



CR 102 Memorandum

Regarding Implementation of 2020 Legislation – E2SSB 5549 (Distilleries).

Date: December 23, 2020
Presented by: Audrey Vasek, Policy and Rules Coordinator

Background

The Washington State Liquor and Cannabis Board (WSLCB) began to consider rule revisions to implement Engrossed Second Substitute Senate Bill (E2SSB) 5549 (chapter 238, Laws of 2020)¹ related to distilleries by initiating a formal rule inquiry under WSR # 20-16-150 on August 5, 2020.

E2SSB 5549 modified the privileges and requirements for distillery and craft distillery licenses, and established a new off-site tasting room license available to distillery and craft distillery licensees beginning January 1, 2021.

Distillery or craft distillery licensees that choose to apply for the new off-site tasting room license created by E2SSB 5549 must pay a \$2000 annual fee that is mandated by statute.² A distillery or craft distillery licensed production facility is eligible for up to two off-site tasting room licenses located in the state. The total number of off-site tasting room licenses that may be issued is limited to one hundred fifty.³

A licensed distillery or craft distillery operating any on-site or off-site tasting room must provide food offerings, for free or for sale, to customers during public service hours.⁴

E2SSB 5549 also authorizes jointly operated off-site tasting rooms and jointly operated conjoined consumption areas.⁵ Jointly operated off-site tasting rooms are authorized for any distillery, craft distillery, domestic winery, or any combination of these licensees. Jointly operated conjoined consumption areas are authorized for any domestic brewery, microbrewery, domestic winery,

¹ E2SSB 5549 is largely codified in RCW 66.24.140 through 66.24.148.

² RCW 66.24.146

³ RCW 66.24.1473

⁴ RCW 66.24.1471

⁵ RCW 66.24.1472

distillery, or craft distillery, or any combination of these licensees, whose property parcels or buildings are located in direct physical proximity to one another.

Stakeholder Engagement

The WSLCB held a virtual Listen and Learn session to gather public feedback and suggestions for revisions to conceptual draft rules⁶ for implementation of E2SSB 5549 on November 17, 2020, from 1:00 to 3:10 PM. The Listen and Learn session was open to any interested members of the public, and messaging for the Listen and Learn session was sent to all WSLCB GovDelivery subscriber lists two weeks prior to the event.⁷ At a peak, there were over forty people in attendance.

The feedback received during Listen and Learn Session is provided in Attachment A to this memo. The WSLCB incorporated feedback received at the Listen and Learn session into the proposed rule language by making a number of changes including, but not limited to, the following:

- Adding language throughout the proposed rules stating that licensees should contact their local government offices for information about local city or county requirements.
- Clarifying that the thirty percent limit on gross revenue per tasting room derived from the sale of adulterated products for on-premises consumption is an annual limit, and that revenue that exceeds the thirty percent limit in any one month does not violate the limit as long as the licensee is below the limit for the calendar year. (WAC 314-28-065)
- Clarifying that the limit of four winery additional locations (under RCW 66.24.17 and WAC 314-24-161) does not apply to the two jointly operated off-site tasting room locations allowed under RCW 66.24.1472. (WAC 314-28-310)
- Adding language providing guidance about the statutory requirement (in RCW 66.24.1472) to share staffing resources at jointly operated off-site tasting rooms and jointly operated conjoined consumption areas. (WAC 314-28-310 and 314-28-320)
- Revising the penalties for failure to maintain the thirty percent annual limit on overall gross revenue per tasting room derived from sales of adulterated spirits for on-premises consumption. (WAC 314-29-035)

Estimated Costs of Compliance

For the purpose of the minor cost analysis required by the Regulatory Fairness Act in chapter 19.85 RCW, the CR 102 includes estimated business costs of

⁶ These conceptual draft rules were developed through a series of collaborative internal project team meetings with WSLCB staff from across the Licensing, Enforcement and Education, and Finance divisions, as well as Public Health and Prevention.

