

**RULES AND REGULATIONS
OF THE ARKANSAS TOBACCO CONTROL BOARD
PROMULGATED PURSUANT TO ARK. CODE ANN. § 26-57-256**

SECTION I – GENERAL

1.1 Meeting of Board - The Board shall meet at least two (2) times each year, time and place to be designated by the Chairman of the Board in his official call of such meetings. However, additional regular, special or emergency meetings may be held at the discretion of the Chairman of the Board, or at the written request of two (2) members of the Board.

1.2 Quorum - A majority of the members of the Board shall constitute a quorum, and if a quorum is not present at the time of such called meeting, same may be adjourned to a later date to be designated by the Chairman.

SECTION 2 – PERMIT APPLICATIONS - GENERALLY

2.1 Permit Necessary for sale of Cigarettes or Tobacco Products - No wholesaler, retailer, vendor or other individual, partnership, corporation or other entity shall sell, barter, give away or otherwise distribute tobacco products or cigarettes in the State of Arkansas without first obtaining the appropriate permit or permits in accordance with A.C.A. § 26-57-201 et seq. and these rules and regulations.

2.2 Permit Needed for Each Capacity - Any individual, partnership, corporation or other entity operating in more than one capacity shall obtain a permit for each capacity.

2.3 Current Address - It shall be the obligation of all permit holders to keep on file with the Board the current address or the current address of an agent for service of process. All correspondence and/or notices from the Board shall be sent to the address on file with the Board. All permit holders are to notify the Board of any change in address and/or agent for service of process within 30 days of said change.

2.4 Forms for Applications - All applications for permits, new or renewal, shall be completed on forms provided by the Arkansas Tobacco Control Board (the “Board.”)

2.5 Application to be Complete - No application, new or renewal, will be accepted or acted upon by the Board unless it is complete and accompanied by the appropriate privilege tax as established by A.C.A. § 26-57-219.

2.6 Posting of Permits – Each and every permit holder shall be required, before doing any business under any permit issued pursuant to any tobacco laws in the State of Arkansas, to post his/her permit in a conspicuous place in the primary office or room where the business is carried on and shall at all times keep his/her permit displayed so that all persons visiting the premises may readily see the permit. Vending machine permit holders are required to post their cigarette vending machine permit conspicuously on the front of the vending machine.

2.7 Records to be Provided - All records relating to the purchase or sale of any tobacco product, including, but not limited to all invoices and/or receipts relating to the sale or purchase of any tobacco products, of any permit holder shall be open to inspection by the Director of the Board and any investigator/agent of the Board. Upon request by the Board, any and all records of any permit holder shall be provided to the Board at any meeting of the Board. All such records shall be maintained by the permit holder for a period of at least three (3) years.

2.8 The term “invoice” as used in Ark. Code Ann. § 26-57-213 is defined as being documentation, contemporaneously made with the sale or purchase, sufficient to show an itemized list of the merchandise shipped, purchased or sold, with the quantity and prices charged. For wholesale sales, the invoice must contain the name or other identifying information of the seller and the purchaser. For purchases by a retailer, the invoice and/or sales receipt must contain the name or other identifying information of the seller. For sales by a retailer to consumers, the invoice need not contain the name or other identifying information of the purchaser.

SECTION 3 – APPLICATION FOR WHOLESALE PERMIT (NEW)

3.1 Detailed Information to be Provided - Any application for a wholesaler permit must be accompanied by a sworn affidavit showing whether the business is owned by an individual, partnership, or corporation or other entity. The application shall state the name, age and address of the applicant, if an individual; the name, age and address of each partner, if the applicant is a partnership; and the name, age and address of each member of the Board of Directors or other governing body and each officer and the managing agent, if the applicant is a partnership, corporation or an association. In addition, the application shall state the name and address of each person financially interested in the permitted business for which application is made, together with the nature of such interests, but if such applicant is a corporation, the applicant shall set forth only the name(s) and address(es) of all stockholders holding more than five percent (5%) interest in the permitted business. In addition, the same information may be required by the director of any manager, director, officer, or member retained by or having interests in the business. The application shall further provide a telephone number which must be listed in the name of the business seeking the application.

3.2 Wholesaler in Fact - Each applicant shall attest that the permittee shall be a wholesaler in fact, proof of which shall consist of an established place of business, the length of time for which said office and/or warehouse has been and/or is rented, leased or owned and the Federal Employer's Business Identification Number of each business.

3.3 Business Location - Each applicant must attach copies of the lease, rental or ownership of all offices and/or warehouses and a photo of all buildings to be used for the storage of inventory or files. No building may be used to store inventory or files which contains personal living quarters which is accessible from the area proposed to be used as a building location.

3.4 Price List to be Kept - Each applicant must agree to maintain a list of prices for all tobacco products which will be sold, such price lists to be kept in the business office and made available to each customer, the Board, the Director of the Board, or an investigator for the Board.

3.5 Character of Applicant - The applicant shall be of good moral character. An individual owner shall submit three letters as to his moral character; a partnership shall submit two letters of moral character for each partner; a corporation or other entity shall submit two letters of moral character for each of the stockholders or owners holding more than five percent (5%) interest in the permitted business. No form letters will be accepted to satisfy this requirement.

3.6 Proof of Financial Responsibility - Each applicant shall furnish proof of financial responsibility in the form of a Dunn & Bradstreet Report or such other financial statement(s) acceptable to the Director. The Director may require a financial statement made by a certified public accountant.

3.7 Change in Ownership - In the event there is a change in ownership of twenty five percent (25%) or more, the permit holder must resubmit the information required by Section 3.1, 3.3, 3.6 and 3.7. Said amended information shall be submitted to the Director of the Board within 30 days of said change in ownership. If after review of the amended information, the Board determines that a permit would not have originally been granted to the legal entity had the original ownership and information been as reflected in the amended information, the Board shall have the authority to revoke any permit, after a hearing. This provision shall not apply to publicly traded corporations.

