90561-4

NO. 45482-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ASSOCIATION OF WASHINGTON SPIRITS AND WINE DISTRIBUTORS, a Washington non-profit corporation,

Appellant,

v.

WASHINGTON STATE LIQUOR CONTROL BOARD, a state agency,

Respondent,

and

WASHINGTON RESTAURANT ASSOCIATION, a Washington non-profit organization; NORTHWEST GROCERY ASSOCIATION, a non-profit organization; and COSTCO WHOLESALE CORPORATION, a Washington corporation,

Intervenor-Respondents.

RESPONSE BRIEF OF WASHINGTON STATE LIQUOR CONTROL BOARD

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I. INTRODUCTION

Since 1934, the State has delegated authority to implement and enforce the State's liquor laws to the Washington State Liquor Control Board (Board). The Board issues licenses to sell liquor, enforces statutes and regulations governing the exercise of licensing rights, and, until May 31, 2012, distributed liquor sold at retail from stores operated by the Board and staffed by employees of the Board, or from stores operated by persons who contracted to sell the state-owned liquor in exchange for a commission. *See* Ch. 66.08 RCW (2010).

In November 2011, the voters of Washington passed Initiative 1183, which "privatized" the importation, distribution, and retail sale of spirits. The Initiative created new spirits distributor licenses, spirits retail licenses, and modified or created privileges that other types of liquor licensees can hold or exercise with regard to spirituous liquor. The law imposed license fees to be collected by the Board. Among those fees is a fee imposed on spirits distributors based on sales. The "license issuance fee" for spirits distributors is set at the rate of 10 percent of sales in the first 27 months of licensure, dropping to five percent in each year after that. *See* RCW 66.24.055(3)(a). Initiative 1183 set a minimum amount of $150 million in license issuance fees that must be collected from those

holding spirits distributor licenses in the first year of spirits sales. RCW 66.24.055(3)(c).

Petitioners—the Association of Washington Spirits and Wine Distributors (Distributor Association), an organization formed to represent the interests of spirits distributors—challenge the Board's rule that implements this portion of I-1183, claiming that the Board should have spread the collection of the $150 million across a broader group of licensees, including those who do not hold spirits distributor licenses but who have limited distribution rights under other licenses or certificates. They assert that by imposing a fee on those licensees with only limited distribution authority for their distribution activities, but not the obligation to contribution to the first year $150 million minimum, the Board acted arbitrarily and capriciously.

The superior court correctly concluded that the Board acted within its authority, that the rule imposing the $150 million minimum obligation only on distributor licensees is consistent with the language of the statute it implements, and that the rule does not violate the privileges and immunities clause of the Washington Constitution. The Board respectfully requests that the Court affirm the superior court's order denying the Distributor Association's Petition for Declaratory Judgment.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the Board properly impose the requirement to contribute $150 million in spirits distributor license fees in the first year of private liquor distribution only on "persons holding spirits distributor licenses" when the rule follows the language of the statute and does not conflict with the Board's separate authority to impose fees on other licensees who exercise limited distribution rights?

2. Does the Board's rule violate the Washington State Constitution's privileges and immunities clause, article I, section 12, when engaging in the business of selling or distributing liquor is not a fundamental right of state citizenship?

3. Even if selling liquor were a fundamental right of state citizenship, did the Board have a reasonable basis to distinguish between persons holding distributor licenses, who have nearly unlimited distribution authority, and other licensees, who exercise very limited distribution authority?

III. STATEMENT OF THE CASE

A. Initiative 1183 Transferred The Business Of Distributing And Selling Spirits From The Liquor Control Board To Private Businesses

Before I-1183 was approved by voters in 2011, the state was the exclusive distributor and retailer for off-premises consumption of spirits.[1] *Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 648, 278 P.3d 632 (2012) (citing former RCW 66.16.010 (2010)); *see also* former RCW 66.08.050 (2010). All retailers selling liquor on premises (e.g., restaurants and bars) had to purchase spirits from a designated state liquor store. *Id.*, 174 Wn.2d at 648. The Board

[1] "Spirits" is defined to include almost all distilled alcoholic beverages and some fortified wines. RCW 66.04.010(41).

purchased spirits from suppliers and distributed them to state liquor stores from a single distribution center. *See* former RCW 66.08.030, .050, and former RCW 66.16.010-080 (2010). Sales, taxes, and markups contributed funds to the state treasury.

B. I-1183 Imposed License Fees Based On Sales To Replace Revenues The State Earned Through Its Sales Of Spirits

Initiative 1183 "privatized" the importation, distribution, and retail sale of spirits. The Initiative provided for spirits distributor and retail licensees, and it imposed license fees based on sales to make up for loss of the state's markup on its sale of liquor. Laws of 2012, ch. 2, §§ 103, 105 (*codified as* RCW 66.24.630, .055). After the implementation of I-1183, the Board continues to collect license fees from all types of liquor licensees, but it no longer has authority to buy, distribute, or sell liquor. Laws of 2012, ch. 2, § 102(2) (*codified as* RCW 66.24.620(2)).

In addition to requiring annual license renewal fees, the Initiative specifically required that persons holding spirits distributor licenses pay an initial spirits distributor license issuance fee to make up any revenue shortfall in the transition to private sales in I-1183's first year. Laws of 2012, ch. 2, §105(3) (*codified as* RCW 66.24.055(3)).

C. I-1183 Authorized Licensed Distillers And Certificate Of Approval Holders To Sell Their Products Directly To Retailers

To replace the state as the sole distributor of spirits, I-1183 created a "spirits distributor license." Laws of 2012, ch. 2, § 105 (*codified as* RCW 66.24.055). Licensed spirits distributors now account for almost all sales of spirits for resale. See CP 16; 18–20, Declaration of John Guadnola (Guadnola Decl.). But I-1183 also allowed distillers and importers to exercise limited authority to distribute their own products without requiring the sale to go through a licensed spirits distributor: licensed in-state distillers may sell their own product directly to retailers, and out-of-state spirits distillers and importers may obtain "certificates of approval" that authorize them to import their products into Washington and sell them directly to retailers. Laws of 2012, ch. 2, § 206 (*codified as* RCW 66.24.640).

