

**JANUARY** 6

**TENTATIVE AGENDA**

**LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

**MONDAY, JANUARY 6, 1992  
9:00 - 11:00 a.m.**

**Senate Judiciary Committee Room, M-451**

1. Approval of Minutes Meetings December 9 and 10, 1991
2. Review of Legislative Rules:
  - a. Health Care Cost Review Authority - Financial Disclosure Rule
  - b. Tax, Division of - Industrial Expansion and Revitalization Credit, Research and Development Credit, Qualified Housing Development Credit, Management Information Services Facilities Credit and Coal Based Liquids for Synthetic Fuels Credit
  - c. Tax, Division of - Severance Tax
  - d. Tax, Division of - Exceptions to Confidentiality of Taxpayer Information, Disclosure of Certain Taxpayer Information
  - e. Tax, Division of - Municipal Business and Occupation Tax
  - f. Alcohol Beverage Control Commissioner - Retail Sale of Wine in Grocery Stores, Wine Specialty Shops and Private Wine Restaurants
  - g. Tax, Division of - Consumers Sales and Service Tax and Use Tax
3. Other business:

Monday, January 6, 1992

9:00 - 11:00 a.m.

Legislative Rule-Making Review Committee  
(Code §29A-3-10)

Keith Burdette  
ex officio nonvoting member

Robert "Chuck" Chambers,  
ex officio nonvoting member

Senate

House

Wooton, Chairman  
Chafin (absent)  
Manchin, J.  
Tomblin (absent)  
Wiedebusch (absent)  
Boley

Grubb, Chairman  
Burk  
Faircloth  
Roop  
Love  
Gallagher

The meeting was called to order by Mr. Wooton, Co-Chairman.

The minutes of the December 9 and 10, 1991 meetings were approved.

Debra Graham, Committee Counsel, explained that the rule proposed by the Health Care Cost Review Authority, Financial Disclosure Rule, had been laid over at the Committee's December meeting. Kit Francis, representing Mountain State Blue Cross and Blue Shield, addressed the Committee regarding the proposed rule and distributed a proposed modification to the proposed rule. Larry Fizer, Chairman, Health Care Cost Review Authority, and Marianne Stonestreet, General Counsel, HCCRA, responded to Mr. Francis' comments and answered questions from the Committee.

Mr. Gallagher moved that Section 6 of the proposed rule be modified by adding the following sentence "This section shall not apply to and/or include contracts with third-party payors.". Following further discussion, Mr. Gallagher withdrew his motion.

Mr. Burk moved that Section 1.1 of the proposed rule be modified by adding the following sentence "This rule shall not apply to and/or include contracts with third-party payors.". The motion was adopted.

Mr. Wooton asked Mr. Fizer if he had met with Delegate White as requested by the Committee. Mr. Fizer told the Committee that he and Delegate White had been unable to reach an agreement because a statutory change is necessary to exempt primary care centers.

Mr. Burk moved that the proposed rule be approved as modified. The motion was adopted.

Michael McThomas, Associate Counsel, told the Committee that the rule proposed by the Division of Tax, Industrial Expansion and Revitalization Credit, Research and Development Credit, Qualified Housing Development Credit, Management Information Services Facilities Credit and Coal Based Liquids for Synthetic Fuels Credit had been laid over at the Committee's December meeting. He stated that he had met

with the Division and with several interested parties. He told the Committee that as a result of the meeting that the Division had submitted a letter withdrawing the proposed rule.

Mr. McThomas explained that the rule proposed by the Division of Tax, Severance Tax had also been laid over at the Committee's December meeting. He stated that the Division had agreed to modify the proposed rule to allow a deduction for incoming freight. Lydia McKee, representing the Tax Division, and Tom Battle, representing Anker Energy, commented on the proposed rule and answered questions from the Committee.

Mr. Love moved that the proposed rule be approved as modified. The motion was adopted.

Mr. McThomas reviewed his abstract on the rule proposed by the Division of Tax, Exceptions to Confidentiality of Taxpayer Information, Disclosure of Certain Taxpayer Information, and stated that the Division had agreed to technical modifications.

Mr. Roop moved that the proposed rule be approved as modified. The motion was adopted.

Mr. McThomas explained the rule proposed by the Division of Tax, Municipal Business and Occupation Tax, and told the Committee that the Division had agreed to technical modifications, including the majority of those suggested by Charles Woolcock, Government Finance Officers Association. Mr. Woolcock told the Committee that he supports the proposed rule with the modifications.

Mr. Love moved that the proposed rule be approved as modified. The motion was adopted.

Mr. McThomas reviewed his abstract on the rule proposed by the Alcohol Beverage Control Commissioner, Retail Sale of Wine in Grocery Stores, Wine Specialty Shops and Private Wine Restaurants. Don Moats, representing the Commission, and John Montgomery, Division of Tax, answered questions from the Committee.

Mr. Roop moved that the proposed rule be approved. The motion was adopted.

Mr. McThomas explained that the rule proposed by the Division of Tax, Consumers Sales and Service Tax and Use Tax, had been laid over at the Committee's December meeting. He reviewed his abstract on the proposed rule and stated that the Division had agreed to technical modifications. Leslie Russo, representing YMCAs, and Robert Bolen, Executive Director of the Beckley YMCA, submitted to the Committee a proposed statutory amendment to the Sales Tax which would allow an exemption to nonprofit youth organizations for charges made to the public for services.

Mr. Roop moved that the Committee submit a bill incorporating the proposed amendment to the Joint Committee on Finance with the Committee's recommendation for passage. The motion was adopted.

Paul Ryker, representing Padget Business Service, Aaron Rehms, representing the National Association of Enrolled Agents, Vern Smith, an enrolled agent, and Alan Mierke, Acting Tax Commissioner, addressed the Committee regarding the status of enrolled agents under the proposed rule and answered questions from the Committee.

Ed McDevitt, representing Nursing Care Management, and Jim Farley, a nursing home administrator, requested that the Committee modify the proposed rule to exempt from taxation those nursing home administrators who contract out their services. Mr. McDevitt and Mr. Farley answered questions from the Committee

Mr. Roop moved that Section 8.1 of the proposed rule be modified by including "nursing home administrators" as professionals. The motion was adopted.

Mr. Roop moved that further consideration of the proposed rule be laid over until the Committee's next meeting. The motion was adopted.

The meeting was adjourned.

ROLL CALL - LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

DATE: JAN. 6, 1992

TIME: 9:00-11:00 A.M.

<u>NAME</u>	<u>Present</u>	<u>Absent</u>	<u>Yeas</u>	<u>Nays</u>
Chambers, Robert "Chuck", Speaker				
Grubb, David, Co-Chair	✓			
Burk, Robert W., Jr.	✓			
Faircloth, Larry V.	✓			
Brian A. Gallagher	✓			
Love, Sam	✓			
Roop, Jack	✓			
Burdette, Keith, President				
Wooton, William, Co-Chair	✓			
Chafin, Truman H.				
Manchin, Joe, III	✓			
Tomblin, Earl Ray				
Boley, Donna	✓			
Wiedebusch, Larry				
TOTAL				

RE: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

REGISTRATION OF PUBLIC  
AT  
COMMITTEE MEETINGS  
WEST VIRGINIA LEGISLATURE

COMMITTEE: Legislative Rule-Making Review

DATE: JANUARY 6, 1992 9:00-11:00 A.M.

NAME	ADDRESS	REPRESENTING <i>Please Print Plainly</i>	PLEASE CHECK (X) IF YOU DESIRE TO MAKE A STATEMENT
<i>Please print or write plainly</i>			
John Harris	Charleston	PPG - Midway	
Paul Ryker	845 4th Ave; Martinsburg	VHS, INC.	X
A.G. JIM REAMES	6830 DYER CT SPRINGFIELD, VA 22150	NATL ASSOC. OF ENROLLED AGENTS ROCKVILLE, MD	X
VERN SMITH	65 KENSLAND DR. HERRING	ULF, INC.	X
Robert B. Wilson	74 WEBSTER TER. CHARLESTON	DEPT. TAX + REV	available to answer questions municipal Bd, Severance
CHARLES WOODOCK	Box 256 BARBOURSVILLE	GFPA - MUN. LEAGUE OF WV	✓
RICHARD M. FRANCIS	Charleston	Blue Cross of Blue Shield	✓
EDWARD J. McDEVITT	CHARLESTON	NURSING CARE MANAGEMENT	✓
JAMES FARLEY	CINN. OHIO	" " "	✓
MARTIN L. PASTURA	300 HILLCREST DR. CHAS WV	YMCA	✓
JOHN MONTGOMERY	CHARLESTON	TAX & REVENUE	AS NEEDED
RUTH ANN DEAL	PT. PLEASANT WV.	SALES TAX Review	
LYDIA McKEE	CHAS	WVA. DEPT TAX & REVENUE	✓ (AS NEEDED)
G. Thomas Baxler	Chas.	Antis Energy serv.	✓
George J. Davies	602 Tennessee Chas.	SELF	
Phyllis A. LYNCH	1510 KAN. BLVD CHAS. WV	SELF	
Robert E. Bolen	121 E. MAIN ST.	Bectley Raleigh County W	✓
Julie A. Paris	401 Delaware Ave.	DAVIS + DAVIS ACCOUNTING	

