ENROLLED

House Bill No. 4549

(By Delegates Manchin, Moore, Eldridge and Skaff)
(By Request of the Alcohol and Beverage Control Commissioner)

Passed March 8, 2014

In effect ninety days from passage.
AN ACT to amend and reenact §11-16-3 of the Code of West Virginia, 1931, as amended; to amend said code by adding thereto a new section, designated §11-16-17a; and to amend and reenact §11-16-20 and §11-16-21 of said code, all relating to the regulation of nonintoxicating beer brewers and distributors, agreements, networks, products, brands and extensions of a line of brands; permitting the commissioner to investigate, review and approve or deny franchise agreements, labels, brands and line extensions; providing hearings; extending certain dates; establishing nonintoxicating beer, resident brewers, distributors, franchise distributor networks and line extensions standards; defining terms; providing sanctions; and authorizing rule making.

Be it enacted by the Legislature of West Virginia:

That §11-16-3 of the Code of West Virginia, 1931, as amended, be amended and reenacted; that said code be amended by adding thereto a new section, designated §11-16-17a; and that §11-16-20 and §11-16-21 of said code be amended and reenacted, all to read as follows:
ARTICLE 16. NONINTOXICATING BEER.

§11-16-3. Definitions.

For the purpose of this article, except where the context clearly requires differently:

(1) "Brand" means a nonintoxicating beer product manufactured, brewed, mixed, concocted, blended, bottled or otherwise produced, or imported or transhipped by a brewer or manufacturer, the labels of which have been registered and approved by the commissioner that is being offered for sale or sold in West Virginia by a distributor who has been appointed in a valid franchise agreement or a valid amendment thereto.

(2) "Brewer" or "manufacturer" means any person manufacturing, otherwise producing or importing or transshipping nonintoxicating beer or nonintoxicating craft beer for sale at wholesale to any licensed distributor. Brewer or manufacturer may be used interchangeably throughout this article. A brewer may obtain only one brewer’s license for its nonintoxicating beer or nonintoxicating craft beer.

(3) "Brewpub" means a place of manufacture of nonintoxicating beer owned by a resident brewer, subject to federal and state regulations and guidelines, a portion of which premises are designated for retail sales of nonintoxicating beer or nonintoxicating craft beer by the resident brewer owning the brewpub.

(4) "Class A retail license" means a retail license permitting the retail sale of liquor at a freestanding liquor retail outlet licensed pursuant to chapter sixty of this code.

(5) "Commissioner" means the West Virginia Alcohol Beverage Control Commissioner.

(6) "Distributor" means and includes any person jobbing or distributing nonintoxicating beer or nonintoxicating craft beer to
30 retailers at wholesale and whose warehouse and chief place of
31 business shall be within this state. For purposes of a distributor
32 only, the term “person” means and includes an individual, firm,  
33 trust, partnership, limited partnership, limited liability company, 
34 association or corporation. Any trust licensed as a distributor or 
35 any trust that is an owner of a distributor licensee, and the trustee 
36 or other persons in active control of the activities of the trust 
37 relating to the distributor license, is liable for acts of the trust or 
38 its beneficiaries relating to the distributor license that are 
39 unlawful acts or violations of article eleven of this chapter 
40 notwithstanding the liability of trustees in article ten, chapter 
41 forty-four-d of this code.

