

**RULES 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:**

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|---|----------|
| 1. DEALER'S LICENSE<br>(Anyone selling vending machines in the state) | \$ 25.00 |
|---|----------|

**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



2. Unless approved for a lower cost of doing business or meeting competition, as provided by this regulation and the Unfair Cigarette Sales Act, or falling within the statutory exceptions in A.C.A. §4-75-703, the wholesaler may not advertise, offer to sell, or sell cigarettes to a retailer at less than the basic cost of the cigarettes involved to the wholesaler, plus the wholesaler's statutorily presumed four percent (4%) cost of doing business, if the wholesaler does so with the intent to injure competitors or destroy or substantially lessen competition. Evidence of advertisement, offering to sell, or sale of cigarettes at a price less than the cost of the cigarettes involved to the wholesaler, plus the wholesaler's cost of doing business shall be prima facie evidence of intent to injure competitors and destroy or substantially lessen competition.

#### B. WHEN TO FILE APPLICATION

1. A wholesaler who wishes to advertise, offer for sale, or sell at less than four percent (4%) presumed cost of doing business shall submit an application to the director, for approval by the Board, at least forty five (45) days before the desired effective date;
2. Or other times as may be authorized by the director.

#### C. APPLICATION TO CONTAIN CERTAIN INFORMATION

1. An application for permission to advertise, offer for sale, or sell at less than four percent (4%) presumed cost of doing business shall contain;
  - a. A summary of expenses associated with the business, on a form to be provided by the director, with the cigarette portion of the business separately listed, and using the information set forth in the most recently filed federal income tax return.
  - b. The certificate statement signed by the owner, partner, or a responsible corporate officer indicating that the summary of expenses as contained on the form required by § C(1)(a) of this rule is true and accurate;
  - c. A statement signed by a certified public accountant indicating the CPA has reviewed the information provided and that it accurately reflects the information shown in all material respects;
  - d. A copy of the most recently filed federal income tax return form with all associated schedules and attachments; and

- e. Any other information requested by the director, as may be necessary to review the application.
2. If the wholesaler engages the services of an independent accounting firm, the statement provided under § C(1)(c) of this regulation shall be signed by a CPA associated with that firm.

#### D. REVIEW AND DETERMINATION

The director shall review and evaluate the information provided by the wholesaler and shall make a recommendation to the Board regarding the approval of the wholesaler's application to sell at less than the statutory presumed cost of doing business. The director shall inform the applicant of his recommendation prior to submitting the application, and the director's recommendation, to the board. The director shall notify the wholesaler of the final action on the application, and, if approved, the specified percentage cost of doing business approved shall remain in affect until the next application and approval or until withdrawn by the director. If a person with permission to sell at less than statutory presumed cost of doing business fails to submit a new application by May 15, then the permission previously given shall be automatically withdrawn on July 1.

#### E. MEETING COMPETITION

A wholesaler may advertise, offer for sale, or sell at a lower cost of doing business while meeting competition. The following criteria shall be considered when meeting competition.

1. The competitor shall have been approved for a lower cost of doing business in accordance with this regulation; or
2. The competitor shall have sold, or made a definite bonafide advertisement or offer to sell cigarettes at a lower price to a specific retailer; and
3. A written offer to sell is considered prima facie evidence of competition at a particular retailer.

#### F. REMEDY

Not with standing approval by the director and the board of a lower cost of doing business, an effected party who claims to be injured may pursue remedies in a court of competent jurisdiction as provided by Ark. Code Ann. § 4-75-713.

## 15.2 RETAILERS' COST OF DOING BUSINESS

### A. COST OF DOING BUSINESS

1. The cost of doing business is presumed to be seven and one-half percent (7.5%) of the basic cost of cigarettes to the retailer, unless a different cost of doing business is determined by a cost study conducted by the director.
2. Unless approved for a lower cost of doing business or meeting competition, as provided by this regulation and the Unfair Cigarette Sales Act, or falling within the statutory exceptions in A.C.A. §4-75-703, the retailer may not advertise, offer to sell, or sell cigarettes to a retail consumer at less than the basic cost of the cigarettes involved to the retailer plus the retailer's statutorily presumed seven and one-half percent (7.5%) presumed cost of doing business, if the retailer does so with the intent to injure competitors or destroy or substantially lessen competition. Evidence of advertisement, offering to sell, or sale of cigarettes at a price less than the cost of the cigarettes involved to the retailer, plus the retailer's cost of doing business shall be prima facie evidence of intent to injure competitors and destroy or substantially lessen competition.

### B. WHEN TO FILE APPLICATION

1. A retailer who wishes to advertise, offer for sale, or sell at less than seven and one-half percent (7.5%) presumed cost of doing business shall submit an application to the director for approval by the Board, at least forty five (45) days before the desired effective date;
2. Or other times as may be authorized by the director.

### C. APPLICATION TO CONTAIN CERTAIN INFORMATION

1. An application for permission to advertise, offer for sale, or sell at less than seven and one-half percent (7.5%) presumed cost of doing business shall contain:
  - a. A summary of expenses associated with the business, on a form to be provided by the director, with the cigarette portion of the business separately listed, and using the information set forth in the most recently filed federal income tax return.
  - b. The certificate statement signed by the owner, partner, or a responsible corporate officer indicating that the summary of

expenses as contained on the form required by § C(1)(a) of this rule is true and accurate;

c. A statement signed by a certified public accountant indicating the CPA has reviewed the information provided and that it accurately reflects the information shown in all material respects;

d. A copy of the most recently filed federal income tax return form with all associated schedules and attachments; and

e. Any other information requested by the director, as may be necessary to review the application.