REGISTRATION OF PUBLIC  
AT  
COMMITTEE MEETINGS  
WEST VIRGINIA LEGISLATURE

COMMITTEE: \_\_\_\_\_

DATE: \_\_\_\_\_

NAME	ADDRESS	REPRESENTING	PLEASE CHECK (X) IF YOU DESIRE TO MAKE A STATEMENT
Please print or write plainly Eugene J. Sapp	91 W. Main St. Buckhannon, WV 26201	SELF (Enrolled Agent)	X
Ron Roats	322 70th ST SE CHAR W.VA	ABCC	
Walter C Fizer	100 Dee Dr. CHAS	HCCRA	
Marianne Stades Street	" " " )	" "	
Randy Lucas, EA	Scott. Depot	SELF (Enrolled Agents)	X
Neal Kim	PO Box 549 Chas	CNG TRANS	
Nancy Peck	Drewery AS Beckley	City of BKW- B40	
Ron McLEARY	1310 FAIRMONT AVE FAIRMONT	Mon. Power Co.	
Helen Freed	Ottort., Box 140 Spencer, WV 25276	EA'S	
GEORGE CARNSBAUER	<del>Spencer</del> Charleston	Steyton & Johnson	



Dist. at meeting  
1-6-92

MODIFICATION TO PROPOSED  
FINANCIAL DISCLOSURE RULE OF THE  
HEALTH CARE COST REVIEW AUTHORITY

§ 65-13-9      Public Access to Information

Except for those documents held confidential pursuant to section 8 of these rules, all other reports, statements, schedules or other information filed with the board pursuant to the Act or these rules shall be open to public inspection and examination during the regular business hours of the board. Copies of any report, statement, schedule or other information shall be made available to the public upon request. The board may charge its reasonable and customary fees for making copies of any such document. ~~These rules shall not apply to and/or include contracts with third-party payors.~~

16008

OBJECTIONS OF PPG INDUSTRIES, INC.  
AND MOBAY CORPORATION, INC. TO PROPOSED  
LEGISLATIVE RULE § 110-13D-1 ET. SEQ.

PPG Industries, Inc. and Mobay Corporation, Inc. respectfully object to positions taken by the Department of Tax and Revenue regarding the utilization of the Industrial Expansion and Revitalization Credit as set forth in the recently filed Proposed Regulations. These Proposed Regulations appear to have been promulgated to limit the amount of credit properly claimable by manufacturers as a result of investments made in new or improved manufacturing facilities in West Virginia. The Department's belated interpretation is unsupported by the statute and improperly disallows credits to which manufacturers in West Virginia have been entitled to for the last two decades. If authorized, these provisions will serve as a disincentive to companies considering additional investments within the State, in direct conflict with the purpose of the Industrial Expansion and Revitalization Credit. W. Va. Code § 11-13D-1; c.f. Andy Bros. Tire Co. v. State Tax Comm'r, 233 S.E.2d 134 (W.Va. 1977) and Brockway Glass Co. v. Caryl, 394 S.E.2d 524 (W.Va. 1990).

In 1987, following the repeal of the Business and Occupation Tax, the Legislature enacted W. Va. Code § 11-13D-3a, allowing manufacturers to use Industrial Expansion and Revitalization Credit against Consumers Sales and Service Tax ("Sales Tax") and Use Tax, provided that the credit did not exceed 50% of Sales Tax and Use Tax "paid on purchases directly used or consumed in taxpayer's qualified investment activity."

The Department of Tax and Revenue has recently performed Sales Tax audits of various chemical manufacturing operations in West Virginia. One of the proposed adjustments would limit the use of Industrial Expansion and Revitalization Credits claimed by manufacturers by requiring these companies to multiply their Sales Tax liability arising from the operation of their chemical manufacturing facilities by a fraction, the numerator of which is the value of qualified investments placed in service at the facility during the previous nine years, and the denominator is the value of all West Virginia property. Presumably, the Department's position is that this apportionment properly measures taxpayer's qualified investment activity. It does not.

Under the Industrial Expansion and Revitalization Credit, property purchased for industrial expansion includes:

Real property, and improvements thereto, and tangible personal property, but only if such property was constructed or purchased on or after

the first day of July, one thousand nine hundred and sixty-nine, for use as a component part of a new or expanded industrial facility. (Emphasis added).  
W. Va. Code § 11-13D-2(b)(13).

Under W. Va. Code § 11-13D-2(b)(5), "industrial facility" is broadly defined as:

any factory, mill, plant, refinery, warehouse, building or complex of buildings located within this state, including the land on which it is located, and all machinery, equipment and other real and tangible personal property located at or within such facility used in connection with the operation of such facility in an industrial business. (Emphasis added).

Given the broad definitions of these key terms in the statute, the qualified investment activity of a chemical manufacturer in West Virginia is its entire manufacturing business. W. Va. Code § 11-13D-3a merely limits the use of the credit against Sales Taxes to taxes paid on property or services directly used or consumed in qualified investment activity. This section is clearly intended only to preclude taxpayers from using their Industrial Expansion and Revitalization Credits to offset Sales Taxes arising from other separate businesses in which they may be engaged in West Virginia (e.g., production of natural resources). The Department has promulgated Prop. Reg. §§ 110-13D-3a.2 and -3a.3 in order to bootstrap the overly aggressive position taken in field audits.

We maintain that the appropriate limitation on use of the Industrial Expansion and Revitalization Credit against Sales Tax and Use Tax liability by chemical manufacturers should be to allocate the credit to those taxes paid on property attributable to its manufacturing business and not the apportionment currently contained in the Proposed Regulations.

We respectfully request that the Rule Making Review Committee modify the Proposed Regulations by eliminating paragraphs 110-13D-3a.2 and 3a.3 and replacing these sections with the following:

3a.2 When Consumers Sales and Service Tax or Use Taxes paid on property and services purchased for use or consumption which are not solely used or consumed in the qualified investment activity, tax paid shall be allocated between such activities. The amount allocated to qualified investment activity shall include Consumers Sales and Service Tax or Use Tax paid on purchases of tangible personal property and services for use in taxpayer's industrial business as defined under subpart (4), subsection (b), Section Two, Article thirteen-D, Chapter eleven of the West Virginia Code.

In addition, Prop. Reg. §§ 110-13D-3a.4 prevents taxpayers from claiming the Industrial Expansion and Revitalization Credit during the tax year against Sales Tax and Use Tax paid with monthly direct pay permit returns and requires these credits be claimed only after the credits are claimed against all other taxes. As other commentators have suggested in analogous provisions, the Proposed Regulations purport to preclude taxpayers from claiming credit against taxes paid on the qualified investment itself. See Prop. Reg. § 110-13D-3a.5. These two provisions are totally unsupported by law and for that reason should similarly be deleted from the Regulations.

We respectfully request that the suggested changes herein be adopted by this Honorable Committee. If the Department will not consent to such changes, we request that this Honorable Committee either refuse to recommend that the Proposed Regulations be authorized by the Legislature or direct said Proposed Regulations to be withdrawn.

Thank you for the opportunity to comment.

Dist. at meeting  
1-6-92



State of West Virginia  
Department of Tax and Revenue

GASTON CAPERTON  
GOVERNOR

Charleston 25305

JAMES H. PAIGE III  
SECRETARY

FAX COVER SHEET

DATE: 1/3/92  
TO: JOHN MONTGOMERY

FROM: LYDIA MCKEE

SENDER'S DIRECT PHONE NUMBER 8730 - \_\_\_\_\_

RE: SEVERANCE REGS.

COMMENTS: Changes suggested by  
Battw - okay by me!

Number of pages (including this page) 6

West Virginia Department of Tax and Revenue  
Revenue Center

Main Number - (304) 348-8500  
Fax Number - (304) 348-8733

If there is trouble with this transmission, please call the sender.

~~5.6~~ 4.6 Transportation Allowance. - A person who produces natural resource products or applies treatment processes deemed to be mining pursuant to W. Va. Code §11-13A-4 (processor) and does not make sale of ~~the same~~ said resources, but uses or consumes ~~said~~ the resources in ~~his~~ its business, shall report the value of such resources on the severance tax return. In determining the value of the natural resource products, the taxpayer must adhere to the requirements of Section ~~3~~ 2a of these regulations and apply such requirements to make appropriate determinations of value at the point where production or processing ends. When the natural resource product is transported to a distant place for use, consumption or further processing, the cost of transporting the natural resource product to the place of use, consumption or further processing shall not be included in the value of product taxed. ~~provided that the natural resources are transported by common carrier.~~ However, no adjustment to value will be permitted for the cost of transporting such natural resource from the point of severance to the processing facilities of the producer in the case of natural resources, the processing of which, is included in the privilege subject to the tax imposed by [11-13A] W. Va. Code §11-13A-1 et seq.

~~5.6.1~~ 4.6.1 Where the relationship between the producer of

the natural resource products and the purchaser thereof is such that the gross proceeds derived from the sale are not indicative of the true value of the natural resources, the taxpayer shall determine value by application of Section ~~3~~ 2a of these regulations.

~~5.7~~ 4.7 Treatment of Freight Charges Incurred by Producers and Processors. - In certain instances, producers and processors of natural resource products are permitted to deduct ~~outgoing~~ freight charges from the gross proceeds of sale or value to arrive at taxable value under the severance tax. ~~Outgoing freight charges include only those transportation costs incurred by the taxpayer subsequent to the completion of all treatment processes conducted by such taxpayer considered as mining under the Severance Tax Act and those treatment processes necessary or incidental thereto.~~

~~5.7.1~~ 4.7.1 In order to determine the value within the State and at the place where production <sup>or processing</sup> ends, there may be deducted from gross proceeds of sales certain ~~outgoing~~ freight charges actually <sup>incurred</sup> ~~paid~~ by the producer or processor, but no deduction will be allowed for expenses incurred by them through the use of their own equipment in transporting items produced, except as provided in Sections <sup>4.7.6 and 4.7.7.</sup> 4.7.4, of these regulations.