42 (7) “Franchise agreement” means the written agreement 
43 between a brewer and a distributor that is identical as to terms 
44 and conditions between the brewer and all its distributors, which 
45 agreement has been approved by the commissioner. The 
46 franchise agreement binds the parties so that a distributor. 
47 appointed by a brewer, may distribute all of the brewer’s 
48 nonintoxicating beer products, brands or family of brands 
49 imported and offered for sale in West Virginia, including, but 
50 not limited to, existing brands, line extensions and new brands 
51 all in the brewer’s assigned territory for the distributor. All 
52 brands and line extensions being imported or offered for sale in 
53 West Virginia must be listed by the brewer in the franchise 
54 agreement or a written amendment to the franchise agreement. 
55 A franchise agreement may be amended by mutual written 
56 agreement of the parties as approved by the commissioner with 
57 identical terms and conditions for a brewer and all of its 
58 distributors. Any approved amendment to the franchise 
59 agreement becomes a part of the franchise agreement. A brewer 
60 and a distributor may mutually agree in writing to cancel a 
61 franchise agreement. A distributor terminated by a brewer as 
62 provided in this article and the promulgated rules no longer has 
63 a valid franchise agreement. If a brewer has reached an 
64 agreement to cancel a distributor or has terminated a distributor, 
65 then a brewer may appoint a successor distributor who accedes 
66 to all the rights of the cancelled or terminated distributor.
(8) "Franchise distributor network" means the distributors who have entered into a binding written franchise agreement, identical as to terms and conditions, to distribute nonintoxicating beer products, brands and line extensions in an assigned territory for a brewer. A brewer may only have one franchise distributor network. Provided, That a brewer that has acquired the manufacturing, bottling or other production rights for the sale of nonintoxicating beer at wholesale from a selling brewer as specified in subdivision (2), subsection (a), section twenty-one of this article shall continue to maintain and be bound by the selling brewer's separate franchise distributor's network for any of its existing brands, line extensions and new brands.

(9) "Freestanding liquor retail outlet" means a retail outlet that sells only liquor, beer, nonintoxicating beer and other alcohol-related products, as defined pursuant to section four, article three-a, chapter sixty of this code.

(10) "Growler" means a glass ceramic or metal container or jug, capable of being securely sealed, utilized by a brewpub for purposes of off-premise sales of nonintoxicating beer or nonintoxicating craft beer for personal consumption not on a licensed premise and not for resale.

(11) "Line extension" means any nonintoxicating beer product that is an extension of brand or family of brands that is labeled, branded, advertised, marketed, promoted or offered for sale with the intent or purpose of being manufactured, imported, associated, contracted, affiliated or otherwise related to a brewer's existing brand through the use of a brewer, its subsidiaries, parent entities, contracted entities, affiliated entities or other related entities'. In determining whether a nonintoxicating beer product is a line extension, the commissioner may consider, but is not limited to, the following factors: name or partial name; trade name or partial trade name; logos; copyrights; trademarks or trade design; product codes; advertising promotion or pricing.
(12) "Nonintoxicating beer" means all natural cereal malt beverages or products of the brewing industry commonly referred to as beer, lager beer, ale and all other mixtures and preparations produced by the brewing industry, including malt coolers and nonintoxicating craft beers with no caffeine infusion or any additives masking or altering the alcohol effect containing at least one half of one percent alcohol by volume, but not more than nine and six-tenths of alcohol by weight, or twelve percent by volume, whichever is greater. The word "liquor" as used in chapter sixty of this code does not include or embrace nonintoxicating beer nor any of the beverages, products, mixtures or preparations included within this definition.

(13) "Nonintoxicating beer sampling event" means an event approved by the commissioner for a Class A retail Licensee to hold a nonintoxicating beer sampling authorized pursuant to section eleven-a of this article.

(14) "Nonintoxicating beer sampling day" means any days and hours of the week where Class A retail licensees may sell nonintoxicating beer pursuant to subdivision (1), subsection (a), section eighteen of this article, and is approved, in writing, by the commissioner to conduct a nonintoxicating beer sampling event.

(15) "Nonintoxicating craft beer" means any beverage obtained by the natural fermentation of barley, malt, hops or any other similar product or substitute and containing not less than one half of one percent by volume and not more than twelve percent alcohol by volume or nine and six-tenths percent alcohol by weight with no caffeine infusion or any additives masking or altering the alcohol effect.

(16) "Original container" means the container used by the brewer at the place of manufacturing, bottling or otherwise producing nonintoxicating beer for sale at wholesale.
(17) "Person" means and includes an individual, firm, partnership, limited partnership, limited liability company, association or corporation.

