



## Notice of Permanent Rules – WAC 314-12-146 Private Label Spirits

**This explanatory statement concerns the Washington State Liquor and Cannabis Board's adoption WAC 314-12-146 Private Label Spirits.**

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 and Cannabis Board will file the amended rules with the Office of the Code Reviser. These rule changes will become effective 31 days after filing (approximately May 5, 2018).

The Liquor and Cannabis 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](mailto:rules@lcb.wa.gov).

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### What are the agency's reasons for adopting these rules?

Rules are needed to clarify the requirements for private label spirits between a distiller, craft distiller, spirit certificate of approval holder, and manufacturer and an on-premises or off-premises spirits retailer.

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### Summary of all public comments received on this rule proposal.

**WSR 17-21-113 filed October 18, 2017: Public Hearing held November 29, 2017.**

One comment was received at the public hearing and seven written comments were received.

**Holly Johnson – Washington Food Industry**

**Comments:** The words "exclusivity" and "reasonable available" seem vague but we approve of the rule. We do have concerns about submitting contracts between manufacturers and retailers since there may be proprietary information in the contracts.

**LCB response:** The final rule adopted by the board does not require the contract to be submitted to the board. The language requires the contracts to be available to the board for inspection.



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### **Ulrike Connelly – Perkins Cole LLP – on behalf of Costco**

**Comments:** Costco does not believe this rulemaking is necessary. The wording for “reasonably available” should be changed to the following “all products must be made available to all retail licensees to the extent it is reasonable practical”. Mandatory filing of contracts for private label spirits with the board seems unnecessarily onerous. Costco believes all TTB COLA labels are already filed with the board so language requiring this seem unnecessary.

**LCB response:** The board maintained the words “reasonably available”. The final rule adopted by the board requires the contracts to be available to the board for inspection. The rule requires the manufacture file all TTB COLA labels with the board.

### **Lynne Omlie – Distilled Spirits Council**

**Comments:** “Private label brand” should be defined. All records should be kept for three years that include the name of the retailer buying the product, the amount of product purchased and the date of the sale and delivery. A manufacturer may produce a private label product for a retailer under the following conditions:

- The retailer or its affiliate pays all costs associated with the development, bottling, labeling, and/or packaging of the private label product;
- The retailer or its affiliate may not set the FOB or wholesale cost of a private label product with the manufacturer or wholesaler;
- Pricing for a private label product shall be independently established by the manufacturer and/or wholesaler;
- The manufacturer must sell the private label product to a retailer or its affiliate only through the State’s legal distribution system;
- Private label products may not use intellectual property elements (which include but are not limited to bottle design, trade dress, packaging, and/or brand name) confusingly similar to any other beverage alcohol product regardless of product class. The Board shall establish a process and procedures to enforce the provisions of this subsection, and redress any complaints;
- A retailer or its affiliate offering for sale and selling any private label product shall clearly disclose in writing to its customers at the point of display, both in-store, as well as in any solicitation, advertising material or on-line offering, that the private label product is the retailer’s or retailer affiliate’s private label product;
- A retailer or its affiliate offering for sale and selling any private label product shall comply with all laws, regulations, rules and trade practice interpretations that are
- applicable to a manufacturer and/or a wholesaler of non-private label products; and
- A retailer or its affiliate shall comply with all laws, regulations and rules with respect to quotas, tie-in sales, slotting fee arrangements, “of value” prohibitions, and/or all other restrictions set forth in the State’s regulatory system.

**LCB response:** All of the requirements suggested are already in RCW 66.28.310 or WAC 314-12-140, WAC 314-12-027, and WAC 314-11-095. The adopted rule does not require the language be repeated. “Private label brand” is not defined in the adopted rule.



### **Steven Main – Distillers Way**

**Comments:** The opportunity to produce private label spirits is vital to our success and continued growth. We would like to ensure that this rule fairly allows manufacturers based in Washington state the ability to produce private label spirits.

**LCB response:** The rule adopted by the board allows distillers and spirit certificate of approval holders to produce private label spirits for on and off-premises spirit retailers.

### **Scott Hazelgrove, Washington Beer & Wine Distributors**

**Comments:** Add a reference into the rule to highlight the need to comply with the statute on cross ownership (RCW 66.28.290) and undue influence (RCW 66.28.285). Preserve the requirement to file contracts between producers and retailers to the board and make the contracts available to the public to ensure adequate enforcement of the law. Include beer and wine private labels in this rule.

**LCB response:** There is no need to repeat the law in the rule. Beer and wine private labels were approved by the legislature and are contained in RCW 66.28.310. The adopted rule required the contracts between manufacturers and retailers to be available for inspection by the board.

### **Rick Hicks, President Teamsters No. 28**

**Comments:** The criteria for non-exclusivity should be further defined. We would like to see language that states all private label spirits must be sold and delivered to the retailer purchasing them from a facility located in the state and licensed by the board.