D. I-1183 Requires Spirits Distributor Licensees To Pay A License Fee Based On Sales, And To Have Paid Collectively At Least $150 Million In Such Fees In The First Year Of Spirits Sales

Initiative 1183 was intended to provide increased funding for state and local government services, including local public safety programs. Laws of 2012, ch. 2, § 101(2)(a), (k). Consistent with that intent, I-1183 created an obligation for "all persons holding spirits distributor licenses on or before March 31, 2013," to have "paid collectively one hundred fifty million dollars or more in spirits distributor license fees." Laws of 2012,

ch. 2, § 105(3)(c) (*codified as* RCW 66.24.055(3)(c)). The Initiative directed the Board to adopt rules to determine how any shortfall in the payment of the $150 million was to be collected, to be "allocated among persons holding spirits distributor licenses . . . ratably according to their spirits sales made during calendar year 2012." *Id.*

In compliance with the Administrative Procedure Act, Chapter 34.05 RCW, the Board adopted WAC 314-23-025 to implement the shortfall payment requirement in RCW 66.24.055(3)(c).[2] WAC 314-23-025 provides that the shortfall must be paid by "persons holding a spirits distributor license on or before March 31, 2013," with the amount owed by each "spirits distributor licensee" calculated by "dividing the total dollar amount of sales made by each spirits distributor licensee by the total spirits sales made by all spirits distributor licensees combined" during the calendar year 2012. A copy of RCW 66.24.055 and of WAC 314-23-025 are attached as Appendix A to this brief.

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[2] The Board filed a Preproposal Statement of Inquiry on May 24, 2012 (AR 8), notified the public of the filing (AR 10), drafted language of the proposed rule, and published notice of the proposed rule, (AR 25-30). (The Certified Administrative Record (AR) was separately transmitted to the Court and is separately paginated from the Clerk's Papers. It is 73 pages.) The Board solicited and accepted written comment, and held a public hearing on the proposed rule language on October 3, 2012. (AR 38). (The hearing was postponed one week from the date listed in the CR-102. AR 29, 33.) The Board received written comments from three entities, and verbal comments from two of those three. AR 38–53. The Board considered the comments, and on October 10, 2012, adopted WAC 314-23-025 to implement RCW 66.24.055(3)(c). AR 58–59. The Board's compliance with rulemaking procedures was not challenged here.

E. First-Year Private Liquor Distribution Sales Resulted In A Shortfall

Pursuant to the statute and rule, the Board calculated the contributions to the first-year $150 million requirement from the fees collected from holders of spirits distributor licenses and assessed any shortfall on the same. CP 23. Since the fees collected from the spirits distributor licensees only amounted to approximately $45 million dollars, an approximately $105 million shortfall assessment was issued to them. CP 23.

F. The Superior Court Denied The Distributor Association's Attempt To Impose On Others A Partial Obligation To Repay The Shortfall

In this action, the Distributor Association, formed to represent the interests of the largest spirits distributors in the state, sought a declaratory judgment that the Board's shortfall rule, WAC 314-23-025, exceeded the Board's authority, was arbitrary and capricious, and violated the privileges and immunities clause of the Washington Constitution.[3] CP 4–13. They complained that the rule should also impose the shortfall obligation on distillers and certificate of approval holders who exercise limited

[3] In a separate action, the Washington Restaurant Association, Northwest Grocery Association, and Costco also challenged the Board's rules implementing I-1183, including WAC 314-23-030(1), (2) and (3), which require spirits certificate of approval holders to pay the 10% fee on sales made when acting as a distributor or when importing product to sell to distributors. The Superior Court upheld these rules. *Wash. Restaurant Ass'n v. Wash. Liquor Contr. Bd.*, No. 12-2-01312-5 (Thurston County Superior Court). The case is stayed pending ruling of the Superior Court on the adequacy of the small business economic impact statement prepared by the Board.

distribution authority. CP 4–13. After briefing and oral argument, the Thurston County Superior Court rejected all of the Distributor Association's arguments, finding the rule does not exceed the Board's rulemaking authority, is not arbitrary and capricious, and does not violate the privileges and immunities clause. RP 29–32. This appeal followed.

IV. SUMMARY OF ARGUMENT

The Court should affirm the superior court's order finding the Board's shortfall rule valid because the rule follows the language of the statute it implements and is not inconsistent with the Board's imposition of an additional fee on distillers and certificate of approval holders who exercise limited distribution authority. The Board's authority to impose the shortfall obligation only on spirits distributor licensees comes directly from the statute, RCW 66.24.055(3)(c), which imposes the obligation only on "persons holding spirits distributor licenses." In contrast, the Board's authority to impose an additional distribution fee on licensed distillers and certificate of approval holders comes not, as the Distributor Association suggests, from the Initiative's requirement that those licensees comply with all "applicable laws and rules relating to distributors," RCW 66.24.640, *see also* RCW 66.28.330(4), but from the Board's historically broad regulatory authority over liquor and its specific authority to impose fees even where the Legislature has prescribed none. RCW 66.08.030(4).

Accordingly, the shortfall rule is consistent with the statutory language, does not exceed the Board's authority, and is not arbitrary and capricious.

The Board's shortfall rule also does not violate the Washington Constitution's privileges and immunities clause, article 1, section 12. For a violation to occur, the rule must infringe a fundamental right of state citizenship, and the right to distribute liquor is not a fundamental right of state citizenship. Even if it were, the Board had a reasonable basis to distinguish licensed spirits distributors, who have broad, nearly unlimited distribution authority, RCW 66.24.055(1), from licensed distillers and certificate of approval holders, who may distribute only their own products, RCW 66.24.640. Spirits distributor licensees are not similarly situated to distiller licensees nor to persons who hold spirits certificates of approval. This Court should affirm.