(18) "Resident brewer" means any brewer or manufacturer of nonintoxicating beer or nonintoxicating craft beer whose principal place of business and manufacture is located in the State of West Virginia and which does not brew or manufacture more than twenty-five thousand barrels of nonintoxicating beer or nonintoxicating craft beer annually, and does not self-distribute more than ten thousand barrels thereof in the State of West Virginia annually.

(19) "Retailer" means any person selling, serving, or otherwise dispensing nonintoxicating beer and all products regulated by this article, including, but not limited to, malt coolers at his or her established and licensed place of business.

(20) "Tax Commissioner" means the Tax Commissioner of the State of West Virginia or the commissioner's designee.

§11-16-17a. Commissioner to investigate, review and approve or deny franchise agreements, labels, brands and line extensions.

(a) The commissioner shall investigate and review:

(1) All franchise agreements and any amendments to a franchise agreement to verify compliance with this article and the promulgated rules.

(2) The registration of all container labels for brands manufactured, imported or sold in West Virginia.

(3) The registration of all brands and line extensions with the commissioner that are the subject of a franchise agreement or an amendment to a franchise agreement.
(4) The appointment of all brands or line extensions to a distributor in a brewer's established franchise distributor network and to that distributor's assigned territory from the brewer.

(5) The appointment of all brands or line extensions acquired by a brewer as either an acquiring brewer, successor brewer and also any successor entities of a brewer, as specified in subdivision (3), subsection (a), section twenty-one of this article, to the distributor in the selling brewer's established franchise distributor network and to that distributor's assigned territory.

(b) The commissioner's investigation and review under subsection (a) of this section may include, but is not limited to: the brewer, its subsidiaries, parent entities, contracted entities, affiliated entities, associated entities or any other related entities, the brewer's corporate structure, the nature of the relatedness of various entities, ownership, trade names or partial trade names, logos, copyrights, trademarks or trade design, product codes, marketing and advertising, promotion or pricing.

(c) The commissioner may approve or deny any item listed in subsection (a) of this section as determined by the commissioner in accordance with this article, the promulgated rules as the facts and circumstances dictate.

(d) Any brewer adversely affected by a denial as specified in subdivision (3) or (4), subsection (a) of this section, may request, in writing, a final written determination from the commissioner.

(e) Upon receipt of final determination as provided in subsection (d), a brewer may request an administrative hearing by filing a written petition and as otherwise required per section twenty-four of this article and the rules promulgated by the commissioner. Upon filing a written petition, the brewer shall file a $1,000 hearing deposit, via certified check or money order, to cover the costs of the hearing. Such certified check or money
order shall be made payable to the commissioner. In any such hearing held by the request of a brewer, the burden of proof is on the brewer and the standard of review for the administrative hearing is by a preponderance of the evidence.

§11-16-20. Unlawful acts of brewers or manufacturers; criminal penalties.

(a) It is unlawful:

(1) For any brewer or manufacturer, or any other person, firm or corporation engaging in the business of selling nonintoxicating beer, ale or other malt beverage or cooler to a distributor or wholesaler, to discriminate in price, allowance, rebate, refund, commission, discount or service between distributors or wholesalers licensed in West Virginia. "Discriminate," as used in this section, shall mean granting of more favorable prices, allowances, rebates, refunds, commissions, discounts or services to one West Virginia distributor or wholesaler than to another.