**LCB response:** Non-exclusivity is addressed in WAC 314-12-140. Currently retailers are allowed to purchase product directly from a manufacturer if the manufacturer has an endorsement to ship directly to retailers and the retailer has an endorsement to receive direct shipments.

### **John Guadnola – Association of Washington Spirits & Wine Distributors**

**Comments:** There should be a definition for "private label". Non-exclusivity needs to be given some teeth in order to be meaningful. There needs to be more language on the contracts and circumstances under which a contract can be deemed invalid and sales under the contract declared unlawful. We believe the sales of private label products made by a manufacturer directly to a retailer will tempt unscrupulous retailers and manufacturers to under-report the volume of product involved and thereby evade payment of all taxes otherwise due.

**LCB response:** Non-exclusivity is addressed in WAC 314-12-140. Currently retailers are allowed to purchase product directly from a manufacturer if the manufacturer has an endorsement to ship directly to retailers and the retailer has an endorsement to receive direct shipments. Beer and wine private labels were approved by the legislature and are contained in RCW 66.28.310. The adopted rule required the contracts between manufacturers and retailers to be available for inspection by the board. All of the requirements suggested are already in RCW 66.28.310 or WAC 314-12-140, WAC 314-



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12-027, and WAC 314-11-095. The adopted rule does not require the language be repeated. "Private label" is not defined in the adopted rule.

### **Craig Wolf, President & CEO, Wine & Spirits Wholesalers of America**

**Comments:** We recommend the LCB note its intent concerning the regulation of private labels in the rule. We also recommend language is added to the rule to state the rule is to maintain a transparent regulatory system and do nothing to confuse or mislead the consumer. We believe "private label spirits brands" should be clearly defined. The rule should include language that requires the label to state who produced the product and whether the product is actually a retailer. The rule should require retailers to disclose in writing to customers at the point of sale and also in all advertising, that private label products are affiliated with the retailer. Lookalike labels should be prohibited. The rule should require equal treatment of private and non-private labels brands, in particular prohibitions on paid advertising and slotting fees by industry members. Private label spirits should not receive preferential shelf space or advertising treatment. We suggest the rule clearly articulate that industry members and retailers selling private label spirits are subject to all the same trade practice requirements as industry members and retailers selling non-private label brands.

**LCB response:** Spirits labels are required by TTB to include the "manufactured and bottled by" information. RCW 66.28.285, RCW 66.28.290, RCW 66.28.300, RCW 66.28.310, WAC 314-12-140, WAC 314-12-027, and WAC 314-11-095 contain language to address requirements and prohibitions between industry members and retailers. The adopted rule does not require the language be repeated. TTB approves all spirits labels with a COLA. TTB would make the determination on what the labels look like. "Private label spirits brand" is not defined in the adopted rule.

**Supplemental WSR 18-03-185 filed January 24, 2018: Public Hearing held March 7, 2018.** Two comments were heard at the public hearing and four written comments were received.

### **Carolyn Logan – Washington Food Industry**

**Comments:** Supports the proposed rule for private label spirits.

### **Scott Hazelgrove – Washington Beer & Wine Distributors (testified and sent in written comments)**

**Comments:** Include an express separate legal entity requirement and prohibition against undue influence. Require a copy of the contract between the producer and the retailer be submitted to the board and made available for inspection to any member of the public. Add private label beer and wine to the rule.

**LCB response:** RCW 66.28.290 and RCW 66.28.285 as well as WAC 314-12-027 already require separate legal entities and prohibit undue influence. The adopted rule does not require the language to be repeated. Beer and wine private labels are already addressed in RCW 66.28.310.



**Ulrike Connelly – Perkins Cole LLP – on behalf of Costco**

**Comments:** Costco does not believe this rulemaking is necessary. The wording for “reasonably available” should be changed to the following “all products must be made available to all retail licensees to the extent it is reasonable practical”. Mandatory filing of contracts for private label spirits with the board seems unnecessarily onerous. Costco believes all TTB COLA labels are already filed with the board so language requiring this seem unnecessary.

**LCB response:** The board maintained the words “reasonably available”. The final rule adopted by the board requires the contracts to be available to the board for inspection. The rule requires the manufacture file all TTB COLA labels with the board.

**Jake Hegeman, VP, Legal & Regulatory Affairs, Wine & Spirits Wholesalers of America**

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**Lynne Omlie – Distilled Spirits Council**

**Comments:** “Private label brand” should be defined. Incorporate all necessary and relevant provisions found in RCW and other rules into the rule for private label spirits.

**LCB response:** RCW 66.28.285, RCW 66.28.290, RCW 66.28.300, RCW 66.28.310, WAC 314-12-140, WAC 314-12-027, and WAC 314-11-095 contain language to address requirements and prohibitions between industry members and retailers. The adopted



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## **WAC Changes**

See attachment.