



# PROPOSED RULE MAKING

## CR-102 (December 2017) (Implements RCW 34.05.320)

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STATE OF WASHINGTON  
FILED

DATE: October 16, 2019

TIME: 10:55 AM

WSR 19-21-102

**Agency:** Washington State Liquor and Cannabis Board

☒ **Original Notice**

☐ **Supplemental Notice to WSR** \_\_\_\_\_

☐ **Continuance of WSR** \_\_\_\_\_

☒ **Preproposal Statement of Inquiry was filed as WSR** 19-13-036 ; or

☐ **Expedited Rule Making--Proposed notice was filed as WSR** \_\_\_\_\_; or

☐ **Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1); or**

☐ **Proposal is exempt under RCW** \_\_\_\_\_.

**Title of rule and other identifying information:** (describe subject) Chapter 314-35 WAC – Vapor Products. The Washington State Liquor and Cannabis Board (Board) proposes new sections and amendments to existing rule to implement the directives of Engrossed House Bill (EHB) 1074 (Chapter 15, Laws of 2019), regarding vapor product legal age for sales; and Engrossed Second Substitute House Bill (E2SHB) 1873 (Chapter 445, Laws of 2019), regarding vapor taxation.

### Hearing location(s):

**Date:** \_\_\_\_\_ **Time:** \_\_\_\_\_ **Location:** (be specific) \_\_\_\_\_ **Comment:** \_\_\_\_\_

November 26, 2019	10:00 am	1025 Union Avenue, Olympia, WA 98501
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**Date of intended adoption:** December 11, 2019 (Note: This is **NOT** the effective date)

### Submit written comments to:

Name: Katherine Hoffman

Address: 1025 Union Avenue, Olympia, WA 98501

Email: rules@lcb.wa.gov

Fax: 360-664-9689

Other:

By (date) November 26, 2019

### Assistance for persons with disabilities:

Contact Clariss Nghanabu, ADA Coordinator, Human Resources

Phone: 360-664-1642

Fax: 360-664-9689

TTY: 7-1-1 or 1-800-833-6388

Email: Clariss.Nghanabu@lcb.wa.gov

Other:

By (date) November 19, 2019

**Purpose of the proposal and its anticipated effects, including any changes in existing rules:** The proposed rules expand the regulatory authority of the Board concerning vapor product licensing and enforcement consistent with the directives of EHB 1074 and E2SHB 1873. The proposed rules increase the age of sale for vapor products; increase vapor product licensee record keeping requirements; clarify vapor product licensee requirements, including qualification, application denial, insurance requirements, license suspension and revocation; establish transportation requirements, establish the ability for the Board to seize both cannabinoid vapor products and vapor products; establish forfeiture guidelines; and establish a penalty structure that aligns with the current Board penalty reform framework. The proposed rules apply to existing and future vapor product distributors, retailers, and product delivery sellers.

**Reasons supporting proposal:** Washington State recognizes that there is a growing body of empirical research 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 improve the health of adolescents, young adults, young mothers, and young children. EHB 1074 accomplishes this by prohibiting the sale of tobacco and vapor products to persons under the age of twenty-one. In addition to creating a vapor tax structure that applies to all persons licensed to sell vapor products under chapter 70.345 RCW, E2SHB 1873 added vapor licensee responsibilities, and broadened WSLCB enforcement authority. Further, Governor Inslee's Executive Order 19-03 Addressing The Vaping Use Public Health Crisis became effective September 27, 2019. This rule proposal is a significant step toward alignment with the goals expressed in Executive Order 19-03. Rules are needed to set enforceable standards consistent with legislative and policy directives, and to clarify existing rule.

**Statutory authority for adoption:** RCW 70.345; RCW 82.24.250; RCW 82.32.300.

**Statute being implemented:** RCW 70.345.010; 70.345.030; 70.345.090; RCW 82.25.030; 82.25.040; 82.25.090; 82.25.095.

**Is rule necessary because of a:**

Federal Law? ☐ Yes ☒ No

Federal Court Decision? ☐ Yes ☒ No

State Court Decision? ☐ Yes ☒ No

If yes, CITATION:

**Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:** None

**Name of proponent:** (person or organization) Washington State Liquor and Cannabis Board

☐ Private

☐ Public

☒ Governmental

**Name of agency personnel responsible for:**

	Name	Office Location	Phone
Drafting: Coordinator	Katherine Hoffman, Rules	1025 Union Avenue, Olympia WA, 98501	360-664-1622
Implementation: Captain	Lisa Reinke, Enforcement	1025 Union Avenue, Olympia, WA. 98501	360-664-1753
Enforcement: Captain	Lisa Reinke, Enforcement	1025 Union Avenue, Olympia, WA, 98501	360-664-1753

**Is a school district fiscal impact statement required under RCW 28A.305.135?**

☐ Yes ☒ No

If yes, insert statement here:

The public may obtain a copy of the school district fiscal impact statement by contacting:

Name:

Address:

Phone:

Fax:

TTY:

Email:

Other:

**Is a cost-benefit analysis required under RCW 34.05.328?**

☐ Yes: A preliminary cost-benefit analysis may be obtained by contacting:

Name:

Address:

Phone:

Fax:

TTY:

Email:

Other:

☒ No: Please explain: A cost benefit analysis is not required under RCW 34.05.328(5)(b)(v) because of the subject of proposed rulemaking is explicitly and specifically dictated by statute.