V. ARGUMENT

The Board's authority to impose an additional fee on licensed distillers and certificate of approval holders, for the limited right to distribute their own products, comes not from the requirement that those licensees comply with the laws applicable to distributors, but rather from the Board's historically broad regulatory authority over liquor and its specific authority to impose fees where the Legislature has prescribed none.

A. Standard Of Review

The Court reviews the validity of an agency rule under RCW 34.05.570(2)(c). Under that provision, a rule may be invalidated only if it 1) violates constitutional provisions; 2) exceeds the agency's statutory authority; 3) was adopted without complying with statutory rule-making procedures; or 4) is arbitrary and capricious in that it could not have been the product of a rational decision maker. *H&H P'ship v. State*, 115 Wn. App. 164, 167, 62 P.3d 510 (2003).

B. The Board Acted Reasonably, Rationally, And Within Its Statutory Authority In Prescribing Fees For Persons Holding Distiller's Licenses Or Certificates Of Approval Who Choose To Distribute Their Products

The Distributor Association argues WAC 314-23-025 exceeds the Board's statutory authority. Opening Br. of Appellant at 13. A rule is presumed valid and should be upheld if it is reasonably consistent with the statute it implements. *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003). The burden is on the Distributor Association to present compelling reasons why the rule is in conflict with the intent and purpose of the statute it implements. RCW 34.05.570(1(a); *Hi-Starr, Inc. v. Liquor Control Bd.*, 160 Wn.2d 455, 459, 722 P.2d 808 (1986).

Because of the public safety implications associated with liquor consumption, the Board historically has had broad regulatory authority

over the sale and distribution of liquor. *See* RCW 66.08.010; *Jow Sin Quan v. Liquor Control Bd.*, 69 Wn.2d 373, 382, 418 P.2d 424 (1966); *see also Wash. Ass'n for Substance Abuse*, 174 Wn.2d at 657. While the passage of I-1183 ended the state's direct involvement in the sale and distribution of liquor, it did not diminish the state's authority to regulate the sale and distribution of liquor or its authority to impose fees on those activities. *See* RCW 66.08.010, 66.08.030(3)–(20). The Board also is specifically authorized to impose license fees even where the Legislature has prescribed none. RCW 66.08.030(4). Given these broad and specific powers, the Board reasonably acted within its authority to impose an additional fee on licensees who act as distributors but who are not required to obtain a specific distributor license. And, as discussed in Section V.C. below, the imposition of this additional fee is not inconsistent with the Board's rule implementing the specific statutory directive that the $150 million shortfall obligation be imposed only on persons who obtained a spirits distributor license.[4]

[4] The Distributor Association may argue that the Court should not entertain this argument because the Board did not present it below. However, a "party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." RAP 2.5(a). As the Board's argument is purely legal and does not rely on any material outside of the record, the Court may consider it.

1. I-1183 created new spirits licenses, giving some manufacturers and importers the authority to distribute spirits without having to obtain a spirits distributor license.

Before the passage and implementation of I-1183, only the State of Washington could distribute and sell packaged spirits within the state. The Initiative ended the state's exclusive right to distribution and retail sales, allowing private persons to become licensed as spirits distributors in Washington. RCW 66.24.055 established a spirits distributor license, allowing a person holding the license to be a general distributor and exporter of spirits. A person holding a spirits distributor license is broadly authorized to purchase spirits from

> manufacturers, distillers, or suppliers including, without limitation, licensed Washington distilleries, licensed spirits importers, other Washington spirits distributors, or suppliers of foreign spirits located outside of the United States,

and to sell those spirits to

> spirits retailers including, without limitation, spirits retail licensees, special occasion license holders, interstate common carrier license holders, restaurant spirits retailer license holders, spirits, beer, and wine private club license holders, hotel license holders, sports entertainment facility license holders, and spirits, beer, and wine nightclub license holders, and to other spirits distributors;

or to export those spirits from the state. RCW 66.24.055(1).

In exchange for the privilege of holding a spirits distributor license, the licensee must pay (with some exceptions to avoid double fees)

a license issuance fee that is comprised of two parts: (1) a monthly fee, calculated as 10 percent of the total revenue from the licensee's sales of spirits for that month, for each of the first 27 months of licensure, dropping to five percent for the 28th month and thereafter; and (2) an additional one-time prorated payment by "all persons holding spirits distributor licenses on or before March 31, 2013," as necessary to bring to at least $150 million the total amount the Board collected in spirits distributor license fees through March 31, 2013. RCW 66.24.055(3)(a), and (c).[5]

Persons holding spirits distributor licenses are authorized as general distributors of spirits in Washington, able to buy and sell spirits purchased from a wide range of manufacturers, distillers, and suppliers anywhere in the world. Other persons may obtain only a much more limited authority to distribute spirits. For example, a person who produces spirits under a distiller's license under RCW 66.24.140 may "act as a . . . distributor to retailers . . . of spirits of its own production." RCW 66.24.640. The fee for a distiller's license is $2,000 per year, with reductions for certain small distillers of spirits. RCW 66.24.140. The

[5] Although the conditional requirement in RCW 66.24.055(3)(c) that additional fees be paid by persons holding spirits distributor licenses may be unorthodox, it is not challenged in this action. The requirement unambiguously requires "additional spirits distributor license fees" only from "persons holding spirits distributor licenses." This is a licensing fee explicitly imposed on a specific licensee.

statute is silent as to any additional fee for a licensed distiller acting as a distributor of its own product, even though it imposes no upper limit on the quantity of product that a licensed distiller may distribute.

Similarly, a manufacturer, importer, or bottler of spirits may obtain a "certificate of approval" authorizing it to import those spirits into the state and distribute them to persons who are licensed by the Board or otherwise legally authorized to sell spirits in Washington. RCW 66.24.640; RCW 66.28.035(2). The statute is silent as to the fee to be imposed for a certificate of approval, leaving it to the Board to provide by rule for the issuance of certificates of approval. RCW 66.24.640.

2. The Board properly exercised both its broad regulatory authority and its specific fee-setting authority to impose an additional fee on distillers and certificate of approval holders when acting as distributors.