~~5.7.2~~ 4.7.2 In all instances where products are used or consumed by the producer at a point distant from the place of production, outgoing freight charges paid by the producer or cost <sup>(S)</sup>

incurred by ~~him~~<sup>it</sup> will not be allowed as a deduction, unless due consideration has been given to such charges or costs in the method by which the production values were determined. Accordingly, when a natural resource product is consumed (except in a further processing or preparing for sale activity treated as production by an integrated producer/processor), transportation costs ~~paid to a common carrier~~ incurred by the producer to deliver the product to the location where the products are used or consumed shall not be included in the value of the natural resource product taxed.

~~5.7.3~~ 4.7.3 Generally, in order to be deductible from gross proceeds of sales, freight charges must be incurred by or paid by the producer or processor to a common carrier for the delivery of natural resources to a bona fide purchaser. To illustrate: Coal, or processing at the place where production ends, has a value or value added in the case of of ten dollars (\$10.00) per ton. If a purchaser buys the coal at the mine for said price, the producer or processor will report under the coal production classification the gross value or value added ~~proceeds of sale~~, \$10.00. However, if the purchaser buys the same coal delivered at eleven dollars (\$11.00) per ton, and the producer or processor pays a common carrier to make such delivery, the producer or processor may deduct such freight charges (\$1.00) from the gross proceeds of sale.

~~5.7.4~~ 4.7.4 If the producer or processor of natural resource products sells ~~his~~ its products to a purchaser and agrees to deliver such products in ~~his~~ its own equipment for a fee, ~~said fee may be deducted from the gross proceeds of sale in arriving at~~



taxable value for severance tax purposes, the producer<sup>or processor</sup> may deduct  
from the gross proceeds of sale in arriving at taxable value for  
severance tax purposes, the transportation costs to the purchaser,  
if the costs are separately stated on the invoice to the purchaser  
or if adequate cost records are maintained to document the  
transportation deduction.

~~5.7.5 If hauling or transportation charges are incurred by the producer or have been absorbed by the producer, such charges are outgoing freight charges and are deductible from gross proceeds of sale to arrive at taxable value.~~

4.7.5 If a producer transports products to another facility for further processing prior to sale by such producer, no deduction is allowed for such transportation costs incurred by the producer.

4.7.6 If a producer sells natural resource products to a processor freight on board at the processor's facility and transportation charges are incurred by the producer or have been absorbed by the producer, such charges are deductible from the gross proceeds of the sale to arrive at the taxable value. If the producer uses its own equipment in transporting the natural resource products to the processor's facility, it may deduct such transportation costs from the gross proceeds of sale in arriving at the taxable value for severance tax purposes, provided a fee is separately charged on the invoice or adequate cost records are maintained to document the transportation deduction.

4.7.7 If a producer sells natural resource products to a processor to be delivered at the producer's facility and transportation charges are incurred by the processor to its own facility, the processor may deduct such transportation charges from its gross proceeds of sale in arriving at the taxable value for severance tax purposes. If the processor uses its own equipment in transporting the natural resource products to its facility, it may deduct such transportation costs from the gross proceeds of sales in arriving at the taxable value for severance tax purposes, provided adequate cost records are maintained to document the transportation deduction.

Hand-out meeting  
1-6-92

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Reply to Above Address

Reply to Above Address

January 6, 1992

Senator William R. Wooton, Co-Chair  
Delegate David Grubb, Co-Chair  
West Virginia Legislature  
Legislative Rule-Making Review Committee  
Room M-152, State Capitol  
Charleston, WV 25305

**Re: Proposed Legislative Rule - Severance Tax**

Dear Senator Wooton, Delegate Grubb and Members  
of the Legislative Rule-Making Review Committee:

This letter is submitted in connection with the Proposed Legislative Rules filed July 1, 1991, relating to severance tax and which are scheduled to be considered by the Committee on January 6, 1992. The Proposed Legislative Rules will affect those regulations currently cited as 110 C.S.R. 13A, § 1 et seq. (1989). Subsequent cites to the Code of State Regulations will be to the Proposed Legislative Rules filed July 1, 1991.

The following comments address the provisions of the Proposed Rules which define treatment processes constituting mining, found at 110 C.S.R. 13A, § 4.1.1.

**Treatment Processes Constituting Mining**

W. Va. Code § 11-13A-4 provides that the following treatment processes are considered as mining and part of the privilege taxed under the severance tax:

(1) Coal - In the case of coal: Clean-  
ing, breaking, sizing, dust allaying, treating  
to prevent freezing and loading for shipment.

110 C.S.R. 13A, § 4.1.1 provides that the following activities are included in the term "production of coal":

. . . crushing, working, cleaning, drying,  
sorting, sizing, blending, dust allaying,  
loading for shipment and freeze treatment.

Senator William R. Wooton, Co-Chair  
Delegate David Grubb, Co-Chair  
January 6, 1992  
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The Proposed Rules add "blending" to the regulatory list of "ordinary processing activities" considered to be within the term "production of coal." 110 C.S.R. 13A, § 4.1.1 (formerly § 5.1.1). The existing regulation inexplicably overlooks the statutory reference to "treatment processes" and seeks to broaden the category to "ordinary processing." The word "treatment" is a significant part of the law and should not be overlooked. The inclusion of "blending" as a treatment process by regulation exceeds the statutory authority of the Tax Commissioner to promulgate rules and regulations since blending is not a coal treatment process specifically described in the statute. W. Va. Code § 11-13A-4(a)(1).

The law specifies that certain treatment processes when applied by the mine owner or operator to natural resources mined in West Virginia are part of the privilege taxed under Article 13A. In the case of coal, the treatment processes designated by statute are those quoted above. The statute also provides that "treatment processes necessary or incidental" to the named treatment processes are considered part of the privilege subject to severance tax. Blending coal is not a treatment process. Blending results from the way coal is handled and loaded in a particular sequence for shipment to customers. Since the statute has designated only the addition of treatment processes necessary or incidental to the specified activities, blending does not fit that category and may not be properly included by regulation since it is not among the items described in the law.

The Tax Commissioner may make all needful rules and regulations for the severance tax as provided in the State Administrative Procedures Act. W. Va. Code § 11-10-5. However, the principle is well established in West Virginia that rule-making authority does not permit the promulgation of regulations that are inconsistent with or go beyond the statute to which they apply. Where a tax regulation is inconsistent with the statute, the regulation will be rejected. See Ballard's Farm Sausage Inc. v. Dailey, 162 W. Va. 10, 246 S.E.2d 265, 267-268 (1978).

We believe the Tax Commissioner has gone beyond the severance tax statute by designating "blending" as a treatment process. By the proposed amendment, the Tax Commissioner has broadened the list of taxable treatment processes beyond those designated and intended by the Legislature.

SPILMAN, THOMAS, BATTLE & KLOSTERMEYER

Senator William R. Wooton, Co-Chair  
Delegate David Grubb, Co-Chair  
January 6, 1992  
Page 3

We propose that the word "blending" be deleted from  
§ 4.1.1 (p. 15) of the proposed regulations.

Respectfully submitted,

SPILMAN, THOMAS, BATTLE & KLOSTERMEYER

BY *G. Thomas Battle*  
G. Thomas Battle

GTB/ljr

Hand Out meeting  
1-6-92

SUGGESTED AMENDMENT TO W.VA. CODE § 11-15-9

ADDING § 11-15-9(oo)

All services rendered by human service organizations, including, but not limited to YMCAs and YWCAs, except to the extent that income received from performing the services<sup>is</sup> taxable under Section 511 of the Internal Revenue Code of 1986, as amended. For purposes of this exemption, a "human service organization" shall include any organization exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code, and which performs services which advance the spiritual, mental, physical, social or emotional welfare of others or which contributes to the relief, comfort or assistance of persons in distress, including but not limited to, health and recreation services and youth activities.

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Members of NAEA are required to complete a minimum of 30 hours of continuing professional education each year in the interpretation, application and administration of federal and state tax laws in order to maintain membership in the organization. This requirement surpasses the IRS' required minimum of 16 hours per year.

### HOW CAN I FIND AN EA?

To locate an EA, call the NAEA 24-hour referral service at (800) 424-4339 (7 days a week) or write the National Association of Enrolled Agents and you will be furnished with a list of names and addresses of members located in your area. Many EAs are listed in the yellow pages under "Tax Preparation". Look for the words **Enrolled Agent, Enrolled To Represent Taxpayers Before The IRS** and the **EA** designation.



## NATIONAL ASSOCIATION OF ENROLLED AGENTS

6000 Executive Boulevard  
Suite 205  
Rockville, MD 20852  
(301) 984-6232  
Fax (301) 231-8961  
Toll-Free 1 (800) 424-4339

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*Hand out  
Meeting 1-6-92*

# ENROLLED AGENTS:

# THE TAX PROFESSIONALS

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## WHAT IS AN ENROLLED AGENT (EA)?

An EA is an individual who has demonstrated technical competence in the field of taxation and can represent taxpayers before all administrative levels of the Internal Revenue Service.

