glas ENDS products, FDA stated that the applicant demonstrated device access restriction technology that, combined with FDA-required marketing restrictions, was expected to mitigate youth use.[11] FDA described technology requiring the user to verify age and identity with a government-issued ID and pair the device with a smartphone via Bluetooth; following verification, the device will not operate if separated from the phone, and the app conducts random biometric check-ins to confirm the registered user is the one using the device.

As currently worded, the Rule could be interpreted to prevent or discourage age-gating technology like the recently authorized Glas product. ABCA should clarify that the phone/app language applies only to youth-oriented labeling, packaging, advertising, marketing, imagery,

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[10] W. Va. Code R. 175-12-3.4.4.a.5.

[11] FDA Expands Market Access, Authorizes New ENDS Products (May 5, 2026). https://www.fda.gov/news-events/press-announcements/fda-expands-market-access-authorizes-new-ends-products (discussing age-verification and device-access restriction technology).

branding, promotional, or video game features. It should not apply to technology used for age verification, identity verification, adult-user authentication, product authentication, device security, lock/unlock controls, battery or device-status information, compliance controls, or other functionality not directed to minors. This clarification would better align the Rule with West Virginia's youth-prevention objectives and avoid discouraging technologies regulators may view as useful tools for reducing youth access. To this end, Reynolds suggests the following language be added to the Rule:

> The prohibition on references to smart watches, phones, video games, or phone application integration features applies only to labeling, packaging, advertising, marketing, imagery, branding, or promotional features designed or reasonably expected to appeal to minors or promote youth use. The prohibition does not apply to application-based or connected-device functionality used for age verification, identity verification, adult-user authentication, product authentication, device security, lock/unlock controls, battery or device-status information, compliance controls, or similar functionality not directed to minors.

IV. As Currently Drafted, the Rule Raises Significant First Amendment Concerns by Compelling Ingredient Lists on Package Labeling.

The Rule requires manufacturers to publicly disclose the ingredient lists by placing that list on the packaging, thereby compelling speech.[12] Yet the government may not compel manufacturers to "use their private property as a 'mobile billboard' for the State's ideological message.[13] Nor may the government use compelled disclosures to drown out commercial speech regarding lawful products that it does not like. Indeed, the government may not commandeer a packaging label by promulgating a rule that is more extensive than necessary to serve the asserted interest.[14]

For a regulation to lawfully compel speech, it must at least pass muster under the frameworks of *Central Hudson* and *Zauderer*. Per *Central Hudson*, in the commercial-speech context, required or compelled statements must further a "substantial" governmental interest; the regulation must materially advance that interest; and the order must be narrowly tailored in doing so.[15] If the compelled statements are "purely factual and uncontroversial information," *Zauderer* allows a state to compel certain types of commercial speech "as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers," are not "unjustified," and are not "unduly burdensome."[16]

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[12] W. Va. Code R. 175-12-3.4.4.c.5.
[13] *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).
[14] *See Nat'l Inst. Of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2378 (2018).
[15] *See Cent. Hudson Gas & Elec. Corp. v Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).
[16] *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

The standard under *Zauderer* does not apply here as the Supreme Court has never allowed the government to compel speech, unless necessary to remedy an otherwise false or misleading commercial message, without satisfying heightened scrutiny.

Accordingly, the more exacting framework of *Central Hudson* applies and the Rule fails *Central Hudson*'s requirements relating to the means-end fit. ABCA has not shown that printing the ingredient list on the physical package materially advances any interest beyond what the previously discussed disclosure alternatives would achieve, so the mandate does not "directly advance" a substantial governmental interest. Compelling the full list onto the package itself, rather than a confidential filing along with a public website, commandeers the label for content that a less intrusive alternative would communicate equally well—the essence of a regulation "more extensive than necessary" under *Central Hudson*.