3.8 Publication of Application – New Application - Upon tentative approval of a new wholesale application by the Board staff, the applicant shall advertise its intentions to seek a permit in a newspaper of state-wide circulation. Said notice shall be placed on two (2) occasions, seven (7) days apart, using the form supplied by the Board. The date of the first publication shall be at least thirty (30) days prior to the meeting at which the Board shall consider the application. The Director of the Board shall establish the date of the Board meeting at which the application shall be considered and the deadline for the filing of objections to the issuance of the permits. The applicant shall provide copies of said notices, along with proof of publication, to the Director fifteen (15) days prior to the scheduled meeting.

3.9 Sales by Wholesalers - No wholesaler shall sell cigarettes or tobacco products to any individual, partnership, corporation or other entity unless said individual, partnership, corporation or other entity is duly licensed to resell said cigarettes or tobacco products.

3.10 Purchases by Wholesalers - Wholesalers shall purchase cigarettes and tobacco products only from other wholesalers or manufacturers who are registered pursuant to A.C.A. § 26-57-215(1)

SECTION 4 – RETAIL PERMIT HOLDERS

4.1 Server Awareness Forms – It shall be the obligation of each retail permit holder to obtain from every employee, permittee or owner who may or does sell cigarettes and tobacco products, upon commencement of such employment, a signed acknowledgement that he or she has read and understands the content of a form entitled “Tobacco Server Awareness Form”, such Form being provided at the time of issuance of any permit, by the Director of the Tobacco Control Board. The Tobacco Server Awareness Form shall set forth pertinent rules and regulations and laws governing the sale of tobacco products and other related information as determined appropriate by the Director. Executed server awareness forms or copies thereof shall be maintained at each permitted retail location and shall be available for inspection upon request by any agent of the Arkansas Tobacco Control Board during normal business hours. Failure to have executed server awareness forms available for inspection shall be deemed a violation of this rule.

4.2 Prohibition on Loose Cigarette Sales – The sale of individual cigarettes or "loosies" is prohibited. Individual cigarettes or "loosies" are defined as any cigarette not contained in its original, unopened pack.

SECTION 5 - OBJECTIONS TO THE ISSUANCE OF PERMITS

5.1 Written Objections to be Made – Pursuant to A.C.A. §26-57-256(a)(6), the Director of the Board shall receive written objections to the issuance of new permits. All objections must be received by the director on or prior to the deadline established by the Director and published by the applicant pursuant to Section 3.1 of these Rules.

5.2 Public Hearing to be Held After Receipt of Three Objections - If the Director receives the petition of three interested parties alleging that facts relevant to the issuance of the permit exists and objecting to the issuance of the permit, the Board shall conduct a public hearing to receive and consider such relevant testimony and evidence.

5.3 Objections Must State Relevant Facts - All petitions and objections must state the nature of the relevant facts that are alleged.

5.4 Applicant to Publish Notice of Hearing - In the event that a public hearing is conducted by the Board, the Director shall establish the time and date of the hearing and notify the applicant. The applicant shall then publish notice of the hearing in a newspaper of state-wide circulation. Said notice shall be placed on two occasions,

seven days apart, using the form supplied by the Board. The date of the first publication shall be at least 15 days prior to the public meeting. The applicant shall provide copies of said notices, along with proof of publication, to the director prior to the scheduled meeting.

SECTION 6 - EXPIRATION OF PERMITS - RENEWALS

6.1 Permits to Expire on June 30 - All permits and licenses shall expire on June 30 of each year. Only those applications received by this deadline shall be considered timely. The responsibility of timely renewal is placed entirely upon the permit holder, and shall not be transferred to any employee, firm, agent, or other third party, including the postal service. All permit holders who desire to retain their permits must apply for renewal on the forms provided by the Board.

6.2 Expired Permit – Each permit not renewed on or before June 30 shall expire. The holder of an expired permit must, after sixty (60) days (September 1), submit a new application and pay all late fees before receiving a new permit. The holder of the expired permit shall not be permitted to purchase, sell, barter, give away or otherwise distribute tobacco products or cigarettes in the State of Arkansas during the time he is not the holder of a valid, unexpired permit. However, this provision shall not bar the holder of an expired permit to return tobacco products or cigarettes to the wholesaler.

SECTION 7 - FEES

7.1 Cash Not Accepted for Payment of Fees or Permits – Payments for all fees or permits are to be made by check, draft or money order. No cash money will be accepted by the employees or members of the Tobacco Control Board for any purpose.

7.2 No Payments Accepted by Agents - No agent of the Tobacco Control Board will take any payments in the field for new or renewal permits, fines or any other matter. All payments are to be mailed or delivered to the Tobacco Control Board as set out in Section 7.1.

7.3 Permit Fee Schedule – The following is the Schedule for all Permit Fees:

RETAIL CIGARETTE & TOBACCO PERMITS:

- | | |
|--|---------|
| 1. WEEKLY GROSS SALES LESS THAN \$5,000 | \$20.00 |
| 2. WEEKLY GROSS SALES BETWEEN \$5,000 & \$15,000 | \$30.00 |
| 3. WEEKLY GROSS SALES IN EXCESS OF \$15,000 | \$50.00 |

WHOLESALE CIGARETTE, TOBACCO & SALES REPRESENTATIVES PERMITS:

- | | |
|--|----------|
| 1. WHOLESALE CIGARETTE PERMIT | \$500.00 |
| 2. WHOLESALE TOBACCO PERMIT | \$500.00 |
| 3. WHOLESALE SALES REPRESENTATIVE PERMIT | \$ 25.00 |

VENDING MACHINE PERMITS:

- | | |
|---------------------------------|---------------|
| 1. VENDING MACHINE PERMIT | \$100.00 |
| 2. VENDING MACHINE PERMIT STAMP | \$ 10.00 EACH |

MANUFACTURERS SALES REPRESENTATIVE PERMIT:

- | | |
|-------------------------------------|----------|
| 1. MFG. SALES REPRESENTATIVE PERMIT | \$ 25.00 |
|-------------------------------------|----------|

VENDING MACHINE DEALER'S LICENSE:

- | | |
|---|----------|
| 1. DEALER'S LICENSE
(Anyone selling vending machines in the state) | \$ 25.00 |
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SPECIAL EVENT ONE TIME PERMIT:

- | | |
|-------------------------|---------|
| 1. SPECIAL EVENT PERMIT | \$ 5.00 |
|-------------------------|---------|

DUPLICATE PERMIT:

- | | |
|-----------------------------|---------|
| 1. DUPLICATE PERMIT REQUEST | \$ 5.00 |
|-----------------------------|---------|

SECTION 8 - CIGARETTE VENDING MACHINES

- 8.1 Location of Vending Machines - New or renewal applications for General Tobacco Products Vending Permit (vendor) license shall file with the Board a notification listing the number of vending machines operated and the physical location of each machine. In the event the location of a machine is changed, the vendor shall file with the Board, within 30 days of the change in location, a notification of the change in location, stating the former location of the machine and the new location. In the event of the addition of a

machine not previously listed on the filing of the vendor, the vendor shall file a notification listing the location of such machine(s) within 30 days of the addition.

8.2 List of Locations of Vending Machines Upon Issuance or Renewal - Upon the issuance or renewal of a cigarette vending machine permit, the permittee shall furnish the Director of the Tobacco Control Board a complete list of vending machine locations which list shall include the name of the business where the machine is operating and along with the physical address where the machine is located.

8.3 Proof of Bond - Before a permittee may renew a cigarette vending machine permit, he/she shall provide the Director of the Tobacco Control Board with proof that the bond is still in force and effect with either a reinstatement notice or letter from the bond company or insurance company providing such coverage and stating the date of termination.

SECTION 9 - REBATES AND CONCESSIONS

9.1 Definitions - The following definitions shall apply to the following terms as used in Ark. Code Ann. § 4-75-708 of the Unfair Cigarette Sales Act (as may be amended):

- A. "Rebate" or "Concession" shall mean any direct or indirect:
- (1) financial incentive, (including, but not limited to, extended credit inducement, allowance, compensation, other benefit or Tying Agreement (as defined herein) offered or extended to any Customer Of A Wholesaler (as defined here) in connection with the sale of cigarettes;
 - (2) providing of advertising, promotional or marketing products, displays, give away items or services to any Customer Of A Wholesaler, with exception of those materials or displays provided by the manufacturers which are delivered by the Wholesaler; or
 - (3) providing any of the above to any affiliate, owner, subsidiary or agent of any Customer Of A Wholesaler.
- B. "Customer Of A Wholesaler" shall mean any person or entity to whom the Wholesaler provides cigarettes in connection with the business of the Wholesaler. For purposes of determining who is a Customer Of A Wholesaler, any of the following shall be deemed to be a Customer Of A Wholesaler to the extent that the Wholesaler provides any Rebate or Concession to:
- (1) members of the family of any person who owns an interest in a Customer Of A Wholesaler;

- (2) any individual, partnership, trust or entity which owns an interest in a Customer Of A Wholesaler;
 - (3) any corporation which is a member of the same controlled group (as defined in Section 1563 of the Internal Revenue Code of 1986, as amended) as a Customer Of A Wholesaler;
 - (4) any beneficiary, partner, shareholder or member of any trust, partnership, corporation, limited liability company, association or entity which owns an interest in a Customer Of A Wholesaler; or
 - (5) any agent of the above.
- C. "Tying Agreement" shall mean any direct or indirect agreement (whether formal, informal, oral or written) whereby any Rebate or Concession is offered to a Customer Of A Wholesaler or non-tobacco products in exchange for the opportunity to provide cigarettes to a Customer Of A Wholesaler.
- D. "Inducement By Retailer" shall mean, in addition to the inducement, procurement or attempt to induce or procure as set forth under Ark. Code Ann. § 4-75-708, any direct or indirect acceptance by a Retailer (or any affiliate, owner or family member of an owner of a Retailer) of any Rebate Concession as defined herein in these Regulations.

9.2 Penalties For Failure To Comply - Any permit holder who violates the provisions of this Regulation shall be subjected to all sanctions set forth in A.C.A. § 26-57-201, (the Arkansas Tobacco Products Tax Act) and these Regulations, which may include the suspension or revocation of any Wholesaler's or Retailer's permit or license.

SECTION 10 - HEARING PROCEDURES

10.1 Determination of Need for Hearing - If upon a complaint filed or upon its own motion, the Board determines that a hearing is necessary, the Board shall instruct the Director and/or the Board's legal counsel to issue a Notice of Hearing.

10.2 Administrative Procedures Act - All hearings shall be held in accordance with the Administrative Procedures Act.

10.3 Notice of Hearing - The Notice of Hearing shall be served upon the respondent by mailing the same to the respondent at the address on file at the Board's office, if any. Service shall be by any means allowable by the Arkansas Rules of Civil Procedure as well as by First Class mail. The failure of a permit holder to receive the Notice of Hearing, if sent to the last address on file at the Board, shall not constitute a failure to serve the permit holder. The Notice of Hearing shall be mailed to the respondent at least 20 days prior to the hearing. This 20 day requirement may be waived by the permit holder.

SECTION 11 - GROUNDS FOR REVOCATION, SUSPENSION, NONRENEWAL OF PERMITS OR ISSUANCE OF A CIVIL PENALTY

11.1 Grounds for Board Action - The following acts on the part of any permit holder shall be deemed by the Board to be grounds for Revocation, Suspension, Non-renewal or Issuance of a Civil Penalty.

- A. The violation of any of the provisions of Rules and Regulations of the Board.
- B. The violation of any provision of the Arkansas Tobacco Products Tax Act (A.C.A. § 26-57-201 et seq.), the Unfair Cigarette Sales Act (A.C.A. § 4-75-701 et seq.), A.C.A. § 5-27-227 (providing minors with tobacco products and cigarette papers - placement of tobacco vending machines), [the grounds for the revocation, suspension, non-renewal or issuance of a civil penalty for violation of Ark. Code Ann. § 5-27-227(a) are more fully set out in Ark. Code Ann. § 26-57-257(r)], any Federal Law or Regulation in connection with the sale or distribution of cigarettes or tobacco products, any Arkansas Law or Regulation in connection with the sale or distribution of cigarettes or tobacco products.
- C. The assistance of another individual to violate any of the provisions of Rules and Regulations of the Board or to violate any provision of the Arkansas Tobacco Products Tax Act (A.C.A. § 26-57-201 et seq.), the Unfair Cigarette Sales Act (A.C.A. § 4-75-701 et seq.), any Federal Law or Regulation in connection with the sale or distribution of cigarettes or tobacco products, any Arkansas Law or Regulation in connection with the sale or distribution of cigarettes or tobacco products.