## WHAT DOES THE TERM "ENROLLED AGENT" MEAN?

"Enrolled" means EAs are licensed by the federal government. "Agent" means EAs are authorized to appear in place of the taxpayer at the Internal Revenue Service. Only EAs, attorneys and CPAs may represent taxpayers before the IRS.

The Enrolled Agent profession dates back to 1884 when, after questionable claims had been presented for Civil War losses, Congress acted to regulate persons who represented citizens in their dealings with the Treasury Department.

## HOW CAN AN EA HELP ME?

EAs advise, represent and prepare tax returns for individuals, partnerships, corporations, estates, trusts and any entities with tax-reporting requirements. EAs prepare millions of tax returns in a typical year. EAs' expertise in the continually changing field of tax law enables them to be effective representatives when taxpayers are audited by the IRS.

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## WHAT ARE THE CRITICAL DIFFERENCES BETWEEN EAS AND OTHER TAX PROFESSIONALS?

Only EAs are required to demonstrate competence in matters of *taxation* before they may represent a taxpayer before the IRS. Unlike attorneys and CPAs, who may or may not choose to specialize in taxes, *all* EAs specialize in matters of taxation. EAs are also the only taxpayer representatives who receive their right to practice from the United States government. (CPAs and attorneys are licensed by the states.)

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## HOW DOES ONE BECOME AN EA?

The EA designation is earned in one of two ways: (1) an individual must pass a difficult two-day examination which covers taxation of individuals, corporations, partnerships, estates and trusts, procedures and ethics. Next, the successful candidates are subjected to a rigorous background check conducted by the Internal Revenue Service, or (2) an individual may become an EA based on employment at the Internal Revenue Service for a minimum of five years in a job where he/she regularly applied and interpreted the provisions of the Internal Revenue Code and regulations.

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## ARE EAS REQUIRED TO TAKE CONTINUING PROFESSIONAL EDUCATION (CPE)?

In addition to the stringent testing and application process, EAs are required to complete 72 hours of CPE, reported every three years, to maintain their status. Because of the difficulty in becoming an EA and keeping up the required credentials, there are fewer than 30,000 EAs in the United States.

## ARE EAS BOUND BY ANY ETHICAL STANDARDS?

EAs are required to abide by the Standards of Ethical Conduct as published in *U.S. Treasury Department Circular 230*. EAs found to be in violation of the provisions contained in *Circular 230* may be suspended or disbarred.

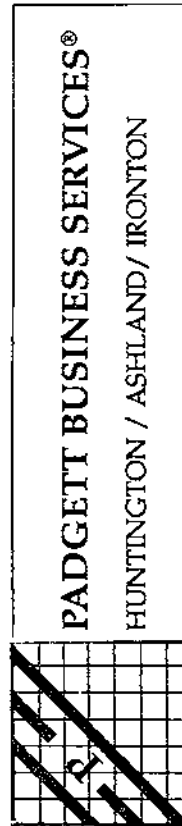
## WHY SHOULD I CHOOSE AN EA WHO IS A MEMBER OF THE NATIONAL ASSOCIATION OF ENROLLED AGENTS (NAEA)?

NAEA is the organization of and for EAs. The principal concern of the Association and its members is honest, intelligent and ethical representation of the financial position of taxpayers before governmental agencies.

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Enrolled Agents  
are  
the *only*  
professional  
tax practitioners  
who *specialize*  
in tax.



If  
you  
pay taxes,  
you  
should know  
about  
Enrolled  
Agents . . .

**ENROLLED AGENTS**

*the taxpayers' tax experts*

# EAs: The Taxpayers' Tax Experts

**Q: What does the term *Enrolled Agent* mean?**

**A:** "Enrolled" simply means EAs are licensed by the federal government. "Agent" means EAs are authorized to appear in place of the taxpayer at the Internal Revenue Service. Only Enrolled Agents, attorneys and CPAs may do so.

Enrollment dates back to 1884, when Congress acted to regulate persons who represented citizens in their dealings with the Treasury Department, after questionable claims had been presented for Civil War losses.

**Q: What exactly do Enrolled Agents do?**

**A:** Unlike attorneys or CPAs, Enrolled Agents specialize in taxation. Throughout the year, they advise, represent and prepare tax returns for individuals, partnerships, corporations, estates, trusts and any entities with tax-reporting requirements. In California, for example, the more than 3,000 Members of the California Society of Enrolled Agents prepare about 1.5 million tax

returns each year. Enrolled Agents' expertise in the constantly changing field of tax law enables them to be effective representatives when taxpayers are audited by the IRS.

**Q: How do Enrolled Agents differ from other tax experts?**

**A:** EAs are the only practitioners who have demonstrated competence specifically in matters of taxation. Also, they are the only representatives for taxpayers who receive that right from the U. S. government. (CPAs and attorneys are licensed by the states).

An individual may become an Enrolled Agent in one of two ways: The primary way is to pass a difficult, two-day examination given annually by the IRS. The test covers taxation of individuals, corporations, partnerships, estates and trusts, as well as procedure and ethics. Less than one-third of individuals taking the examination have passed, allowing them to apply for enrollment and subject themselves to a background investigation.

The other way is to have been an employee of the Internal Revenue Service for five years, regularly applying and interpreting the provisions of the Internal Revenue Code and regulations.

**Q: Are there other requirements?**

**A:** In addition to the stringent testing and application process, Enrolled Agents are required to earn 72 hours of continuing professional education, reported every three years, to maintain their status. Because of the difficulty in becoming enrolled and maintaining that enrollment, there are fewer than 35,000 Enrolled Agents in the United States.

**Q: How can I find out more about Enrolled Agents?**

**A: Contact:**



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Huntington, West Virginia 25708-0305

V. H. (Vern) SMITH, *President*  
Enrolled Agent  
Certified Tax Professional  
Accredited Tax Advisor

**(304) 522-1040**

ACCOUNTING • BOOKKEEPING • TAXES • CONSULTING

**ENROLLED AGENTS**

*the taxpayers' tax experts*

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The Tax Professionals

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# Enrolled Agents

**NAEA**

National Association of Enrolled Agents  
6000 Executive Boulevard  
Suite 205  
Rockville, MD 20852



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Enrolled Agents are individuals who have demonstrated technical competence and professional ethics to the Treasury Department and have been granted enrollment to practice before the Internal Revenue Service.

---

**What is an Enrolled Agent?** An Enrolled Agent is an individual who has been granted enrollment by the Treasury Department to represent all classes of taxpayers in any matters connected with presentations to the Internal Revenue Service relating to the client's rights, privileges and liabilities under laws and regulations coming under the jurisdiction of the Internal Revenue Service. In short, the Enrolled Agent may "stand in the shoes" of the taxpayer in Income Tax, Estate Tax, Gift Tax, Excise Tax, and miscellaneous tax matters. An Enrolled Agent may represent any taxpayer at any administrative level of IRS, regardless of who prepared the return(s) in question, and at any IRS office without regard to the state of residency of the taxpayer. Enrolled Agents are recognized as tax professionals with technical competency in federal and state tax matters.

**Are all tax preparers equally qualified?** No! The Department of the Treasury and Internal Revenue Service recognize only three categories of tax practitioners who may represent all taxpayers through all of the levels, including District Director and Appeals levels. In addition to Enrolled Agents, whose authority is derived from Federal sources, state licensed certified public accountants and attorneys are recognized.

**How is enrollment to practice obtained?** Enrolled Agent status may be gained in one of two ways: (a) Satisfactory completion of a comprehensive written examination administered by the Internal Revenue Service which demonstrates the individual's technical competence in applying and interpreting the Internal Revenue Code and regulations thereunder, or (b) At least five years' continuous employment with the Internal Revenue Service during which the individual was regularly engaged in applying and interpreting the Internal Revenue Code and regulations thereunder. Following an investigation of the individual's background by the Department of the Treasury, the applicant may be granted enrollment.

**How can I find an Enrolled Agent?** If you wish to locate an Enrolled Agent, call the NAEA 24-hour referral service (800) 424-4339 (7 days a week) or write the National Association of Enrolled Agents and you will be furnished with a list of names and addresses of members whose offices are in your area. Many Enrolled Agents are also listed in the Yellow Pages under "Tax Preparation."

**Why should I choose a Member of the National Association of Enrolled Agents?**

The National Association of Enrolled Agents is the

organization of and for Enrolled Agents. The principle concern of the Association and of its members is honest, intelligent and ethical representation of the financial position of taxpayers before governmental agencies.

**Taxpayer Rights.** The Association condones no practices which deprive the individual taxpayer of the right to take advantage of all provisions of the laws and regulations concerning taxation. It condones no illegal or fraudulent practices which misrepresent the tax liability of the client, thereby placing the client in jeopardy or subject to official sanction.

**Continued Professional Competency.** The Association promotes professional competency. Member EAs are required to complete a minimum of 30 hours of Continuing Professional Education each year in the interpretation, application and administration of federal and state tax laws. The Internal Revenue Service has also established a Continuing Professional Education requirement of 24 hours (per year) for all Enrolled Agents in order to maintain their enrollment.

**Public Information.** One basic objective of the Association is to encourage public awareness of taxpayer rights, privileges and obligations under federal and state tax laws and regulations. Member EAs are available through the Association and its Affiliates to address seminars and other programs sponsored by local, state or regional civic and service clubs and organizations, as well as to assist with employee and educational programs.

