



Notice of Permanent Rules for Cannabis Retail License Forfeiture Rules

This explanatory statement concerns the Washington State Liquor Control Board's adoption of amendments to marijuana advertising rules.

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.

The Liquor and Cannabis Board appreciates your involvement in the rule making process. If you have questions, please contact Joanna Eide, Policy and Rules Coordinator, at (360) 664-1622 or e-mail at rules@lcb.wa.gov.

Background and reasons for adopting this rule.

The Legislature directed the WSLCB to create a cannabis retail license forfeiture process in rule when it passed changes to [RCW 69.50.325](#) in [ESSB 5131](#) during the 2017 legislative session. The WSLCB received comments expressing concerns with the proposed rules as filed in the original CR-102, which were addressed in the adjustments included to the rule proposals in the supplemental CR-102.

The proposed rules in this supplemental CR-102 include the following process for cannabis retail license forfeitures:

Licenses that may be subject to forfeiture:

- A retail license will be subject to forfeiture on November 1, 2018 if:
 - The licensee has been issued a license since November 1, 2017 or earlier, and
 - The licensee has NOT, for a minimum of 12 consecutive weeks:
 - Been open to the public for a minimum of 5 hours per day, 3 days per week,
 - Posted business hours outside the premise in public view, AND
 - Reported any sales for a minimum of 12 consecutive weeks.
- A retail license will be subject to forfeiture at a time after November 1, 2018, based on the license issuance date if the license was issued after November 1, 2017, and the licensee fails to meet the above criteria.

Licenses that may not be subject to forfeiture:*

- A license in a ban or moratoria,

- A license that cannot open due to zoning, business licensing or permitting issues, land use ordinance, or other regulation that prevents it from opening (but must provide proof under (2)(c)), OR
- Another condition under the discretion of the board that allows an exemption to be applied if the licensee has had circumstances occur that are out of their control, such as a natural disaster. Such exemptions will be made by the board on a case-by-case basis (documentation may be required and is probably advisable).

*If the condition, such as a local permit being issued or a ban or moratoria being lifted, that prevents the licensee from becoming fully operational and open to the public goes away and takes away the exemption from the forfeiture process in the rule, then the 12 month period and fully operational and open requirements will run from the date that condition is no longer present.

A retailer subject to forfeiture has the right to request an administrative hearing to contest the forfeiture under the Administrative Procedure Act, chapter 34.05 RCW.

CR-101 – filed July 19, 2017, as WSR 17-15-121.

CR 102 – filed February 7, 2018, as WSR 18-04-114.

Supplemental CR-102 – filed April 4, 2018, as WSR 18-08-093
Public Hearing held May 16, 2018.

Summary of public comments received on this rule proposal.

Supplemental CR-102 Comments Received:

Comment: Include an exception if the licensee is actively working towards opening in conjunction with a remodel. Currently, in Seattle, permits for a change of use and construction are taking between 9 and 12 months and then a remodel could easily take 6 months to a year on top of that. A licensee should be able to lay dormant if the licensee can provide proof that it is actively moving forward. Expressed support for the proposed rules and other than the aforementioned suggestion believe the proposed language to be effective and reasonable and commend the WSLCB on their outreach and inclusion of stakeholders throughout this process. Expressed concerns with what happens to the licenses forfeited under this new section, as most retailers continue to struggle to survive.

WSLCB Response: Thank you for your comments. The rules include considerations for a licensee that cannot open due to zoning, business licensing or permitting issues, land use ordinance, or other regulation that prevents it from opening (but must provide adequate documentation for verification under subsection (2)(c)).

Was the comment reflected in the final rule? The rules as proposed addressed the concerns raised in the comments. No changes to the rules were necessary to address these comments.

Comment: Comment regarding what to do with any retail licenses that need to be reallocated. With the removal of the priority system from the WAC, it is my opinion that the correct thing to do -- both legally and ethically -- is to go back to the lottery results from the November 2013 applications if additional licenses become available, either through forfeiture or other means. The LCB has a unique opportunity to "make things right" in this situation by processing all original applications, in the lottery order, before doing anything else. I have every reason to believe that if I was granted a second or third retail license that I would be able to open those store(s) timely. These could be used for new stores.

WSLCB response: The lottery results from 2013 are no longer available and all applications based on those lottery results were withdrawn some time ago. For this reason, this is not an available option. The WSLCB will continue to explore options on what will occur with any licenses forfeited under these rules. However, we cannot predict whether any / how many licenses may be forfeited due to inability to meet the requirements in this rule.

Was the comment reflected in the final rule? No. The rule requirement only detail the forfeiture process and do not address the disposition of any licenses that may be forfeited under the requirements.