This mismatch is compounded by the practical reality, discussed above, that a complete ingredient list will not fit on vapor packaging in a legible font. Because less-restrictive alternatives are readily available, the on-package mandate cannot survive *Central Hudson*'s narrow-tailoring requirement. ABCA can avoid this issue by allowing for a more flexible disclosure framework as laid out in Section II.

V. ABCA Must Supplement the Economic-Impact Analysis.

ABCA must supplement the rulemaking record to evaluate private-sector costs associated with implementation of the Rule, particularly if the Rule is interpreted to require West Virginia-specific product labeling or product redesign. West Virginia law requires proposed rules to include a fiscal note itemizing the cost of implementing the rule as it relates to the State and to persons affected by the rule.[17] The current Rule's fiscal note is insufficient and must be revised to consider the cost to manufacturers, retailers and vendors.

The private-sector costs of a state-specific labeling or technology regime are materially different from ordinary compliance costs. These costs arise not merely because labeling changes are expensive, but because manufacturers distribute products through integrated national manufacturing and distribution systems. State-specific product labeling requirements can necessitate separate inventory systems, inventory tracking controls, and distribution restrictions. At a minimum, ABCA should consider the following categories of costs:

- product-label redesign and associated legal and regulatory review;
- West Virginia-specific packaging, sticker, insert, or overlabeling systems;
- SKU segregation, inventory controls, warehousing changes, and distribution tracking;

[17] "All proposed rules filed under subsection (a) of this section shall have a fiscal note attached itemizing the cost of implementing the rules as they relate to this state and to persons affected by the rules. W. Va. Code Ann." § 29A-3-4; *see also* W. Va. Code Ann. § 29A-3-5. ("At the time of filing the notice of its action, the agency shall also file with the Secretary of State a copy of the full text of the rule proposed and a fiscal note as defined in subsection (b), section four of this article.")

- distributor and retailer training, compliance communications, and product-identification procedures;
- potential product withdrawals where state-specific compliance is infeasible or cannot be implemented on the Rule's timeline;
- trade-secret review, confidential-information handling, and public-disclosure controls;
- technology redesign costs associated with age-gating, app-based authentication, device security, or compliance functionality;
- consumer and retailer disruption resulting from reduced availability of lawful products; and
- compliance uncertainty associated with ambiguous enforcement standards.

If ABCA adopts the clarifications requested in these comments, much of this burden can be avoided without compromising the Rule's youth-prevention objectives. Flexible disclosure mechanisms, confidential-information protections, and a compliance-technology carveout are less burdensome alternatives that directly advance the objectives of HB 5437 without creating new West Virginia-specific compliance costs for manufacturers.

VI. ABCA Should Provide Guidance, Cure Rights, a Sell-Through Period, and Enforcement Discretion.

The current rulemaking schedule creates a practical problem for manufacturers: the West Virginia-specific labeling requirements discussed above are already in effect prior to the written comment deadline due to the promulgation of the emergency rule. Manufacturers have ordered inventory, designed packaging, and entered distribution contracts in reliance on prior requirements. Regulated parties acting in good-faith should not be subject to penalties based on interpretations of the Rule before ABCA has considered public comments and provided final guidance regarding compliance expectations.

Similarly, regulated parties that are already in possession of products that lack the labeling required by the Rule should be afforded the opportunity to sell off the remaining noncompliant products without risk of an unfair enforcement action given the retroactive nature of the regulation.

ABCA should announce that it will exercise enforcement discretion for good-faith compliance issues involving labeling format, electronic disclosure, confidential ingredient information, and marketing or product labeling related to phone/app functionality used for compliance purposes. ABCA should also provide notice and an opportunity to cure before imposing penalties for technical or interpretive issues not involving youth access, false statements, or intentional misconduct. Finally, ABCA should announce that any products with noncompliant labeling already available for sale or already stocked by retailers and distributors at the time of the issuance of ABCA's final guidance may be lawfully sold through.