SECTION 12 – ENFORCEMENT OF ARK. CODE ANN. § 5-27-227

12.1 Offenses by Non-Licensees - If a complaint alleging the violation of Ark. Code Ann. § 5-27-227, by a non-licensee of the Board, is received by the Board, and the Board, at its discretion, determines that there are reasonable grounds to believe that a violation has occurred, the Board may direct that a Notice of Hearing be issued to the respondent for the appropriate allegation.

12.2 Information to be Given to the Board – Timeliness of Information - In order for the Board to comply with notice requirements of Arkansas law, alleged violations of Ark. Code Ann. § 5-27-227 reported to the Board must contain, at a minimum, the following: the date and time of the alleged violation, either the name of the person making such alleged sale or information reasonably necessary to determine the location in the store of the person allegedly making the sale. Such information should include, where appropriate, the cash register number, physical location of the sale in the store, and if possible the lane or aisle number. If a cash register receipt was given for the sale, it should be included with the information.

- A. Notice of the alleged violation must be given to the alleged violator within ten (10) days of the alleged event. Therefore, information as to an alleged violation should be given to the Board as soon as possible.

12.3 Training of Individuals or Groups Conducting Compliance Checks – Use of Board Approved Forms

- A. In order to assure compliance with Arkansas law, all individuals or groups authorized to conduct compliance checks under Ark. Code Ann. § 5-27-227(d)(5) [excluding individuals and groups authorized to conduct compliance checks pursuant to 5-27-227(d)(1) through 5-27-227(d)(4)] shall be trained by an authorized agent of the Board, at a course or seminar approved by the Board. The director shall from time to time, as is necessary, schedule courses or seminars to instruct those groups or individuals interested in conducting compliance checks.
- B. All individuals or groups authorized to conduct compliance checks under Ark. Code Ann. § 5-27-227(d)(5) [excluding individuals and groups authorized to conduct compliance checks pursuant to 5-27-227(d)(1) through 5-27-227(d)(4)] shall use the forms approved by the Board to compile and report information on compliance checks.

12.4 Mitigating Factors – In determining the culpability of a retail permit holder for a violation of Ark. Code Ann. § 5-27-227(a) resulting from the actions of an employee or agent of the retail permit holder, the Board is required by law to consider certain factors set forth in Ark. Code Ann. § 26-57-257(t). While each permit holder appearing before the Board shall be presumed innocent, the retail permit holder may submit the following to the Board to establish an affirmative defense to any charge that the retail permit holder has violated Ark. Code Ann. § 5-27-227(a):

- A. The retail permit holder must establish proof that, prior to the offense charged, it had adopted and enforced a written policy against selling cigarettes or tobacco products to persons under the age of eighteen (18) years. The retail permit holder shall produce to the Director a copy of the written policy for review. In determining whether the retail permit holder has enforced the written policy, the Board will consider disciplinary sanctions set forth in the written policy that applies to employees who violate the policy as well as any past disciplinary sanctions enforced against employees by the retail permit holder for violations of the policy.
- B. The retail permit holder must establish that it has through training, informed all employees or agents involved in the sale of cigarettes or tobacco products of the applicable laws regarding the sale of cigarettes and tobacco products to persons under the age of eighteen (18) years, including the provisions of Ark. Code Ann. § 5-27-227 and the penalty provisions set forth in Ark. Code Ann. § 5-27-227(i) and 26-57-257(r). This information may be included in the retail permit holder's written policy pursuant to subsection (a) above, but the retail permit holder must also establish that the written

policy has been provided to all employees or agents involved in the sale of cigarettes or tobacco products.

- C. The retail permit holder must establish that it required all employees and agents involved in the sale of cigarettes or tobacco products to verify by way of photographic identification the age of cigarette or tobacco product customers who appear to be of age twenty-seven (27) or under. This requirement may be included in the retail permit holder's written policy pursuant to subsection (a) above, but the retail permit holder must also establish that the written policy has been provided to all employees or agents involved in the sale of cigarettes or tobacco products.
- D. The retail permit holder must establish that it has established and, if applicable, imposed disciplinary sanctions on employees or agents for noncompliance with the applicable laws regarding the sale of cigarettes and tobacco products to persons under the age of eighteen (18) years. The establishment of disciplinary sanctions may be included in the retail permit holder's written policy pursuant to subsection (a) above.
- E. The retail permit holder may present evidence that the appearance of the purchaser, at the time of sale, of the tobacco in any form or cigarette papers was such that an ordinary prudent person would believe him or her to be of legal age to make the purchase. Such evidence may be presented to the Board by photographic, testimonial and/or other evidentiary means.
- F. The Board may consider other factors, including but not limited to, the compliance rate of the retail permit holder, as determined by compliance checks conducted by agents of the Tobacco Control Board and/or conducted by agents of the retail permit holder, in refusing the sale of cigarettes and tobacco products to persons under the age of eighteen (18) years.

