

ARKANSAS REGISTER

Transmittal Sheet

Use only for **FINAL** and **EMERGENCY RULES**



Secretary of State

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For Office

Use Only:

Effective Date _____ Code Number _____

Name of Agency Arkansas Department of Finance & Administration

Department Arkansas Tobacco Control

Contact Will Olson, ATC Attorney E-mail william.olson@dfa.arkansas.gov Phone 501-682-9756

Statutory Authority for Promulgating Rules A.C.A. 4-75-701, et al., 26-57-201, et al., A.C.A. 5-27-227, Act 386 (21') & Act 942 (21')

Rule Title: Rules of Arkansas Tobacco Control Board

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☐ Other _____
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Electronic Copy of Rule e-mailed from: (Required under ACA 25-15-218)

Will Olson

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5/27/2022

Contact Person

E-mail Address

Date

CERTIFICATION OF AUTHORIZED OFFICER

I Hereby Certify That The Attached Rules Were Adopted
In Compliance with the Arkansas Administrative Act. (ACA 25-15-201 et. seq.)

Signature

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Phone Number

E-mail Address

Director, Arkansas Tobacco Control

Title

5/27/2022

Date

**ARKANSAS TOBACCO CONTROL RULES
PROMULGATED PURSUANT TO
ARK. CODE ANN. § 4-75-706, § 20-27-2108, and § 26-57-206**

SECTION I – GENERAL

Arkansas Tobacco Control (“Agency”)
Arkansas Tobacco Control Board (“Board”)

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

SECTION 2 – PERMIT APPLICATIONS - GENERALLY

2.1 Permit Necessary for Sale of Cigarettes or Other Tobacco Products. No wholesaler, retailer, vendor or other individual, partnership, corporation or other entity shall sell, barter, give away or otherwise distribute cigarettes, vapor products, alternative nicotine products, e-liquid products or other tobacco products in the State of Arkansas without first obtaining the appropriate permit or permits in accordance with the Arkansas Tobacco Products Tax Act of 1977, A.C.A. § 26-57-201 *et seq.*, and these Rules.

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. All permit holders must keep a current address or the current address of an agent for service of process on file with the Agency. All correspondence and/or notices from the Agency or Board shall be sent to the address on file with Agency. All permit holders are to notify the Agency of any change in address and/or agent for service of process within thirty (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 Agency.

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 payment as established by A.C.A. § 26-57-219.

2.6 Replacement Notice or Transfer Forms. All permit transfers and all use of a previous permit for thirty (30) days as specified under A.C.A. § 26-57-214, A.C.A. § 26-57-215 and A.C.A. § 26-57-221 must be completed on forms provided by the Agency. Such Replacement Notice or Transfer forms must be submitted to the Agency as a part of any new permit application.

2.7 Posting of Permits. All permit holders are required to publicly display his/her permit 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.

2.8 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 Agency and any investigator/agent of the Agency. All such records shall be maintained by the permit holder for a period of at least three (3) years.

2.9 The term “invoice” as used in Ark. Code Ann. § 26-57-213 is defined as “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 –WHOLESALE PERMIT APPLICATIONS

3.1 Detailed Information to be Provided. Any application for a wholesale 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 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 agreement 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, or an investigator of the Agency.

3.5 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) or document(s) acceptable to the Director. The Director may require financial statement made by a certified public accountant.

3.6 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 Agency 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.

3.7 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 Agency 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.

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/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 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 Arkansas Tobacco Control 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 shall receive written objections to the issuance of new permits. All objections must state the nature of the relevant facts and 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 (3) 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 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 cigarettes or other tobacco products 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 cigarettes or other tobacco products 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, or credit card. 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 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. RC-RETAIL PERMIT
(Tobacco Products, Vapor Products,
Alternative Nicotine Products, or E-Liquid Products) | \$100.00 |
| 2. RV-RETAIL VAPOR PRODUCT AND E-LIQUID ONLY PERMIT | \$50.00 |

WHOLESALE & WHOLESALE'S SALESPERSON PERMITS:

- | | |
|--|------------|
| 1. WP-WHOLESALE PERMIT
(Tobacco Products, Vapor Products,
Alternative Nicotine Products, or E-Liquid Products) | \$1,000.00 |
| 3. WS-WHOLESALE'S SALESPERSON PERMIT | \$25.00 |

VENDOR & VENDING MACHINE PERMITS:

- | | |
|--|----------|
| 1. VS-VENDING MACHINE PERMIT (per machine) | \$10.00 |
| 2. GV-VENDOR PERMIT | \$100.00 |

MANUFACTURER & MANUFACTURER'S SALESPERSON PERMIT:

- | | |
|--|----------|
| 1. MV-MANUFACTURER VAPOR PRODUCT & E-LIQUID PRODUCT ONLY PERMIT | \$500.00 |
| 2. MT-MANUFACTURER TOBACCO PRODUCTS &
ALTERNATIVE NICOTINE PRODUCTS ONLY PERMIT | \$500.00 |

- Manufacturers or importers who deal solely in cigars may submit a copy of their current federal tobacco import license or federal manufacturer's license to Arkansas Tobacco Control when applying for a Manufacturer Tobacco Products and Alternative Nicotine Products Only Permit to receive the permit at no cost.

