

Significant Legislative Rule Analysis

New WAC 314-55-013
Rules Concerning the Voluntary Marijuana Licensee
Consultation and Education Program

August 5, 2020

SECTION 1:

Describe the proposed rule, including a brief history of the issue, and explain why the proposed rule is needed.

The Washington State Liquor and Cannabis Board (Board) enforcement division is responsible for a variety of activities related to the regulation of marijuana in Washington State. These activities include, but are not limited to, conducting compliance checks, inspections, following up on complaint investigations, and verifying license site locations, consistent with provisions described in chapter 69.50 RCW and chapter 314-55 WAC.

In the six years since the first marijuana licenses were issued, the marijuana market, industry, and authorizing environment have matured. Although the Board designed the current regulatory structure to align with I-502's direction to bring marijuana "under a tightly regulated, state-licensed system similar to that for controlling hard alcohol," it is appropriate to reevaluate that conservative system, including compliance, education, and enforcement activities.

The Board began to consider revisions to existing enforcement guidelines by initiating a formal rule inquiry under WSR #18-22-099 in October, 2018. Those efforts were extended by the passage of Engrossed Substitute Senate Bill (ESSB) 5318 during the 2019 regular session of the Washington State legislature. While ESSB 5318 provided direction for enforcement guideline redesign, it also provided a framework to perfect and expand existing programs for compliance education for licensed marijuana businesses and their employees. Rules developed under the provisions of ESSB 5318 are required to include a voluntary compliance program created in consultation with licensed marijuana businesses and their employees, and must include recommendations on abating violations described in chapter 69.50 RCW and chapter 314-55 WAC.

The proposed rules establish the LCB's compliance education program, and consistent with ESSB 5318, frame the following provisions:

- WSLCB may grant a licensee's application for advice and consultation and visit the licensee's premises.
- If any areas of concern are disclosed within the scope of any on-site consultation, the LCB must recommend how to eliminate the areas of concern.
- A visit to a licensee's premises through the compliance education program is not considered an inspection or investigation.
- During the visit, the LCB may not issue notices or citations and may not assess civil penalties. However, if the on-site visit discloses a violation with a direct or immediate relationship to public safety and the violation is not corrected, the LCB may investigate.

Additionally, the proposed rules provide that violations with a direct or immediate relationship to public safety discovered during a consultative visit must be corrected

within a specified period of time and an inspection must be conducted at the end of the time period.

SECTION 2:

Is a Significant Analysis required for this rule?

Under RCW 34.05.328(5)(a)(i), the WSLCB is not required to complete a significant analysis for this or any of its rules. However, RCW 34.05.328(5)(a)(ii) also provides that except as provided by applicable statute, significant analysis applies to any rule of any agency, if voluntarily made applicable by the agency.

The WSLCB voluntarily asserts that proposed sub-sections WAC 314-55-013(3), (4), and (5) meet the definition of legislatively significant as described in RCW 34.05.328(5)(c)(iii)(C) because they are rules other than procedural or interpretive rules that adopt new, or make significant amendments to a policy or regulatory program.

Proposed new subsections (1) and (2) regarding scope, intent and definitions are exempt because they do not meet the definition of significant rule under RCW 34.05.328(5)(c).

For these reasons, the WSLCB voluntarily offers this significant analysis.

SECTION 3:

Clearly state in detail the general goals and specific objectives of the statute that the rule implements.

The proposed rules implement specific sections of ESSB 5318, codified in RCW 69.50.342(3) and RCW 69.50.561. In stating its intent regarding ESSB 5318, the Washington State Legislature found, in relevant part, “While a strong focus on enforcement is an important component of the regulated marketplace, a strong focus on compliance and education is also critically necessary to assist licensees who strive for compliance and in order to allow the board to focus its enforcement priorities on those violations that directly harm public health and safety.”

The proposed rules implement the goals and objectives of RCW 69.50.342(3) and 69.50.561 by establishing a voluntary marijuana licensee consultation and education program that aligns with statutory requirements, but was developed in consultation with licensed marijuana business, their employees, industry representatives, and other interested parties.

SECTION 4:

Explain how the agency determined that the rule is needed to achieve these general goals and specific objectives. Analyze alternatives to rulemaking and the consequences of not adopting the rule.

The proposed rules realize and embody the intent of ESSB 5318 by expanding existing programs for compliance education for licensed marijuana businesses and their employees.

Rules are needed to establish and frame the program, offer clear guidance and framework for licensees, and assure consistent application of rule and agency decision making.

SECTION 5:

Explain how the agency determined that the probable benefits of the rule are greater than the probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented.