12.5 Affirmative Defenses

- A. Any retail permit holder having a written policy containing elements A-D as set forth in Rule 12.4 may submit the written policy to the Director for prior approval as prima facie evidence that the retail permit holder has in place policies sufficient to deter violations of Ark. Code Ann. § 5-27-227(a). Upon approval of the written policy by the Director, the retail permit holder shall not be subject to civil penalties or suspension of permit resulting from any sale of cigarettes or tobacco products to persons under the age of eighteen (18) years by its employees or agents which occurs subsequent to the Director's approval of such written policy for the first and second violations within a twenty-four (24) month period unless the Director overcomes the prima facie evidence through a showing that the written policy was not implemented and enforced as approved. Any refusal of the Director to approve a written policy may be appealed to the Board, whose decision shall be final.
- B. In lieu of developing its own written policy containing elements A-D as set forth in Rule 12.4, any retail permit holder may adopt and implement a written policy and training program which has been previously approved by the Board as constituting prima facie

evidence that the retail permit holder has in place policies sufficient to deter violations of Ark. Code Ann. § 5-27-227(a). Upon registering with the Director the adoption and implementation of such approved written policy and training program, the retail permit holder shall not be subject to civil penalties or suspension of permit resulting from any sale of cigarettes or tobacco products to person under the age of eighteen (18) years by its employees or agents that occurs subsequent to the retailer permit holder's registration with the Director of the approved written policy and training program for the first and second violations within a twenty-four (24) month period. However, the Director may rebut the prima facie evidence through a showing that the written policy and training program approved by the Board was not implemented and enforced as approved.

- C. If after adopting a written policy as described in sections 12.5 A and B above, a retailer has a third violation within a twenty-four (24) month period, then the prima facie presumption provided by sections 12.5 A and B is automatically revoked and said third offense shall be treated as a third offense sale-to-minor offense under Ark. Code Ann. § 5-27-227 with subsequent offences being treated accordingly.
- D. Notwithstanding any provision of these Rules and Regulations, any retail permit holder is entitled to an affirmative defense, and no penalty will be imposed upon the retail permit holder, if the retail permit holder can establish that, prior to the date of the violation, the retail permit holder, or his/her agent or employee, furnishing the tobacco in any form or cigarette papers reasonably had previously relied upon proof of age which identified the person receiving the tobacco in any form or cigarette papers as being eighteen (18) years of age or older. Proof of age means any document issued by a governmental agency containing a description of the person, such person's photograph, or both, and giving such person's date of birth and includes, without being limited to, a passport, military identification card, or driver's license.

SECTION 13 – ESTABLISHMENT OF A SPECIAL FUND

13.1 Maintaining Adequate Funding - In order to maintain adequate funding within the Tobacco Control Board to provide all necessary copying and miscellaneous legal costs, and to ensure the maintenance of Regulation Books in sufficient quantities within existing budgetary constraints, it is necessary that a fee be charged for Regulation Books. Further, it is necessary that a Tobacco Control Board Fund be established into which the fees charged for the books will be deposited. These revenues may be used for the purpose of printing additional books, official publications, documents, pleadings, or postage costs, as well as for paying any necessary filing fees or costs on any court appeals filed by the Tobacco Control Board.

13.2 Charge for Rules & Regulations Book - A fee of ten dollars (\$10.00) shall be charged for each Regulation Book, and such revenues shall be deposited in the Special Tobacco Control Board Fund, to be established pursuant to this Regulation, and shall be used for the purposes stated in Section 13.1, as such payment is deemed necessary and proper by the Director.

13.3 Charge for Copies Made - The Tobacco Control Board shall be entitled to recover forty cents (\$.40) per page for each copy of any files, records, or transcripts. Any copies of Tobacco Control Board files, records, or transcripts shall be paid for at the rates noted

above. All monies received by the Tobacco Control Board pursuant to the above provisions shall be deposited to the special Tobacco Control Board Fund.

SECTION 14 - PAYMENT OF FINES

14.1 Due Date for Payment of Fines (Accepted Offers of Settlement) Fines issued to and accepted by a permit holder or other person or entity shall be paid no later than forty-five (45) days from the date the Board approves said acceptance unless other written arrangements are made and approved by the Director.

14.2 Due Date for Payment of Fines (Hearings or Defaults) Fines issued to a permit holder or other person or entity after a full hearing or a finding that said permit holder or other person or entity is in default shall be paid no later than fifteen (15) days after said permit holder's or other person or entity's time for filing an appeal has run.

14.3 Penalty for Non-Payment (Permit Holders) If a permit holder fails to pay their fine when due and has failed to file a timely appeal to Circuit Court, the Director may immediately and without further notice temporarily suspend the permit holder's retail, vending or wholesale cigarette and tobacco permit until a hearing is held to show cause why the permit holder should not be found in contempt of the Board's Orders and their suspension continued for a period of time determined by the board, be fined up to \$1000.00, have their permit suspended or revoked or any combination thereof.

14.4 Penalty for Non-Payment (Non-Permit Holders) If a person or entity other than a permit holder fails to pay their fine when due and has failed to file a timely appeal to Circuit Court, the Director may immediately and without further notice confiscate or seal any and all cigarettes and other tobacco products on said person or entity's business premises until a hearing is held to show cause why the person or entity should not be found in contempt of the Board's Orders and their confiscated inventory be destroyed, be fined up to \$1000.00 or any combination thereof.

SECTION 15 – COST AND MINIMUM PRICE

15.1 Sales Below Cost Prohibited; Exceptions; Purpose of Regulations.

The Arkansas Tobacco Control Board has been charged with the enforcement of the Unfair Cigarette Sales Act. § 4-75-701, *et seq.* This amendment to Regulation 15 is adopted to reconcile language of the current rule with changes brought about in the 2003 legislative session by Act 627 of 2003 and recent court decisions with respect to the Unfair Cigarette Sales Act. This rule establishes the methodology by which the Board will review applications to sell cigarettes at less than the presumptive cost of doing business set by the legislature in Act 627 of 2003. An additional purpose of the rule is to correct typographical errors and repeal the current cost-survey rules.