**Regulatory Fairness Act Cost Considerations for a Small Business Economic Impact Statement:**

This rule proposal, or portions of the proposal, **may be exempt** from requirements of the Regulatory Fairness Act (see chapter 19.85 RCW). Please check the box for any applicable exemption(s):

☐ This rule proposal, or portions of the proposal, is exempt under RCW 19.85.061 because this rule making is being adopted solely to conform and/or comply with federal statute or regulations. Please cite the specific federal statute or regulation this rule is being adopted to conform or comply with, and describe the consequences to the state if the rule is not adopted.

Citation and description:

☐ This rule proposal, or portions of the proposal, is exempt because the agency has completed the pilot rule process defined by RCW 34.05.313 before filing the notice of this proposed rule.

☐ This rule proposal, or portions of the proposal, is exempt under the provisions of RCW 15.65.570(2) because it was adopted by a referendum.

☒ This rule proposal, or portions of the proposal, is exempt under RCW 19.85.025(3). Check all that apply:

☐ RCW 34.05.310 (4)(b)  
(Internal government operations)

☒ RCW 34.05.310 (4)(e)  
(Dictated by statute)

☐ RCW 34.05.310 (4)(c)  
(Incorporation by reference)

☐ RCW 34.05.310 (4)(f)  
(Set or adjust fees)

☒ RCW 34.05.310 (4)(d)  
(Correct or clarify language)

☐ RCW 34.05.310 (4)(g)  
((i) Relating to agency hearings; or (ii) process requirements for applying to an agency for a license or permit)

☒ This rule proposal, or portions of the proposal, is exempt under RCW 19.85.025(3): WAC 314-35-010; 314-35-015; 314-35-020; 314-35-023; 314-35-024; 314-35-025; 314-35-027; 314-35-030; 314-35-040; 314-35-045; 314-35-050; 314-35-055; 314-35-060; 315-35-065; 314-35-070; 314-35-075; 314-35-080; 314-35-085.

Explanation of exemptions, if necessary: RCW 34.05.310(4)(d): WAC 314-35-010; WAC 314-35-015; WAC 314-35-020; and WAC 314-35-023; RCW 34.05.310(4)(e): WAC 314-35-024; WAC 314-35-025; WAC 314-35-027; WAC 314-35-030; WAC 314-35-040; WAC 314-35-045; WAC 314-35-050; WAC 314-35-053; WAC 314-35-055; WAC 314-35-060; WAC 314-35-065; WAC 314-35-070; WAC 314-35-075; WAC 314-35-080; and WAC 314-35-085.

**COMPLETE THIS SECTION ONLY IF NO EXEMPTION APPLIES**

If the proposed rule is **not exempt**, does it impose more-than-minor costs (as defined by RCW 19.85.020(2)) on businesses?

☐ No Briefly summarize the agency's analysis showing how costs were calculated. \_\_\_\_\_

☒ Yes Calculations show the rule proposal likely imposes more-than-minor cost to businesses, and a small business economic impact statement is required. Insert statement here:

**What is the scope of the rule package?**

Compliance with the majority of the proposed requirements described in this document are not likely to cause vapor product licensees to lose sales or revenue. However, the proposed specific requirement to carry commercial liability insurance coverage will likely result in additional compliance costs.

**Which businesses are impacted by the proposed rule package? What was their North American Industry Classification (NAICS) code or codes? What are their minor cost thresholds?**

The NAICS code, business description, and minor cost thresholds are described and calculated below:

NAICS CODE	NAICS Business Description	# of businesses in WA	Minor cost threshold= 1% of Average Annual Payroll
453998	Tobacco Stores	3,869	\$183.99

These calculations are based on the following:

- NAICS 453998, All Other Miscellaneous Store Retailers (except Tobacco Stores). This code specifically includes retailing electronic cigarettes.
- BLS (Bureau of Labor Statistics), Retail Salesperson, SOC (Standard Occupational Classification) code is 41-2031.

- Washington state ESD (Employment Security Department) reports \$14.40 as the median hourly wage for SOC 41-2031. The reported annual wage for the SOC is \$35,594. For purposes of this calculation, the agency assumed that each business employed, on average, two full time Retail Salespersons.
- According to WSLCB data, there are 3,869 vapor licenses issued in Washington state. This figure includes licenses that have of physical Washington address.
- The number of vapor licensees that could be considered to be small businesses as defined in RCW 19.85.020(3) is estimated at 2,176. This estimate does not include gas station chains or franchises, such as Chevron, Arco or Shell. It does not include grocery or drug store chains, such as Safeway, QFC, Walmart, Walgreens or Rite Aid.
- For purposes of this calculation, the agency assumes that each small business employs, on average, two full-time employees. Annual payroll based on ESD data for two full-time Retail Salespersons = \$35,594 x 2 = \$71,188.
- $\$71,188 \times (1,000/3,869) \times (0.01) = \mathbf{\$183.99 \text{ (minor cost threshold)}}$

**Does the rule have a disproportionate impact on small businesses?**

Basic, commercial general liability insurance is estimated to range in cost from \$2,500 and \$3,500 annually depending on a variety of factors, including but not limited to levels of coverage and geographic location. These estimates suggest that there may be a disproportionate impact on small businesses (defined as businesses with less than 50 employees, and not by receipts/sales).

**Did the agency make an effort to reduce the impact of the rule?**

The current estimated costs associated with the proposed rules are related to the necessary protection of public health and safety. The agency asserts that these costs are necessary, appropriate, and supported by the Governor's Executive Order 19-03, Addressing the Vaping Use Public Health Crisis.

