



Notice of Permanent Rules Chapter 314-35 WAC – Vapor products

This concise explanatory statement concerns the Washington State Liquor and Cannabis Board's (WSLCB) adoption of new sections and amendments to existing rules regarding chapter 314-35 WAC – Vapor products.

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. The concise explanatory statement must be provided to any person upon request, or from whom the WSLCB received comment.

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

Background and reasons for adopting this rule

The adopted rules apply to vapor products, defined in RCW 70.345.010(19) as any noncombustible product that may contain nicotine and employs a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means, regardless of shape or size that can be used to produce vapor or aerosol from a solution or other substance. Vapor products include any electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device and any vapor cartridge or other container that may contain nicotine in a solution or other form that is intended to be used with or in an electronic device. The adopted rules *do not* apply to any product that meets the definition of marijuana as provided in RCW 69.50.101. It is important to distinguish these rules and those products given the attention to reported adverse health impacts attributed to vaping nicotine products, non-nicotine products, and vapor products containing marijuana, or THC. It is also important to distinguish that this rule project superseded and does not concern the Washington State Board of Health emergency rules and bans of certain products issued under chapter 246-80 WAC.

Chapter 70.345 RCW provides the Board with limited licensing and enforcement authority of vapor product distributors, retailers, and product delivery sales. RCW 70.345.020(2) provides, in relevant part, that the Board may adopt rules regarding the regulation of vapor *licenses*. RCW 70.345.160(4) provides that the Board may work with local health departments or districts, as well as law enforcement to conduct random unannounced inspections to ensure compliance. More importantly, RCW 70.345.160(5) provides that if the Secretary of Health or local health jurisdiction determines that a



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product may be injurious to human health, or poses a significant risk that the Board, in consultation with the Department of Health and others, may cause a vapor product to be analyzed. Thus, while the Board's regulatory authority is currently limited with respect to vapor *products*, the extent of Board's authority with respect to *licensing* and *enforcement* is reflected in these adopted rules, supporting the overarching agency goal of ensuring the highest level of public safety by continually improving and enforcing regulations that reflect the current dynamic environment.

Washington State recognizes that there is a growing body of empirical research, including a recent report issued by the National Institute of Medicine to support an overall, state-wide health goal of increasing the age of sale for both tobacco and vapor products to twenty-one. Based on this evidence, increasing the age of sale for these products will significantly reduce the number of adolescents and young adults who are smoking, and will immediately improve the health of adolescents, young adults, young mothers, and young children. To achieve that goal, Engrossed House Bill (EHB) 1074 (Chapter 15, Laws of 2019), prohibits the sale of cigarettes, tobacco products, and vapor products to persons under the age of twenty-one. This aligns Washington with several other states who have raised the minimum legal sales age to twenty-one in an effort to save lives and reduce healthcare costs.

Additionally, Engrossed Second Substitute House Bill (E2SHB) 1873 (Chapter 445, Laws of 2019) accomplishes several related goals. In addition to establishing a vapor tax structure that applies to all persons who sell vapor products under chapter 70.345 RCW, it also contains statutory amendments and new sections that include, but are not limited to the establishment of recordkeeping, business, product sales and distribution requirements that also apply to all persons licensed to sell vapor products under chapter 70.345 RCW.

Since the legislation directing these rule revisions was enacted, concern around the use of vapor products has increased significantly. These concerns hinge on several factors, including but not limited to the composition and content of the concentrates used in vapor products, and the product delivery system. Based on the current regulatory environment, the heightened concern around the safety of vapor products, and Governor Inslee's Executive Order 19-03 Addressing the Vaping Use Public Health Crisis, the overall public health and safety benefits of these rule amendments and new sections outweigh any increase in costs or administrative burden related to their implementation.

Currently, chapter 314-35 WAC provides a limited regulatory framework around the manufacturing, distribution and sale of vapor products. Both EHB 1074 and E2SHB 1873 expanded WSLCB's regulatory authority by:

- Increasing the age of sale of vapor products;
- Increasing record keeping requirements;
- Clarifying vapor product licensee requirements, including qualification, application denials, insurance requirements, license suspension and revocation;



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- Establishing transportation requirements;
- Establishing the ability for the Board to seize both cannabinoid vapor products and vapor products under specific circumstances;
- Establishing forfeiture guidelines;
- Establishing a penalty structure that aligns with the current Board penalty reform framework.

