



Notice of Permanent Rules for Fair Trade Practices

This explanatory statement concerns the Washington State Liquor Control Board's adoption of rules for Fair Trade Practices.

The Administrative Procedure Act (RCW 34.05.325(6)) requires agencies to complete a concise explanatory statement before filing adopted rules with the Office of the Code Reviser. This statement must be provided to anyone who gave comment about the proposed rulemaking.

Once persons who gave comment during this rulemaking have had a chance to receive this document, the Liquor Control Board will file the amended rules with the Office of the Code Reviser. These rule changes will become effective 31 days after filing (approximately October 22, 2015).

The Liquor Control Board appreciates your involvement in this rule making process. If you have any questions, please contact Karen McCall, Rules Coordinator, at (360) 664-1631 or e-mail at rules@lcb.wa.gov.

What are the agency's reasons for adopting this rule?

A petition for rulemaking was submitted by stakeholders to clarify RCW 66.28.170 **Discrimination in price to purchaser for resale prohibited—Price differentials**. The petition stated that small liquor stores were being charged more per bottle for purchases of larger quantities of spirits than on-premises licensees were being charged for smaller volume purchases.

Summary of all public comments received on this rule proposal.

Many comments were received on this rulemaking. A breakdown of comments on the proposed rules is as follows:

CR 102 – filed November 6, 2013 WSR 13-22-095. Public hearing held April 23, 2014;

7 comments received including large stakeholder groups representing several thousand on-premises licensees, manufacturers and distributors, and off-premises licensees:

Commenters asserted that the board does not have the authority to restrict spirits and wine pricing at the wholesale level to restaurants and bars; Washington law prohibits price discrimination but authorizes price differentials under certain conditions; "Channel pricing" is a bona fide business practice for other types of goods; Prohibiting channel



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pricing to on-premises licensees will harm on-premises licensees; That in passing I-1183 the citizens of Washington voted to end uniform pricing requirements and allow flexible pricing for the sales of spirits and wine based upon business reasons.

LCB response: The board is granted the authority to adopt rules under RCW 66.08.030 (12):

- The power of the board to make regulations under chapter [34.05](#) RCW extends to: (12) Prescribing the conditions, accommodations, and qualifications requisite for the obtaining of licenses to sell beer, wines, and spirits, and regulating the sale of beer, wines, and spirits thereunder;

Alcohol cannot be marketed and regulated as other goods. Alcohol privatization did not change the fact that alcohol is different from other products and should be regulated accordingly. The citizens who voted for I-1183 did not intend to abandon reasonable regulation, and did not authorize the Liquor and Cannabis Board to abdicate its responsibility to adopt and enforce such regulations. In the final version of the proposed rules the board allows differential pricing other than by volume under specific circumstances

24 comments received from former state and contract store off-premises licensees:

The board should not allow distributors to sell product to on-premises licensees at a lower price than off-premises licensees. Discounts should be based on volume of product purchased for all licensees. Distributors selling to on-premises licensees at a lower price has done a great deal of financial harm to off-premises licensees.

LCB response: The board determined at this stage in this rulemaking that channel pricing would not be allowed unless it was based on volume purchased. An exception was made in the final rules.

2 comments received.

Allow discounts for spirits and wine if a certain percentage of the back bar is purchased from a particular distributor's product line. This helps small restaurant and bar businesses.

LCB response: This practice is known as "tie-in" sales and considered a form of inducement. The board has prohibited this practice in the rules.

4 comments received including large stakeholder groups representing several thousand on-premises licensees, and off-premises licensees:

Volume discounts over time should be allowed for small restaurants. Central warehousing is not an option for small restaurants.

LCB response: This practice is considered a form of money's worth and is prohibited in RCW 66.28.305.

5 comments received including large stakeholder groups representing several thousand on-premises licensees, and off-premises licensees.

Allow volume discounts to a licensee with several locations for all products for all locations with delivery being to each individual location.



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LCB response: In the first draft of the proposed rules the board prohibited this practice. In the final rules the board made an exception under specific conditions.

5 comments received.

The marketplace should be distinguished between on and off-premises licensees. They are not the same market.

LCB response: The rules allow on and off-premises licensees to be considered as separate marketplaces, as there are some differences in how products are sold by the two business types.

1 comment was received from a stakeholder representing several thousand on-premises licensees.

A Small Business Economic Business Impact Survey (SBEIS) needs to be completed.

LCB response: The board did send out a SBEIS to stakeholders on July 24, 2014.

Supplemental CR 102 – filed June 4, 2014 WSR 14-12-099.

5 comments received, including large stakeholder groups representing several thousand on-premises licensees, manufacturers and distributors, and off-premises licensees asserted:

The board does not have the authority to restrict spirits and wine pricing at the wholesale level to restaurants and bars. Washington law prohibits price discrimination but authorizes price differentials under certain conditions. Price differentials should be allowed under other bona fide business practices.