**Did the agency involve small businesses in the rule development process?**

The majority of the proposed rules are required by statute and non-negotiable. The specific section that is the subject of this analysis is necessary, appropriate, and supported by the Governor's Executive Order 19-03, Addressing the Vaping Use Public Health Crisis.

**Will businesses have to hire or fire employees because of the requirements in the rule?**

The proposed rules do not require additional staffing. Vapor product licensees may modify current business models, including staffing levels, in response to market shifts and adjustments that may occur as a result of the attention to the reported effects of nicotine and non-nicotine vapor product consumption. However, some businesses may already be insured at the proposed minimum, and these rule proposal would not result in any staffing level adjustment.

The public may obtain a copy of the small business economic impact statement or the detailed cost calculations by contacting:

Name: Katherine Hoffman  
 Address: 1025 Union Avenue, Olympia, WA 98501  
 Phone: 360-664-1622  
 Fax: 360-664-9689  
 TTY:  
 Email: rules@lcb.wa.gov  
 Other:

**Date:** October 16, 2019

**Name:** Jane Rushford

**Title:** Chair

**Signature:**



AMENDATORY SECTION (Amending WSR 16-23-088, filed 11/16/16, effective 12/17/16)

**WAC 314-35-010 Vapor products—Introduction.** This chapter provides rules that apply in addition to those requirements regarding the manufacturers, distributors, delivery sales, and retail sellers of vapor products provided in chapter 70.345 RCW. Penalties for violations of this chapter and for violations of chapter 70.345 RCW are provided in chapter 70.345 RCW.

NEW SECTION

**WAC 314-35-015 Definitions.** The following definitions apply to this chapter in addition to the definitions provided in RCW 70.345.010, unless the context clearly indicates otherwise:

(1) "Control" means the direct power to order or direct the management of a licensee.

(2) "Domicile" means a person's true, fixed primary permanent home. It is the place where a person intends to remain and where the person expects to return when the person leaves without intending to establish a new domicile elsewhere.

(3) "Financial institution" means any bank, consumer loan company, credit union, savings bank, savings and loan association, trust company, or similar lending institution under the jurisdiction and registered with the department of financial institutions.

(4) "Profit" means the entire gross receipts from all sales and services made in, upon or from a licensed business.

AMENDATORY SECTION (Amending WSR 16-23-088, filed 11/16/16, effective 12/17/16)

**WAC 314-35-020 ((Vapor product licenses required—Licensing requirements, denials, suspensions, and revocations.)) Licensing requirements.** (1) ((The)) Vapor product license types are:

(a) Vapor product retailer's license((τ));

(b) Vapor product distributor's license((τ)); and

(c) Vapor product delivery sale license. ((A vapor product retailer's license, vapor product distributor's license, or a vapor product delivery sale license is))

(2) All vapor product license types are required to perform the functions ((of a vapor product retailer, vapor product distributor, or a vapor product delivery seller, respectively, whether or not)) of the respective license type regardless of whether the vapor product contains nicotine.

((2) A vapor product retailer's license, vapor product distributor's license, or a vapor product delivery sale license cannot)) (3) A vapor product manufacturer must hold a vapor product distributor license if the manufacturer is engaged in the business of selling vapor products in Washington state, and brings or causes to be brought into

this state from outside the state any vapor products for sale consistent with RCW 70.345.010 (7) and (9).

(4) No vapor product license will be issued to a location that is a domicile or attached to a domicile, is not a fixed or stationary location, or both.

((3)) (a) The board will not approve any vapor product license for a location where board access without notice or cause is limited.

(b) The board may revoke any vapor product license that is issued to an attached structure or any other location inconsistent with this section.

(5) A person or entity must meet ((certain)) all qualifications ((to receive)) described in this chapter and chapter 70.345 RCW to be issued a vapor product license, and must continue to meet those qualifications to maintain the license.

((4) No more than) (6) One license of each vapor product license type may be issued at a single location.

((5)) (7) A licensed location must be separated from other vapor product businesses, and not accessible through neighboring businesses.

((6)) (8) For the purpose of initial or renewal application review for a vapor product license, the board may conduct an investigation of all licenses it has issued to an applicant including, but not limited to, administrative violation history. The board reserves its discretion to issue a vapor product license to a person or entity that has four or more violations within the two years prior to the date the application is received by the board.

(9) For the purpose of ((reviewing an)) initial or renewal application review for a vapor product license ((or considering the denial of a license application, the WSLCB)), the board may consider the applicant's prior criminal conduct ((of the applicant)) and criminal history record within the five years prior to the date the application is received by the ((WSLCB)) board. The ((WSLCB)) board uses the following point system to determine a person's qualification for a license((. The WSLCB will not normally issue a vapor product license to a person or entity that has accumulated eight or more points as determined in (a) through (e) of this subsection. If a case is pending for an alleged offense that would earn eight or more points in total for the applicant, the WSLCB will hold the application until the final disposition of the pending case. If the case does not reach final disposition within ninety days of application, the WSLCB may administratively close the application.)):

(a) Felony conviction within the five years immediately prior to application: Twelve points.

(b) Gross misdemeanor conviction for violation of chapter 70.345, 82.24 or 82.26 RCW within the five years immediately prior to application: Twelve points.

(c) Other gross misdemeanor conviction within three years immediately prior to application: Five points.

(d) Misdemeanor conviction within three years immediately prior to application: Four points.

(e) Nondisclosure of any of the above: Four points each in addition to underlying points.