⁷ See Attachment B, GovDelivery Messaging for the 11/17/20 Listen and Learn Session.

compliance with the proposed rules. These estimated costs of compliance and the relevant minor cost threshold estimates are described in detail in the CR 102 form.

Rule Necessity

The proposed rules are needed to align existing rules with and implement the law as established by E2SSB 5549. Specifically:

- *The following sections in chapter 314-28 WAC are amended:* WAC 314-28-005 “Definitions.”; 314-28-030 “What does a distillery license allow?”; and 314-28-050 “What does a craft distillery license allow?”.
- *The following sections in chapter 314-28 WAC are new:* WAC 314-28-065 “Sampling, service, and sales requirements for distillery and craft distillery licensees.”; 314-28-066 “Tasting room age restrictions for distillery and craft distillery licensees.”; 314-28-067 “Food offerings requirements.”; 314-28-300 “Off-site tasting room license.”; 314-28-310 “Jointly operated off-site tasting rooms.”; and 314-28-320 “Jointly operated conjoined consumption areas.”
- *The following section in chapter 314-28 WAC is repealed:* WAC 314-28-095 “Farmer’s market spirits sales.”
- *The following section in chapter 314-29 WAC is amended:* WAC 314-29-035 “Group 4 nonretail violations.”

Description of Rule Changes

Amended section. WAC 314-28-005, relating to definitions. The proposed revisions include adding a definition of “off-site tasting room” and a cross-reference to RCW 66.24.146. An introductory sentence is added as a technical update, stating that the definitions apply throughout chapter 314-28 RCW unless the context clearly requires otherwise.

Amended section. WAC 314-28-030, relating to distillery licenses. The proposed revisions include removing language in subsection (1) that corresponds to language that was deleted or amended by E2SSB 5549 and adding a cross-reference to the authorizing statute, RCW 66.24.140. A new subsection (2) is added containing cross-references to applicable laws and rules. A new subsection (4) is added containing language related to obtaining a spirits, beer, and wine restaurant license consistent with RCW 66.24.1474.

Amended section. WAC 314-28-050, relating to craft distillery licenses. The proposed revisions include removing language in subsection (1) that corresponds to language that was deleted or amended by E2SSB 5549 and adding a cross-reference to the authorizing statute, RCW 66.24.145. A new subsection (2) is added containing cross-references to applicable laws and rules. A cross-reference to RCW 66.24.140 is added to subsection (3) to provide context for the one hundred fifty thousand proof gallon limit for craft distilleries, and cross-

references to RCW 66.24.1474 and 66.24.400 are added to subsection (4) related to obtaining a spirits, beer, and wine restaurant license.

New section. WAC 314-28-065, relating to sampling, service, and sales requirements. The proposed rule section implements the statutory requirements in RCW 66.24.140 and 66.24.145 applicable to distillery and craft distillery licensees that sell spirits and other authorized alcohol products (such as vermouth or sparkling wine) for off-premises or on-premises consumption, or sell servings of adulterated spirits (mixed drinks) for on-premises consumption. These statutory requirements include, but are not limited to, the alcohol stock-keeping unit requirement⁸ and the thirty percent annual limit on revenue derived from sales of adulterated spirits for on-premises consumption.⁹

New section. WAC 314-28-066, relating to tasting room age restrictions. The proposed rule section implements the statutory requirements related to tasting room age restrictions in RCW 66.24.140 and 66.24.145 applicable to distillery and craft distillery licensees. For example, the requirement that persons under the age of twenty-one be accompanied by their parent or legal guardian in order to enter a tasting room, and that tasting rooms include a designated area for persons under the age of twenty-one.

New section. WAC 314-28-067, relating to food offerings requirements. The proposed rule section implements RCW 66.24.1471 by describing the food offerings requirements applicable to distilleries, craft distilleries, and off-site tasting rooms.¹⁰

New section. WAC 314-28-300, relating to off-site tasting room licenses. The proposed rule section implements RCW 66.24.146, which creates the new off-site tasting room license available to distillery or craft distillery licensees, and includes a reference to the annual fee for the new license, which is set by law at \$2000. The proposed rule section also includes a cross-reference to the limit on the total number of off-site tasting room licenses under RCW 66.24.1473, and includes cross-references to other applicable laws and rules.

