



Notice of Rule Change – Explanatory Statement Tobacco sampling and official forms of identification to show proof of age to purchase tobacco

This explanatory statement concerns the **Washington State Liquor Control Board's adoption of changes to the rules regarding tobacco sampling and repealing the rule on official forms of identification to show proof of age to purchase tobacco.**

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 rule making.

Once persons who gave comment during this rule making have had a chance to receive this document, the Liquor Control Board will file the amended rule with the Office of the Code Reviser. This rule change will become effective 31 days after filing (approximately November 1, 2008).

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@liq.wa.gov.

What are the agency's reasons for revising these rules?

Legislation enacted during the 2005 legislative session eliminated certain documents and added tribal enrollment cards to a list of officially issued documents that can be used to prove age when purchasing liquor and tobacco.

Legislative changes. The Legislature changed RCW 70.155.090 as follows:

1. SHB 1496 (2005 session) - Authorizes enrollment cards issued by the governing authority of a federally recognized Indian tribe located in Washington to be used as identification for the purchase of tobacco. The enrollment card must incorporate security features comparable to those implemented by the Department Of Licensing for Washington drivers'

licenses. The tribe must give the liquor control board at least 90 days notice of intent to use the tribal enrollment card for the purpose of purchasing alcohol or tobacco. The liquor control board will notify licensees of the new tribal enrollment card.

2. The Legislature passed a law banning the use of sampling as a marketing tool for both cigarettes and other tobacco products. The R J Reynolds Tobacco Company sued the state alleging that, as to cigarettes, the state was preempted by Federal law and could not impose a sampling ban on cigarettes. That left a state ban on sampling for other tobacco products. WSLCB rules must be updated as a result of legislative action and the resulting lawsuit settlement.

What changes are being made?

1. Tobacco sampling WACs 314-10-090 and 314-10-100.

The rules on tobacco sampling must be modified to ban sampling on other tobacco products but continue to allow the sampling of cigarettes. The proposed rules also require that those conducting sampling activities provide the WSLCB with notice of the activity 45 days prior to the event.

2. Tribal enrollment cards as official ID - Repeal WAC 314-10-050.

The agency rule repeats the description of documents contained in RCW 70.155.090 and does not add any additional clarifying language. This WAC may be repealed.

Rule Adoption

The Board adopted these rule changes on September 24, 2008. The rule will be filed on September 30, 2008 and will be effective November 1, 2008.

Summary of all public comments received on this rule proposal.

The Liquor Control Board received public comment in writing on sampling of cigarettes WAC 314-10-090 and 314-10-100 during the comment period that ended April 14, 2008. No comment was received at the public meeting held on April 9, 2008.

Summary of comments received during the supplemental comment period ending September 5, 2008

Comment:

1. Just to be clear, if the proposal #08-15 passes, are tobacco products other than cigarettes allowed to be sampled as long as the WA State Liquor Control Board is notified 45 days prior to the event?

Response:

Only cigarettes may be sampled in Washington. The Legislature banned all sampling in 2006. As a result of a lawsuit, cigarette sampling is allowed under federal law that preempts state law on this subject. The 45 day pre-event notification applies to cigarette sampling. No other tobacco products may be used for sampling.

Summary of comments received during comment period ending September 5, 2008

Comment:

1. Advance notice of any cigarette sampling activity should be required. The notice should be submitted to the Liquor Control Board 45 days prior to the event. Under current rules, notice to Public Health of sampling events takes place a minimum of 30 days and up to 7 months after the activity.

Response:

Current rules allow the board to request tobacco sampling licensees provide the locations and times of sampling activities. The board distributes those times and places to stakeholders. There is no specific time requirement in the rule for prior notice of sampling events.

Comment:

2. If legal authority exists, sampling rules should also include a process for objecting to a sampling license based on a retailer's violation history of:

- selling tobacco products to minors;
- the state's Clear Air Act;

- c. failure to pay fees, fines, or liens, or in other ways not being in good standing with Public Health or the state; or
- d. other state laws.

Response:

- a. A tobacco sampler's license is different from a tobacco retailer license. The violation history of a retailer has no bearing on a tobacco sampler's license.
- b. The board has suspension/revocation rights for sampling licensees based on failure to comply with sampling reports and activities. The board has administrative responsibilities for youth access to tobacco laws on a retail licensee's premises but we do not have enforcement responsibility for the state's clean air act.
- c. The Board does not have authority to suspend or revoke a sampling license based on failure to pay fines, fees or liens, or in other ways not being in compliance with state laws.
- d. The department of Licensing can hold the retail license up for renewal based on fines or liens not paid to the state.

Public Comment Participant List

Name and Affiliation

Written comments during comment period ending September 5, 2008

Nick Backes, Tax Manager GMR Marketing LLC | Radiate Group Inc.