1. WAC 314-55-013(3) – Request for consultation.

Description of the proposed rule: This new section establishes the following:

- Provision of one request for advice and consultation per year and per licensee, with Board discretion to consider additional requests;
- A time frame to allow for scheduling and completion of requests for advice and consultation; and
- A process by which a licensee, designee or board representative may request extension of time to schedule and complete the consultation visit.

Cost/Benefit Analysis:

WSLCB estimated that there may be annual costs associated with the administrative process of requesting once-per-year consultation services by the licensee or their designee, including completion of the online request for consultation, and any associated interaction with Board representatives to schedule the consultation service. The time to complete these annual administrative tasks is estimated at three hours. Since there is no available data establishing an average hourly wage for a marijuana business owner or their designee, and this figure could widely vary, the agency estimated an hourly wage of \$50. Under that premise, the estimated cost of compliance is \$150 annually. Based on the agency's analysis consistent with chapter 19.85 RCW,

the cost of compliance does not exceed 1% of average payroll or 0.3% of average annual gross business income.

2. WAC 314-55-013(4) - Advice and consultation services.

Description of the proposed rule: This new section establishes the following concerning the nature and scope of advice and consultation services provided:

- A statement that the regulatory issues described in the chapter that may be observed during the course of an advice and consultation visit are not subject to disciplinary action unless the issue has a direct or immediate relationship to public health and safety;
- Frames the activities that may be included in a consultation, such as:
 - An initial meeting;
 - A walk-through visit to evaluate compliance concerns;
 - A closing meeting to discuss any conditions noted and to make recommendations;
 - A written report of the conditions; or
 - A follow-up visit, if appropriate.
- For identified conditions that are not direct or immediate risks to public health and safety, provides that:
 - The condition will be noted in the appropriate WSLCB database, along with a detailed description of the condition;
 - The full statutory or regulatory citation applicable to the non-compliant condition;
 - A statement of what steps the licensee must take to achieve compliance;
 - The date, method of service, name of the licensee participating in the visit; and
 - The date the licensee must achieve compliance, which may be mutually agreed upon by the board representative and the licensee, and may be based on a variety of factors, including but not limited to the severity and costs of the conditions to be abated.

Cost/Benefit Analysis:

WSLCB estimates that there may be annual costs associated with the initial meeting, walk through meeting and any follow up meetings that may result in time away from business operation. The agency estimated this time to be two hours annually, based on an hourly rate calculated above of \$50 per hour for an annual estimated cost of compliance of \$100.00. Based on the agency's analysis consistent with chapter 19.85 RCW, the cost of compliance does not exceed 1% of average payroll or 0.3% of average annual gross business income.

3. WAC 314-55-013(5) – Licensee responsibilities.

Description of the proposed rule: This new section establishes general licensee responsibilities when participating in the voluntary marijuana licensee consultation and education program. These responsibilities include:

- Agreement to work with the board representative to schedule a consultation visit;
- Agreement to make reasonable efforts to correct or abate identified conditions;
- Agreement to contact the WSLCB in writing if unable to correct or abate all conditions identified in the statement of conditions to request an extension of time, describing the need for the extension, confirmation of steps taken to that point, and a proposed abatement date.

Cost/Benefit Analysis:

WSLCB estimates that there may be costs associated with abating a noted condition. The agency estimated this time to be an average of five hours annually based on an hourly rate of \$50 an hour (5 x \$50 = \$250). We did not estimate the widely variable costs of repair, purchasing new equipment or other related costs since this is not a requirement under the rule and considered an indirect cost of compliance. Agencies are not required under chapter 19.85 RCW to consider indirect costs not associated with compliance. For example, if the proposed rule requires that businesses install a new safety feature, the agency does not have to consider the increase in sales for manufacturers of the new safety feature or decreases in sales of the old safety feature. The agency also need only consider costs incurred by businesses for compliance with the rule. RCW 19.85.040(1). Here, those costs are related only to the administrative aspects of the request for consultation services and associated activities.

Cost/Benefit Summary:

The new rules offer increased public benefit by offering marijuana licensees an opportunity to request advice and consultation services that will be provided consistent with statutory provisions. Consultation services increase educational opportunities that offer pathways to licensee success, and support marijuana business production, processing and retail best practices. For these reasons, the proposed rules do not impose more than minor costs on businesses as defined by RCW 19.85.020(2).