These adopted rule sections and amendments support the overarching agency goal of ensuring the highest level of public safety by continually improving and enforcing regulations that reflect the current dynamic environment.

Rulemaking history for this adopted rule:

CR-101 – filed June 12, 2019, under WSR #19-13-036
CR 102 – filed October 16, 2019 as WSR #19-21-102
Public hearing held November 26, 2019

Public comment received on the rule proposal

The following comments were received as indicated below, and are presented in their native form, including formatting, text and spelling. A response to each comment is provided, along with an indication as to whether the comment was reflected in the adopted rule.

1. Email message, received November 14, 2019:

“WAC 246-80 should be repealed in it's entirety! They have now discovered the source of the Lung disease and this is putting undue stress and strain on business owners who are ALREADY complying with stringent laws that will become unenforceable when the federal government changes it's status ANYWAY! CANNABIS is natural and should not be lumped into the same category as other drugs! Every single case has proven to be a use by a NON REPUTABLE company! Cannabis licensed companies should not have to COMPENSATE for the illegal use of products they DIDN'T produce!!”

WSLCB response: These rules are unrelated to chapter 246-80 WAC, a recently adopted Washington State Board of Health emergency rule regarding vapor products and flavors. The WSLCB appreciates this comment and demonstration of participation in the rulemaking process. The commenter was provided with contact information for the Washington State Department of Health, and the Washington State Board of Health to encourage continued participation in rule and policy development process.

Was the comment reflected in the adopted rule? The comment was not reflected in the final rule.



2. Email message, received November 14, 2019:

“LCB,

As a former grower, current retailer and stakeholder, I would like to give you my input regarding vaping.

1. I have operated my retail store since March of 2016 we have never had any complaints regarding any health issues with the products we've sold. All of our vape products are tested and to my knowledge we have never had any cartridges, or dabs that had the vitamin e acetate in them. I think it would be prudent to make sure that product is banned from all vaping products in Washington State.

2. I think the ban on flavored Vapes initiated by the Governor is completely erroneous, as we have never had any issues and I have not heard of any reported issues of flavored Vapes impacting the health of any of the users here in Washington. I know that we should be cautious and protect the public interest, but without any research or documentation of a problem, I don't believe it's prudent to remove 10% to 25% of our vape products off the market.

In some cases it has caused businesses to close because of this new ban, especially with no research to back it up.

Along that note I don't think LCB and enforcement is going after the black market well enough, with all of the resources that could be mustered with the exorbitant taxation that we pay 45.6%, are sales growth and viability is still being challenged. I know there has been many producers, processors and retail stores that have closed because they cannot pay the taxes, employees and overhead.

3. The black market is alive, well and thriving and they don't really care what they're selling, when they're doing basement manufacturing of vape products. I don't believe they intentionally trying to harm anyone, they are just not sophisticated and also find it hard to find the materials to complete a clean safe product and lack the knowledge to make a safe product. Nevertheless it is out there.”

WSLCB response: These rules are unrelated to chapter 246-80 WAC, a recently adopted Washington State Board of Health emergency rule regarding vapor products and flavors. The WSLCB appreciates this comment and demonstration of participation in the rulemaking process. The commenter was provided with contact information for the Washington State Department of Health, and the Washington State Board of Health to encourage continued participation in rule and policy development process.

Was the comment reflected in the adopted rule? The comment was not reflected in the final rule.



3. Email message, dated November 18, 2019:

“My comment is in regards to WAC 314-35-030 (4) Vapor product licensee recordkeeping requirements, specifically regarding keeping records at the retail outlet for five (5) years and to be produced ‘at any time’.

For our company with multiple locations, all of the record keeping is conducted out of our central corporate office. Due to a small retail space, turn-over of employees, and proper chain of custody of the documents there is minimal paperwork that can be reasonably kept at the individual retail locations. In addition, our managers are our gate-keepers of documents at the retail store and work set hours. They cannot reasonably be expected to produce them outside their working hours.

