WEST VIRGINIA CODE CHAPTER 60 ARTICLE 9

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§60-9-1. Definitions.

(a) As used in this article:

(1) "Package" means a pack, carton or container of any kind in which cigarettes are offered for sale, sold, or otherwise distributed, or intended for distribution, to consumers.

(2) "Importer" means "importer" as that term is defined in 26 U.S.C. 5702(1).

(3) "Person" means and includes any individual, firm, association, company, partnership, corporation, joint-stock company, club, agency, syndicate, municipal corporation or other political subdivision of this state, trust, receiver, trustee, fiduciary or conservator, and when used in connection with any penalties imposed by this article, means and includes officers, directors, trustees or members of any firm, copartnership, association, corporation, trust or any other unit acting as a group.

(4) "Retailer" means and includes every person in this state, other than a wholesaler or subjobber, as defined in section two, article seventeen, chapter eleven of this code, engaged in the selling of cigarettes at retail to a consumer or to any person for any purpose other than resale.

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§60-9-2. Cigarettes produced for export -- prohibitions.

(a) It is unlawful for any person:

(1) To sell or distribute to consumers in this state, to acquire, hold, own, possess or transport, for sale or distribution in this state, or to import, or cause to be imported, into this state for sale or distribution in this state:

(A) Any cigarettes the package of which:

(i) Bears any statement, label, stamp, sticker, or notice indicating that the manufacturer did not intend the cigarettes to be sold, distributed, or used in the United States, including, but not limited to, labels stating "for export only," "U.S. tax-exempt," "for use outside U.S." or similar wording; or

(ii) Does not comply with:

(I) All requirements imposed by or pursuant to federal law regarding warnings and other information on packages of cigarettes manufactured, packaged or imported for sale, distribution, or use in the United States, including, but not limited to, the precise warning labels specified in the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1333; and

(II) All federal trademark and copyright laws;

(B) Any cigarettes imported into the United States in violation of 26 U.S.C. 5754 or any other federal law or the implementing federal regulations;

(C) Any cigarettes that the person otherwise knows or has reason to know the manufacturer did not intend to be sold, distributed or used in the United States; or

(D) Any cigarettes for which there has not been submitted to the secretary of the United States department of health and human services, the list or lists of the ingredients added to tobacco in the manufacture of such cigarettes required by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1355a;

(2) To alter the package of any cigarettes, prior to sale or distribution to the ultimate consumer, so as to remove, conceal or obscure:

(A) Any statement, label, stamp, sticker or notice described in subparagraph (i), paragraph (A), subdivision (1), subsection (a) of this section; or

(B) Any health warning that is not specified in, or does not conform with the requirements of, the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1333; or

(3) To affix any stamp required pursuant to article seventeen, chapter eleven of this code to the package of any cigarettes described in subdivision (1), subsection (a) of this section or

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altered in violation of subdivision (2), subsection (a) of this section.

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§60-9-3.

Repealed.

Acts, 2013 Reg. Sess., Ch. 60.

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§60-9-4. Criminal penalties.

Any person that commits any of the acts prohibited by section two of this article, either knowing or having reason to know he or she is doing so is guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned in a state correctional facility not more than five years, or both fined and imprisoned.

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§60-9-5. Administrative sanctions.

(a) The State Tax Commissioner may revoke or suspend the authorization to affix the tax stamp of any person for a violation of this article or any legislative rule related to this article that is promulgated by the commissioner pursuant to chapter twenty-nine-a of this code and, in conjunction, the Alcohol Beverage Control Commissioner may impose on the person a civil penalty in an amount not to exceed the greater of five hundred percent of the retail value of the cigarettes involved or $5,000, upon finding a violation by such person of this enactment, or the rules promulgated by the commissioner.

(b) Cigarettes that are acquired, held, owned, possessed, transported in, imported into or sold or distributed in this state in violation of this article are considered contraband under article seventeen, chapter eleven of this code and are subject to seizure and forfeiture as provided therein. Such cigarettes are considered contraband whether the violation of this article is knowing or otherwise.

(c) The State Tax Commissioner may assess tax due, penalty, and interest on any product acquired, possessed, sold, or offered for sale in violation of this article.

(d) Any monetary penalty assessed and collected by the Alcohol Beverage Control Commissioner shall be transmitted to the State Treasurer for deposit into the State Treasury to the credit of "the alcohol beverage control enforcement fund," established pursuant to section thirteen, article seven, chapter sixty of this code. All moneys collected, received and deposited in the "alcohol beverage control enforcement fund" shall be kept and maintained for expenditures by the commissioner for the purpose of enforcement of this article and rules pertaining to cigarettes and shall not be treated by the State Treasurer or State Auditor as any part of the general revenue of the state.