2. If the retailer engages the services of an independent accounting firm, the statement provided under § C(1)(c) of this regulation shall be signed by a CPA associated with that firm.

#### D. REVIEW AND DETERMINATION

The director shall review and evaluate the information provided by the retailer and shall make a recommendation to the board regarding the approval of the retailer's application to sell at less than the statutory presumed cost of doing business. The director shall inform the applicant of his recommendation prior to submitting the application, and the director's recommendation, to the board. The director shall notify the retailer of the final action on the application, and, if approved, the specified percentage cost of doing business approved shall remain in affect until the next application and approval or until withdrawn by the director. If a person with permission to sell at less than statutory presumed cost of doing business fails to submit a new application by May 15, then the permission previously given shall be automatically withdrawn on July 1.

#### E. MEETING COMPETITION

A retailer who has not be approved for a lower cost of doing business may advertise, offer for sale, or sell at a lower cost while meeting competition. The following criteria shall be considered when meeting competition:

1. The competitor shall have been approved for a lower cost of doing business in accordance with this regulation; or

2. The competitor shall have sold, or made a definite bonafide advertisement or offer to sell, cigarettes at a lower price to a specific individual; and

3. A written offer to sell is considered prima facie evidence of competition to a particular individual.

#### F. REMEDY

Not with standing approval by the director and the board of a lower cost of doing business, an effected party who claims to be injured may pursue remedies in a court of competent jurisdiction as provided by Ark. Code Ann. § 4-75-713.

### 15.3 **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.

## **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 – TOBACCO FORFEITURE**

17.1 Section 17 is promulgated pursuant to A.C.A. §26-57-247(j)(6).

17.2 For purposes of forfeiture tracking, each law enforcement agency seizing property pursuant to A.C.A. §26-57-247 shall be assigned a unique numeric identifier.

17.3 FORM ATC-C10 is hereby adopted as standardized confiscation report form to be used by all law enforcement agencies when forfeitable property is confiscated pursuant to A.C.A. §26-57-247 as follows:

**ARKANSAS TOBACCO CONTROL  
CONFISCATION REPORT**

**Report No.** \_\_\_\_\_  
**(assigned by ATC)**

Date & Time of seizure: \_\_\_\_\_

County of seizure: \_\_\_\_\_

Name & Address of persons from whom the property was seized:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Seizing Officer: \_\_\_\_\_

REASON OR BASIS FOR SEIZURE: (Check all applicable)

- VEHICLE (or other conveyances) used or intended for use to transport untaxed tobacco product.
- MONEY furnished or intended to be furnished in exchange for untaxed tobacco product or profits and proceeds traceable to such exchange or found in close proximity to a forfeitable tobacco product or a forfeitable record of an importation of a tobacco product, or used to facilitate a criminal violation of the Tobacco Products Tax Act of 1977 or the Unfair Cigarette Sales Act.
- FIREARMS furnished or intended to be furnished in exchange for a tobacco product in violation of the Tobacco Products Tax Act of 1977 OR explain other basis for seizure (e.g. stolen firearm, felon in possession, etc...): \_\_\_\_\_

OTHER PROPERTY seized and basis for seizure:

DESCRIPTION AND ESTIMATED VALUE OF PROPERTY SEIZED:

(must contain serial and model numbers, if applicable, must contain odometer or hour meter if vehicle or equipment)

\_\_\_\_\_  
\_\_\_\_\_

PROPERTY SEIZED WILL BE HELD AT THE FOLLOWING LOCATION(S).

\_\_\_\_\_

The undersigned officer states that he/she is the "seizing officer" and that this report is true and complete.

\_\_\_\_\_  
Signature of seizing officer

The undersigned hereby states that he/she is the person(s) from whom the above property was seized and that his/her correct mailing address is given below.

\_\_\_\_\_  
Signature

Printed name & mailing address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

In the event that a party refuses to sign, the following must be completed:

The undersigned additional law enforcement officer hereby states that the party from whom the property was seized refused to sign this report and I hereby place my signature attesting to such refusal.

\_\_\_\_\_  
Signature of secondary officer

The undersigned agent hereby certifies that he has sent a copy of this report to the Prosecuting Attorney and has obtained and is maintaining a copy of this report that has been acknowledged as being received by: \_\_\_\_\_ and further certifies that he has sent a copy of the foregoing to the Arkansas Tobacco Control Director on this \_\_\_\_day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Signature of seizing officer

The Prosecuting Attorney's Office acknowledges receipt of a copy of the foregoing on this \_\_\_\_day of \_\_\_\_\_, 20\_\_\_\_.

(must be signed by the Prosecuting Attorney or deputy prosecuting attorney.)

\_\_\_\_\_  
Signature of PA

**FORM ATC-C10 (8/2010)**

17.4 A report number for each seizure shall be assigned by ATC and recorded on the FORM ATC-C10 that will be completed by the seizing law enforcement agency.

17.5 The report number shall consist of the calendar year, the LEA numeric identifier, and the sequential confiscation number for that calendar year. (e.g. 2010001001)

**SECTION 18 – SAVINGS CLAUSE**

18.1 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 19 – EFFECTIVE DATE**

19.1 Effective Date. These modifications to the Rules of the Arkansas Tobacco Control Board shall become effective November 15, 2010.

**SECTION 20 – MODIFICATION OF RULES**

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