15.2 Definitions. In this regulation:

- A. Basic Cost of Cigarettes. The following definitions shall apply to the following terms as used in the definition of “basic cost of cigarettes” in Ark. Code Ann. § 4-75-702 of the Act.
1. “Gross Invoice Cost” has the meaning specified in A.C.A. § 4-75-702(13).
 2. “Manufacturer Promotional Allowance” has the meaning specified in A.C.A. § 4-75-702(14).
 3. “Gross Replacement Cost” means the manufacturer's published price to the wholesaler or the wholesaler's price to the retailer for the same merchandise as the merchandise whose cost is in question, before any deduction for allowances, whether manufacturer promotional allowances or otherwise, or for discounts of any kind.
- B. Presumptive Cost of Doing Business. Absent the filing with the Board of proof satisfactory to establish a lesser or higher cost of doing business, the presumed cost of doing business for wholesalers and retailers is set forth in Ark. Code Ann. § 4-75-702. As used in these regulations, the term “presumptive cost of doing business” shall mean the presumed cost of doing business to a wholesaler or retailer as defined by Ark. Code Ann. § 4-75-702.
- C. Actual Cost of Doing Business. As used in these regulations, the term “Actual Cost of Doing Business” shall mean the basic cost of cigarettes plus the wholesaler or retailer’s cost of doing business which has been proven in accordance with these regulations. For purposes of determining a wholesalers or retailers actual cost of doing business, factors not taken into account in determining basic cost may not be taken into account in determining a wholesalers or retailers cost of doing business.
- D. Related Entity. As used in these regulations, the term “related entity” shall mean any one of two or more organizations, trades or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not licensed wholesalers or retailers under the Act) owned or controlled directly or indirectly by the same interests.
- E. Trading Area. As used in Ark. Code Ann. § 4-75-711, the terms “trade area” and “trading area” shall mean the State of Arkansas.

15.3 Procedure for Establishing Proof of a Lower Cost of Doing Business.

- A. Application to Be Filed with Tobacco Control Board. A wholesaler or retailer who wishes to sell at less than the Presumptive Cost of Doing Business shall file an application with the Board on a form provided by the Board at least ninety (90)

days prior to the applicant's desired effective date of the lower cost. The application must include the applicant's proposed cost of doing business.

- B. Submission of Cost Data With Application. A wholesaler or retailer applying to sell below the Presumptive Cost of Doing business must submit the following cost data to support its application. Such cost data must reflect bona fide actual costs; costs reported by an applicant which cannot be justified by prevailing market conditions in this state shall not be used in determining an applicant's actual cost.
1. An accounting of the applicant's basic cost of cigarettes sold in Arkansas and cost of doing business with respect to selling cigarettes in Arkansas for a twelve (12) month period, with the cigarette portion of the business allocated as provided in Section 15.3.C below and including those costs listed in Section 15.3.C below. The twelve (12) month period shall end on the fiscal quarter that the applicant most recently completed prior to the date it files its application for approval of a lower cost of doing business. Such accounting must be made on a form provided by the Board or in a form substantially similar to that provided by the Board.
 2. A certification statement signed by the applicant's owner, general partner, managing member or responsible corporate officer indicating that the accounting required by this Section 15.3.B is true and accurate.
 3. A statement signed by a certified public accountant ("CPA") indicating that the CPA has reviewed the information provided and that it accurately reflects the applicant's actual cost of doing business in all material respects.
 4. A copy of the applicant's most recently filed federal income tax return, including all associated schedules and attachments.
 5. A copy of one cigarette purchase invoice from each cigarette manufacturer or wholesaler for every month of the period of analysis.
 6. Any other information requested by the Board which may be necessary to review the applicant's application and cost data.
- C. Allocation of Costs. In accordance with Ark. Code Ann. § 4-75-702(11)-(12), a wholesaler or retailer's cost of doing business must include, but is not limited to, labor costs, including salaries of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, taxes, insurance and advertising. In addition to these broad categories, an applicant must submit the following specific cost information, whether such costs are paid for by the applicant or a related entity, and allocate such costs between the applicant's cigarette and non-cigarette business as provided below.

1. Sales Allocation. Wholesalers and retailers shall allocate the expenses listed below together with any other expenses incurred in the operation of the business that are not listed elsewhere in this section, according to the percentage that the sale of cigarettes comprises of total sales:
 - a) Bad debts.
 - b) Data processing.
 - c) Depreciation of buildings, except as allocated under Sections 15.3.C.2 or 15.3.C.3 below.
 - d) Depreciation on lease improvements on the applicant's general facilities, other than its warehouse(s).
 - e) Depreciation on office equipment.
 - f) Maintenance of equipment and buildings, except as allocated under Sections 15.3.C.2 or 15.3.C.3 below.
 - g) Non-delivery vehicles.
 - h) Dues and subscriptions.
 - i) Licenses and permits.
 - j) Taxes.
 - k) Insurance on inventory. If an applicant's inventory insurance is based on the value of inventory, these expenses may be allocated based on the percentage that cigarette inventory value comprises of total inventory value, rather than on sales. The inventory valuation reports required by the insurer shall be used as the basis of allocation according to inventory value.
 - l) Other insurance, except as allocated under Sections 15.3 .C.2 or 15.3 .C.3 below.
 - m) Interest, except as allocated under Section 1 5.3.C.2 below;
 - n) Office expenses, supplies and printing or copying expenses.
 - o) Professional fees, except as allocated under Section 15.3.C.2 below.
 - p) Promotion and advertising.

- q) Retirement, profit sharing, employee benefit plans and employee welfare including group health insurance.
- r) Salaries, fringe benefits and other remuneration, including employees' pay, officers' salaries, stock plans and payroll taxes, except as allocated under Sections 15.3.C.2 or 15.3.C.3 below. If officers or other management personnel receive no remuneration or token remuneration, a value shall be placed on their services at a rate no lower than the average labor rate paid in Arkansas by the "Food and Kindred Products Industry" as reported by the Arkansas Employment Security Department, Labor Market Information Section.
- s) Telephone, fax and Internet expenses.
- t) Rent and real estate taxes, except as allocated under Section 15.3.C.2 below.
- u) Inbound freight charges.
- v) Utilities (gas, power and water), except as allocated under Section 15.3.C.2 below.
- w) Supervision costs, except as allocated under Section 15.3 .C.4 below.
- x) Debit and credit card fees.
- y) Travel expenses.
- z) Security, except as allocated under Sections 15.3.C.2 or 15.3.C.4 below.
- aa) Miscellaneous expenses.