**Ethics.** Members of the National Association of Enrolled Agents are bound by an oath to conduct themselves at all times in a dignified and professional manner. In addition, all EAs are required to abide by the Standards of Ethical Conduct as promulgated in U.S. Treasury Department Circular 230, as revised, and the Code of Ethics and Professional Conduct of the National Association of Enrolled Agents.

# NAEA

National Association of Enrolled Agents

6000 Executive Boulevard  
Suite 205

Rockville, MD 20852  
301/984-6232

800/424-4339—24-hour message center



MEMBERS ENROLLED TO REPRESENT TAXPAYERS BEFORE THE INTERNAL REVENUE SERVICE

**ENROLLED AGENTS  
(LICENSED BY THE FEDERAL GOVERNMENT)**

Since the word "profession" has lost some of its earlier precision through widespread application, it is worthwhile reviewing the characteristics which mark a calling as a professional in the traditional sense. Much has been written on the subject and court cases have revolved around it. The weight of the authorities, however, identifies the following distinguishing elements:

**THERE IS A MASTERY BY THE PRACTITIONERS OF A PARTICULAR SKILL, ACQUIRED BY LENGTHY TRAINING AND EDUCATION.**

**THE FOUNDATION OF THE CALLING RESTS IN PUBLIC PRACTICE - THE APPLICATION OF THE ACQUIRED SKILL TO THE AFFAIRS OF OTHERS FOR A FEE.**

**THE CALLING CENTERS ON THE PROVISION OF PERSONAL SERVICES RATHER THAN ENTREPRENEURIAL DEALING IN GOODS.**

**THERE IS AN OUTLOOK, IN THE PRACTICE OF THE CALLING, WHICH IS ESSENTIALLY OBJECTIVE.**

**THERE IS AN ACCEPTANCE BY THE PRACTITIONERS OF A RESPONSIBILITY TO SUBORDINATE PERSONAL INTERESTS TO THOSE OF THE PUBLIC GOOD.**

**THERE EXISTS A DEVELOPED AND INDEPENDENT SOCIETY COMPRISING THE MEMBERS OF THE CALLING, WHICH SETS AND MAINTAINS STANDARDS OF QUALIFICATIONS, ATTESTS TO THE COMPETENCE OF THE INDIVIDUAL PRACTITIONER AND SAFEGUARDS AND DEVELOPS THE SKILLS AND STANDARDS OF THE CALLING.**

**THERE IS A SPECIALIZED CODE OF ETHICAL CONDUCT, LAID DOWN AND ENFORCED BY THAT SOCIETY, DESIGNED PRINCIPALLY FOR THE PROTECTION OF THE PUBLIC.**

**THERE IS A BELIEF, ON THE PART OF THOSE ENGAGED IN THE CALLING, IN THE VIRTUE OF INTERCHANGE OF VIEWS, AND IN A DUTY TO CONTRIBUTE TO THE DEVELOPMENT OF THEIR CALLING, ADDING TO ITS KNOWLEDGE AND SHARING ADVANCES IN KNOWLEDGE AND TECHNIQUE WITH THEIR FELLOW MEMBERS.**

**BY THIS CRITERIA THE ENROLLED AGENT IS A PROFESSIONAL.**

## ENROLLED AGENTS THE TAX PROFESSIONALS

### WHAT IS AN ENROLLED AGENT?

"Enrolled" means that Enrolled Agents (EAs) are licensed by the federal government. "Agent" means that EAs can represent taxpayers before all administrative levels of the Internal Revenue Service. Only Enrolled Agents, attorneys and CPA's may do so.

Enrollment date back to 1884, when Congress acted to regulate persons representing citizens in their dealings with the Treasury Department.

### WHAT IS THE CRITICAL DIFFERENCE BETWEEN EA'S AND OTHER TAX PROFESSIONALS?

EA's have demonstrated competence in matters of *taxation*. Unlike attorneys and CPA's, who may not choose to specialize in taxes, *all* EA's specialize in matters of taxation. EA's also are the only representatives for taxpayers who receive that right from the U. S. government - CPA's and attorneys being licensed by the states.

### HOW DOES ONE BECOME AN EA?

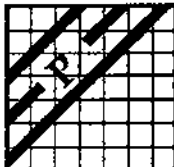
The EA designation is earned in one of two ways: An individual must pass a difficult, two-day examination given annually by the IRS. The test covers taxation of individuals, corporations, partnerships, estates and trusts, procedures and ethics. Less than one-third of individuals taking the examination have passed. Next the successful candidates are subjected to a rigorous background check conducted by the Internal Revenue Service. The other way is based on employment with the IRS for a minimum of five years regularly applying; and interpreting the provisions of the Internal Revenue Code and regulations.

### ARE EA'S REQUIRED TO TAKE CONTINUING PROFESSIONAL EDUCATION (CPE)?

In addition to the stringent testing and application process, EA's are required to complete 72 hours of CPE every three years to maintain their status. Because of the difficulty in becoming enrolled and maintaining the required credentials, there are fewer than 35,000 EA's in the United States.

### ARE EA'S BOUND BY ANY ETHICAL STANDARDS?

EA's are required to abide by the Standards of Ethical Conduct as published in *U. S. Treasury Department Circular 230*. EA's found to be in violation of the provisions contained in *Circular 230* may be suspended or disbarred.



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P. O. Box 305 • 700 Adams Avenue • Huntington, West Virginia 25708-0305  
(304) 522-1040 FAX (304) 522-1041

V. H. (Vern) SMITH  
President  
Enrolled Agent  
Certified Tax Professional  
Accredited Tax Advisor

NANCY C. SMITH  
Vice-President

NANCY B. JORDAN  
Vice-President

Dear Senator Chafin:

I am writing to you in the sincere hope that you will not allow an *unfair* amendment to the **Consumers Sales and Service Tax**, as proposed by the State Tax Department, to be approved.


I am enclosing literature which is all rather self-explanatory but let me summarize:

Enrolled Agents are indeed "*professionals*" and do the *same work* that CPA's and LPA's do with the exception of certified audits (which all but the largest firms have abandoned). It would be grossly unfair if one group of people **DOING THE SAME TASKS** were compelled to charge sales tax while another is exempt. I can only compare this to buying gas at a Go Mart - pay 6% sale tax; buy gas at a Chevron station - no sales tax need be collected!

How unfair; and certainly not the intent (I would think) of our legislative bodies!

Senator Chafin, I would be available nearly anytime to meet with you on this matter and to answer any questions you might have.

Sincerely,

  
Vern Smith, EA

Member: National Association of Tax Practitioners • National Society of Tax Professionals  
National Society of Public Accountants • National Association of Enrolled Agents

ACCOUNTING • BOOKKEEPING • TAXES • CONSULTING

"Your Success is Our Success"

*Paul A. Ryker L.C.*

*Attorney at Law*

*845 Fourth Avenue*

*Suite 701*

*Huntington, West Virginia 25701*

*(304) 522-7379*

Dear

Accompanying this letter is concise literature which describes the nature of what an "Enrolled Agent" is, how they become qualified and what they must do to maintain their avocation.

In the case of my client, Mr. Vern Smith (an Enrolled Agent) of Padgett Business Services of West Virginia, in Huntington, the State Department of Tax and Revenue's fanatical determination to tax the services of EA's as a "nonprofessional" is especially reprehensible. The Department issued an assessment for an arbitrarily-set sum of tax allegedly due against Padgett, covering a 19 month period during 1988-1989. After we filed a petition for reassessment, the matter came on for an administrative hearing on June 12, 1990, before a hearing examiner of the Department. At that time, we presented an independent expert witness and numerous documents (including IRS Circular 230), in addition to Mr. Smith's testimony, to demonstrate that an EA meets the tests for what qualifies as a "professional" under the West Virginia Supreme Court's criteria in Wooddell v. Bailey, and, pointedly, under the present regulatory guidelines in Section 8.1.1.1; that is:

- (1) The level of education required for the activity;
- (2) The nature and extent of nationally recognized standards for performancy;
- (3) Licensing requirements on the State and national level; and
- (4) The extent of continuing legal education requirements.

The Department offered no witnesses of their own to contest our case. Neither did they offer any documentary evidence to support their position that EA's are not professional. Indeed, after post-hearing briefing was completed, no decision was ever rendered, even though Section 11-10-9 of the West Virginia Code requires that a decision, in writing, be issued within "a reasonable time". After more than one year had passed since the completion of the briefing, and almost a full 18 months since the hearing, we filed a Petition for a Writ of



Mandamus with the Supreme Court, asking it to at least order the Department to make a decision. (You may also review or obtain a copy of the Petition as filed, on request, from me). That Petition was filed on December 5, 1991.

My client does not regularly subscribe to or review the Register, and was not aware until December 9, 1991, that the Department was trying to do by regulation what it would not decide in the course of its statutory administrative duty. After learning of it by happenstance, we alerted fellow EA's and prepared to address the committee at your December meeting, before you tabled it.

Please do not allow this underhanded tactic of the Department to succeed. Although their regulation would pay lip service to common law (i.e. court decisions) to determine what is "professional", they have shown that they desperately want this kept out of the courts until they can obtain a regulation which they, in turn, can claim has the blessing of legislative intent.

This proposed regulation, as to EA's, would probably be susceptible to nullification as arbitrary and capricious in the courts under the State Administrative Procedures Act. But it should not have to go that far.

I urge you to either designate EA's as an example of a professional under a proposed 8.1.1.1 or, delete references to EA's entirely.