((7) For the purpose of reviewing an initial or renewal application for a vapor product license and considering the denial of a vapor product license application, the WSLCB will conduct an investigation of all applicants' liquor and cigarette and tobacco products law and rule administrative violation history. The WSLCB will not normally is-

~~sue a vapor product license to a person or entity that has four or more violations within the two years prior to the date the application is received by the WSLCB.~~

~~(8) If the WSLCB makes an initial decision to deny a vapor product license or renewal, or suspend or revoke a license, for the reasons listed above or as provided in chapter 70.345 RCW, the applicant or licensee may request a hearing subject to the applicable provisions under chapter 34.05 RCW. Appeals under this section will be conducted under a brief adjudicative proceeding pursuant to WAC 314-42-110 through 314-42-130, and RCW 34.05.482 through 34.05.494.))~~ (10) The board may, at its discretion, issue a vapor product license to a person or entity that has accumulated eight or more points as described in this subsection.

(11) If an applicant has a pending case for an alleged offense that totals eight or more points, the board will hold the application until the final disposition of the pending case. If the case does not reach final disposition within ninety days of application, the board may administratively close the application.

(12) The board may conduct a final inspection of the proposed licensed premises to determine if the applicant has met the requirements of the licensure requested.

#### NEW SECTION

**WAC 314-35-021 Insurance requirements.** Vapor product licensees must obtain insurance coverage described in this section. 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 or omission of the vapor product licensees. Vapor product licensees must furnish evidence in the form of a certificate of insurance satisfactory to the board that insurance, in the following kinds and minimum amounts, has been secure. Failure to provide proof of insurance may result in license cancellation.

(1) Commercial general liability insurance: The licensee must at all times carry and maintain commercial general liability insurance or commercial umbrella insurance for bodily injury and property damage arising out of licensed activities. The limits of liability insurance must not be less than one million dollars.

(a) This insurance must cover such claims as may be caused by any act, omission, or negligence of the licensee or its officers, agents, representatives, assigns, or servants.

(b) The insurance must also cover bodily injury, including disease, illness and death, and property damage arising out of the licensee's premises/operations, products, and personal injury.

(2) Insurance carrier rating: The insurance required in subsection (1) of this section must be issued by an insurance company authorized to do business within the state of Washington. Insurance is to be placed with a carrier that has a rating of A - Class VII or better in the most recently published edition of *Best's Reports*. If an insurer is not admitted, all insurance policies and procedures for issuing the insurance policies must comply with chapters 48.15 RCW and 284-15 WAC.

(3) Additional insured. The state and its employees, agents, and volunteers must be named as an additional insured on insurance poli-

cies required under this section. All policies must be primary over any other valid and collectable insurance.

#### NEW SECTION

##### **WAC 314-35-023 Vapor product license transfer and relocation.**

(1) A license may not be transferred or relocated without prior approval of the board.

(a) A licensee must notify the board at least ten business days before any ownership changes or location changes of the licensed vapor products business. Failure to notify the board without applying for a separate license for a new location will be treated as operating without a license.

(b) If a licensee fails to notify the board prior to moving a location, the licensee may be suspended until the new location meets the requirements and qualifications for a vapor products license.

(c) License relocation may be requested by contacting board enforcement by email or telephone.

(2) As a condition of licensure, all vapor products licensees must:

(a) Keep premises where vapor products are stored, manufactured, and offered for sale in a clean and sanitary condition.

Examples of clean and sanitary conditions include, but are not limited to:

(i) Vapor product mixing areas separate from restroom;

(ii) Storage of cleaning agents separate from consumable vapor products;

(iii) Vapor products not in contact or stored with or near hazardous materials and products.

(b) Label all packages and containers that contain nicotine with the nicotine content of the product until the product is packaged and labeled in finished packaging for sale consistent with the packaging and labeling requirements described in RCW 70.345.075.

(c) Vapor product licensees may only purchase vapor products from board licensed vapor product locations.

#### NEW SECTION

##### **WAC 314-35-024 Vapor product packaging and labeling.**

(1) A manufacturer or distributor that sells, offers for sale, or distributes liquid nicotine containers must label the vapor product with all of the following:

(a) A warning regarding the harmful effects of nicotine;

(b) A warning to keep the vapor product away from children;

(c) A warning that vaping is illegal for those under the legal age to use the product; and

(d) Except as provided in WAC 314-35-023 of this section, the amount of nicotine in milligrams per milliliter of liquid along with the total volume of the liquid contents of the product expressed in milliliters.



(2) A manufacturer or distributor that sells, offers for sale, or distributes liquid nicotine containers must comply with any other packaging and labeling requirements including, but not limited to, specific warnings as mandated by the United States Food and Drug Administration, any other federal agency, or any agency of state of Washington including, but not limited to, the Washington state department of health.

NEW SECTION

**WAC 314-35-025 Vapor product applicant and licensee hearing rights.** (1) If the board denies a vapor product license application or renewal, or suspends or revokes a license for any of the reasons listed in this chapter or in chapter 70.345 RCW, the applicant or licensee may request a hearing subject to the applicable provisions of chapter 34.05 RCW.

(2) Appeals under this chapter will be conducted by a brief adjudicative proceeding pursuant to WAC 314-42-110 through 314-42-130, and RCW 34.05.482 through 34.05.494.

NEW SECTION

**WAC 314-35-027 Qualifying for a vapor product license.** A vapor product license must be issued in the name(s) of the true party(ies) of interest.