(2) For any brewer or manufacturer, or any other person, firm or corporation engaged in the business of selling nonintoxicating beer, ale or other malt beverage or malt cooler to a distributor or wholesaler, to sell or deliver nonintoxicating beer, ale or other malt beverage or malt cooler to any licensed distributor or wholesaler unless and until such brewer, manufacturer, person, firm or corporation, as the case may be, shall have filed the brewery or dock price of such beer, ale or other malt beverage or malt cooler, by brands and container sizes, with the commissioner. The pricing submitted to the commissioner shall also be submitted contemporaneously to the licensed distributor or wholesaler. No price schedule shall be put into effect until ninety days after receipt of same by the commissioner and shall be submitted on or before the following quarterly dates of January 1, April 1, July 1 and October 1 of the calendar year to be effective: Provided, That any price shall remain in effect not less than ninety days.
(3) For any brewer or manufacturer, resident brewer or any other person, firm or corporation engaged in the business of selling nonintoxicating beer, ale or other malt beverage or malt cooler to a distributor or wholesaler to sell, offer for sale or transport to West Virginia any nonintoxicating beer, ale or other malt beverage or malt cooler unless it has first registered its labels and assigned to the appropriate distributor per an equitable franchise agreement, all as approved by the commissioner.

(4) For any brewer or manufacturer, or any other person, firm or corporation engaged in the business of selling nonintoxicating beer, ale or other malt beverage or malt cooler to provide, furnish, transport or sell its nonintoxicating beer products, brands and line extensions to any person or distributor other than the appointed distributor per the franchise agreement and established in the franchise distributor network in the territory assigned to that appointed distributor.

(5) For any brewer or manufacturer, or any other person, firm or corporation engaged in the business of selling nonintoxicating beer, ale or other malt beverage or malt cooler to provide, furnish, transport or sell its nonintoxicating beer products, brands and line extensions that have been denied by the commissioner.

(6) For any resident brewer that chooses to utilize a franchise agreement and a franchise distributor network, either in addition to or in conjunction with its limited quantity of nonintoxicating beer for self-distribution, to violate this section and the resident brewer is subject to the sanctions in subsections (b) and (c) of this section.

(b) The violation of any provision of this section by any brewer or manufacturer shall constitute grounds for the forfeiture of the bond furnished by such brewer or manufacturer in accordance with the provisions of section twelve of this article.

(c) The violation of this section by any brewer or manufacturer is grounds for sanctions as determined by the
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commissioner in accordance with sections twenty-three and twenty-four of this article and the rules promulgated by the commissioner.

(d) Any resident brewer that chooses to utilize a franchise agreement and a franchise distributor network, either in addition to or in conjunction with its limited quantity of nonintoxicating beer for self-distribution, shall be treated as a brewer under this article and the applicable promulgated rules.

§11-16-21. Requirements as to franchise agreements between brewers and distributors; transfer of franchise by distributor; franchise distributor network; notice thereof to brewer; arbitration of disputes as to such transfer; violations and penalties; limitation of section.

(a) On and after July 1, 1971, it shall be unlawful for any brewer to transfer or deliver to a distributor any nonintoxicating beer, ale or other malt beverage or malt cooler without first having entered into an equitable franchise agreement with such distributor, which franchise agreement and any amendments to that agreement shall be in writing, shall be identical as to terms and conditions with all other franchise agreements and any amendments between such brewer and its other distributors in this state in its approved franchise distributor network, all as approved by the commissioner and which shall contain a provision in substance or effect as follows:

(1) The brewer recognizes that the distributor is free to manage his or her business in the manner the distributor deems best and that this prerogative vests in the distributor, subject to the provisions of this article, the exclusive right: (A) To establish his or her selling prices; (B) to have the distribution rights to the brands and line extensions of nonintoxicating beer products that are bound by franchise agreements specifying a distributor’s assigned territory and that are assigned to a franchise distributor
network, and, further, that the distributor may determine which
brands and line extensions of nonintoxicating beer products he
or she wishes to handle; and (C) to determine the efforts and
resources which the distributor will exert to develop and promote
the sale of the brewer’s nonintoxicating beer products handled
by the distributor. However, since the brewer’s nonintoxicating
beer products, brands and line extensions shall only be handled
by the distributor with a franchise agreement for a certain
territory in West Virginia as a part of the brewer’s overall
franchise distributor network in West Virginia and will not be
sold by other distributors in the territory, the brewer is dependent
upon the appointed distributor alone for the sale of such products
in the assigned territory. Consequently, the brewer expects that
the distributor will price competitively the nonintoxicating beer
products handled by the distributor, devote reasonable effort and
resources to the sale of such products and maintain a satisfactory
sales level.