Enforcement resources should focus on conduct that most directly implicates the public-health objectives of HB 5437: youth-access violations, unlawful products, youth-oriented marketing, false or misleading labeling, and intentional misconduct. That approach would allow ABCA to target the most significant public-health concerns while giving lawful manufacturers and retailers a reasonable opportunity to implement ABCA's final guidance. Reynolds suggests the following language to be included in the Rule:

> For a reasonable transition period following issuance of final guidance, the Commissioner will prioritize enforcement against sales to persons under 21, youth-oriented marketing, illicit products, false or misleading labeling, and knowing violations. For good-faith compliance issues involving ingredient disclosure format, confidential information, or connected-device functions not directed to minors, ABCA will provide notice and an opportunity to cure before imposing penalties. Products with noncompliant labeling that were already in possession or in the inventory stock of retailers, wholesalers, and distributors at the time of the publication of the Commissioner's final guidance may lawfully be sold off of remaining inventory.

CONCLUSION

Reynolds appreciates ABCA's work to implement HB 5437 and supports West Virginia's efforts to prevent youth access, combat illicit and youth-oriented products, and promote responsible retail practices. Reynolds respectfully requests that ABCA adopt the targeted revisions described above so that the Rule advances those important objectives without imposing unnecessary state-specific labeling burdens, requiring public disclosure of confidential formulation information, or discouraging age verification, identity verification, adult-user authentication, product authentication, device security, lock/unlock controls, battery or device-status information technologies that support youth-prevention goals.

Those clarifications would not weaken the Rule's core enforcement objectives. Rather, they would help ensure that the Rule is implemented in a manner that is clear, administrable, and focused on addressing the conduct of greatest regulatory concern. By allowing flexible disclosure mechanisms, protecting confidential commercial information, preserving compliance-supporting technology, and providing a reasonable transition framework, ABCA can further the goals of HB 5437 while avoiding unnecessary disruption to lawful manufacturers, distributors, retailers, and adult consumers.

Reynolds would welcome the opportunity to work with ABCA on language that provides clear, administrable standards for manufacturers, distributors, and retailers while preserving the State's enforcement priorities.

Respectfully submitted,

/s/ *Andrew T. Mikac*

From: **Maximillian Nogay** <max@maverickwv.com>
Date: Tue, Jul 21, 2026 at 8:24 AM
Subject: Comment to Emergency Rule
To: anoop.k.bhasin@wv.gov <anoop.k.bhasin@wv.gov>
CC: William Ihlenfeld <wji@maverickwv.com>, Washington, Alonzo <awashington@flahertylegal.com>, Allen, Lexus D. <lallen@flahertylegal.com>

Good morning,

On behalf of affected West Virginia business owners and operators, please see the attached Comment in opposition to the Alcohol Beverage Control Administration's Vape or Smoke Shop Licensure and Enforcement emergency rule, Code of State Rules Title 175, Series 12.

Sincerely,

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155K

July 21, 2026

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By Electronic Mail and U.S. Mail
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WV Alcohol Beverage Control Administration
Legal Division
900 Pennsylvania Avenue, 4th Floor
Charleston, WV 25302
anoop.k.bhasin@wv.gov

Re: Preliminary Comment to Code of State Rules Title 175, Series 12
Alcohol Beverage Control Administration
Vape or Smoke Shop Licensure and Enforcement

Dear Mr. Bhasin:

On behalf of affected West Virginia business owners and operators, we submit the following Comment in opposition to the Alcohol Beverage Control Administration's ("ABCA") legislative emergency rule implementing changes resulting from passage and enactment of the Vape Safety Act (the "Act"), filed under Title 175, Series 12 of the Code of State Rules. The Rule improperly subverts the West Virginia Administrative Procedures Act ("WV APA"), W. Va. Code § 29A-3-1 *et seq.* and grossly exceeds the scope of rulemaking authority delegated to it by the Legislature. This Comment is submitted within the Secretary of State's 42-day review period under W. Va. Code § 29A-3-15a, which expires August 3, 2026.