(1) True parties of interest must qualify to be listed on the license, consistent with RCW 70.345.020. For purposes of this chapter, "true party of interest" means:

Entity	True Party(ies) of Interest
Sole proprietorship	Sole proprietor and spouse.
General partnership	All partners and spouses.
Limited partnership, limited liability partnership, or limited liability limited partnership	All general partners and spouses. All limited partners and spouses.
Limited liability company	All members and spouses. All managers and spouses.
Privately held corporation	All corporate officers (or persons with equivalent title) and spouses. All stockholders.
Publicly held corporation	All corporate officers (or persons with equivalent title) and spouses. All stockholders.

Entity	True Party(ies) of Interest
Multilevel ownership structures	All persons and entities that make up the ownership structure.
Any entity or person(s) expecting or receiving profits, or part thereof, or exercising control over a licensed business	Any entity or person who is in receipt of, or has the right to receive profits, or part thereof, from the licensed business during any full or partial calendar or fiscal year.
Any entity or person(s) who exercise(s) control over the licensed business in exchange for money or expertise	Any entity(s) or person(s) and spouses who exercise(s) control over the licensed business in exchange for money or expertise.
Nonprofit corporations	All individuals and spouses, and entities having membership rights in accordance with the provisions of the articles of incorporation or the bylaws.

(2) The board may conduct an investigation of any person or entity who exercises any control over the applicant's or licensee's business operations, including a financial investigation, a criminal history background check, or both. When an entity other than the owner controls daily business operations consistent with an agreement between the owner and the operating entity, the operating entity becomes a true party of interest. The operating entity must meet the same qualifications and requirements as a licensee.

AMENDATORY SECTION (Amending WSR 16-23-088, filed 11/16/16, effective 12/17/16)

**WAC 314-35-030 Vapor product licensee recordkeeping requirements.** (1) Vapor product ~~((distributors and manufacturers))~~ licensed locations must keep complete, legible and accurate records, including itemized invoices, at each place of business for that place of business of vapor products held, purchased, manufactured, brought ~~((in))~~ into or caused to be brought ~~((in from without))~~ into the state from outside the state, or shipped or transported to ~~((retailers in this state, and of all sales of vapor products made. These))~~ locations in Washington state, or sold. The required records must show:

(a) The names and addresses of purchasers((r));

(b) The names and addresses of sellers;

(c) The inventory of all vapor product((s,r)) (to include the description of the product, size (mL), brand); and

(d) Other pertinent papers and documents relating to the purchase, sale, or disposition of vapor products. ((All invoices and other records required by this section to be kept must be preserved for a period of five years from the date of the invoices or other documents or the date of the entries appearing in the records.))

(2) Vapor product licensees must render with each sale of vapor products to persons other than ultimate consumers itemized invoices showing the seller's name and address, the purchaser's name and address, the date of sale, brand, size (mL), and all prices. ~~((Vapor product licensees must preserve legible copies of all such invoices for five years from the date of sale.))~~

(3) ~~((Every licensed))~~ Vapor product ~~((retailer))~~ licensees must ~~((procure))~~ obtain itemized invoices of all vapor products purchased. The invoices must show the seller's name and address, the date of purchase, brand, size (mL), and all prices and discounts.

~~((The licensed vapor product retailer must keep at each retail outlet copies of complete, accurate, and legible invoices for that retail outlet or place of business. All invoices required to be kept under this section must be preserved for five years from the date of purchase.))~~ Vapor product licensees must make all records available for inspection upon request of the board or its duly authorized agents or employees, and may not interfere with location inspection, record inspection, or both. The board or its duly authorized agents or employees may enter any vapor product licensed location at any time without a search warrant to inspect the premises for:

(a) Required invoices as described in this section; and

(b) Regulated products contained in the licensed location.

(5) All invoices, documents, or other records required under the provisions of this chapter must be legible, preserved, and retained for five years from the date of the invoices, documents, or other records at the place of the business where the vapor products are sold or stored.

(6) Vapor product licensees must provide the board, any of its agents or employees free, unhindered access to the vapor product licensed location.

(7) A licensed manufacturer with representatives who sell or distribute the manufacturer's vapor products must provide the board with a list of the names and addresses of all such representatives at an email address established by the board and maintained on the board's web site. The licensed manufacturer must ensure that the list of representatives who sell or distribute its vapor products is kept current.

(a) A manufacturer's representative is not authorized to distribute or sell vapor products unless the manufacturer holds a valid distributor's license under chapter 70.345 RCW; and

(b) A manufacturer's representative must carry a copy of the hiring distributor's license at all times when selling or distributing the manufacturer's vapor products.

AMENDATORY SECTION (Amending WSR 16-23-088, filed 11/16/16, effective 12/17/16)

**WAC 314-35-040 Age-restricted vapor products retailer licensed locations.** (1) Age-restricted vapor products retailer licensed locations must register as such with the ~~((WSLCB))~~ board by indicating at the time of application or within ten days prior to becoming an age-restricted location. A vapor product retail licensee must inform the ~~((WSLCB))~~ board in writing ten business days prior to a change in the

age-restriction status. The board will make the appropriate age-restricted status form ((is)) available on ((the WSLCB)) its web site.

(2) ((Holders of a)) Vapor product retailer ((license)) licensed locations where entry into the licensed premises is age-restricted to persons ((eighteen)) twenty-one years of age or older must post signs provided by the ((WSLCB)) board at each entrance point to indicate the premises is age-restricted. Such signs must not be removed at any time ((during opening hours of the licensed vapor products retail establishment)).

(3) All vapor product licensed locations that allow vapor products to be consumed on the premises, including vapor product tastings as provided in RCW 70.345.100, must be restricted to persons age twenty-one and over at all times.