The Distributor Association suggests that because distillers and certificate of approval holders who exercise limited distribution authority are required to comply with the "applicable laws and rules relating to distributors," RCW 66.24.640, *see also* RCW 66.28.330(4), then both the 10 percent distributor license fee and first-year $150 license fee obligation must be imposed on those other licensees. Opening Br. of Appellant at 13–23. They are mistaken. The Board has broad, general authority to "[p]erform all other matters and things, whether similar to the foregoing or

not, to carry out the provisions of this title, and has full power to do each and every act necessary to the conduct of its regulatory functions . . . subject only to audit by the state auditor." Former RCW 66.08.050(7).[6] The entirety of Title 66 RCW is "deemed an exercise of the police power of the state, for the protection of the welfare, health, peace, morals, and safety of the people of the state, and all its provisions shall be liberally construed for the accomplishment of that purpose." RCW 66.08.010. Moreover, the Washington Supreme Court has consistently acknowledged and affirmed the broad grant of powers to the Board. *See, e.g.*, *Hi-Starr*, 106 at 458; *Anderson, Leech & Morse, Inc. v. Liquor Control Bd.*, 89 Wn.2d 688, 694–95, 575 P.2d 221 (1978); *State ex rel. Thornbury v, Gregory*, 191 Wash. 70, 74–79, 70 P.2d 788 (1937). The Court has specifically recognized the power of administrative agencies to adopt rules "to fill in the interstices of statutes." *Hi-Starr*, 106 Wn.2d at 462–63.

In addition to the Board's broad authority to regulate the distribution and sale of liquor, the Board is specifically authorized to prescribe fees for "permits and licenses issued under this title for which no fees are prescribed in the title, and prescribing the fees for anything done

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[6] This statute was amended by the 2014 Legislature, and former RCW 66.08.050(7) was renumbered as .050(8) without any other change to the subsection. Laws of 2014, ch. 63, § 3 (ESHB 2155). Although I-1183 amended RCW 66.08.030 and .050 (*see* Laws of 2012, ch. 2, §§ 204 and 107, respectively), the statutory language cited in this paragraph was preserved.

or permitted to be done under the regulations." RCW 66.08.030(4). Accordingly, although I-1183 did not specifically impose fees on licensed distillers who choose to distribute their product directly to licensed liquor retailers or persons obtaining a certificate of approval to import spirits into Washington to distribute them to licensed liquor retailers, the Board has ample authority to prescribe such fees. And it is within its discretion to calculate these fees using the same formula as provided for persons holding spirits distributor licenses—i.e., as a percentage of gross distribution sales of the product distributed to licensed liquor retailers. WAC 314-28-070(3); WAC 314-23-030(3). It is these broad and specific powers that authorize the Board to impose an additional fee on distillers and certificate of approval holders who exercise limited distribution rights, and not, as the Distributor Association suggests, the requirement to comply the "applicable laws and rules relating to distributors," RCW 66.24.640, *see also* RCW 66.28.330(4). Opening Br. of Appellant at 13–23.

But the Board's exercise of its authority to prescribe these fees did not somehow transform distillers licenses and certificates of approval into spirits distributor licenses; nor does it transform distillers licensees and certificate holders into holders of spirit distributor licenses. As explained above, the holder of a spirits distributor license is granted broad approval

to be a general distributor and exporter of spirits with very few limits on the sources from which it purchases and distributes spirits. RCW 66.24.055(1). In contrast, the holder of a certificate of approval has much more limited authority to distribute the spirits it imports into the State—it may sell only its own products, and it may sell them only to spirits distributors or importers licensed in Washington, unless it pays the prescribed fees to receive a separate additional endorsement allowing sale directly to licensed spirits retailers. WAC 314-23-030. Similarly, the holder of a distiller's license has authority to sell only its own products, which it may sell to licensed spirits distributors or, by paying the additional fee prescribed in WAC 314-28-070(3), directly to licensed spirits retailers. But paying the additional fees prescribed in WAC 314-23-030(3) and WAC 314-28-070(3) does not confer authority on the holder of a distiller license or a certificate of approval to become a general distributor of spirits; that authority is reserved to persons holding a spirits distributor license.

Moreover, the Board did not purport to rely solely on RCW 66.24.055—which created provisions for spirits distributor licenses—as authority for prescribing fees on licensed distillers and persons holding a certificate of approval who choose to distribute their own products. In adopting both WAC 314-28-070, 314-23-025, and 314-23-030, the Board

cited as authority five statutes, including RCW 66.08.030 (providing for the Board's broad rulemaking authority).[7] Accordingly, it is not necessary to parse the language in RCW 66.24.055(3) to find the necessary authority for these rules. Because distiller licensees and certificate of approval holders are not transformed into spirits distributor licensees just because they are permitted to undertake limited distribution activities, they are not "persons holding spirits distributor licenses" from whom the Board must collect additional spirits distributor license fees under RCW 66.24.055(3)(c). Persons holding a distillers license or certificate of approval are not licensed under RCW 66.24.055, and their license fees—including the extra fee prescribed for undertaking the limited distribution of their products to licensed spirits retailers—do not depend on the language of RCW 66.24.055(3)(a).

Finally, the general requirement in RCW 66.24.640, that a licensed distiller operating as a distributor or retailer must comply with the applicable laws and rules relating to distributors or retailers, does not subject a licensed distiller to fees assessed against holders of a spirits distributor license. As explained above, these are different licenses, authorizing different sets of activities, for which different fees have been

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[7] Both rules cited RCW 66.08.030, 66.24.055, 66.24.160, 66.24.630, and 66.24.640. A copy is attached as Appendix B. *See also* Wash. St. Reg. 12-12-065, at 79–85 (available at http://apps.leg.wa.gov/documents/laws/wsr/2012/12/12-12PERM.pdf); AR 29.

established by statute or by the Board pursuant to its broad statutory authority. Where the activities authorized by different licenses overlap, it is appropriate and reasonable that those activities be subject to the same or similar applicable regulatory requirements, such as reporting requirements and requirements relating to fair dealing and undue influence. *See, e.g.*, RCW 66.28.290, .315. But a general provision requiring compliance with applicable laws and rules does not trump specific provisions setting fees. *Hallauer v. Spectrum Prop., Inc.*, 143 Wn.2d 126, 146–47, 18 P.3d 540 (2001) (specific statutes control over general ones); *see also* Section V.C.2 below.