- | | |
|--|----------|
| 3. MC-MANUFACTURER CIGARETTE ONLY PERMIT | \$500.00 |
| 4. MS-MANUFACTURER'S SALESPERSON PERMIT | \$25.00 |

VAPOR AND E-LIQUID PRODUCT EXCLUSIVE PERMIT:

- | | |
|--|------------|
| 1. VAPOR PRODUCT AND E-LIQUID PRODUCT EXCLUSIVE PERMIT
(Manufacturer, Wholesaler, and Retailer) | \$1,000.00 |
|--|------------|

SPECIAL EVENT ONE TIME PERMIT:

- | | |
|----------------------------------|--------|
| 1. SPECIAL EVENT ONE-TIME 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 Definition.

A. **Rebate.** Pursuant to A.C.A. § 4-75-702, "Rebate" means a payment made by a seller of cigarettes to a purchaser of cigarettes after the sale that serves as a discount

or return of part of an amount previously given in payment by the purchaser of cigarettes.

B. **Concession.** “Concession” has the same meaning as “Rebate.”

C. **Cost to Wholesaler.** “Cost to wholesaler” means the basic cost of the cigarettes involved to the wholesaler plus the cost of doing business by the wholesaler as evidenced by the standards and methods of accounting regularly employed by him or her and must include, without limitation, 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. The cost of doing business is presumed to be four (4%) of the basic cost of cigarettes to the wholesaler unless a cost of doing business application is submitted pursuant to ATC Rule 15.1.

9.2 **Unlawful Rebate.** It is unlawful for any wholesaler, retailer, or salesperson to offer a rebate in price, to give a rebate in price, to offer a concession of any kind, or to give a concession of any kind or nature whatsoever in connection with the sale of cigarettes with intent to injure competitors or destroy or substantially lessen competition.

9.3 **Lawful Rebate.** A wholesaler may give a rebate (1) if the rebate is paid by check or electronic direct deposit and (2) does not result in a sale at less than cost to the wholesaler according to A.C.A. § 4-75-702(5)(A), less discounts that are received by the wholesaler from the manufacturer.

9.4 **Unlawful Retailer Inducement.** It is unlawful for any retailer to induce or attempt to induce or to procure or attempt to procure the purchase of cigarettes at a price less than cost to the wholesaler.

9.5 **Penalties For Failure To Comply** - Any permit holder who violates the provisions of the ATC Rules shall be subjected to all sanctions set forth in A.C.A. § 26-57-201, et seq. (the Arkansas Tobacco Products Tax Act) and these Rules, 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, A.C.A. 25-15-201 et seq.

10.3 **Notice of Hearing.** The Notice of Hearing shall be served upon the permit holder by mailing the same to the address on file with the Agency. 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 address on file with the Agency, shall not constitute a failure to serve the permit holder. The Notice of Hearing shall be mailed 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 of a license or permit or issuance of a civil penalty.

- A. The violation of any of the provisions of these Rules.
- 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-Permittee. If a complaint alleging the violation of Ark. Code Ann. § 527-227 is received by the Agency, and the Agency, at its discretion, determines that there are reasonable grounds to believe that a violation has occurred, the Agency 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 Agency to comply with notice requirements of Arkansas law, alleged violations of Ark. Code Ann. § 527-227 reported to the Agency 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.

C. Notwithstanding any provision of these Rules, 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

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.

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 thirty (30) days from the date the Board approves said acceptance unless other written arrangements are made and approved by the Director.

14.3 Penalty for Non-Payment (Permit Holders) – If a permit holder fails to pay their fine when due and has either failed to file a timely appeal to Circuit Court or more than thirty (30) days has passed since the entry of a final order on appeal, 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.

SECTION 15 – UNFAIR CIGARETTE SALES

A. COST OF DOING BUSINESS

1. The cost of doing business is presumed to be four percent (4%) of the basic cost of cigarettes to the wholesaler 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 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 effect 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 Section 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 effect 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 an unlawful Rebate or an unlawful 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 an unlawful Rebate or an unlawful 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. §2657-247 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 If any provision of these rules 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 These modifications to the Rules of the Arkansas Tobacco Control Board shall become effective November 15, 2010.