(4) Any restricted location as described above may not employ persons under the age of twenty-one.

#### NEW SECTION

**WAC 314-35-045 Vapor product licensee responsibilities.** (1) Vapor product licensees and their employees must conduct the licensed premises in compliance with all applicable statutes as they now exist or may later be amended including, but not limited to, Titles 9, 9A RCW, chapters 69.50, 70.155, 70.158, 70.345, 82.24, and 82.26 RCW.

(2) Licensees have the responsibility to control their conduct and the conduct of employees and patrons at all times. Except as otherwise provided by law, licensees and employees may not:

(a) Be disorderly, apparently intoxicated, or under the influence of a controlled substance, on the licensed premises;

(b) Permit any disorderly person to remain on the premises;

(c) Engage in or allow behavior that provokes conduct that may endanger public safety.

#### NEW SECTION

**WAC 314-35-050 Vapor product license suspensions and revocations.** (1) The board may revoke or suspend a retailer, distributor, or delivery seller license issued under chapter 70.345 RCW and this chapter upon sufficient cause showing a violation of chapter 70.345 RCW, this chapter, or both.

(2) Any retail location license issued under chapter 82.24 or 82.26 RCW to a person whose vapor product retailer license or licenses have been suspended or revoked for violating RCW 26.28.080 must also be suspended or revoked during the period of suspension or revocation under this section and RCW 70.345.170.

(3) Any person whose license or licenses have been revoked under this section may reapply to the board at the expiration of two years of the license or licenses, unless the license was revoked pursuant to RCW 70.345.180 (2)(e). The license or licenses may be approved by the board if it finds that the licensee has complied with the provisions of this chapter.

(4) A person whose license has been suspended or revoked may not sell vapor products or permit vapor products to be sold during the period of suspension or after revocation on the premises occupied by the person or upon other premises controlled by the person or others or in any other manner or form. If the suspension or revocation involves licenses issued under chapter 82.24 or 82.26 RCW, the person is prohibited from selling cigarette and tobacco products consistent with WAC 314-34-020 and RCW 26.28.080.

(5) On the date a vapor product license suspension goes into effect a board enforcement officer will post a suspension notice in a conspicuous place on or about the licensed premises. This notice will state that the license has been suspended by order of the board due to a violation of a board law or rule.

(6) During the period of vapor product license suspension, the licensee and employees:

(a) Are required to maintain compliance with all applicable vapor product laws and rules;

(b) May not remove, alter, or cover the posted suspension notice, and may not permit another person to do so;

(c) May not place or permit the placement of any statement on the licensed premises indicating that the premises has been closed for any reason other than what is stated in the suspension notice;

(d) May not advertise by any means that the licensed premises is closed for any reason other than what is stated in the board's suspension notice.

(7) During the period of vapor product license suspension:

(a) A vapor product licensee may operate their business provided there is no sale, delivery, service, consumption, removal, or receipt of vapor products.

(b) If a vapor product license is suspended, revoked, or both, the location's licenses under chapter 82.24 or 82.26 RCW if held are also revoked, consistent with subsection (4) of this section.

(8) If the board makes an initial decision to deny a vapor product license or renewal, or suspend or revoke a license for the reasons listed in this section, or as provided in this chapter or chapter 70.345 RCW, the applicant or licensee may request a hearing subject to the applicable provisions described in chapter 34.05 RCW. Appeals under this section will be conducted under a brief adjudicative proceeding pursuant to WAC 314-42-110 through 314-42-130, and RCW 34.05.482 through 34.05.494.

(9) Any determination and order by the board, and any order of suspension or revocation by the board of the license issued under chapter 70.345 RCW or this chapter, or refusal to reinstate a license or licenses after revocation is reviewable by an appeal in the superior court of Thurston County. The superior court must review the order or ruling of the board and may hear the matter de novo, having due regard to the provisions of this chapter and the duties imposed upon the board.

#### NEW SECTION

**WAC 314-35-053 Transportation.** (1) No person may transport or cause to be transported vapor products for sale, except:

(a) A licensed distributor under chapter 70.345 RCW;

- (b) A licensed retailer under chapter 70.345 RCW;
  - (c) A seller with a valid delivery sale license under chapter 70.345 RCW; or
  - (d) A person who has given the board advance notice of the commencement of transportation of vapor products.
- (2) When transporting vapor products for sale, the person must have, in their actual possession, invoices or delivery tickets for the vapor products that must show:
- (a) The true name and address of the consignor or seller;
  - (b) The true name and address of the consignee or purchaser; and
  - (c) The number of items, size of each item in mL, and brands of the vapor products being transported.
- (3) In any case where the board has knowledge or reasonable grounds to believe that any vehicle is transporting vapor products in violation of this section or chapter 70.345 RCW, the board is authorized to stop the vehicle and to inspect for contraband vapor products.

#### NEW SECTION

**WAC 314-35-055 Seizure of cannabinoid vapor products.** (1) Any vapor product given or offered for sale containing cannabinoids is prohibited by RCW 70.345.030.

(2) Any vapor product offered for sale that is labeled or marketed as containing cannabinoid, synthetic cannabinoid, cathinone, or methcathinone may be seized without a warrant by an agent of the board and are subject to forfeiture.

(3) It is prima facie evidence that the vapor product contains a cannabinoid if the packaging or labeling in which it is offered for sale contains language or depictions that the product is or contains a cannabinoid.