Background

On March 13, 2026, the West Virginia Legislature passed House Bill 5437, known as the Vape Safety Act. *See* W. Va. Code § 16-9H-1 *et seq.* The Act, which went into effect on June 11, 2026, provides for limited rulemaking by the ABCA regarding licensing, background investigations of applicants, and product labeling. West Virginia Code § 16-9H-5(j) states that the ABCA "may propose rules for legislative approval in accordance with the [WV Administrative Procedures Act] as may be necessary to carry out the purposes of this article." Section 5 of the Act, W. Va. Code § 16-9H-5, governs licensure and related background investigations. The Act further directs that the ABCA "shall propose legislative rules for promulgation in accordance with [the WV APA] developing labeling standards for vapor products..." W. Va. Code § 16-9H-14. Despite these express limitations, on June 22, 2026, the ABCA promulgated a broad-reaching emergency rule that seeks to regulate the vape industry in a manner far beyond the statutory authority conferred upon it by the Act.

Legal and Administrative Standards

Every rule and regulation shall be promulgated by an agency only in accordance with the WV APA and shall be and remain effective only to the extent that it has been or is promulgated in accordance with this article. *See* W. Va. Code § 29A-3-1. An agency's rulemaking power is limited to the particular grant of authority provided by law. *See* W. Va. Code § 29A-3-2. The WV APA provides that an agency with authority to propose legislative rules may find that an emergency exists which may provide for promulgation of an emergency rule. *See* W. Va. Code § 29A-3-15(a). The agency must, *inter alia,* file the emergency rule, together with a statement of the facts and circumstances constituting the emergency. That authority is narrow. An emergency exists only where an emergency rule is necessary "(1) [f]or the immediate preservation of the public peace, health, safety or welfare; (2) to comply with a time limitation established by this code or by a federal statute or regulation; or (3) to prevent substantial harm to the public interest." W. Va. Code § 29A-3-15(f). An agency "may not use the provisions of this section to avoid or evade...any provisions for legislative review and approval of proposed rules." *Id.* § 29A-3-15(d). The rule is subject to de novo review, *see id.* § 29A-3-15(a), and the Secretary of State "shall disapprove" it upon determining that it exceeds the scope of its authorizing law, that no emergency justifies it, or that § 29A-3-15 was not followed. *Id.* § 29A-3-15a(b).

West Virginia Code § 16-9H-18 provides that the commissioner of the ABCA may propose rules for legislative approval in accordance with the Act. The ABCA invoked § 29A-3-15 on its own initiative, and it bears the burden of establishing that an emergency exists within the meaning of § 29A-3-15(f). It has not.

The reasons the ABCA gives are administrative convenience, not emergencies. It says it "needs the rule effective immediately so as to begin licensure and enforcement," that "[s]everal terms and processes are further explained in the rule versus the statute," and that a "licensure period beginning July 1, 2026" requires it. None of these meets any of the three grounds above. The Act's public health provisions do not take effect until 2027 so nothing to do with public health, safety, or welfare is urgent. And no time limitation compels the rule: the ABCA cites "W. Va. Code § 16-9H-1 et seq.," but the Act sets no deadline for rulemaking or licensure. The July 1, 2026, deadline is the one the ABCA wrote into its own rule at § 175-12-3.4.1, and an agency cannot create a deadline by rule and then call that deadline an emergency.

What the rule does accomplish is the immediate imposition — without hearing, review, or legislative approval — of requirements the Legislature did not enact. That is the use of § 29A-3-15 the Legislature forbade. *See* § 29A-3-15(d). We note also that an emergency rule expires on the thirty-first day unless the agency files a notice of public hearing on the proposed rule within thirty days — here, July 22, 2026 — and on the ninety-first day unless the proposed rule is filed with the Legislative Rule-Making Review Committee. *See* § 29A-3-15(a)(2), (3). We request confirmation that these filings have been made.