SECTION 20 – MODIFICATION OF RULES

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

QUESTIONNAIRE
FOR FILING PROPOSED RULES WITH THE
ARKANSAS LEGISLATIVE COUNCIL

DEPARTMENT/AGENCY _____
DIVISION _____
DIVISION DIRECTOR _____
CONTACT PERSON _____
ADDRESS _____
PHONE NO. _____ FAX NO. _____ E-MAIL _____
NAME OF PRESENTER AT COMMITTEE MEETING _____
PRESENTER E-MAIL _____

INSTRUCTIONS

- A. Please make copies of this form for future use.
- B. Please answer each question completely using layman terms. You may use additional sheets if necessary.
- C. If you have a method of indexing your rules, please give the proposed citation after "Short Title of this
- D. Rule" below.
- E. Submit two (2) copies of the Questionnaire and Financial Impact Statement attached to the front of two (2) copies of the proposed rule and required documents. Mail or deliver to:

Jessica C. Sutton
Administrative Rules Review Section
Arkansas Legislative Council
Bureau of Legislative Research
One Capitol Mall, 5th Floor
Little Rock, AR 72201

1. What is the short title of this rule?

2. What is the subject of the proposed rule?

3. Is this rule required to comply with a federal statute, rule, or regulation? Yes No

If yes, please provide the federal rule, regulation, and/or statute citation.

4. Was this rule filed under the emergency provisions of the Administrative Procedure Act?

Yes No

If yes, what is the effective date of the emergency rule? _____

When does the emergency rule expire? _____

Will this emergency rule be promulgated under the permanent provisions of the Administrative Procedure Act? Yes No

5. Is this a new rule? Yes No If yes, please provide a brief summary explaining the rule.

Does this repeal an existing rule? Yes No If yes, a copy of the repealed rule is to be included with your completed questionnaire. If it is being replaced with a new rule, please provide a summary of the rule giving an explanation of what the rule does.

Is this an amendment to an existing rule? Yes No If yes, please attach a mark-up showing the changes in the existing rule and a summary of the substantive changes. Note: The summary should explain what the amendment does, and the mark-up copy should be clearly labeled “mark-up.”

6. Cite the state law that grants the authority for this proposed rule? If codified, please give the Arkansas Code citation.

7. What is the purpose of this proposed rule? Why is it necessary?

8. Please provide the address where this rule is publicly accessible in electronic form via the Internet as required by Arkansas Code § 25-19-108(b).

9. Will a public hearing be held on this proposed rule? Yes No If yes, please complete the following:

Date: _____

Time: _____

Place: _____

10. When does the public comment period expire for permanent promulgation? (Must provide a date.)

11. What is the proposed effective date of this proposed rule? (Must provide a date.)

On or about June 1, 2022, or after legislative review and 10 days after filing with the Arkansas Secretary of State

12. Please provide a copy of the notice required under Ark. Code Ann. § 25-15-204(a), and proof of the publication of said notice. _____

13. Please provide proof of filing the rule with the Secretary of State as required pursuant to Ark. Code Ann. § 25-15-204(e). _____

14. Please give the names of persons, groups, or organizations that you expect to comment on these rules? Please provide their position (for or against) if known.

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY

DEPARTMENT _____
DIVISION _____
PERSON COMPLETING THIS STATEMENT _____
TELEPHONE NO. _____ FAX NO. _____ EMAIL: _____

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two (2) copies with the Questionnaire and proposed rules.

SHORT TITLE OF THIS RULE

1. Does this proposed, amended, or repealed rule have a financial impact? Yes No
2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule?
Yes No
3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered? Yes No

If an agency is proposing a more costly rule, please state the following:

- a) How the additional benefits of the more costly rule justify its additional cost;
- b) The reason for adoption of the more costly rule;
- c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and
- d) Whether the reason is within the scope of the agency's statutory authority, and if so, please explain.

4. If the purpose of this rule is to implement a federal rule or regulation, please state the following:

a) What is the cost to implement the federal rule or regulation?

Current Fiscal Year

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

Total _____

b) What is the additional cost of the state rule?

Current Fiscal Year

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

Total _____

5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected.

Current Fiscal Year

Next Fiscal Year

\$ _____

\$ _____

6. What is the total estimated cost by fiscal year to state, county, and municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is affected.

Current Fiscal Year

Next Fiscal Year

\$ _____

\$ _____

7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

Yes No

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously with the financial impact statement and shall include, without limitation, the following:

- (1) a statement of the rule's basis and purpose;
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
- (3) a description of the factual evidence that:
 - (a) justifies the agency's need for the proposed rule; and
 - (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;
- (4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and
- (7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
 - (a) the rule is achieving the statutory objectives;
 - (b) the benefits of the rule continue to justify its costs; and
 - (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.