C. The Shortfall Rule Is Reasonably Consistent With The Statute It Implements

As discussed above, the Board has both general and specific authority to impose a fee on distillers and certificate of authority holders for their distribution activities, and it properly exercised that authority when it calculated that fee based on the distributor license issuance fee imposed on licensed distributors under RCW 66.24.055(3)(a). The exercise of this authority is not inconsistent with the Board's rule imposing the $150 million shortfall obligation only on licensed distributors, because the language of RCW 66.24.055(3)(c) specifically imposes that separate obligation only on "persons holding spirits

distributor licenses," and neither the Board nor this Court may add language to that statute. Because the Board's shortfall rule closely tracks the language of the statute it implements, it should be upheld. *Washington Pub. Ports Ass'n*, 148 Wn.2d at 646.

1. WAC 314-23-025 is consistent with the language of RCW 66.24.055(3)(c), and neither the Board nor the Court may add language to the statute.

Initiative 1183 imposed a "license issuance fee" on each person obtaining a spirits distributor license and set out the amount and parameters of the fee:

> (3)(a) As limited by (b) of this subsection and subject to (c) of this subsection, each *spirits distributor licensee* must pay to the board, for deposit into the liquor revolving fund, a *license issuance fee* calculated as follows:
>
> > (i) In each of the first twenty-seven months of licensure, ten percent of the total revenue from all the licensee's sales of spirits made during the month for which the fee is due, respectively; and
> >
> > (ii) In the twenty-eighth month of licensure and each month thereafter, five percent of the total revenue from all the licensee's sales of spirits made during the month for which the fee is due, respectively.

RCW 66.24.055(3)(a) (emphasis added).[8] The Initiative also included a provision to guarantee the state collected a minimum amount of $150

[8] The block quote includes an amendment by the 2013 Legislature, which changed the time period from two years to twenty-seven months. Laws of 2013 2nd sp. sess., ch. 12, § 1.

million in these fees from spirits distributor licensees in the first year of private distribution:

> By March 31, 2013, all *persons holding spirits distributor licenses* on or before March 31, 2013, must have paid collectively one hundred fifty million dollars or more in spirits distributor license fees. If the collective payment through March 31, 2013, totals less than one hundred fifty million dollars, the board must, according to rules adopted by the board for the purpose, collect by May 31, 2013, as additional spirits distributor license fees the difference between one hundred fifty million dollars and the actual receipts, *allocated among persons holding spirits distributor licenses* at any time on or before March 31, 2013, ratably according to their spirits sales made during calendar year 2012. Any amount by which such payments exceed one hundred fifty million dollars by March 31, 2013, must be credited to future license issuance fee obligations of *spirits distributor licensees* according to rules adopted by the board.

RCW 66.24.055(3)(c) (emphasis added). The statute explicitly defines where the obligation for the $150 million minimum payment lies: on "persons holding spirits distributor licenses" during the relevant time period. Accordingly, the Board required only this specific group of licensees to contribute to any shortfall when it implemented WAC 314-23-025.

WAC 314-23-025(1) closely tracks the language of RCW 66.24.055(3)(c) in outlining what the law requires the Board to collect and from whom. WAC 314-23-025(1)(b) implements the ratable allocation

requirement in RCW 66.24.055(3)(c) by providing that "[e]ach licensee" will be required to pay their proportionate share of the shortfall. WAC 314-23-025(1)(b). The use of "each licensee" refers back to the opening of subsection (1), which identifies the group on whom the $150 million requirement falls ("all persons holding a spirits distributor license") and against whom the Board is directed to assess the requirement ("those persons holding a spirits distributor license"), and also to subsection (1)(a) which refers to "total spirits sales made by each spirits distributor licensee").

After careful review, the superior court agreed that language of WAC 314-23-025 is consistent with the language of RCW 66.24.055(3)(c). RP 29. The Board's decision to decline to impose the $150 million minimum and shortfall obligations on anyone other than those holding spirits distributor licenses on or before March 31, 2013, "is reasonably consistent with the statutory scheme right as a whole and does not directly conflict with the provisions of the statute or Initiative 1183 . . . ." RP 32. This Court should affirm.

The Distributor Association asks this Court to read the responsibility for contributing to any shortfall in the $150 million minimum requirement as also falling on other licensees acting as

distributors.[9] But neither the Board in its rulemaking nor the Court in deciding this case may add language to an unambiguous statute. *City of Seattle v. Fuller*, 177 Wn.2d 263, 287, 300 P.3d 340 (2013). RCW 66.24.055(3)(c) specifically refers to "persons holding spirits distributor licenses," not to spirits distributors generically and not to persons holding certificates of approval or licensed distillers acting as distributors. The Board correctly declined to add language to the shortfall provision so as to require anyone other than "persons holding spirits distributor licenses" to contribute.

2. The specific language imposing the shortfall obligation only on persons holding spirits distributor licenses supersedes the general language requiring licensees who act as distributors to comply with applicable laws relating to distributors.

The Distributor Association argues that there is "no plausible argument" that the general language in the statutes authorizing other licensees to act as distributors does not require those other licensees to contribute to the $150 million minimum and any shortfall. Opening Br. of Appellant at 13 (relying on RCW 66.24.640 ("An industry member operating as a distributor . . . under this section must comply with the applicable laws and rules relating to distributors . . . .") and RCW

[9] Indeed, by stating "For all practical purposes, [distillers] are 'persons holding spirits distributor licenses,'" the Distributor Association urges the Court to change the plain statutory language. Opening Br. of Appellant at 14.