The ABCA's emergency rule also far exceeds the Legislature's grant of rulemaking authority set forth in the Act. As stated above, the Act permits the ABCA to propose rules in two limited circumstances: licensure and related background investigations, and labeling standards for vapor products.

<u>Comment</u>

Through the Act, the Legislature intended for the ABCA to propose rules regulating licensure and related background investigations and labeling standards for vapor products. The ABCA, however, promulgated a broad emergency rule in contravention and excess of that grant of authority.

A. Definitions

The ABCA's emergency rule defines an "Applicant" (§ 175-12-2.5), "Vape or smoke retailer" (§ 175-12-2.28), "Vapor product" (§ 175-12-2.30), and "Vapor products accessories" (§ 175-12-2.31). Each of these definitions is either newly created or expanded upon by the ABCA without requisite statutory authority. "Vapor product" is the plainest example. The Act defines it as a "non-combustible product containing nicotine." W. Va. Code § 16-9H-2. The rule appends products "which can also include vapable hemp products and kratom products," § 175-12-2.30 — products containing no nicotine, which the Legislature regulates separately under W. Va. Code §§ 19-12E-1 *et seq.* and 19-12F-1 *et seq*. The rule also invents "Tobacco product and accessories," § 175-12-2.26, sweeping in ashtrays, matches, lighters, butane, candles, charging cables, and knives, which are goods stocked by nearly every gas station, convenience store, and hardware store in the State.

Equally concerning, the emergency rule seeks to define retail "Floor space" (§ 175-12-2.11) and implements a calculation that is internally contradictory and skewed at every step toward a finding that an ordinary retailer is a "vape or smoke shop."

B. Licensure

The ABCA's emergency rule imposes additional barriers to licensure not contemplated by the Act. For example, § 175-12-3.1.2 requires a complete copy of a "valid lease," exposing confidential commercial terms to an agency with no statutory need for them. Applicants are also required to provide a floor plan. *See* § 175-12-3.1.7. Neither requirement is set forth in W. Va. Code § 16-9H-5. Nor does the Act require, as § 175-12-3.5.1 does, that a business close its doors and reapply upon a change of ownership; the Act requires only a new license. In that same vein, the ABCA's rule places a disproportionate burden on applicants by mandating submission of zoning forms or, if outside the city limits, a letter from county commission stating that the shop is not violating any zoning ordinances. Failure to do so may result in refusal of a license. *See* § 175-12-3.2.4. In much of the State that requirement cannot be satisfied at any price: many counties have no zoning ordinance, and their commissions have no mechanism for issuing the letter the rule demands.

West Virginia Code §16-9H-10(c) makes clear that vape or smoke retailers shall be located at least 300 feet from a church, school, or daycare center. The ABCA improperly expands this prohibition to include college and state university campuses (or any branch thereof). *See* § 175-12-3.2.1.a. The Act, however, does not expressly or impliedly include public or higher education institutions. The Legislature clearly did not intend for this provision to extend as far as the ABCA's rule reaches. Separately, the 300-foot standard is statutory; using it to deny licensure is not. Section 175-12-3.2.1.b imposes a "retailer" standard on "shops" and grandfathers no one, though many hold long-term leases signed in reliance on prior law. The bar is the rule's, not the Act's, so the ABCA may apply it prospectively. And with "church," "school," and "daycare center" undefined and no measuring date, a licensee compliant at licensure may lose renewal when a daycare opens across the street.