New section. WAC 314-28-310, relating to jointly operated off-site tasting rooms. The proposed rule section implements the statutory requirements in RCW 66.24.1472 related to jointly operated off-site tasting rooms. These requirements

⁸ At any one time, no more than twenty-five percent of a licensee's total alcohol stock-keeping units may be vermouth, sparkling wine, or spirits produced by another licensee. However, if a distillery sells fewer than twenty alcohol stock-keeping units of products of its own production, it may sell up to five stock-keeping units of vermouth, sparkling wine, or spirits produced by another licensee. RCW 66.24.140(3)(a) and 66.24.145(4)(a).

⁹ Revenue derived from sales of adulterated spirits (mixed drinks) for on-premises consumption must not comprise more than thirty percent of the overall gross revenue earned in the tasting room during the calendar year. RCW 66.24.140(2)(c)(ii) and 66.24.145(3)(b).

¹⁰ RCW 66.24.1471(5) states: "Requirements for food offerings shall be determined by the board in rule."

are applicable to any distillery, craft distillery, or winery, or any combination of these licenses, who choose to jointly operate an off-site tasting room location. Cross-references to applicable laws and rules are included.

New section. WAC 314-28-320, relating to jointly operated conjoined consumption areas. The proposed rule section implements the statutory requirements in RCW 66.24.1472 related to jointly operated conjoined consumption areas. These requirements are applicable to breweries, microbreweries, wineries, distilleries, or craft distilleries, or any combination of these licensees, whose property parcels or buildings are located in direct physical proximity to one another. Cross-references to applicable laws and rules are included.

Amended section. WAC 314-29-035, relating to penalties—Group 4 nonretail violations. The proposed revisions to this rule section implement E2SSB 5549 by updating the penalty schedule to include violations of the new statutory requirements. Penalties corresponding to violations of the requirements related to food offerings, alcohol stock-keeping units, and the thirty percent annual limit on revenue derived from sales of adulterated spirits (mixed drinks) for on-premises consumption, are added to the penalty schedule, along with cross-references to the appropriate RCWs and WACs.

Repealed section. WAC 314-28-095, relating to farmer's market spirits sales. The proposed repeal of this section is necessary to implement E2SSB 5549, which deleted the statutory language creating the distillery and craft distillery farmer's market spirits sales endorsement.¹¹

Attachments:

Attachment A. (Table containing public feedback received during Listen and Learn Session on November 17, 2020.)

Attachment B. (GovDelivery Messaging re Listen and Learn Session.)

¹¹ See RCW 66.24.145(4) as it existed prior to the June 11, 2020, effective date of the amendments made by E2SSB 5549 to this section.

CR 102 Memo—E2SSB 5549 Distilleries

Attachment A

Table containing a summary of public feedback received in connection with the virtual Listen and Learn Session held on November 17, 2020.