#### NEW SECTION

**WAC 314-35-060 Seizure of vapor products.** (1) Any vapor products in the possession of a person acting as a distributor or retailer of vapor products, and who is not licensed as required under this chapter, chapter 70.345 RCW or both, or a person who is selling vapor products in violation of RCW 82.24.550(6), may be seized without a warrant by any agent of the board. Any vapor products seized under this subsection are deemed forfeiture.

(2) Any vapor products in the possession of a person who is not a licensed distributor, delivery seller, retailer, or a manufacturer's representative, and who transports vapor products for sale without having provided notice to the board as required under WAC 314-35-053, or without invoices or delivery tickets showing the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of vapor products being transported may be seized and are subject to forfeiture.

(3) All conveyances, including aircraft, vehicles, or vessels that are used, or intended for use to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of

vapor products under this section, may be seized and are subject to forfeiture except:

(a) A conveyance used by any person as a common or contract carrier having in actual possession invoices or delivery tickets showing the true name and address of the consignor or seller, the true name of the consignee or purchaser, and the quantity and brands of the vapor products transported, unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this chapter;

(b) A conveyance subject to forfeiture under this section by reason of any act or omission of which the owner establishes to have been committed or omitted without his or her knowledge or consent; or

(c) A conveyance encumbered by a bona fide security interest if the secured party neither had knowledge of nor consented to the act or omission.

(4) Property subject to forfeiture under subsections (2) and (3) of this section may be seized by any agent of the board upon process issued by any superior court or district court having jurisdiction over the property.

(5) Seizure without process may be made if:

(a) The seizure is incident to an arrest or a search warrant; or

(b) The board has probable cause to believe that the property was used or is intended to be used in violation of this chapter and exigent circumstances exist making procurement of a search warrant impracticable.

(6) This section may not be construed to require the seizure of vapor products if the board's agent reasonably believes that the vapor products are possessed for personal consumption by the person in possession of the vapor products.

(7) Any vapor products seized by a law enforcement officer must be turned over to the board as soon as practicable.

#### NEW SECTION

**WAC 314-35-065 Forfeiture.** (1) In all cases of seizure of any vapor products made subject to forfeiture under this chapter, the board must proceed as provided in RCW 82.24.135.

(2) When vapor products are forfeited under this chapter, the board may:

(a) Retain the property for official use or upon application by any law enforcement agency of this state, another state, or the District of Columbia, or of the United States for the exclusive use of enforcing this chapter or the laws of any other state or the District of Columbia or of the United States; or

(b) Sell the vapor products at public auction to the highest bidder after due advertisement. Before delivering any of the goods to the successful bidder, the department or board must require the purchaser to pay the proper amount of any tax due. The proceeds of the sale must be first applied to the payment of all proper expenses of any investigation leading to the seizure and of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising, and court costs. The balance of the proceeds must be distributed consistent with chapter 70.345 RCW.

(3) The board may return any property seized under the provisions of this chapter when it is shown that there was no intention to violate the provisions of this chapter. When any property is returned under this section, the board may return the property to the parties from whom they were seized if and when such parties have paid the proper amount of tax due under this chapter.

#### NEW SECTION

**WAC 314-35-070 Penalty structure.** (1) The board determines if a penalty will be imposed. Penalties are based on the severity of the violation in the following categories:

(a) Category I: Violations that create a direct or immediate threat to public health, safety, or both;

(b) Category II: Violations that create a potential threat to public health, safety, or both; and

(c) Category III: Regulatory violations.

(2) For purposes of assessing penalties, only violations occurring in the three-year time period immediately preceding the date of the violation will be considered unless otherwise provided in the chapter.

(3) The board may, at its discretion, deviate from the prescribed penalties herein consistent with RCW 70.345.180. Such deviations will be determined on a case-by-case basis, considering mitigating or aggravating factors.

(a) Mitigating factors may result in a waiving or lowering of fines, civil penalties, imposition of a fine in lieu of suspension, or fewer days of suspension. Mitigating factors may include demonstrated business policies and practices that may reduce risk to public health and safety.

(b) Aggravating factors may result in increased days of suspension, increased monetary penalties, cancellation, or nonrenewal of a vapor products license. Aggravating factors may include obstructing an investigation, business operations, behaviors, or both, that increase risk to public health and safety.