2. Warehouse Space Allocation. Wholesalers shall allocate the expenses listed below according to the percentage that the cubic feet of warehouse space used to store cigarettes sold comprises of total warehouse space used for the storage of goods. All other space in the warehouse(s) shall be excluded from this percentage calculation, although expenses associated with such space shall be allocated.

- a) Depreciation on warehouse buildings.
- b) Depreciation on lease improvements on warehouses.

- c) Depreciation on warehouse equipment.
- d) Warehouse equipment rental.
- e) Utilities (gas, power and water). If any of these items is separately metered for warehouse areas serving only cigarettes, such as humidity-controlled rooms, these expenses shall be allocated entirely to the sale of cigarettes. If any of these items is separately metered for warehouse areas not serving cigarettes, such as freezers or coolers, these expenses need not be allocated to the sale of cigarettes.
- f) Insurance on warehouse equipment and buildings.
- g) Interest on real estate.
- h) Warehouse rent and warehouse property taxes.
- i) Repairs, maintenance and groundskeeping.
- j) Garbage pickup.
- k) Security, except as allocated under Section 15.3.C.4 below.
- l) Fees of professionals whose work is principally associated with the wholesaler's warehouses.
- m) Salaries, fringe benefits and other remuneration of warehouse employees.
- n) Warehouse supplies.

3. Delivery Vehicle Space Allocation. Wholesalers shall allocate the expenses listed below according to the percentage that the ~~cubic~~ cubic feet of space in vehicles used for transporting cigarettes sold comprises of total space used for the transportation of goods sold in delivery vehicles. All other space in delivery vehicles shall be excluded from this percentage calculation, although expenses associated with this space shall be allocated.

- a) Salaries, fringe benefits and other remuneration of delivery vehicle drivers.
- b) Garage expenses for the housing and maintenance of vehicles, including:

- i) Salaries, fringe benefits and other remuneration of garage employees;
 - ii) Depreciation and insurance on garage equipment;
 - iii) Non-capitalized expendable tools;
 - iv) Garage supplies;
 - v) Purchased parts;
 - vi) Purchased repairs to vehicles.
- c) Gas, oil, tires and licenses.
 - d) Delivery vehicle insurance and depreciation.
 - e) Delivery vehicle lease payments.

4. Direct Costs Allocated to Cigarettes Only. Wholesalers and retailers shall allocate the expenses listed below and any other direct costs associated solely with the sale of cigarettes to the wholesaler or retailer's cost of doing business with respect to selling cigarettes.

- a) Lease/rental and maintenance of cigarette stamping machines.
- b) Cigarette stamping and processing supplies.
- c) Cigarette processing equipment.
- d) Additional security and supervision costs attributed solely to cigarettes.
- e) Any other expenses attributed solely to the sale of cigarettes in Arkansas.

D. Notice of Hearing. Upon receipt of the application and cost data submitted by an applicant, the Board shall schedule the matter for hearing which shall be set at least thirty (30) days but not more than sixty (60) days from the date of mailing by certified mail the hearing notice to the applicant. The hearing notice may require that the applicant provide additional specified documents to the Board prior to or at the hearing. The Board shall provide notice of such hearing to the public in the same manner that it generally provides notice of its regularly scheduled meetings to the public.

- E. Review of Application. Prior to the scheduled hearing on the applicant's application, the Board shall review and evaluate the cost data submitted. The cost data submitted with an application (but not the application itself) shall be treated as confidential and shall not be disclosed by the Board, or its employees or agents, except for administrative review at a hearing for the purpose of providing the applicant an opportunity to explain or answer any questions concerning the cost data submitted. It is the Board's understanding that such cost data may be exempt from the Freedom of Information Act of 1967 as information that would give advantage to competitors if disclosed. Provided, however, this provision shall not be construed to prohibit the publication of statistics so classified as to prevent the identification of particular information concerning the cost of doing business of any retailer or wholesaler, or the disclosure to the attorney general or other legal representatives of the state in connection with any action or proceeding under this article brought by or against the retailer or wholesaler, or against whom an action or proceeding under this chapter has been recommended by the Board or by the attorney general.
- F. Hearing Before Tobacco Control Board. At the hearing on the applicant's application to prove lower cost, the applicant may present evidence or further explain previously submitted evidence that its actual cost of doing business is lower than the presumptive cost of doing business. The applicant has the burden to prove by a preponderance of the evidence that its actual cost is less than the presumptive cost of doing business. Other interested parties may submit objections to the application at the hearing and produce evidence controverting the evidence presented in support to the application. The conduct of the hearing shall be governed by the Administrative Procedures Act, as provided by Section 10.2 of these regulations.
- G. Determination of Actual Cost. Following its review of and hearing on the cost data submitted, the Board shall determine if the applicant has met its burden of proof that the cost data presented proves that the applicant's actual cost of doing business is lower than the presumed amount.
1. If the Board finds that the applicant's cost data presented constitutes proof of an actual cost of doing business that is lower than the presumptive cost of doing business, the Board shall determine the applicant's actual cost of doing business based on the evidence submitted and notify the applicant within thirty (30) days of its determination. If the allocation of costs to the applicant's cigarettes sold in Arkansas results in a fraction of a cent, the cost is to be rounded off to the next higher cent in calculating the applicant's actual cost of doing business.
 2. If the Board finds that the applicant's cost data was insufficient to prove that its actual cost of doing business is less than the presumptive cost of doing business, the Board shall deny the applicant's application for a lower cost and notify the applicant of its determination within thirty (30) days.