LCB response: The board is granted the authority to adopt rules under RCW 66.08.030 (12):

- The power of the board to make regulations under chapter [34.05](#) RCW extends to: (12) Prescribing the conditions, accommodations, and qualifications requisite for the obtaining of licenses to sell beer, wines, and spirits, and regulating the sale of beer, wines, and spirits thereunder;

Alcohol cannot be marketed and regulated as other goods. Alcohol privatization did not change the fact that alcohol is different from other products and should be regulated accordingly. The citizens who voted for I-1183 did not intend to abandon reasonable regulation, and did not authorize the Liquor and Cannabis Board to abdicate its responsibility to adopt and enforce such regulations. The final rules adopted by the board allow differential pricing other than by volume under specific circumstances.

11 comments received from on and off—premises retailers and wineries.

Allow licensees to negotiate prices with the distributors for spirits and wine.

LCB response: Price differentials are allowed based on volume purchased. The final rules adopted by the board allows differential pricing other than by volume under specific conditions.

5 comments received from former state and contract store off-premises licensees:



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The board should not allow distributors to sell product to on-premises licensees at a lower price than off-premises licensees. Discounts should be based on volume of product purchased for all licensees. Distributors selling to on-premises licensees at a lower price has done a great deal of financial harm to off-premises licensees.

LCB response: The board determined at this stage in this rulemaking that differential pricing between on and off-premises licensees would be allowed based on volume of product purchased. This was changed in the final rules.

2 comments received including a large stakeholder group representing several thousand on-premises licensees.

Allow discounts for spirits and wine if a certain percentage of the back bar is purchased from a particular distributor's product line. This helps small restaurant and bar businesses.

LCB response: This practice is known as "tie-in" sales and considered a form of inducement. The board has prohibited this practice in the rules.

4 comments received including a large stakeholder group representing several thousand on-premises licensees and a stakeholder group representing distributors. The use of "family plans" in the proposed rule is incorrect. "Family plans" to the distributor means a combination of products within the same family. It doesn't mean requiring a retailer to purchase a percentage of their back bar products from that particular distributor to receive lower price.

LCB response: "Family plans" was removed from the rule. Requiring a retailer to purchase a percentage of their back bar to receive a lower price remains in rule and is prohibited.

2 comments were received including a large stakeholder group representing several thousand on-premises licensees to allow a discount if a retailer purchases a percentage of their back bar from a distributor. One comment was received from a stakeholder group representing distributors to prohibit this practice.

LCB response: This practice is known as "tie in sales" and is prohibited.

2 comments received including large stakeholder groups representing several thousand on-premises licensees, and off-premises licensees:

Volume discounts over time should be allowed for small restaurants. Central warehousing is not an option for small restaurants.

LCB response: This practice is considered a form of money's worth and is prohibited in RCW 66.28.305.

4 comments received including large stakeholder groups representing several thousand on-premises licensees, and off-premises licensees.

Allow volume discounts to a licensee with several locations for all products for all locations with delivery being to each individual location.

LCB response: In the first draft of the proposed rules the board prohibited this practice. In the final rules the board made an exception under specific conditions.



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3 comments received.

The marketplace should be distinguished between on and off-premises licensees. They are not the same market.

LCB response: The rules allow on and off-premises licensees to be considered as separate marketplaces.

1 comment received from a stakeholder group representing former state and contract liquor stores.

The marketplace should not be distinguished between on and off-premises licensees. They are the same market.

LCB response: The rules allow on and off-premises licensees to be considered as separate marketplaces, as there are some differences in how products are sold by the two business types.

2nd Supplemental CR 102 – filed December 17, 2014 WSR 15-01-093 (Small Business Economic Impact Statement also filed). Public hearing held February 11, 2015.

4 comments received including large stakeholder groups representing several thousand on-premises licensees, manufacturers and distributors, and off-premises licensees, asserting:

The board does not have the authority to restrict spirits and wine pricing at the wholesale level to restaurants and bars. Washington law prohibits price discrimination but authorizes price differentials under certain conditions. Price differentials should be allowed under other bona fide business practices.

LCB response: The board is granted the authority to adopt rules under RCW 66.08.030 (12):

- The power of the board to make regulations under chapter [34.05](#) RCW extends to: (12) Prescribing the conditions, accommodations, and qualifications requisite for the obtaining of licenses to sell beer, wines, and spirits, and regulating the sale of beer, wines, and spirits thereunder;

Alcohol cannot be marketed and regulated as other goods. Alcohol privatization did not change the fact that alcohol is different from other products and should be regulated accordingly. The citizens who voted for I-1183 did not intend to abandon reasonable regulation, and did not authorize the Liquor and Cannabis Board to abdicate its responsibility to adopt and enforce such regulations. In the final rules adopted by the board allow differential pricing other than by volume under specific circumstances.

10 comments received from former state and contract store off-premises licensees:

The board should not allow distributors to sell product to on-premises licensees at a lower price than off-premises licensees. Discounts should be based on volume of product purchased for all licensees. Distributors selling to on-premises licensees at a lower price has done a great deal of financial harm to off-premises licensees.



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LCB response: The board determined at this stage in this rulemaking that channel pricing would not be allowed unless it was based on volume purchased. An exception was made in the final rules.