I look forward to addressing the Committee when it reconvenes. Please let me know if I can supply any further information or assistance.

Sincerely,  
  
Paul A. Ryker

PAR/maw



## NATIONAL ASSOCIATION OF ENROLLED AGENTS

6000 Executive Boulevard • Suite 205 • Rockville, MD 20852 • (301) 984-6232 • FAX (301) 231-8961  
Members Enrolled to Represent Taxpayers Before the Internal Revenue Service

December 27, 1991

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Rick Wilshire, EA (TX)

Senator William R. Wooton  
117 Granville Ave  
Beekley, West Virginia 25801

Re: West Virginia Code pertaining to sales tax on  
professional services

Dear Senator:

We are writing to you on behalf of our Enrolled Agent members in West Virginia and on behalf of over 28,000 Enrolled Agents nationwide.

The National Association of Enrolled Agents takes exception to your State Statute that classifies the services of Enrolled Agents as nonprofessional and places it in issue for the following reasons.


United States Treasury Department Circular No. 230 (Code of Federal Regulations Part 10) sets forth standards and requirements for Enrolled Agents. For your convenience, we have enclosed a copy of this law. You will notice that Enrolled Agents are recognized just as Certified Public Accountants and Attorneys in the Federal Law.

The United States Supreme Court, in 1963, Sperry v Florida, 373 U.S. 379, 83S. Ct. 1322 has ruled that "the law of a state, although enacted in the exercise of powers not controverted, must yield when incompatible with federal legislation."

For your state to identify Enrolled Agents as nonprofessional and recognize CPA's and Attorneys as professional is a violation of the rights of the Enrolled Agents in West Virginia.

Please give this matter your most urgent attention.

Respectfully submitted,

  
Rick Wilshire, EA, Director of  
State Government Affairs

cc: Mr. David Grubb, Delegate  
Mr. Paul A. Ryker, Attorney

WEST VIRGINIA  
SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #3

FILED  
1991 AUG -9 PM 12: 57  
OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE  
AND  
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: STATE TAX DIVISION TITLE NUMBER: 110

CITE AUTHORITY W. VA. CODE § 11-10-5

AMENDMENT TO AN EXISTING RULE: YES X NO     

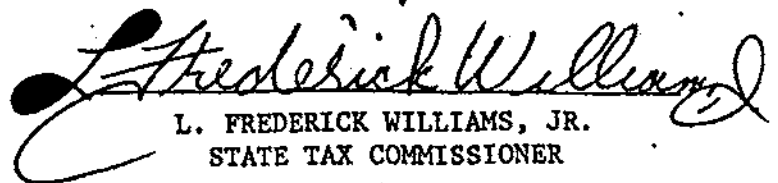
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 15

TITLE OF RULE BEING AMENDED: CONSUMERS SALES AND SERVICE TAX  
AND USE TAX

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED:                     

TITLE OF RULE BEING PROPOSED:   

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

  
L. FREDERICK WILLIAMS, JR.  
STATE TAX COMMISSIONER

RECEIVED

AUG 09 1991

Legislative Rule Making  
Review Committee

PROPOSED REG.

property owners. The asphalt which ABC Company manufactures and sells or uses or consumes will be taxed as follows:

1. Consumers sales and service tax must be collected on sales of asphalt to other contractors and persons unless ABC Company accepts in good faith an exemption certificate or a valid direct pay permit number.

2. As of October 1, 1990, asphalt which ABC Company manufactures and uses or consumes in building or resurfacing roads under a single government contract for materials and labor is exempt from subject to consumers sales and use tax, as manufacturing for sale to the governmental entity. See Section 109 of these regulations for transition rules concerning the taxing of materials for use in governmental contracts.

3. Asphalt which ABC Company manufactures and uses or consumes in building or resurfacing roads, parking lots and driveways etc. in this State for other persons is subject to consumers sales and service tax based on the gross value of the asphalt so used or consumed.

§ 110-15-8. Furnishing of Services Included; Exceptions. - The consumers sales and service tax and the use tax shall apply not only to selling tangible personal property, but also to the furnishing of all services, except professional services, personal services, those services furnished by corporations subject to the control of the Public Service Commission, contracting services, and services rendered by an employee to his employer.

8.1 Sales of the following services are excepted from the imposition of the consumers sales and service tax and the use tax.

8.1.1 Professional Services.

8.1.1.1 Professional services, as defined in Section 2 of these regulations, are rendered by physicians, dentists, lawyers, certified public accountants, public accountants, optometrists, architects, professional engineers, registered professional nurses, veterinarians, licensed physical therapists, ophthalmologists, chiropractors, podiatrists, embalmers, osteopathic physicians and surgeons, registered sanitarians, pharmacists, psychiatrists, psychoanalysts, psychologists, landscape architects, registered professional court reporters, licensed social workers, licensed real estate appraisers and certified real estate appraisers licensed in accordance with W. Va. Code § 37-14-1 et seq., and licensed real estate brokers, licensed professional counselors. Persons who provide services classified as nonprofessional for consumers sales and service tax purposes include interior decorators, private detectives/investigators, security guards, bookkeepers, foresters, truck driving schools, nursing home administrators, hearing aid dealers/fitters, contractors, electricians, enrolled agents, musicians, auctioneers, and hospital administrators; the foregoing listing is not all-inclusive but intended as containing examples of trades and occupations. Generally, the Tax Department will only recognize as "professional" the activities indicated as such in Chapter 38 of the West Virginia Code. The determination as to whether other activities are "professional" in nature will be determined by the State Tax Division on a case-by-case basis unless the Legislature amends W. Va. Code § 11-15-1 et seq. to provide that a specified

8.1.1.1 Professional services, as defined in Section 2 of these regulations, are rendered by physicians, dentists, lawyers, certified public accountants, public accountants, optometrists, architects, engineers, registered professional nurses, veterinarians, physical therapists, ophthalmologists, chiropractors and licensed real estate brokers. Generally, the Tax Department will only recognize as "professional" the activities indicated as such in Chapter 30 of the West Virginia Code. The determination as to whether other activities are "professional" in nature will be determined on a case-by-case basis. When making a determination as to whether other activities fall within the "professional" classification, the Tax Department will consider such things as the level of education required for the activity, the nature and extent of nationally recognized standards for performance, licensing requirements on the State and national level, and the extent of continuing education requirements.

8.1.1.2 Services for which a professional license is required and which are provided by corporations, regardless of whether such corporations are professional or business, are not subject to the sales and service tax. Likewise, non-professional services provided by a professional corporation are subject to the tax.

8.1.1.3 Professional persons who make sales of tangible personal property or who engage in activities which are not professional services shall collect sales and service tax on such sales or services. For example, kennel services provided by a veterinarian are subject to tax.

8.1.1.4 Professional services shall not be related to the quality of performance or expertise of the person performing the service. Professional, when used in these regulations, is not synonymous with excellence. It is the type of service which must be professional, not the quality or manner in which the service is performed. To illustrate: A doctor's services to his patients are professional services whether or not his patients are satisfied with his performance; or, an individual may excel at repairing television sets, but his type of service (repair of television sets) is not considered professional under these regulations even though the manner in which he performs is considered "professional" by his customers or by other television repairmen.

#### 8.1.2 Personal Services.

8.1.2.1 Personal services shall include those services done to or performed on the person of an individual, and such services must be directly from one person to another. Personal services include barbering, massaging, nursing, manicuring, hair setting, hair washing and dyeing, services of dental hygienists, shoe-shining while the shoes are worn by the customer, and similar services. The determination as to whether other services are personal in nature will be determined on a case-by-case basis. For further information See Section 35 of these regulations.

8.1.2.2 As provided in Section 2 of these regulations, personal services are services rendered to the person of an individual without, at the same time, selling tangible personal property: Provided, That the sale of tangible personal property used and consumed in the rendering of the personal service shall be subject to tax only if stated as a separate charge. In order for the service to be personal in nature, it is necessary for there to be

**JANUARY 7**



**AGENDA**

**LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

**TUESDAY, JANUARY 7, 1992  
4:00 - 7:00 p.m.**

**Senate Finance Committee Room, M-451**

1. Approval of Minutes Meetings January 6, 1991
2. Review of Legislative Rules:
  - a. Tax, Division of - Consumers Sales and Service Tax and Use Tax
  - b. Pharmacy, Board of - Licensure of Wholesale Drug Distributors
  - c. Pharmacy, Board of - Mail Order House
  - d. Risk and Insurance Management, Board of - Discontinuation of Professional Malpractice Insurance
  - e. Insurance Commissioner - Guaranteed Loss Ratios as Applied to Individual Sickness and Accident Insurance Policies
  - f. Insurance Commissioner - "Tail" Malpractice Insurance Covering Certain Medical and Allied Health Care Providers
  - g. Insurance Commissioner - Regulation of Credit Life Insurance and Credit Accident and Sickness Insurance
  - h. Insurance Commissioner - Examiners' Compensation, Qualifications and Classification
  - i. Insurance Commissioner - Permanent Regulations on Medicare Supplement Insurance
  - j. Crime, Delinquency and Correction, Governor's Committee - Protocol for Law Enforcement Response to Domestic Violence
  - k. Public Safety, Division of - Modified Vehicle Inspections
3. Other business:

Tuesday, January 7, 1992

4:00 - 7:00 p.m.