2017 Industry NAICS Code	Estimated Cost of Compliance	Industry Description	NAICS Code Title	Minor Cost Estimate Max of 1%Pay, 0.3%Rev, and \$100	1% of Avg Annual Payroll (0.01*AvgPay)	0.3% of Avg Annual Gross Business Income (0.003*AvgGBI)
31199	\$500	Marijuana Processors	All Other Food Manufacturing	\$22,986.58	\$9,214.26 2018 Dataset pulled from USBLS	\$22,986.58 2018 Dataset pulled from DOR

111	\$500	Marijuana Producers	Crop Production	\$4,010.47	\$4,010.47 2018 Dataset pulled from USBLS	\$2,399.33 2018 Dataset pulled from DOR
453	\$500	Marijuana Retailers	Miscellaneous Store Retailers	\$2,503.84	\$2,365.88 2018 Dataset pulled from USBLS	\$2,503.84 2018 Dataset pulled from DOR

SECTION 6:

Identify alternative versions of the rule that were considered, and explain how the agency determined that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated previously.

Rule Development and Stakeholder Engagement Process

The proposed rules are the product of a protracted rule development process that began in July of 2019, paused briefly in response to the COVID-19 outbreak, and concluded in May of 2019. Initially, WSLCB planned to develop these rules along with the penalty reform rule project implementing ESSB 5318. Ultimately, that was not possible given the level of stakeholder engagement required by the authorizing statute, and the desire to distinguish this program and its development from the penalty rule redesign project.

WSLCB’s stakeholder engagement process encouraged parties to:

- Identify burdensome areas of existing and proposed rules;
- Propose initial or draft rule changes; and
- Refine those changes.

WSLCB reached out to approximately 49 marijuana businesses owners and industry representatives in October 2019 to form a rules workgroup consistent with the consultation requirements of ESSB 5318. The first work session was held on November 12, 2019, attended by WSLCB staff and approximately 10 marijuana business owners and industry representatives. This meeting produced extensive feedback from business owners and industry representatives regarding the types of consultation and education services that would increase compliance opportunities while addressing the scope, nature and extend of the compliance visit.

From that feedback, WSLCB developed draft conceptual rules, and scheduled a second meeting that included a virtual attendance option held on February 24, 2020. This session was well attended, and additional feedback was gathered. From that feedback, WSLCB further refined the draft conceptual rules.

A Listen and Learn session was scheduled for early March 2020, but this session was postponed based on the Washington State response to the COVID-19 pandemic. The session was rescheduled and held virtually in May 2020. The session was well attended by over sixty participants. Comments received from that session are attached hereto. While these comments are considered informal because they were received before the

CR102 was filed, WSLCB offers these here to demonstrate the interest, level of participation, and the broad range of perspectives presented during this session.

WSLCB considered these comments, and made a number of revisions to the draft conceptual rules offered at the May 20, 2020 Listen and Learn session based on these comments. The proposed rules are a result of that iterative and inclusive process.

Summarized in Attachment A are the comments received during the Listen and Learn session. Below is a brief description of the main discussion topics that emerged during the Listen and Learn session related to the proposed rule set, and how the agency collaborated with stakeholders to mitigate potential burden associated with rule compliance:

Issue	Potential Burden	Mitigation Strategy
Concern that virtual visits are not explicitly provided as an option in rule.	Licensees in remote locations may experience reduced access to consultation services.	WSLCB will work with licensees to offer consultation and advice other than on-site consultation consistent with RCW 69.50.561(1).
Definition of “direct and immediate relationship to public health and safety” and “direct or immediate risk to public health and safety.”	Risk of broad interpretation that may result in inadvertent confusion or disparate enforcement.	Added additional language to 314-55-013(2) to mirror statutory language contained in RCW 69.50.
Request for consultation: section required that WSLCB schedule and complete advice and consultation visits within 30 days of assignment to an enforcement officer.	No time frame for the agency to assign an enforcement officer to the licensee request, creating uncertainty for licensees regarding when a response may be received to the consultation request.	Rules revised to require WSLCB to schedule and complete advice and consultation visits within forty-five days of receipt.
Advice and consultation service: Concern that written reports issued as a result of consultation visit may be viewed negatively by banks and at license renewal.	Inability to renew license or negative economic impact.	Clarified in rule that a written consultation report or notice to correct is not a formal enforcement action.

SECTION 7:

Determine that the rule does not require those to whom it applies to take an action that violates requirements of another federal or state law.

The rules do not require those to whom it applies to take action that violates requirements of federal or state law.

SECTION 8:

Determine that the rule does not impose more stringent performance requirements on private entities than on public entities unless required to do so by federal or state law.

The rules do not impose more stringent performance requirements on private entities than on public entities.

SECTION 9:

Determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter and, if so, determine that the difference is justified by an explicit state statute or by substantial evidence that the difference is necessary.

The rules do not differ from any applicable federal regulation or statute.

SECTION 10:

Demonstrate that the rule has been coordinated, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter.

These rules did not require coordination with federal, state, or local laws.