CR-102 Comments Received:

Comment. Proposed Section 314-55-055(1) as it is written appears overly oppressive to those retail licensees who, as of the filing date of this CR-102, have not opened to the public. Licensees who have been licensed 9 months or more and have not opened as of February 7, 2018 cannot possibly become fully operational by April 23, 2018 as it is currently defined to require 20 consecutive weeks of meeting subsections (a)-(c). This is because there are fewer than 20 weeks between February 7, 2018 (the date of filing) and April 23, 2018. Current retail licensees should be given an opportunity to comply by open and become fully operational after notice of these rules (but before 2 years from the date of licensing). The rules should push the April 23, 2018 date to a date that is 20 weeks after the intended adoption date of April 4, 2018, which would be September 23, 2018.

WSLCB response: Thank you for your comments. They will be included in the rulemaking file and considered as this rulemaking progresses through the process.

Was the comment reflected in the final rule? Yes. The proposed rules were adjusted in the Supplemental CR-102 filing and those changes addressed these

concerns.

Comment. Concerns regarding the amount of time the LCB requires you to be open, prior to the deadline, allows for too long of a window for licenses to continue to be unopened. This duration is currently drafted at 12 weeks, meaning a license can remain un-opened until mid-August. This window should be shortened to mid-June. Which would mean that the length of time prior to the cutoff, that a store has to be open, should be longer, at 20 weeks. Making stores open by a mid-June timeframe will be better for the industry. Producers and the excess supply created to supply these stores, needs to go onto the market sooner.

WSLCB response: Thank you for your comments. We did not have a quorum at the Board meeting today, so we were unable to gain approval for filing the supplemental CR-102 with the adjusted language for this rulemaking. We will plan to bring that to the next Board meeting on April 4th. I will share your thoughts with the Board as we continue in the rulemaking process on this item. Thank you again for taking the time to share your thoughts.

Was the comment reflected in the final rule? No. While the 20 consecutive week requirement appeared in the original CR-102, the Supplemental CR-102 included a 12 consecutive week requirements. The timeframe for being considered fully operational and open to the public was not adjusted from the 12 consecutive week minimum from the filing of the Supplemental CR-102 to the rules as adopted.

Comment. As you are likely aware, I was the legislator responsible for this provision, the first draft of which was introduced in HB 1126. It was my intention and the intention of the Legislature to pressure retail licensees who were simply sitting on licenses for internal reasons (not because of any issues with local jurisdictions or for reasons beyond their control, etc.) to either open their doors by a certain date or forfeit their licenses. We intended to give them until at least April of this year to meet certain benchmarks of progress. This was not intended to affect anyone retroactively or to open the potential for anyone to lose a license if they have their doors open to the public by April 23 of this year, up to 24 months after the issuance of their license, or are simply awaiting an occupancy permit from the local jurisdiction.

In sub-section (1) of LCB's draft rules it states: "A marijuana retailer's license is subject to forfeiture if the retailer is not fully operational and open to the public after nine months of issuance of the license or April 23, 2018, whichever is later. Fully operational means the business meets the following criteria for at least 20 consecutive weeks within a nine month period:" In this language, LCB is proposing to begin forfeiting licenses 9 months after issuance or as of April 23. In ESSB 5131, 9 months was listed as a bare minimum amount of time, but LCB was allowed to give licensees up to 24 months to open. Forfeiting the license of a company that is just sitting on their license and making no attempts at progressing towards opening their location after 9 months might be

reasonable. In some jurisdictions, however, it can take 6 months or longer just to get through the permitting process for a build-out. I believe it would be reasonable to give up to 24 months to companies that are progressing with their build-outs rather than simply cutting off everyone at either 9 months after issuance or April 23.

The final language from ESSB 5131 reads: “no license of a marijuana retailer that otherwise meets the conditions for license forfeiture established pursuant to this subsection (3)(c) may be subject to forfeiture within the first nine calendar months of the effective date of this section.” This was intended to signal to certain license holders in the industry ahead of time what their potential deadline was, yet give LCB flexibility in working with licensees who are making progress.

The draft language regarding 20 weeks of operation appears to go against both the spirit and the letter of ESSB 5131. The way this language is written seems to mean that licensees would lose their license the moment the rules take effect if they weren't already open in December of 2017. While we want some definitions for determining what it means to be fully operational, it is not reasonable to create retroactive requirements. I have heard from retailers who have been racing to get open to meet the deadlines outlined in the legislation and are in fear that the money they are currently spending on construction and business development may be forfeited in April despite their genuine work and progress at getting their operations open to the public.

I respectfully request that LCB change these two very crucial issues, possibly even urgently resubmit a new CR 102 to ensure that panicking and confused licensees know they won't have a retroactive rule potentially wipe out their investment.

WSLCB response: Thank you for your comments. We appreciate you taking the time to share this information with the WSLCB and we have heard similar concerns from licensees.

Was the comment reflected in the final rule? Yes, the rules were changed from the CR-102 language to the proposed language in the Supplemental CR-102 to address many of the concerns raised in the comments, as well as in response to other comments received.

WAC Changes from Proposed Rules (CR-102) to the Rules as Adopted:

All changes to rule language originally included with the CR-102 filing were made in the Supplemental CR-102. No changes were made to the proposed rules as filed in the Supplemental CR-102 to the rules as adopted by the Board.