Source	Date	Name	Theme	Feedback
Webex Live	11/17/2020	Beverly Heising	Definitions (WAC 314-28-005)	Definition of "distillery" is unclear.
Webex Live	11/17/2020	Mitch Nickolds	References to local laws (WAC 314-28-030, 314-28-050, throughout)	Suggested including a reference to local laws throughout the proposed rules wherever there is a reference to "all applicable state laws and rules"(e.g. "all applicable state <u>and local</u> laws and rules"
Webex Live & Chat	11/17/2020	Justin Stiefel	Thirty percent annual limit on revenue derived from sales of adulterated spirits (mixed drinks) for on-premises consumption (WAC 314-28-065)	Suggested adding the following underlined language regarding the thirty percent annual limit on revenue derived from sales of adulterated spirits (mixed drinks) for on-premises consumption in conceptual draft WAC 314-28-065 to clarify that even if a distillery is above the thirty percent limit for a single month, a violation is not triggered: (ii) The revenue derived from the sale of adulterated products for on-premises consumption under this subsection (1)(c) must not comprise more than thirty percent of the overall gross revenue earned in the tasting room during the calendar year. The annual reporting requirement for tasting room sales of adulterated products is satisfied through cumulative monthly reporting under WAC 314-28-070. <u>Gross revenue from on-premises consumption that exceeds the thirty percent test in any one month shall not trigger any violation so long as the thirty percent annual cap is not exceeded on an annual basis.</u>
Webex Live	11/17/2020	Jason Parker	Distillery and craft distillery reporting forms	Interested in participating in the process of developing the distillery and craft distillery reporting forms (e.g. Craft Distillery Production and Sales Summary Fee Report (LIQ-112) and Distillery Production and Sales Summary Fee Report (LIQ-160) forms).
Webex Live	11/17/2020	Mhairi Voelsgen	Distillery and craft distillery reporting forms	Would like to provide input on the preliminary distillery and craft distillery reporting forms.
Webex Live	11/17/2020	Jason Parker	Stock-keeping unit requirements (WAC 314-28-065)	Suggested that the twenty-five percent stock-keeping unit requirement should take seasonal swings into account. Concerned about inadvertently setting monthly limits.
Webex Live	11/17/2020	Justin Stiefel	Stock-keeping unit requirements (WAC 314-28-065)	Intent of the twenty-five percent stock-keeping unit requirement is to be a point in time snapshot, not an annual requirement.

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Webex Live	11/17/2020	Mhairi Voelsgen	Stock-keeping unit requirements (WAC 314-28-065)	Agreed with Justin and that the intent of the twenty-five percent stock-keeping unit limit in the law was to provide a limit on the products on the shelf <i>at any one time</i> , not annually. This gives flexibility to change product seasonally as needed.
Email	11/14/2020	Mitch Nickolds	Employment of young adults (18-21) at distilleries (WAC 314-28-066)	In reading the Engrossed Substitute Senate Bill 5549 I see that (ref. Section 2 (7)) in the age limitations there is no consideration for a distillery, winery or brewery to hire under age employees to prepare and serve food, stock the bar or provide entertainment. We have a large number of young adults in Washington between the ages of 18 and 21 that would benefit from part time employment in this industry, and who can be licensed as food servers or who play in bands for weddings and events, but who would be ineligible for employment as legislated in this well-regulated family-operated craft industry. Any chance the Board would open these employment opportunities up for our young adults?
Webex Live	11/17/2020	Mitch Nickolds	Employment of young adults (18-21) at distilleries (WAC 314-28-066)	Limiting distillery employees to those 21 years of age or older is overly restrictive
Webex Live	11/17/2020	Justin Stiefel	Employment of young adults (18-21) at distilleries (WAC 314-28-066)	In response to Mitch Nickolds: other existing WACs, outside of this rule set, don't allow distilleries to employ people under 21.
Webex Live	11/17/2020	Beverly Heising	Designated area in tasting room for persons under the age of 21 (WAC 314-28-066)	She has a rural, one door tasting room (400 sq ft?--no room for a bar). Would like to make things more family friendly, for kids to be able to sit down with their parents. Does not like the current designated area language, thinks (2)(c)needs clarification to make it operational for small distilleries
Webex Live	11/17/2020	Jason Parker	Designated area in tasting room for persons under the age of 21 (WAC 314-28-066)	In response to Beverly Heising: one way to structure it—the area by the bar is marked as 21+, the whole rest of the tasting room area is marked as the designated area for persons under 21 ; this layout would also be consistent with the way 21+ areas work for e.g. SBW restaurants
Webex Live	11/17/2020	Mhairi Voelsgen	Designated area in tasting room for persons under the	In response to Beverly Heising and Jason Parker: Agrees, with Jason, the intent of the "designated area" language in the law was to provide parity with SBW restaurants