(2) The franchise agreement binds the parties so that a
distributor, appointed by a brewer, may distribute all of the
brewer’s nonintoxicating beer products, brands or family of
brands imported and offered for sale in West Virginia, including,
but not limited to: existing brands, line extensions and new
brands in the brewer’s assigned territory for the distributor. All
brands and line extensions being imported or offered for sale in
West Virginia must be listed by the brewer in the franchise
agreement or a written amendment to the franchise agreement.
A franchise agreement may be amended by mutual written
agreement of the parties as approved by the commissioner with
identical terms and conditions for a brewer and all of its
distributors. Any approved amendment to the franchise
agreement becomes a part of the franchise agreement.

(3) Whenever the manufacturing, bottling or other
production rights for the sale of nonintoxicating beer at
wholesale of any brewer is acquired by another brewer, the
franchised distributor and franchise distributor network of the
selling brewer shall be entitled to continue distributing the
selling brewer's nonintoxicating beer products as authorized in
the franchised distributor's existing franchise agreement and the
acquiring brewer shall market all the selling brewer's
nonintoxicating beer products through said franchised distributor
and franchise distributor network as though the acquiring brewer
had made the franchise agreement and the acquiring brewer may
terminate said franchise agreement only in accordance with
subdivision (2), subsection (b) of this section: Provided, That the
acquiring brewer may distribute any of its other nonintoxicating
beer products through its duly authorized franchises and
franchise distributor network in accordance with all other
provisions of this section. Further, this subdivision shall apply to
the brewer, successor brewers and also any successor entities of
a brewer who shall be bound by the existing franchise agreement
and the franchise distributor network, unless all the parties
mutually agree, in writing, to change or cancel the existing
franchise agreement and franchise distributor network or unless
the brewer terminates a distributor as provided in this article and
the promulgated rules.

(b) It shall also be unlawful:

(1) For any brewer, resident brewer or distributor, or any
officer, agent or representative of any brewer, resident brewer or
distributor, to coerce or persuade or attempt to coerce or
persuade any person licensed to sell, distribute or job
nonintoxicating beer, ale or other malt beverage or malt cooler
at wholesale or retail, to enter into any contracts or agreements,
whether written or oral, or to take any other action which will
violate or tend to violate any provision of this article or any of
the rules, regulations, standards, requirements or orders of the
commissioner promulgated as provided in this section;

(2) For any brewer, resident brewer or distributor, or any
officer, agent or representative of any brewer, resident brewer or
distributor, to cancel, terminate or rescind without due regard for
the equities of such brewer, resident brewer or distributor and
without just cause, any franchise agreement, whether oral or
written, and in the case of an oral franchise agreement, whether
the same was entered into on or before June 11, 1971, and in the
case of a franchise agreement in writing, whether the same was
entered into on, before or subsequent to July 1, 1971. The
cancellation, termination or rescission of any such franchise
agreement shall not become effective for at least ninety days
after written notice of such cancellation, termination or
rescission has been served on the affected party and the
Commissioner by certified mail, return receipt requested:

Provided, That said ninety-day period and said notice of
cancellation, termination or rescission shall not apply if such
cancellation, termination or rescission is agreed to in writing by
both the brewer and the distributor involved.