The citizenship requirement, as contemplated by the Act, requires applicants and managers to be United States citizens, *see* W. Va. Code §16-9H-5, whereas the ABCA rule vastly extends the citizenship requirement. *See* § 175-12-3.2.1.c. As written, the rule permits the ABCA to deny licensure to any vape or smoke shop applicant "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." *See id.* The Act requires only that "[t]he applicant" be a United States citizen. W. Va. Code § 16-9H-5(a)(1). It says nothing of beneficiaries, trustees, or "interested persons," and § 16-9H-5(a)(4) reaches only those with the ability to control the applicant. Read with § 175-12-3.2.1.g, which disqualifies any applicant involving "individuals...who are less than 21 years of age," and §§ 175-12-3.1.6 and 3.1.8, which reach every trust beneficiary, the rule makes a family business held in trust un-licensable if a single beneficiary is a minor or a lawful permanent resident. A bar directed at lawfully admitted residents also raises equal protection concerns; such classifications receive strict scrutiny. See *Graham v. Richardson*, 403 U.S. 365 (1971).

The rule also permits the ABCA to interpret and deny licensure based upon an applicant's conformity to "applicable laws of the State with respect to sanitation, health, construction, or equipment, or any similar requirements." § 175-12-3.2.3.a. The Act confines the ABCA's rulemaking to licensure, background investigations, and labeling. It does not make the ABCA the arbiter of the building, sanitation, and health codes that other agencies administer.

Section 175-12-3.4.4.b.4 bars any retail location from illuminating a sign outside of business hours. The Act permits an illuminated sign and bars only flashing or intermittent light. *See* W. Va. Code § 16-9H-10(b)(4). The rule's additional requirement has no statutory basis.

While the Act expressly delegates to the ABCA the authority to promulgate rules for labeling standards of vape products, the Act did not authorize these rules to be implemented in such an immediate and emergent fashion. The strict and burdensome rules, § 175-12-3.4.4.c, which were implemented almost immediately, provided virtually no notice to manufacturers or retailers. Section 175-12-3.4.4.c purports to require compliant labeling "[b]eginning, June 11, 2026" — eleven days before the rule was filed and six weeks before it can take effect. A rule cannot impose obligations before it exists, least of all where noncompliance is a misdemeanor escalating to a felony carrying not less than ten years. *See* W. Va. Code § 16-9H-15(c). A grace period must be allowed, together with a sell-through period for existing inventory and a safe harbor for good-faith reliance on a manufacturer's certification.

C. Operations

The ABCA is not authorized to set hours of operations for licensees. Pursuant to the emergency rule, "[n]o licensee shall sell [products] between the hours of midnight and 8:00 a.m." § 175-12-4.6. This prohibition cannot stand, as the Act contains no "hours" provision of any kind and the rulemaking it authorizes does not reach when a lawful business may open its doors. The rule likewise requires licensees to retain three years of purchase records, § 175-12-4.5, a requirement the Act nowhere imposes.

The ABCA also lacks authority to suspend, immediately or otherwise, a license upon finding that a person has *spent the night* inside a licensed premises. *See* § 175-12-4.7. The Act reaches only use of a premises "as a residence, dwelling place, or location for human habitation." W. Va. Code § 16-9H-8. Spending a night is not residing, and the breakroom couch the rule would have removed — along with "beds, pillows, blankets, and etc." — is not habitation. The rule should be conformed to the statutory term.

D. Violations and Penalties

West Virginia Code Section 16-9H-14 directed that "[t]he commissioner shall propose legislative rules for promulgation in accordance with the provisions of § 29A-3-1 et seq. of this code developing labeling standards for vapor products..." Instead, the ABCA restated the Act's criminal penalties verbatim and added administrative violations of its own.

The emergency rule provides for misdemeanor criminal liability upon 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* § 175-12-5.2.1. The prohibition it enforces, however, runs against manufacturers alone: § 16-9H-10(a) provides that "a manufacturer of a vapor product may not sell." The rule leaves that liability on the retailer who stocks the product, though the retailer controls neither its name nor its packaging. Rulemaking is the ABCA's opportunity to supply the safe harbor the Act's structure requires.

The emergency rule goes so far as to prevent a shop owner from changing its floor plan without ABCA approval. *See* § 175-12-5.3.6. Retailers reset displays seasonally. Absent any threshold of materiality, the provision makes an ordinary merchandising decision an administrative violation.