Legislative Rule-Making Review Committee  
(Code §29A-3-10)

Keith Burdette  
ex officio nonvoting member

Robert "Chuck" Chambers,  
ex officio nonvoting member

Senate

House

Wooton, Chairman (absent)  
Chafin  
Manchin, J.  
Tomblin  
Wiedebusch (absent)  
Boley (absent)

Grubb, Chairman  
Burk  
Faircloth (absent)  
Roop  
Love  
Gallagher

The meeting was called to order by Mr. Grubb, Co-Chairman.

The minutes of the January 6, 1991 meeting were approved.

Mr. Grubb told the Committee that the first item on the agenda was the continued consideration of the rule proposed by the Division of Tax, Consumers Sales and Service Tax and Use Tax. Paul Ryker, representing Padget Business Services, and Alan Mierke, Acting Tax Commissioner, commented on the proposed rule.

Mr. Manchin moved that Section 8.1 of the proposed rule be amended to include "enrolled agents" as professionals. The motion was adopted.

Mr. Love moved that the proposed rule be approved as modified and amended. The motion was adopted.

Debra Graham, Committee Counsel, reviewed her abstract on the rule proposed by the Board of Pharmacy, Licensure of Wholesale Drug Distributors, and stated that the Board had agreed to technical modifications. Larry Barker, Board member, answered questions from the Committee.

Mr. Chafin moved that the proposed rule be approved as modified. The motion was adopted.

Ms. Graham explained the rule proposed by the Board of Pharmacy, Mail Order House and stated that the Board had agreed to technical modifications. Mr. Barker commented on the proposed rule.

Mr. Manchin moved that the proposed rule be approved as modified. The motion was adopted.



Ms. Graham, reviewed her abstract on the rule proposed by the Board of Risk and Insurance Management, Discontinuation of Professional Malpractice Insurance and stated that the Board had agreed to a technical modification. Mark McAllister, representing the Board, commented on the proposed rule and answered questions from the Committee.

Mr. Roop moved that the proposed rule be approved as modified. The motion was adopted.

Michael McThomas, Associate Counsel, reviewed his abstract on the rule proposed by the Insurance Commissioner, Guaranteed Loss Ratios as Applied to Individual Sickness and Accident Insurance Policies and stated that the Commissioner had agreed to technical modifications. Keith Huffman, Counsel to the Commissioner, and Hanley Clark, Insurance Commissioner, answered questions from the Committee.

Mr. Love moved that the proposed rule be approved as modified. The motion was adopted.

Mr. McThomas reviewed the rule proposed by the Insurance Commissioner, "Tail" Malpractice Insurance Covering Certain Medical and Allied Health Care Providers and stated that the Commissioner had agreed to technical modifications.

Mr. Chafin moved that the proposed rule be approved as modified. The motion was adopted.

Mr. Manchin moved that the Committee reconsider its action whereby it recommended that the rule proposed by the Board of Pharmacy, Mail Order House, be approved as modified. The motion was adopted.

Mr. Manchin moved that the proposed rule be amended to include a section requiring freedom of choice.

Mr. Grubb ruled that the motion was out of order as the proposed amendment requires an amendment to the statute.

Mr. Manchin appealed the ruling of the Chair. The ruling of the Chair was not sustained.

Mr. Manchin moved that the proposed rule with the pending amendment be placed at the foot of the agenda. The motion was adopted.

Mr. McThomas explained that the rule proposed by the Insurance Commissioner, Regulation of Credit Life Insurance and Credit Accident and Sickness Insurance had been withdrawn.

Mr. Gallagher moved that the rule proposed by the Board of Pharmacy, Mail Order House, be laid over until the Committee's next meeting. The motion was adopted.

Mr. McThomas reviewed his abstract on the rule proposed by the Insurance Commissioner, Examiners' Compensation, Qualifications and Classification and stated that the Commissioner had agreed to technical modifications.

Mr. Roop moved that the proposed rule be approved as modified. The motion was adopted.

Mr. McThomas explained the rule proposed by the Insurance Commissioner, Permanent Regulations on Medicare Supplement Insurance, and stated that the Commissioner had agreed to technical modifications.

Mr. Chafin moved that the proposed rule be approved as modified. The motion was adopted.

Mr. McThomas reviewed his abstract on the rule proposed by the Governor's Committee on Crime, Delinquency and Correction, Protocol for Law Enforcement Response to Domestic Violence. He explained that he believed that the Governor's Committee had exceeded the scope of its authority by providing for warrantless arrests and that the Governor's Committee was unwilling to modify the proposed rule. Mr. McThomas distributed a proposed amendment to the proposed rule. James Albert, Executive Director of the Governor's Committee, clarified his Committee's position with respect to the proposed rule and answered questions from the Committee.

Mr. Love moved that the proposed rule be amended in accordance with Mr. McThomas' suggested amendments. The motion was adopted.

Mr. Love moved that the proposed rule be approved as modified and amended. The motion was adopted.

Mr. McThomas explained the rule proposed by the Division of Public Safety, Modified Vehicle Inspections and told the Committee that the proposed rule conforms with the Emergency Rule which was amended at the request of the Committee. First Sergeant Robert Blankenship, representing the Division of Public Safety, responded to questions from the Committee.

Mr. Love moved that Sections 2.2.3.3 and 2.2.3.4 of the proposed rule be amended by deleting the word "two" in each section and inserting in lieu thereof, the word "one" in each section. The motion was adopted.

Mr. Roop moved that the proposed rule be approved as amended. The motion was adopted.

The meeting was adjourned.

ROLL CALL - LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

DATE: 1-7-92

TIME: 4:00 - 7:00 p.m.

NAME

Present	Absent	Yeas	Nays
✓			
✓			
✓			
✓			
✓			
✓			
✓			
✓			

Chambers, Robert "Chuck", Speaker

Grubb, David, Co-Chair

Burk, Robert W., Jr.

Faircloth, Larry V.

Brian A. Gallagher

Love, Sam

Roop, Jack

Burdette, Keith, President

Wooton, William, Co-Chair

Chafin, Truman H.

Manchin, Joe, III

Tomblin, Earl Ray

Boley, Donna

Wiedebusch, Larry

TOTAL

RE: \_\_\_\_\_  
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REGISTRATION OF PUBLIC  
AT  
COMMITTEE MEETINGS  
WEST VIRGINIA LEGISLATURE

COMMITTEE: Leg. Rule Making Review

DATE: 1-7-92 4:00 pm

NAME	ADDRESS	REPRESENTING	PLEASE CHECK (X) IF YOU DESIRE TO MAKE A STATEMENT
Please print or write plainly			
Paul Ryker	Hghtn WV	VHS, Inc. d/b/a Padgett Bus Serv	X
AARON G. REAMES	6830 DYER ET SPRINGFIELD, VA 22150	NAT'L ASSOC OF ENROLLED AGENTS ROCKVILLE, MD	X
VERN SMITH	Hghtn WV	VHS INC	X
LARRY BARKER	236 CAPITOL ST CHAS, WV 25306	BOARD OF PHARMACY	X
JOHN MONTGOMERY	CHARLESTON	TAX & REVENUE	AS NEEDED
INDIAS McVee	CHAS, WV	DEPT OF TAX & REV.	"
David B. McAlister	1033 Quailview #700	W.Va. Legal Services Plcy	✓
MARK McCALESTER	Risk: INS		AS NEEDED
BOB MILLS	Risk: INS		"
ALAN MIETRICE	TAX	TAX	
JAMES M. ALBERT	Charleston	Gov's. Comm. on Crime, Del., Conv	As needed ✓
Keith Huffman	Chas.	W Va Ins Comm	" "
Hanley Clark	Chas.	"	" "
Donna Walker	Chas.	"	
EVALYN ANDERSON	Chas.	"	" "
John DAVIDSON	Chas.	"	
Jenny Gladwell	CHAS.	"	





Met

AMENDMENTS TO DOMESTIC VIOLENCE RULE

On page 1, section 2.1 by deleting "member of the Department of Natural Resources,"

On page 1, by deleting subsection 2.2.4

On page 1, by deleting section 3

On page 4, section 6.2.1 after the word "home" by adding "or business"

On page 6, section 6.4.6 by deleting the word "abuse"

On page 6, section 7.2.3 after the words "protective order" by adding "and the the officer has actual knowledge that a valid protective order exists."

On page 6, by deleting sections 7.2.4 and 7.2.5

On page 7, by deleting section 7.3.5

On page 8, section 7.5 by adding the following proviso "Provided, that this section does not authorize a search of the premises unless a search warrant has been obtained or consent was given by the occupant of the premises."

On page 8, by deleting section 7.6 and 7.7

On page 8, section 8.1 by deleting the words "the officer determines that a warrantless arrest is appropriate or that" and by deleting "in the event that a warrantless arrest for a misdemeanor is authorized" and by deleting the word "If" from the sentence "If a warrant is necessary..."

On page 9, by adding the following:

9.1.4 Advise the victim or victims that upon request of the victim or victims the officer will provide transportation for, or facilitate transportation of the victim or victims to a shelter or the appropriate court where there is reasonable cause to believe that such victim or victims have suffered or are likely to suffer physical injury.

9.1.5 Provide transportation for or facilitate transportation of the victim or victims upon the request of such victim or victims to a shelter or the appropriate court where there is reasonable cause to believe that such victim or victims have suffered or are likely to suffer physical injury.