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Attachment A

Table containing a summary of public feedback received in connection with the virtual Listen and Learn Session held on November 17, 2020.

			age of 21 (WAC 314-28-066)	
Webex Live	11/17/2020	Mitch Nickolds	Designated area in tasting room for persons under the age of 21 (WAC 314-28-066)	Suggested that performance areas could be demarcated as designated areas for persons under 21 years of age
Webex Live & Chat	11/17/2020	Justin Stiefel	Designated area in tasting room for persons under the age of 21 (WAC 314-28-066)	Suggested that in small tasting room spaces, no demarcation should be required, or a commercially reasonable standard should be applied: Proposed language in [] underlined below: (c) The designated area must be separated from the remainder of the tasting room space by a clear demarcation. “Demarcation” has the same meaning and options as provided in WAC 314-02-025(3). <u>[For tasting rooms where it is not physically possible or commercially unreasonable to create a clearly demarcated separation area the licensee may propose specific seating or service areas where minors are not allowed.]</u>
Webex Live	11/17/2020	Mhairi Voelsgen	Food offerings (WAC 314-28-067)	Gave kudos on the food offerings requirements
Webex Live	11/17/2020	Josh McDonald	Jointly operated off-site tasting rooms and winery additional locations (WAC 314-28-310)	Question: Wineries are currently allowed to have up to four additional locations (RCW 66.24.170(4)(a)(ii) and WAC 314-24-161). Would the LCB view these off-site tasting room locations where a winery is involved as an additional location counting toward that limit? Perhaps would be helpful to clarify in rule.
Webex Live & Chat	11/17/2020	Justin Stiefel	Share staffing resources (WAC 314-28-310 and WAC 314-28-320)	Although (1)(c)(iii) mirrors language in statute, additional work may be needed to flesh out the parameters around sharing staffing resources. What would that look like/ minimum requirements? Proposed language: Share staffing resources <u>[under a written plan in which the licensees demonstrate they are reasonably sharing in the cost of staffing the premises. A shared staffing resource plan shall not create an implied employment agreement, relationship or obligation where one does not otherwise explicitly exist between a particular licensee and an employee].</u>
Webex Live	11/17/20	Mitch Nickolds	Conflict with local requirements (WAC 314-28-320)	Concerned about potential conflict in these type of arrangements with local ordinance, fire code, etc. With respect to shared consumption areas, if there were incubators for distilleries, they may benefit from that type of occupancy. Need to

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Table containing a summary of public feedback received in connection with the virtual Listen and Learn Session held on November 17, 2020.

				be careful about fire-sprinkler requirements or occupant loads of 99+. Suggestion to make reference to size limitations on those areas? This is an area where local ordinance could conflict with the states intent to license these facilities. Limitations on occupant loads would add costs.
Webex Chat	11/17/2020	Justin Stiefel	Conflict with local requirements (WAC 314-28-320)	In response to Mitch: I believe the issue raised earlier about limiting the size or occupancy of a tasting room or consumption space does not need to be addressed in these rules. Each locality and the fire code will set the standard for a particular location, so nothing in the RCW or WAC from this rulemaking would override a city or county fire or building code.
Webex Live	11/17/2020	Justin Stiefel	Penalties (WAC 314-29-035)	Current penalties for failure to maintain the 30% annual sales limit are too aggressive and should be revised to be more in line with the existing penalty schedule. Instead of two categories (one up to 40%, and one over 40%) there should just be one category. The monetary penalty should be much lower and should be similar/ somewhere between the "Providing/accepting money or money's worth" and the "Providing/accepting exclusive or contingency agreements" penalties. Since it is a two-year window, there should be no third column.
Webex Live & Chat	11/17/2020	Mhairi Voelsgen	Penalties (WAC 314-29-035)	Agreed with Justin. It seems especially egregious to penalize what will basically be a math error, especially the Gross Revenue section, and seems out of scope, the Guild would not support something at that level. One category is better and easier to manage.
Webex Live & Chat	11/17/2020	Jason Parker	Penalties (WAC 314-29-035)	Agreed with Justin. I agree with Justin's comments about keeping penalties for the 30% test in line with the rest of the penalties in the chart.
Webex Live	11/17/2020	Mhairi Voelsgen	Taxation/ Spirits Retail fee	Taxation hasn't been addressed in these rules, but is a hot topic among guild members. Concerned about the tax structure being proposed for cocktails served in tasting rooms, which is similar to ready to drink (RTD) structure, versus the current structure being used at bars/restaurants/retail. The liquor that is served from other distilleries is being taxed at a higher rate than it would normally be taxed at. The cocktail is being taxed, versus the bottle is being taxed. Taxation for products from other distilleries that are being served in cocktails, or bottles sold, being taxed in a way that gave us parity to the existing industries taxation now. That translates to bottles sold coming into a distillery being allocated for on or off premise use, and taxed at that entry point versus being taxed as used. Some of the