3. If the Board denies the application, the applicant may appeal the decision pursuant to the Administrative Procedures Act.
- H. Expiration of Determination of Actual Cost. Any determination by the Board that an applicant's actual cost of doing business is lower than the presumptive cost of doing business shall expire within eighteen (18) months from the date of the determination of the applicant's actual cost of doing business. The expiration date shall coincide with the applicant's fiscal year end as established in the applicant's federal income tax return. Each subsequent determination of actual cost shall expire twelve (12) months from the date the last determination was made. Upon expiration, a wholesaler or retailer must use the then current presumptive cost of doing business in determining the price of cigarettes. Actual cost data and supporting documentation for each subsequent period must be submitted sixty (60) days prior to the expiration date of the determination of actual cost.
 - I. Effect of Failure To Obtain Prior Approval to Sell Below Presumptive Cost of Doing Business. If any retailer or wholesaler advertises, offers to sell, or sells cigarettes at a price that is less than the applicable presumptive cost of doing business, and such retailer or wholesaler's actions do not fall within any of the exceptions listed in Ark. Code Ann. §§ 4-75-703 or 704 and were made with predatory intent and without prior authorization from the board in accordance with these regulations, the Board, may, after notice and an opportunity for a hearing as provided by Ark. Code Ann. § 4-75-706, revoke or suspend the retailer or wholesaler's license in accordance with Ark. Code Ann. §§ 4-75-706 and 26-57-256, and fine the wholesaler or retailer in accordance with Ark. Code Ann. §§ 4-75-708 and 26-57-256.

15.4 Coupons and Manufacturer Promotional Allowances.

- A. Application of Manufacturer Promotional Allowances. For purposes of Ark. Code Ann. § 4-75-709, a manufacturer promotional allowance for a particular brand style of cigarette may only be passed on to the purchaser by the wholesaler or retailer in a transaction involving that particular brand style of cigarette. A wholesaler or retailer may not apply manufacturer promotional allowances in a sale involving a brand style of cigarette other than the particular brand style of cigarette for which that manufacturer promotional allowance was given by the manufacturer.
- B. No Accrual of Manufacturer Promotional Allowances. For purposes of Ark. Code Ann. § 4-75-709, manufacturer promotional allowances may not be accrued and applied in the aggregate, but must be applied only on the same gross or pro rata basis as they are provided by the manufacturer. For example, if a manufacturer provides a manufacturer promotional allowance of twenty cents per carton of a particular brand style, that manufacturer promotional allowance may only be passed on to the purchaser by the Wholesaler at the rate of twenty cents

per carton, or a pro rata portion thereof per pack from the carton, for the particular brand style of cigarette for which it is provided by the manufacturer.

15.5 Sales to Meet Lawful Competition. A wholesaler or retailer who has not been approved for a lower cost of doing business may sell at a lower cost by meeting lawful competition pursuant to Ark. Code. Ann. § 4-75-704.

SECTION 16 – ADVISORY OPINIONS

16.1 Issuance of Advisory Opinions. To the extent any Wholesaler or Retailer has questions concerning the price at which the Wholesaler or Retailer may legally sell cigarettes under Ark. Code Ann. §§ 4-75-701 *et seq.* or whether an act constitutes a Rebate or Concession, the Wholesaler or Retailer may submit a written request to the Director for an advisory opinion. The written request should include a recitation of all facts relevant to the subject matter of the inquiry. The Director shall present the written request to the Board within forty-five (45) days of receipt thereof, unless good cause requires a longer period, along with the Director's proposed response to the request. The Board shall approve, modify or reject the Director's proposed response within thirty (30) days of receipt thereof from the Director, unless good cause requires a longer period. The Board may also issue advisory opinions on its own initiative if it determines that the subject of the opinion is of such public concern that an advisory opinion would benefit the public. Neither the Director nor the staff of the Board shall provide oral or written advisory opinions concerning the price at which the Wholesaler or Retailer may legally sell cigarettes under Ark. Code Ann. §§ 4-75-701 *et seq.* or whether an act constitutes a Rebate or Concession in any manner other than that authorized by these Rules.

16.2 Advisory Opinions Approved by the Board. No advisory opinion prepared under this Rule by the Director, the Board's staff or counsel, whether in draft or final form, shall be valid, official or of any effect unless and until it has been approved by a vote of a majority of a quorum of the Board. The Director's response to a request for an advisory opinion shall be prepared by the Director in consultation with the Board's legal counsel, as appropriate, and presented by the Director to the Board for consideration.

16.3 Form of Advisory Opinions. Advisory opinions shall set forth the facts upon which the opinion is based, and shall address only whether an intended, future course of conduct violates any law or rule within the jurisdiction of the Board. The opinion shall interpret the applicable law or rule as applied to the facts presented, and shall not address the legality of any past or present conduct. The identity of the requesting person shall be disclosed in the opinion. If the individual facts and circumstances provided are insufficient in detail to enable the Board to render an advisory opinion, the Board shall request supplementary information from the requesting individual to enable the Board to render such opinion. If such supplementary information is still insufficient or is not provided, the Board shall so state and shall not render an advisory opinion based upon what it considers to be insufficient detail.

16.4 Records. The Director shall provide a copy of each advisory opinion to the requesting party and to each member of the Board. The Director shall keep the original opinion in a permanent file maintained for that purpose, along with a copy of the original request for the

advisory opinion and any information or documents provided to the Board by the requesting party. Copies of all documents considered by the Board, the staff or counsel in the drafting or rendering of an advisory opinion shall be retained by the Director and kept in the file for that particular advisory opinion. All files maintained for advisory opinions issued by the Board shall be made available for public inspection upon request, subject to the protections provided by the Arkansas Freedom of Information Act, Ark. Code Ann. § 25-19-105(b)(9)(A).

16.5 Effect of Opinions. The Board may reconsider, withdraw, or amend prior opinions upon request of a citizen, or on its own motion, by a majority vote of a quorum of the Board. In such event, written notice of the change shall be mailed to the original requesting party at the last address for that party provided to the Board.

SECTION 17 – SAVINGS CLAUSE

17.1 Savings Clause. If any provision of these regulations should be held invalid for any reason, the remaining provisions of these regulations shall not be affected thereby and shall remain in full force and effect.

SECTION 18 – EFFECTIVE DATE

18.1 Effective Date. These Rules and Regulations of the Tobacco Control Board shall become effective _____, 2005.

SECTION 19 – MODIFICATION OF RULES AND REGULATIONS

19.1 Modification of These Rules. These Rules and Regulations may be modified or changed from time to time in accordance with the Administrative Procedures Act.