What language we would prefer to see:

- Keep one (1) year of invoices at the individual retail location for inspection and provide the additional four (4) years of paperwork upon request.*
- The board or its duly authorized agents enter the licensed location to inspect the required invoices before 3pm weekdays only.”*

WSLCB response: The WSLCB appreciates this comment and demonstration of participation in the rulemaking process. The language contained in the adopted rule concerning retention of records at retail outlets for five (5) years aligns with statutory language contained in RCW 82.25.075, effective October 1, 2019, regarding distributors and retailer invoices, that provides:

- (1) No person engaged in or conducting business as a distributor or retailer in this state may:
 - (b) Fail to produce, on demand of the department or of the board all invoices of all the vapor products taxed under this chapter within five years prior to such demand unless the person can show by satisfactory proof that the nonproduction of the invoices was due to causes beyond the person’s control.

Additionally, WSLCB enforcement works with and attempts to reasonably accommodate the business and operational schedules of all 3,700 vapor product licensees. Limiting, or decreasing the ability of the WSLCB to inspect records as suggested in this comment does not align with agency best practices, or offer the scheduling flexibility that is needed to encourage positive engagement, and support compliance success.

Was the comment reflected in the adopted rule? These comments were not reflected in the final rule.



4. Email message, received November 26, 2019, entitled, "Error(s) in CR-102 for Vaping Product Rules."

"I wanted to bring to your attention an error in the CR-102 relating to WSR 19-13-036, as presented during the Oct 16, 2019 Board meeting.

The MINOR COST THRESHOLD calculated on page 3 is incorrect and dramatically understates the actual 1% of actual annual payroll" figure that it is supposed to represent.

Further, the justification document you supply seem to deny that the proposed rule will result in a negative impact on the sales of affected businesses. On the face of it, that denial is without merit and is, clearly, false."

WSLCB response: The WSLCB appreciates this comment and demonstration of participation in the rulemaking process. This comment is related to the Small Business Economic Impact Statement (SBEIS) required consistent with the Regulatory Fairness Act described in chapter 19.85 RCW, and used to analyze the new section of rule that will require vapor product licensees to obtain general commercial liability insurance. This comment is not related to, suggest or offer rule language revisions. It does not offer substantive or constructive feedback for the WSLCB to consider.

Consistent with RCW 19.85.030(1)(a), the WSCLB prepared an SBEIS because it determined that one sub-section of the proposed rule regarding mandatory commercial insurance would impose more than minor costs on businesses in the industry. The WSLCB *estimated* costs, based on currently available data from the North American Industry Classification System (NAICS) and the United States Census. Calculations, estimates, and analysis were completed consistent with the requirements of chapter 19.85 RCW and the guidance provided, and publicly available through the Governor's Office of Regulatory Innovation and Assistance (ORIA).

As described in the adopted rules, the intent of the required insurance is to protect the consumer should there be any claims, suits, actions, costs, damages or expenses arising from any negligent or intentional act of omission of a vapor product licensee. The WSLCB finds that the current estimated costs associated with the adopted rules are related to the necessary protection of public health and safety. The WSLCB finds that these estimated are necessary, appropriate, and supported not only by the agency's statutory mandate to protect public health and safety, but also by the Governor's Executive Order 19-03 Addressing the Vaping Use Public Health Crisis, and the Washington State Board of Health emergency rules issued as WSR 19-21-050 on October 10, 2019.



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Was the comment reflected in the adopted rule? The comment was not reflected in the final rule.

5. Undated letter, received as an attachment to an email message received November 25, 2019:

“PROPOSED RULE MAKING WSR #19-21-102

Comments/Suggestions

1. Prohibit the internet sales of Tobacco and Flavored E-juices to an individual.
2. Tobacco and Flavored E-juices should only be sold by a licensed Vape Store.
3. Only sell Tobacco and Flavored E-juices made in the USA and registered at FDA.
4. Prohibit the sale of pre-fill Tobacco and Flavored E-juices like Juul. An individual won't be able to know if the e-juices inside the cartridge is bad or not because it is sealed/attached in the device unlike the e-juices sold in a bottle. And the e-juices in a bottle has expiration date.”

WSLCB response: The WSLCB appreciates this comment and demonstration of participation in the rulemaking process. Consistent with RCW 70.345.020, the WSLCB is authorized to license vapor product retailers, distributors, and delivery sales. These comments suggest activities that are beyond the statutory authority provided to the WSLCB in chapter 70.345 RCW. Specifically, the WSLCB does not have the statutory authority to prohibit, restrict or otherwise limit sales of vapor products, or the products themselves, as suggested in this comment. The suggested revisions require statutory revisions that would be the result of legislative action as opposed to rule making.