Written comments during comment period ending April 14, 2008

Scott Neal, Tobacco Prevention Program Manager, Seattle & King County Public Health

David Fleming, Director, Public Health, Seattle & King County

Erin Dziedzic, Washington State Government Relations Director, American Cancer Society

Lucy Culp, Washington Government Affairs Director, American Heart Association

Carrie Nyssen, Director of Advocacy, American Lung Association of Washington

Paul Davis, Tobacco Prevention and Control Unit, Washington State Department of Health

Douglas Allen, Director, Division of Alcohol and Substance Abuse, Department of Social and Health Services.

Testimony at Public Hearing – April 9, 2008 at Olympia, WA

None

Testimony at Public Hearing – August 27, 2008 at Olympia, WA

None

Text of modified rules (Estimated effective date is November 1, 2008)

Tobacco sampling and repeal of official forms of identification to show proof of age to purchase tobacco

Amend WAC 314-10-090 ~~Tobacco sampling Licenses~~. What tobacco products may be used for sampling promotions? (1)

No person may engage in providing ~~tobacco~~ samples of tobacco products other than cigarettes within Washington state.

(2) No person may engage in providing samples of cigarettes without a valid sampler's license. A firm contracting with a tobacco manufacturer to distribute samples of a manufacturer's product is deemed to be the person engaged in the business of sampling. The liquor control board will issue any sampler's licenses.

~~(2)~~ (3) The annual fee for a manufacturer's cigarette samplers license within the state is \$500 and is designated a Class T1 license. The fee for independent businesses that provide samples of ~~tobacco products~~ cigarettes is \$50 and is designated a Class T2 license. All sampler's licenses expire on the 30th day of June each year and must be renewed annually.

In adopting the language of WAC 314-10-090(3), the board affirms that sampling does have a direct impact upon the availability of product to minors. Many sampling activities, because of the large volume of product offered, promote secondary distribution to bystanders, especially minors. Addiction to nicotine can occur quickly after the use of a relatively small amount of product. It is the board's intention to limit this amount thereby reducing the opportunity and potential for product to be redistributed to minors.

~~(3)~~ (4) A sample is the smallest portion representative of the product that is available for retail sales and distribution. T1 and T2 license holders may distribute samples of ~~tobacco products~~ cigarettes pursuant to chapter 70.155 RCW and chapter 314-10 WAC as follows:

(a) Cigarettes: No more than one sample package may be furnished per eligible customer per day. Such sample shall not contain more than twenty cigarettes per sample package.

~~(b) Cigars: No more than one sample of any single brand and type and no more than two samples may be furnished per eligible customer per day. Such sample shall not contain more than one cigar per sample package.~~

~~(c) Smokeless tobacco products: No more than one sample can, package or pouch may be furnished per eligible customer per day. Such sample can, package or pouch shall not exceed the size of the smallest unit available for sale at retail.~~

~~(d) All other tobacco products: No more than one sample unit may be furnished per eligible customer per day. Such sample unit shall not exceed the size of the smallest unit available for sale at retail.~~

~~(e) T1 and T2 licensees that have sample packages available that contain less tobacco product fewer cigarettes than allowed by this section are encouraged to provide such alternative sizes.~~

[Statutory Authority: RCW 70.155.110. 96-19-018, § 314-10-090, filed 9/6/96, effective 10/7/96. Statutory Authority: RCW 66.08.030. 93-23-016, § 314-10-090, filed 11/5/93, effective 12/6/93.]

WAC 314-10-100 ~~Samplers license~~ ~~Distribution of tobacco products.~~ How may cigarette sampling activity be conducted? (1) The cigarette sampler's license entitles the licensee, and employees or agents of the licensee, to distribute samples at any lawful location in the state during the term of the license. The person engaged in sampling shall carry the Class T1 or T2 license or a copy of the license at all times and produce same at the request of an enforcement officer as defined in RCW 7.80.040.

(2) No person may distribute or offer to distribute samples in a public place. This prohibition does not apply to:

(a) An area to which persons under 18 years of age are denied admission,

(b) A store or concession to which a cigarette retailers license has been issued, or

(c) At or adjacent to a production, repair or outdoor construction site or facility.

(3) Notwithstanding (2) above, no person may distribute or offer to distribute samples within or on a public street, sidewalk, or park that is within 500 feet of a playground, school, or other facility where that facility is being used primarily by persons under 18 years of age for recreational, educational or other purposes.

(4) Class T1 and T2 licensees shall provide the board, upon request, the locations, dates and times sampling activities will take place.

(5) All T1 and T2 licensees must provide to the liquor control board, in a format prescribed by the board, a listing of the location, date, hours and quantities of ~~tobacco products~~ cigarettes distributed in the state for the previous six months.

(a) A report for the period covering January 1st through June 30th of each year is due by no later than July 31st of each year.

(b) A report for the period covering July 1st through December 31st is due by no later than January 30th of the immediately following year.

(c) The board may take administrative action against any ~~tobacco~~ cigarette sampler who fails to submit the required reports.

[Statutory Authority: RCW 66.08.030. 93-23-016, § 314-10-100, filed 11/5/93, effective 12/6/93.]

Repeal WAC 314-10-050