66.28.330(4) ("The distiller must, to the extent consistent with the purposes of chapter 2, Laws of 2012, comply with all provisions of and regulations under this title applicable to wholesale distributors selling spirits to retailers.")). But a specific statute supersedes a general statute when both apply. *Kustura v. Dep't of Labor & Indus.*, 169 Wn.2d 81, 88, 233 P.3d 853 (2010); *see also Knowles v. Holly,* 82 Wn.2d 694, 702, 513 P.2d 18 (1973) ("[W]here there is a conflict between one statutory provision which deals with a subject in a general way and another which deals with the same subject in a specific manner, the latter will prevail.") (citing *State ex rel. Phillips v. Liquor Control Bd.*, 59 Wn.2d 565, 369 P.2d 844 (1962)). Here, contrary to the Distributor Association's argument, the specific limitation on precisely who must contribute to the shortfall in the collection of $150 million in license issuance fees prevails over the general requirement that licensees who act as distributors comply with the applicable laws relating to distributors. The Board's rule limiting the $150 million minimum and shortfall obligations to only those who actually hold spirits distributor licenses is consistent with the specific language of RCW 66.24.055(3)(c).

D. Initiative 1183 Explicitly Authorized The Board To Adopt A Rule Governing The Collection Of Any Shortfall

Under RCW 34.05.570(2)(c), a court may invalidate a rule only if it "exceeds the statutory authority of the agency." A rule is valid if it is promulgated pursuant to properly delegated authority. *State v. Brown*, 142 Wn.2d 57, 62, 11 P.3d 818 (2000). The Court's review is de novo. *Armstrong v. State*, 91 Wn. App. 530, 536, 958 P.2d 1010 (1998).

Here, the statute explicitly directed the Board to adopt a rule governing the collection of any shortfall:

> If the collective payment through March 31, 2013, totals less than one hundred fifty million dollars, the board must, according to rules adopted by the board for the purpose, collect by May 31, 2013, as additional spirits distributor license fees the difference between one hundred fifty million dollars and the actual receipts . . . .

RCW 66.24.055(3)(c) (emphasis added). The rule was promulgated pursuant to properly delegated authority.

E. The Shortfall Rule Is Not Arbitrary And Capricious Because It Was Enacted With Due Consideration

A court may invalidate a rule if it is "arbitrary and capricious." RCW 34.05.570(2)(c). A rule is arbitrary and capricious only if is "willful and unreasoning and taken without regard to the attending facts or circumstances." *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003). "'[W]here there is room for two opinions, an action taken after due consideration is not

arbitrary and capricious even though a reviewing court may believe it to be erroneous.'" *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002) (quoting *Hillis v. Dep't of Ecology,* 131 Wn.2d 373, 383, 932 P.2d 139 (1997)). The arbitrary and capricious standard is very narrow and highly deferential, and the party asserting it carries a "heavy burden." *King Cnty. Public Hosp. Dist. No. 2 v. Dep't of Health*, 167 Wn. App. 740, 749, 275 P.3d 1141 (2012).

The Distributor Association's argument regarding arbitrary and capricious rulemaking is essentially a recapitulation of its contention that the rule is inconsistent with the statute. As explained above, the rule closely follows the statute and is not inconsistent with it. Neither is the rule arbitrary and capricious. The Board gave due consideration to the language of I-1183, the comments and testimony it received during the rulemaking process, and obtained the advice of counsel in determining the content and form of the rule that is challenged here. *See* AR 54–73. Even if the Board erred in its interpretation of the statute (an error the Board does not concede), an error made in good faith after due consideration is not an arbitrary and capricious action. *Wash. Indep. Tel. Ass'n*, 148 Wn.2d at 905; *Rios*, 145 Wn.2d at 501. Nor is the rule arbitrary and capricious based on the Distributor Association's assertion of an alternative interpretation of the statute, *id.*, especially given the broad

regulatory authority and fee-setting discretion accorded the Board. RCW 66.08.010, 66.08.030(3)–(20).

F. Collecting The Shortfall Assessment Only From Those Holding Spirits Distributor Licenses Does Not Violate Washington's Privileges And Immunities Clause

The rule imposing the shortfall obligation only on licensed distributors and not on other licensees with limited distribution privileges does not violate the privileges and immunities clause of the Washington Constitution because the provision does not confer a privilege or immunity protected by article I, section 12. No "fundamental right of citizenship" is implicated the Board's rule; therefore, the Distributor Association's claim must fail. Even if there were a constitutional privilege involved, the Board had reasonable grounds to distinguish between persons holding spirits distributor licenses and persons holding other licenses.

Constitutional challenges are questions of law subject to de novo review. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). A party alleging a rule is unconstitutional must prove unconstitutionality beyond a reasonable doubt. *Longview Fibre Co. v. Dep't of Ecology*, 89 Wn. App. 627, 632–33, 949 P.2d 851 (1998) (citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990)). Thus, the Distributor Association must prove a privileges and immunities violation beyond a reasonable doubt.

1. WAC 314-23-025 does not violate the privileges and immunities clause because it does not involve a fundamental right of state citizenship.

The Washington Constitution's privileges and immunities clause states, "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." Const. art. I, § 12. A violation of article I, section 12 does not occur unless a law or its application confers a privilege to a class of citizens.[10] *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 812, 83 P.3d 419 (2004) (*Grant County* II). Although the state's privileges and immunities clause requires an independent constitutional analysis from the federal Constitution's Equal Protection Clause,[11] the party challenging the provision must first establish that there is a fundamental right of state citizenship at issue in the case. *Grant County* II, 150 Wn.2d at 811–14. If no fundamental privilege or immunity is

[10] The Washington Supreme Court uses the terms "privilege" and "immunity" interchangeably. *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 777 n.6, 317 P.3d 1009 (2014).

[11] Although the U.S. Constitution also has a Privileges and Immunities Clause, our Supreme Court has always compared the state constitution's privileges and immunities clause with the federal Equal Protection Clause, because federal jurisprudence focuses on the federal Equal Protection Clause in cases involving differential treatment. *Grant County* II, 150 Wn.2d at 805 n.10.

implicated by the challenged provision, the claim of a violation of article I, section 12 must fail.[12] *Id.* at 814.