(e) Any person aggrieved by the imposition of a civil penalty pursuant to this article may request a hearing, within ten days of receipt of the notice imposing penalties, before the Alcohol Beverage Control Commissioner in the manner set forth herein. The commissioner may not hold a hearing or impose any civil penalties until after at least ten days' notice to the person of the time and place of such hearing, which notice shall contain a statement or specification of the charges, grounds or reasons for such penalty, and which shall be served upon the person as notices under the West Virginia rules of civil procedure or by certified mail, return receipt requested; at which time and place, so designated in the notice, the person has the right to appear and produce evidence in his or her behalf, and to be represented by counsel.

The commissioner may summon witnesses in the hearing before him or her, and fees of witnesses summoned on behalf of the state in proceedings shall be treated as a part of the expenses of administration and enforcement. The fees shall be the same as those in similar hearings in the circuit courts of this state. The commissioner may, upon a finding of violation, assess a sum, not to exceed $200 per violation, to reimburse the commissioner for expenditures of witness fees, court reporter fees and travel costs incurred in holding the

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hearing. Any moneys so assessed shall be transferred to the alcohol beverage control enforcement fund.

The action of the commissioner imposing a civil penalty is subject to review by the circuit court of Kanawha County, West Virginia, in the manner provided in chapter twenty-nine-a of this code. Petition for such review must be filed with the circuit court within a period of thirty days from and after the date final imposition of the civil penalty following hearing, if any, and any person obtaining an order for such review shall be required to pay the costs and fees incident to transcribing, certifying and transmitting the records pertaining to such matter to the circuit court. An application to the Supreme Court of Appeals of West Virginia for a writ of error from any final order of the circuit court in any matter shall be made within thirty days from and after the entry of the final order. All hearings before the commissioner shall be held in the offices of the commissioner in Charleston, Kanawha County, West Virginia, unless otherwise provided in the notice, or agreed upon between the person and the commissioner; and when the hearing is held elsewhere than in the commissioner's office, the person may be required to make deposits of the estimated costs of such hearing.

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§60-9-6. Unfair trade practices.

A violation of section two of this article constitutes an unlawful trade practice as provided in article eleven-a, chapter forty-seven of this code and, in addition to any remedies or penalties set forth in this article, is subject to any remedies or penalties for a violation of that article.

The Alcohol Beverage Control Commissioner shall enforce each and every provision of the Unfair Trade Practices Act in article eleven-a, chapter forty-seven of this code with respect to packages of cigarettes with like effect as if that article were set forth in extenso herein.

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§60-9-7. Unfair cigarette sales.

For purposes of this article, cigarettes imported or reimported into the United States for sale or distribution under any trade name, trade dress, or trademark that is the same as, or is confusingly similar to, any trade name, trade dress, or trademark used for cigarettes manufactured in the United States for sale or distribution in the United States shall be presumed to have been purchased outside of the ordinary channels of trade.

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§60-9-8. General enforcement provisions.

(a) This article shall be enforced by the State Tax Commissioner and the Alcohol Beverage Control Commissioner and for the purpose of enforcing this article, the commissioners may request information from any state agency, Constitutional officer or local agency and, notwithstanding the provisions of section five-d, article ten, chapter eleven of this code or any other provision of this code, may share information with, and request information from, any federal agency and any agency or Constitutional officer of this or any other state or any local agency thereof.

(b) A person that acquires, holds, owns, possesses, transports in or imports into this state cigarettes that are subject to this article shall, with respect to the cigarettes, maintain and keep all records required pursuant to article seventeen, chapter eleven of this code.

(c) In addition to any other remedy provided by law, any person may bring an action for appropriate injunctive or other equitable relief for a violation of this article; actual damages, if any, sustained by reason of the violation; and, as determined by the court, interest on the damages from the date of complaint, taxable costs, and reasonable attorney's fees. If the trier of fact finds that the violation is flagrant, it may increase recovery to an amount not in excess of three times the actual damages sustained by reason of the violation.

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§60-9-9. Applicability.

This article does not apply to cigarettes allowed to be imported or brought into the United States for personal use, and cigarettes sold or intended to be sold as duty-free merchandise by a duty-free sales enterprise in accordance with the provisions of 19 U.S.C. 1555(b) and any implementing regulations: Provided, That this article does apply to any cigarettes that are brought back into the customs territory for resale within the customs territory. The penalties provided in this article are in addition to any other penalties imposed under other law.

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