The ABCA reserved for itself the right to suspend a license for an indefinite period if someone is found to be residing in a licensed premises or any number of other minor violations of its rules. *See* § 175-12-5.4.3. And § 175-12-5.4.5 bars issuance or renewal to any entity with "outstanding violations," without regard to materiality or to whether the violation is contested.

Most concerningly, § 175-12-5.9 permits revocation or suspension at the commissioner's "sound discretion" whenever a licensee is "determined by law" to be a public nuisance "under local law" — a standard the rule does not define, resting on ordinances that vary across 55 counties, and carrying no stated procedure or opportunity to abate before the license is suspended. *See* § 175-12-5.9.

E. Hearings and Appeals

In addition to fashioning new civil and criminal penalties, the ABCA has effectively violated each licensee's right to due process by promulgating an unfair and unconstitutional hearing and appellate process for challenging its determinations. The Act makes clear that any person who is aggrieved by any order, requirement, decision, or determination made by the commissioner may appeal the decision pursuant to § 29A-5-1 et seq. *See* W. Va. Code § 16-9H-16. The ABCA's rule requiring a petitioner to post a $600 cost deposit as a precondition to the hearing itself, *see* § 175-12-6.5, cannot stand. The Act confers the right to challenge the commissioner's determinations, and nothing authorizes the ABCA to charge admission. The rule also affords a hearing on denial, suspension, or revocation, § 175-12-6.1, but none on the civil penalties it imposes at $100 per day per product — and it does not say whether that penalty runs per stock-keeping unit or per unit on the shelf.

Conclusion

The Act directed and permitted the ABCA to *propose* rules regulating licensure and related background investigations and labeling standards for vapor products. The ABCA, however, promulgated a broad emergency rule in blatant contravention of the Legislature's directives. Any rule or regulation beyond these limited areas exceeds the ABCA's specific and narrow statutory authority and violates its rule making power under the WV APA.

The ABCA's attempt at statutory interpretation is not entitled to deference. In *Loper Bright Enters. v. Raimondo*, the Supreme Court of the United States made clear that the federal Administrative Procedures Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and deference shall not be afforded to the agency's interpretation. *See United States v. Legrand*, 790 F. Supp. 3d 492, 503 (S.D.W. Va. 2025) citing *Loper Bright Enters. v. Raimondo,* 603 U.S. 369, 369, 144 S. Ct. 2244, 2247, 219 L. Ed. 2d 832 (2024).

We respectfully request that the ABCA withdraw the emergency rule and proceed through ordinary rulemaking under W. Va. Code § 29A-3-1 *et seq*. Should it decline, we request that the rule be amended, at a minimum, to:

1. Strike the provisions the Act does not authorize: the campus prohibition, the zoning conditions, the hours restriction, the three-year records requirement, floorplan pre-approval, and the $600 hearing deposit;

2. Conform the definitions to the Act by removing hemp and kratom from "vapor product," and striking "tobacco product and accessories";

3. Replace the floor-space methodology with one that measures the same space on both sides of the ratio and applies the ingress allowance evenhandedly, published with worked examples;

4. Limit the citizenship and age requirements to the persons the Act reaches: the applicant, the manager, and those able to control the applicant;

5. Apply the 300-foot standard prospectively, fix the measuring date at initial licensure, and define "church," "school," and "daycare center";

6. Defer the labeling requirements to no earlier than the rule's effective date, with a sell-through period and a good-faith safe harbor;

7. Permit a licensee to continue operating pending action on an application following a change of ownership or location;

8. Afford a hearing before civil penalties are imposed, and clarify whether the $100 daily penalty runs per stock-keeping unit or per unit; and

9. Provide a transition period during which the ABCA will not enforce W. Va. Code § 16-9H-3 against establishments filing complete applications within a reasonable time after the rule takes effect.

By counsel,

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