The Distributor Association argues that requiring persons holding a spirits distributor license to pay their pro-rata share of the shortfall in collection of the $150 million minimum in distributor license fees required in I-1183, without also requiring a contribution from persons licensed as distillers or holding a certificate of approval, confers an unconstitutional privilege on licensed distillers and certificate holders. Opening Br. of Appellant at 25. It argues this requirement infringes on its "right 'to carry on business therein.'" *Id.* at 24. But simply because a provision exempts a class of persons from an obligation does not mean the provision involves a "privilege" subject to article I, section 12. *See Grant County* II, 150 Wn.2d at 812 ("[N]ot every statute authorizing a particular class to do or obtain something involves a 'privilege' subject to article I, section 12.") Instead, the terms "privileges and immunities"

> pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship. These terms . . . secure in each state . . . the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect

[12] Rational basis review applies under both the federal Equal Protection Clause and article I, section 12 "as long as the statute does not infringe on a fundamental right or create a suspect classification." *McDevitt v. Harborview Med. Ctr.*, 179 Wn.2d 59, 316 P.3d 469, 474 (2013); *accord United Parcel Service, Inc. v. Dep't of Revenue*, 102 Wn.2d 355, 369, 687 P.2d 186 (1984) (applying rational basis review to taxation classification).

> debts, and to enforce other personal rights; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from."

Id. at 812–13 (quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)). The Distributor Association asserts that the fundamental right involved here is the right "to carry on business" in the state. Opening Br. of Appellant at 24. It is mistaken.

In *American Legion Post #149 v. Dep't of Health*, 164 Wn.2d 570, 608, 192 P.3d 306 (2008), the Post challenged a law that prohibited smoking "in a public place or in any place of employment" but excepted from the prohibition "smoking in private facilities which are occasionally open to the public except upon the occasions when the facility is open to the public." *Id.* at 586 (quoting RCW 70.160.030, .020(2)). The Post, a private facility that was also a "place of employment," wanted to permit its patrons to smoke; it argued that allowing smoking in one facility but banning it in another created a privilege at the expense of its "fundamental right 'to remove to and carry on business therein.'" *Id.* at 607. The court disagreed that the law implicated any fundamental right of citizenship because it did not "prevent any entity from engaging in business." *Id.* at 608. It merely prohibited smoking in places of employment, which is not

a fundamental right. *Id.* Because no privilege was involved, there was no article I, section 12 violation. *Id.*

Like the court in *American Legion*, this Court should reject the Distributor Association's attempt, in order to manufacture a fundamental right, to frame the right involved more broadly than the Supreme Court has already done. The Supreme Court has already held that "[t]here is no natural or constitutional right to sell or engage in the business of selling or dispensing intoxicating liquor." *Randles v. Liquor Control Bd.*, 33 Wn.2d 688, 694, 206 P.2d 1209 (1949). Because the Legislature, as an exercise of its police power, can regulate the sale and distribution of liquor—to the point of prohibiting it entirely, *id.*—a spirits distributor cannot claim a right to distribute liquor on equal footing with all others. *Cf. Grant Cy.* II, 150 Wn.2d at 813 (the Legislature has plenary power to adjust municipal boundaries and authorize annexation); *Ventenbergs v. City of Seattle*, 163 Wn. 2d 92, 104, 178 P.3d 960 (2008) (no fundamental right to provide Seattle's garbage service because the duty to collect and dispose of solid waste rests solely with Legislature as an exercise of its police power, which Legislature can delegate to local government). In other words, when considering claims of disparate treatment of businesses, "the distinction between a lawful business which a citizen has the right to

engage in and one in which he may engage only as a matter of grace of the state" must be considered. *Randles*, 33 Wn.2d at 694.

The challenged rule does not prevent persons from obtaining spirits distributor licenses, nor does it prevent persons holding spirits distributor licenses from engaging in the business of distributing spirits. *See Ralph v. City of Wenatchee*, 34 Wn.2d 638, 641–42, 209 P.2d 270 (1949) (municipal ordinance requiring licenses for nonresident photographers, but not residents, and prohibiting public solicitation for photographic work violated article I, section 12 because it prevented nonresidents from engaging in the photography business). To the contrary, in the short time since I-1183 was approved by the voters, persons holding spirits distributor licenses now control 97 percent of the spirits distribution market. CP 23, Guadnola Decl., Ex. B.

The Distributor Association relies on cases that pre-date *Grant County* II to illustrate violations of article I, section 12. *See* Opening Br. of Appellant at 24–26 (citing *State v. Robinson Co.*, 84 Wash. 246, 249–50, 146 P. 628 (1915) (invalidating statute that exempted cereal and flour mills from act imposing onerous conditions on similar businesses); *In re Camp*, 38 Wash. 393, 397, 80 P. 547 (1905) (ordinance prohibiting fruit and vegetable peddling within city, but exempting farmers, violated privileges and immunities clause); *City of Seattle v. Dencker*, 58 Wash.

501, 504, 108 P. 1086 (1910) (ordinance that imposed license fee on businesses selling products by vending machine but not on businesses selling the same products by hand violated privileges and immunities clause)). The Distributor Association's reliance is misplaced. Those cases did not first determine whether the right at issue was a fundamental right of state citizenship because they did not engage in an independent analysis of the state privileges and immunities clause. In fact, since the Washington Supreme Court announced in *Grant County* II that an independent interpretation of article I, section 12 is required, it has not found a law to violate the privileges and immunities clause. *Ockletree*, 179 Wn.2d at 778 n.7 (citing *Am. Legion*, 164 Wn.2d at 606–07; *Ventenbergs*, 163 Wn.2d at 103; *Madison*, 161 Wn.2d at 96–97 (plurality opinion); *Andersen v. King County*, 158 Wn.2d 1, 16, 138 P.3d 963 (2006) (plurality opinion); *Grant County* II, 150 Wn.2d at 816). No fundamental right is at issue here, and the Court again should decline to find a violation of article I, section 12.