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Attachment A

Table containing a summary of public feedback received in connection with the virtual Listen and Learn Session held on November 17, 2020.

				biggest distilleries in the state are in agreement that they will pursue legal action if the tax structure does not follow the existing structure for bars/restaurants/retailers.
Webex Chat	11/17/2020	Justin Stiefel	Taxation/ Spirits Retail fee	Agreed with Mhairi on the taxation issue. There is no statutory authority for the LCB to create a tax on cocktails where the Legislature has not created it.
Webex Chat	11/17/2020	Jason Parker	Penalties (WAC 314-29-035)	Agreed with Justin's and Mhairi's comments on penalties and taxation.
Webex Chat	11/17/2020	Justin Stiefel	Timing of rules/ implementation	Do you have an estimate on timing? Will LCB allow licensing to start on off-site tasting rooms now so that we can be ready on Jan 1 under interim rules while the final rules are being worked on?



CR 102 Memo—E2SSB 5549 Distilleries Attachment B

Listen and Learn Session for E2SSB 5549 Distilleries Conceptual Draft Rules

Washington State Liquor and Cannabis Board sent this bulletin at 11/03/2020 02:50 PM PST

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November 3, 2020

Listen and Learn Session for E2SSB 5549 Distilleries Conceptual Draft Rules

The Washington State Liquor and Cannabis Board (WSLCB) is hosting a virtual Listen and Learn session to gather feedback on conceptual draft rules for implementation of [Engrossed Second Substitute Senate Bill \(E2SSB\) 5549 \(chapter 238, Laws of 2020\)](#) related to distilleries. The conceptual draft rules are provided [here](#).

The preproposal statement of inquiry (CR 101) was filed as [WSR 20-16-150](#) on August 05, 2020. More background information on this rules project is available in the [CR 101 memo](#).

We welcome your feedback on these conceptual draft rules and hope you can join us virtually on Tuesday, November 17, 2020, from 1:00 p.m. until 4:30 p.m. on Webex Events. To help you prepare for this Listen and Learn session, please review the [agenda](#) and this [guidance document](#).

****Please plan to attend on time at 1 p.m. to ensure your feedback is heard. This meeting could end earlier than the scheduled time of 4:30 p.m. depending on the amount of feedback offered by participants.****

If you plan to join us virtually, we'd like to offer the following reminders:

- For the best virtual participation experience, please connect to WebEx using a web browser.
- Virtual participation will be structured to allow one speaker at a time though a hand-raising feature on WebEx.

- The hand-raising feature is not available if you connect to WebEx using the call-in number.

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To join or register for the WebEx Event:

<https://watech.webex.com/watech/onstage/g.php?MTID=ec4736c3e8645a41960fc76e1586b3c04>

Event number: 133 462 8622
Event password: 5549Rules

To attend by phone:

Toll: 1-415-655-0001
Toll Free: 1-855-929-3239
Access code: 133 462 8622

Have questions? Would you like to provide written feedback before the Listen and Learn session?

Email: audrey.vasek@lcb.wa.gov

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