Was the comment reflected in the adopted rule? These comments were not reflected in the final rule.



6. Letter dated November 21, 2019, received as an attachment to an email message received on November 21, 2019:

Thank you for the opportunity to comment on the rules governing Vapor Products.

Okanogan County Community Coalition is a youth substance abuse prevention coalition. We have been providing prevention services in Okanogan County for over 10 years. One of our focuses is youth tobacco prevention. We have conducted STARS and VSTARS assessments of tobacco retailers in the County. We promote positive social norms, tobacco cessation programs, and smoke and vape free public spaces. We provide public awareness around dangers of tobacco and vaping use, and we also provide evidenced based curriculum in Omak School District. These strategies work together to create a healthy community, but these strategies also depend on rules and laws helping to the create norms and values in Omak. Please consider my comments below as you implement rules for Vapor Products sold in Washington State.

- **WAC-314-35-075 -Category I-Violations**

According to the category title these violations are for acts that create a DIRECT or IMMEDIATE threat to public health, safety, or both. I do not believe retailers should be given five opportunities to impact public safety before their license is cancelled and they should not be able to have their license reinstated. Four violations in three years is sufficient evidence that a retailer does not care about public safety. Please consider the following for violation penalties.

- 1st Violation- \$1000 fine
- 2nd Violation - \$2000 fine and 6 month license suspension
- 3rd Violation – \$3000 fine and 9 month license suspension
- 4th Violation – License cancellation and no reinstatement

Violation Type-Selling, giving, or permitting products to person under 21 (RCW 26.28.080) I do think the fines should be steeper for selling or giving Vapor products to someone under 21 years old due to the direct threat to public safety. The fines should start at \$150 and increase by at least \$50-\$100 per violation.

- **WAC-314-35-080- Category II Violations- Potential threats to public safety**

The fines should be higher for the first violations and suspension of sales should occur for the 3rd violation. Please consider the following for violation penalties.

- 1st Violation - \$500 fine
- 2nd Violation - \$1000 fine
- 3rd Violation - \$1500 fine and 6 month license suspension



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- 4th Violation - \$2000 fine and 12 month license suspension
- 5th Violation – Cancellation of License

- **WAC 314-35-085- Category III Regulatory Violations**
Violation: *Selling or distributing vapor products from self-serve displays or with out the intervention of a store employee (RCW 7-.345.080)* should be a Category II violation if the product is not attended then there is more of a Potential for abuse and misuse therefore it's a public threat not just a regulatory issue.

I do recognize that retailers can receive more than one violation at a time and that these fines could quickly add up for a small business but I do think it's important that the penalties convey the seriousness of the violation to deter activities that are a public health threat.

Thank you for considering my comments,

WSLCB response: The WSLCB appreciates this comment and demonstration of participation in the rulemaking process. The penalties, sanctions, and actions against licensees adopted in this rule are statutorily established in RCW 70.345.180, and the Board may not exceed the monetary penalties as set forth in the statute. Specifically, RCW 70.345.180 provides in relevant part:

- (1) The board may impose a monetary penalty as set forth in subsection (2) of this section, if the board finds that the licensee has violated RCW [26.28.080](#) or any other provision of this chapter.
- (2) Subject to subsection (3) of this section, the sanctions that the board may impose against a person licensed under this chapter based upon one or more findings under subsection (1) of this section may not exceed the following:
 - (a) A monetary penalty of two hundred dollars for the first violation within any three-year period;
 - (b) A monetary penalty of six hundred dollars for the second violation within any three-year period;
 - (c) A monetary penalty of two thousand dollars for the third violation within any three-year period and suspension of the license for a period of six months for the third violation of RCW [26.28.080](#) within any three-year period;
 - (d) A monetary penalty of three thousand dollars for the fourth or subsequent violation within any three-year period and suspension of the license for a period of twelve months for the fourth violation of RCW [26.28.080](#) within any three-year period;
 - (e) Revocation of the license with no possibility of reinstatement for a period of five years for the fifth or more violation within any three-year period.

Was the comment reflected in the adopted rule? These comments were not reflected in the final rule.



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

There were no changes from the proposed rules to the final rules.