(c) In the event a distributor desires to sell or transfer his or
her franchise and assigned territory in the brewer or resident
brewer's franchise distributor network, such distributor shall
give to the brewer, or resident brewer at least sixty days' notice
in writing of such impending sale or transfer and the identity of
the person, firm or corporation to whom such sale or transfer is
to be made and such other information as the brewer or resident
brewer may reasonably request. Such notice shall be made upon
forms and contain such additional information as the
Commissioner by rule or regulation shall prescribe. A copy of
such notice shall be forwarded to the commissioner. The brewer
or resident brewer shall be given sixty days to approve or
disapprove of such sale or transfer. If the brewer or resident
brewer neither approves nor disapproves thereof within sixty
days of the date of receipt of such notice, the sale or transfer of
such franchise shall be deemed to be approved by such brewer
or resident brewer. In the event the brewer or resident brewer
shall disapprove of the sale or transfer to the prospective
franchisee, transferee or purchaser, such brewer or resident
brewer shall give notice to the distributor of that fact in writing,
setting forth the reason or reasons for such disapproval. The
approval shall not be unreasonably withheld by the brewer or resident brewer. The fact that the prospective franchisee, transferee or purchaser has not had prior experience in the nonintoxicating beer business or beer business shall not be deemed sufficient reason in and of itself for a valid disapproval of the proposed sale or transfer, but may be considered in conjunction with other adverse factors in supporting the position of the brewer or resident brewer. Nor may the brewer or resident brewer impose requirements upon the prospective franchisee, transferee or purchaser which are more stringent or restrictive than those currently demanded of or imposed upon the brewer or resident brewers or other distributors in the State of West Virginia. A copy of such notice of disapproval shall likewise be forwarded to the commissioner and to the prospective franchisee, transferee or purchaser. In the event the issue be not resolved within twenty days from the date of such disapproval, either the brewer, resident brewer, distributor or prospective franchisee, transferee or purchaser shall notify the other parties of his or her demand for arbitration and shall likewise notify the commissioner thereof. A dispute or disagreement shall thereupon be submitted to arbitration in the county in which the distributor’s principal place of business is located by a board of three arbitrators, which request for arbitration shall name one arbitrator. The party receiving such notice shall within ten days thereafter by notice to the party demanding arbitration name the second arbitrator or, failing to do so, the second arbitrator shall be appointed by the chief judge of the circuit court of the county in which the distributor’s principal place of business is located on request of the party requesting arbitration in the first instance. The two arbitrators so appointed shall name the third or, failing to do so within ten days after appointment of the second arbitrator, the third arbitrator may be appointed by said chief judge upon request of either party. The arbitrators so appointed shall promptly hear and determine and the questions submitted pursuant to the procedures established by the American
Arbitration Association and shall render their decision with all reasonable speed and dispatch but in no event later than twenty days after the conclusion of evidence. Said decision shall include findings of fact and conclusions of law and shall be based upon the justice and equity of the matter. Each party shall be given notice of such decision. If the decision of the arbitrators be in favor of or in approval of the proposed sale or transfer, the brewer or resident brewer shall forthwith agree to the same and shall immediately transfer the franchise to the proposed franchisee, transferee or purchaser unless notice of intent to appeal such decision is given the arbitrators and all other parties within ten days of notification of such decision. If any such party deems himself or herself aggrieved thereby, such party shall have a right to bring an appropriate action in circuit court. Any and all notices given pursuant to this subsection shall be given to all parties by certified or registered mail, return receipt requested.

(d) The violation of any provision of this section by any brewer or resident brewer shall constitute grounds for the forfeiture of the bond furnished by such brewer or resident brewer in accordance with the provisions of section twelve of this article and shall also constitute grounds for sanctions in accordance with sections twenty-three and twenty-four of this article. Moreover, any circuit court of the county in which a distributor’s principal place of business is located shall have the jurisdiction and power to enjoin the cancellation, termination or rescission of any franchise agreement between a brewer or resident brewer and such distributor and, in granting an injunction to a distributor, the court shall provide that the brewer or resident brewer so enjoined shall not supply the customers or territory of the distributor while the injunction is in effect.
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman, House Committee

Originating in the House.

In effect ninety days from passage.

Clerk of the House of Delegates

Clerk of the Senate

Speaker of the House of Delegates

President of the Senate

The within is approved this the 31st
day of March, 2014.

Governor
PRESENTED TO THE GOVERNOR

[Signature]

Time 10:45 AM