On page 10, section 10.7.1 by deleting the words "should arrest the assailant upon probable cause to believe that a crime has been committed" and in lieu thereof insert the following "should arrest the assailant if the officer observes the commission of a crime"

On page 11, section 11.3 by replacing the word "advise" with "inform" and deleting "Such condition may include..." to the remainder of section 11.3



**JANUARY 16**



**AGENDA**

**LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

**January 16, 1992  
4:00 p.m.**

**Senate Finance Committee Room, M-451**

1. Approval of Minutes Meetings January 7, 1992
2. Review of Legislative Rules:
  - a. Pharmacy, Board of - Mail Order House
  - b. Labor, Division of - West Virginia Contractor's Licensing Act
3. Other business:

**SPECIAL MEETING**

Thursday, January 16, 1992

4:00 - 5:00 p.m.

Legislative Rule-Making Review Committee  
(Code §29A-3-10)

Keith Burdette  
ex officio nonvoting member

Robert "Chuck" Chambers,  
ex officio nonvoting member

Senate

House

Wooton, Chairman  
Chafin  
Manchin, J.  
Tomblin  
Wiedebusch (absent)  
Boley

Grubb, Chairman  
Burk  
Faircloth  
Roop  
Love  
Gallagher

The meeting was called to order by Mr. Wooton, Co-Chairman.

The minutes of the January 7, 1991, meeting were approved.

Mr. Wooton told the committee that, based on the concern of some Committee members, the State Tax Commissioner has agreed to further modify the Severance Tax Rule by deleting the word "blending" from Section 4.1.1 of the proposed rule. Alan Mierke, Acting State Tax Commissioner, responded to questions from the Committee.

Mr. Manchin moved that the State Tax Commissioner withdraw the modification to the proposed rule filed in the Secretary of State's Office on the January 10, 1992, and that the Commissioner file a modification to the proposed rule containing the modification regarding blending. The motion was adopted.

Debra Graham, Committee Counsel, explained that the rule proposed by the Board of Pharmacy, Mail Order House, had been laid over at the Committee's last meeting with a motion pending by Mr. Manchin that the proposed rule be amended by adding a section on freedom of choice. Larry Barker, Board Member, commented on the proposed amendment.

Mr. Manchin's motion was adopted

Ms. Graham reviewed her abstract on the rule proposed by the Division of Labor, West Virginia Contractor's Licensing Act, and stated that the Division has agreed to technical modifications. Roy Smith, Commissioner of Labor, distributed proposed modifications to sections 4.7 and 5.4 of the proposed rule and answered questions from the Committee. Mike Clowser, representing the Contractors Association of West Virginia, and Winfield Strock, Chairman of the Contractor Licensing Board, also answered questions from the Committee.

Mr. Grubb moved that sections 4.7 and 5.4 of the proposed rule be modified in accordance with the proposed modifications distributed by the Division.

Mr. Grubb's motion was adopted.

Mr. Manchin moved that Section 5.5 of the proposed rule be modified to allow a 15 day grace period for the renewal of licenses and that the penalty for late renewal be reduced from \$250 to \$100. The motion was adopted.

Mr. Manchin moved that the proposed rule be approved as modified. The motion was adopted.

Mr. Grubb moved that the Committee's staff be directed to draft a bill of authorization for each rule considered by the Committee, to cause the bills to be introduced in both Houses under the sponsorship of the respective Committee Chair and to prepare and submit the Committee's report to the Legislature. The motion was adopted.

The meeting was adjourned.

ROLL CALL - LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

DATE: JANUARY 16, 1992

TIME: 4:00 p.m.

NAME

Present      Absent      Yeas      Nays

Chambers, Robert "Chuck", Speaker  
 Grubb, David, Co-Chair  
 Burk, Robert W., Jr.  
 Faircloth, Larry V.  
 Gallagher, Brian A.  
 Love, Sam  
 Roop, Jack  
  
 Burdette, Keith, President  
 Wooton, William R., Co-Chair  
 Boley, Donna  
 Chafin, Truman H.  
 Manchin, Joe, III  
 Tomblin, Earl Ray  
 Wiedebusch, Larry  
 TOTAL

<u>Present</u>	<u>Absent</u>	<u>Yeas</u>	<u>Nays</u>
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RE: \_\_\_\_\_  
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REGISTRATION OF PUBLIC  
AT  
COMMITTEE MEETINGS  
WEST VIRGINIA LEGISLATURE

COMMITTEE: \_\_\_\_\_

DATE: \_\_\_\_\_

NAME	ADDRESS	REPRESENTING	PLEASE CHECK (X) IF YOU DESIRE TO MAKE A STATEMENT
Please print or write plainly			
LARRY BARKER	DUNBAR	BO. OF PHCY	X
Wing Stock	CHARLESTON	CONTRACTORS LICENSING	
Roy Smith	Chas	Div. of Labor	X
Jud Cooper	Chas	505	
ROBERT WHITLOCK	CHARLESTON	WV HOME BUILDERS ASSOC	
BETH THOMASSON	CHAS	WV HOME BUILDERS	IF NEEDED
Bob Miller	CHAS	Division of Labor	
Andy Brown	Chas	Labor	IF NEEDED
GEORGE CARENBAUER	CHARLESTON	Skyles + Johnson	
MARK POLEN	Charleston	WV COAL ASSOCIATION	
Missy Woolverton	Charleston	WV-CAG	
MIKE CLOUSER	CHAS.	Contractor Assn of W.Va.	
David Wilkinson	Chas.	Associated Press	IF NEEDED

No licensed pharmacist or pharmacy or any other person, partnership, corporation, or any entity who is regulated by the West Virginia Board of Pharmacy shall enter into any agreement or arrangement with any private or public third party payor, insurance company, health maintenance organization, health care service corporation, hospital or medical service corporation, or employee benefit plan whereby in any way a patient is denied, limited, or restricted to choose a pharmacist or pharmacy or pharmaceutical service, or whereby in any way a patient is denied face-to-face oral consultation with a pharmacist licensed by the West Virginia Board of Pharmacy.

- (h) residential contractor; or
- (i) specialty contractor.
  - (1) drywall specialty contractor
  - (2) excavation specialty contractor
  - (3) landscaping specialty contractor
  - (4) masonry specialty contractor
  - (5) remodeling and repair specialty contractor
  - (6) residential asphalt specialty contractor
  - (7) residential concrete specialty contractor
  - (8) residential pools specialty contractor
  - (9) residential siding specialty contractor
  - (10) roofing specialty contractor

5.3. The Board will conduct examinations quarterly and at such other times as it considers necessary. The Board shall make available to all applicants, on request, an annual schedule of examination locations and dates. The Board shall notify all applicants for examination of the date, place, and time of examination at least fifteen (15) days prior to the scheduled date.

5.4. The applicant must take an examination in each classification for which a license is desired. Examinations shall be made available by a private testing agent(s) approved and certified by the Board to conduct such examinations. Examination fees will be charged for each classification examination requested and shall be the responsibility of the individual applicant. All examination fee(s) shall be paid directly to the approved testing agent.

The individual taking an examination on behalf of an entity seeking licensure must be the owner, a partner, a corporate officer or a full-time employee of the entity. Upon the termination of the relationship of the individual who took the examination to obtain a license for an entity, the entity shall, within thirty (30) days of that termination, designate a new individual for re-examination.

## Section 6. DISCIPLINARY POWERS OF THE BOARD

6.1. The Board may take the following disciplinary actions for causes defined in WV Code 21-11-14:

- (a) permanently revoke a license;
- (b) suspend a license for a specified period;
- (c) censure or reprimand a licensee;
- (d) impose limitations or conditions on the professional practice of a licensee;



WV Code 21-11-15(c), and payment the appropriate license fee, the Board shall issue a contractor's license without examination.

4.4. Any person desiring a license shall, at the time of application, pay the annual fee of \$ 100.00. Except that in the case of a sole proprietorship conducting business only as an Electrical Contractor where the business owner holds an electrician's license issued under the provisions WV Code 29-3B-4 and provides proof thereof to the commissioner, the annual fee is \$20.00.

4.5. A license issued under the provisions of this rule is valid for twelve months from the date of issue unless sooner revoked for cause.

4.6. The holder of a valid license may renew the license on or before the expiration date by making renewal application on forms provided by the Board and payment of the appropriate fee as set forth in section 4.4 of this rule. If the renewal application is made after the expiration date, the applicant is required to pay, in addition to the annual renewal fee, a penalty fee of \$250.00: Provided, that no license which has lapsed for a period of two years or more may be renewed. A renewal of a license may be conditional by action of the Board under the provisions of WV Code 21-11-13 and 21-11-14. The Board will provide each licensee with a renewal notice at least thirty (30) days in advance of the expiration date.

4.7. A copy of the license must be posted in a conspicuous position at every construction site where work is being done by the contractor. The contractor's license number shall be included in all contracting advertisements and all fully executed and binding contracts. No bid shall be accepted which does not bear on its face, the contractor's license number.

4.8. The building inspector or other authority of any incorporated municipality or other political subdivision in this state charged with the duty of issuing building or other permits for construction as defined in this rule, shall not issue such permits to any person who does not possess a valid contractor's license when required by this rule.

4.9. The Board may issue a conditional license to a person for bidding purposes only. A person may apply for a conditional license on special forms provided by the Board and the payment of a conditional license fee of \$ 50.00. A conditional license is valid for sixty (60) days from the date of issue. Under no circumstances may a person perform work or services for compensation under a conditional license. If the holder of a conditional license becomes a successful bidder and will be performing contracting work in West Virginia, the holder must make application for a contractor's license before work can commence.