1 comment received from a stakeholder group representing former state and contract liquor stores.

The marketplace should not be distinguished between on and off-premises licensees. They are the same market.

LCB response: The rules allow on and off-premises licensees to be considered as separate marketplaces, as there are some differences in how products are sold by the two business types.

2 comments received from stakeholder groups representing thousands of on-premises and off-premises licensees.

Delay implementation of the rules until a court can decide the appropriate scope of pricing regulations following I-1183.

LCB response: The board doesn't feel it is appropriate to stay the effective date of the rules in order to allow a legal challenge to be brought.

3rd Supplemental CR 102 – filed July 15, 2015 WSR 15-15-096.

1 comment received from a stakeholder group representing distributors.

Pricing for new and established spirits products to on-premises licensees should be treated the same. Consumers are introduced to products at restaurants and bars. A six month period makes no sense in the context of introducing consumers to a product. Pricing for wine and spirits should be treated the same.

Volume discounts should not be allowed if the product is to be delivered to multiple locations licensed by the same legal entity.

LCB response: The rules allow for differential pricing to on-premises licensees for new spirits products to the market for a period of six months. The board realizes this as a marketing tool for customers to be introduced to new spirits products to the market. Six months is a reasonable amount of time to market these new products. Established products are not new to the market and are known by consumers.

Price differentials for wine are allowed in the rules. A winery listed on a restaurant's wine list allows wine to be introduced to consumers. Many vintages are limited in quantity.

The rules allow volume discounts for spirits to a retailer purchasing product for all of their licensed locations and the distributor is allowed to deliver the product to each of the locations as long as they are licensed under the same legal entity. The rule does not require the delivery to multiple locations but allows it if the distributor chooses to do so. The rule also does not prohibit the distributor from charging a delivery charge for each location product is delivered to.

2 comments received from stakeholder groups representing several thousand on-premises and off-premises licensees.



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Delay implementation of the rules until a court can decide the appropriate scope of pricing regulations following I-1182.

LCB response: The board doesn't feel it is appropriate to stay the effective date of the rules.

3 comments received including large stakeholder groups representing several thousand on-premises licensees, manufacturers and distributors, and off-premises licensees asserted:

The board does not have the authority to restrict spirits and wine pricing at the wholesale level to restaurants and bars. Washington law prohibits price discrimination but authorizes price differentials under certain conditions. Price differentials should be allowed under other bona fide business practices.

LCB response: The board is granted the authority to adopt rules under RCW 66.08.030 (12):

- The power of the board to make regulations under chapter [34.05](#) RCW extends to: (12) Prescribing the conditions, accommodations, and qualifications requisite for the obtaining of licenses to sell beer, wines, and spirits, and regulating the sale of beer, wines, and spirits thereunder;

Alcohol cannot be marketed and regulated as other goods. Alcohol privatization did not change the fact that alcohol is different from other products and should be regulated accordingly. The citizens who voted for I-1183 did not intend to abandon reasonable regulation, and did not authorize the Liquor and Cannabis Board to abdicate its responsibility to adopt and enforce such regulations. In the final rules adopted by the board allow differential pricing other than by volume under specific circumstances. The commenters would interpret the law that prohibits price discrimination but allow it in certain circumstances so that the exceptions are so broad that the statutory prohibition on price discrimination is meaningless.

1 comment received from a stakeholder group representing former state and contract liquor stores.

The marketplace should not distinguish between on and off-premises licensees. They are the same market.

Volume discounts should not be allowed if the product is to be delivered to multiple locations licensed by the same legal entity.

Pricing for wine and spirits should be treated the same.

LCB response: The rules distinguish on and off-premises licensees as separate marketplaces.

The rules allow volume discounts for spirits to a retailer purchasing product for all of their licensed locations and the distributor is allowed to deliver the product to each of the locations as long as they are licensed under the same legal entity. The rule does not require the delivery to multiple locations but allows it if the distributor chooses to do so. The rule also does not prohibit the distributor from charging a delivery charge for each location product is delivered to.



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Price differentials for wine are allowed in the rules. A winery listed on a restaurant's wine list allows wine to be introduced to consumers. Many vintages are limited in quantity.

2 comments received from stakeholder groups representing thousands of on-premises and off-premises licensees.

Delay implementation of the rules until a court can decide the appropriate scope of pricing regulations following I-1182.

LCB response: The board doesn't feel it is appropriate to stay the effective date of the rules.

1 comment received from a stakeholder group representing former state and contract store off-premises licensees:

The board should not allow distributors to sell product to on-premises licensees at a lower price than off-premises licensees. Discounts should be based on volume of product purchased for all licensees. Distributors selling to on-premises licensees at a lower price has done a great deal of financial harm to off-premises licensees.

LCB response: The board determined at this stage in this rulemaking that channel pricing would not be allowed unless it was based on volume purchased. An exception was made in the final rules.

35 comments received supporting adoption of the rules filed in the 3rd Supplemental CR 102 filed July 15, 2015.

WAC Changes

See attachment.