#### NEW SECTION

**WAC 314-35-075 Category I—Violations that create a direct or immediate threat to public health, safety, or both.**

**Category I: Violations that create a direct or immediate threat to public health, safety, or both.**



<b>Violation Type</b>	<b>1st Violation in a three-year period</b>	<b>2nd Violation in a three-year period</b>	<b>3rd Violation in a three-year window</b>	<b>4th Violation in a three-year window</b>	<b>5th Violation in a three-year window</b>
Sales to persons under twenty-one, allowing a person under twenty-one to frequent consumption of vapor products, or vapor product tasting.  RCW 26.28.080 RCW 70.345.100 WAC 314-35-040	\$200 monetary penalty	\$600 monetary penalty	\$2,000 monetary penalty and a 6-month license suspension	\$3,000 monetary penalty and a 12-month license suspension	Cancellation of license with no possibility of reinstatement for 5 years
Obstruction: Misrepresentation of fact; not permitting physical presence.  RCW 70.345.030(2)	\$200 monetary penalty	\$600 monetary penalty	\$2,000 monetary penalty and a 6-month license suspension	\$3,000 monetary penalty and a 12-month license suspension	Cancellation of license with no possibility of reinstatement for 5 years
Sell, give, or permit to sell or give a product that contains any amount of any cannabinoid, synthetic cannabinoid, cathinone, or methcathinone, unless otherwise provided by law.  RCW 70.345.030 WAC 314-35-055	\$200 monetary penalty	\$600 monetary penalty	\$2,000 monetary penalty and a 6-month license suspension	\$3,000 monetary penalty and a 12-month license suspension	Cancellation of license with no possibility of reinstatement for 5 years
Conduct violations: Permitting or engaging in criminal conduct, or both.  Title 9 RCW Title 9A RCW Chapter 69.50 RCW Chapter 70.155 RCW Chapter 70.158 RCW Chapter 70.345 RCW Chapter 82.24 RCW Chapter 82.26 RCW WAC 314-35-045	\$200 monetary penalty	\$600 monetary penalty	\$2,000 monetary penalty and a 6-month license suspension	\$3,000 monetary penalty and a 12-month license suspension	Cancellation of license with no possibility of reinstatement for 5 years
Selling, giving, or permitting to give a vapor product or products to persons under twenty-one by any person other than a licensed retailer.  RCW 26.28.080	\$50 monetary penalty	\$100 monetary penalty	\$100 monetary penalty	\$100 monetary penalty	\$100 monetary penalty

## NEW SECTION

**WAC 314-35-080 Category II—Violations that create a potential threat to public health, safety, or both.**

**Category II: Violations that create a potential threat to public health, safety, or both.**

<b>Violation Type</b>	<b>1st Violation in a three-year window</b>	<b>2nd Violation in a three-year window</b>	<b>3rd Violation in a three-year window</b>	<b>4th Violation in a three-year window</b>	<b>5th Violation in a three-year window</b>
Failure to comply with child resistant packaging requirements. RCW 70.345.130	\$150 monetary penalty	\$300 monetary penalty	\$600 monetary penalty	\$2,000 monetary penalty and a 6-month license suspension	\$3,000 and a 12-month license suspension
Failure to comply with product labeling requirements. RCW 70.345.075	\$150 monetary penalty	\$300 monetary penalty	\$600 monetary penalty	\$2,000 monetary penalty and a 6-month license suspension	\$3,000 and a 12-month license suspension
Vapor products purchased from an unlicensed source. WAC 314-35-023	\$150 monetary penalty	\$300 monetary penalty	\$600 monetary penalty	\$2,000 monetary penalty and a 6-month license suspension	\$3,000 and a 12-month license suspension
True party of interest. RCW 70.345.020 WAC 314-35-020 WAC 314-35-027	\$150 monetary penalty	\$300 monetary penalty	\$600 monetary penalty	\$2,000 monetary penalty and a 6-month license suspension	\$3,000 and a 12-month license suspension
Operating without a valid license. RCW 70.345.030	\$150 monetary penalty	\$300 monetary penalty	\$600 monetary penalty	\$2,000 monetary penalty and a 6-month license suspension	\$3,000 and a 12-month license suspension
Transportation violations. WAC 314-35-053	\$150 monetary penalty	\$300 monetary penalty	\$600 monetary penalty	\$2,000 monetary penalty and a 6-month license suspension	\$3,000 and a 12-month license suspension

#### NEW SECTION

### **WAC 314-35-085 Category III—Regulatory violations.**

#### **Category III: Regulatory Violations.**

<b>Violation Type</b>	<b>1st Violation in a three-year window</b>	<b>2nd Violation in a three-year window</b>	<b>3rd Violation in a three-year window</b>	<b>4th Violation in a three-year window</b>	<b>5th Violation in a three-year window</b>
Noncompliance with record keeping requirements. WAC 314-35-020 WAC 314-35-030	\$75 monetary penalty	\$150 monetary penalty	\$300 monetary penalty	\$600 monetary penalty	\$2,000 monetary penalty and a 6-month license suspension
Failure to post required signs. RCW 70.345.070 WAC 314-35-040	\$75 monetary penalty	\$150 monetary penalty	\$300 monetary penalty	\$600 monetary penalty	\$2,000 monetary penalty and a 6-month license suspension

<b>Violation Type</b>	<b>1st Violation in a three-year window</b>	<b>2nd Violation in a three-year window</b>	<b>3rd Violation in a three-year window</b>	<b>4th Violation in a three-year window</b>	<b>5th Violation in a three-year window</b>
Selling or distributing vapor products from self-serve displays or without the intervention of a store employee. RCW 70.345.080	\$75 monetary penalty	\$150 monetary penalty	\$300 monetary penalty	\$600 monetary penalty	\$2,000 monetary penalty and a 6-month license suspension
Noncompliance with mail or internet sales requirements. RCW 70.345.090	\$75 monetary penalty	\$150 monetary penalty	\$300 monetary penalty	\$600 monetary penalty	\$2,000 monetary penalty and a 6-month license suspension
Failure to verify age or accepting unpermitted forms of identification. RCW 70.345.120	\$75 monetary penalty	\$150 monetary penalty	\$300 monetary penalty	\$600 monetary penalty	\$2,000 monetary penalty and a 6-month license suspension
Failure to comply with license suspension or revocation. WAC 314-35-050	\$75 monetary penalty	\$150 monetary penalty	\$300 monetary penalty	\$600 monetary penalty	\$2,000 monetary penalty and a 6-month license suspension
Giving or distributing vapor products without charge by coupon, unless exempted. RCW 70.345.110	\$75 monetary penalty	\$150 monetary penalty	\$300 monetary penalty	\$600 monetary penalty	\$2,000 monetary penalty and a 6-month license suspension