2. Even if the rule did involve a constitutional privilege, the Board had reasonable grounds to distinguish between persons holding spirits distributor licenses and persons holding other licenses or certificates.

Even if the rule involved a fundamental right of citizenship, the Court still must uphold the rule if the Board had a "reasonable ground" for

granting the privilege. *Ockletree*, 179 Wn.2d at 776. To meet the "reasonable ground" test, "distinctions must rest on 'real and substantial differences bearing a natural, reasonable, and just relation to the subject matter of the act.'" *Id.* at 783 (quoting *State ex rel. Bacich v. Huse*, 187 Wash. 75, 84, 59 P.2d 1101 (1936)). The differences "'need not be great'" to allow differential treatment under the privileges and immunities clause. *United Parcel Service, Inc. v. Dep't of Revenue*, 102 Wn.2d 355, 368, 687 P.2d 186 (1984) (quoting *Texas Co. v. Cohn*, 8 Wn.2d 360, 386, 112 P.2d 522 (1941)). "The test is merely whether any state of facts can reasonably be conceived that would sustain the classification." *Id.* at 369. The party challenging a revenue provision bears the burden of showing there was no reasonable basis for the questioned classification. *Id.*

First, the privileges and immunities clause is not violated just because a statute or rule treats similarly situated businesses differently. *Ockletree*, 179 Wn.2d at 781. Second, persons holding spirits distributor licenses are not similarly situated to persons who hold other licenses conferring limited distribution privileges. As explained above, a person holding a spirits distributor license is authorized to purchase spirits from manufacturers, distillers, and suppliers located anywhere in the world, and to sell them to any spirits retailer or distributor anywhere in the world (subject, of course, to applicable laws of other jurisdictions).

RCW 66.24.055(1). In contrast, persons holding a distillers license or a certificate of approval holder have very limited distribution rights. A distiller may distribute only the spirits its produces and only to licensed spirits retailers in the state of Washington; a certificate holder may distribute only the spirits it imports into the state and only to spirits distributors or importers licensed in Washington. RCW 66.24.640; WAC 314-28-030(1), 314-28-050(1)(d), 314-23-030(2)(a).

Under I-1183, persons holding spirits distributor licenses obtained virtually complete control of the distribution of spirits that formerly was undertaken by the state;[13] thus, it is reasonable that spirits distributor licensees should pay the one-time $150 million revenue replacement required by I-1183. Their primary business activity is the distribution of liquor, and they distribute far larger quantities of spirits than other licensees who may obtain limited distribution privileges.[14] There is a real and substantial difference between businesses operating under a spirits distributor license and businesses operating under a distillers license or a

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[13] *See* CP 18–21 (showing monthly distributor fees paid by craft distillers, distillers, distributors, and spirits certificate of approval holders); CP 23, Guadnola Decl., Ex. B (persons holding spirits distributor licenses control 97 percent of the spirits distribution market).

[14] The Distributor Association's reliance on *Dencker* is misplaced. Unlike the cigar shops in *Dencker*, the businesses at issue here do not operate "similar and identical" businesses. *Dencker*, 58 Wash. at 609.

certificate of approval, and thus there is a reasonable ground to treat them differently.

The Distributor Association's privileges and immunities argument also appears to be based on its arguments about alleged arbitrary and capricious rulemaking. *See* Opening Br. of Appellant at 27. Those arguments should be rejected for the reasons stated above.

The Distributor Association has not met its burden of showing that the challenged rule violates article I, section 12, of the Washington Constitution.

VI. CONCLUSION

The Board properly exercised its broad regulatory authority when it imposed an additional fee on licensed distillers and certificate of approval holders for exercising distribution privileges but declined to impose the first-year $150 million distributor license issuance fee requirement on them. The rule is consistent with the language of the statute it implements. Because the rule does not implicate a fundamental right of state citizenship and reasonably distinguishes spirits distributor license holders from other licensees and certificate holders, it does not

violate the privileges and immunities clause of the Washington Constitution. The Board respectfully asks the Court to affirm the superior court's order of dismissal.

RESPECTFULLY SUBMITTED this 29th day of May, 2014.

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WAC 314-23-025

Collection of shortfall of spirits distributor license fees from spirits distributor license holders.

(1) RCW 66.24.055 requires that all persons holding a spirits distributor license on or before March 31, 2013, must have collectively paid a total of one hundred fifty million dollars in spirits distributor license fees by March 31, 2013. If the spirits distributor license fees collected by March 31, 2013, total less than one hundred fifty million dollars, the board is required to assess those persons holding a spirits distributor license on or before March 31, 2013, in order to collect a total of one hundred fifty million dollars. The board will calculate the additional amount owed by each spirits distributor licensee as follows:

(a) The amount of additional fees owed will be calculated using the total spirits sales made by each spirits distributor licensee during calendar year 2012. If a spirits distributor licensee had no spirits sales during calendar year 2012, no additional fees will be due;

(b) Each licensee will be assessed and required to pay their proportionate share of the remaining liability between one hundred fifty million dollars and actual collections. The proportionate share of fees due will be calculated by dividing the total dollar amount of sales made by each spirits distributor licensee by the total spirits sales made by all spirits distributor licensees combined. If the total amount of payments exceeds one hundred fifty million dollars, each licensee will be credited a proportionate amount of the overpayment to their future license issuance fee obligations.

(2) The board will notify all spirits distributor licensees no later than April 30, 2013, of the amount they are required to pay in additional license fees. Spirits distributor licensees must pay the additional license fees to the board by May 31, 2013.

(3) The board may suspend or revoke any spirits distributor license if the required additional license fees are not paid by May 31, 2013. If suspended, the suspension will remain in effect until the additional license fees are paid.

(4) The board may also initiate collection proceedings for any amount of additional fees not paid to the board by May 31, 2013.

[Statutory Authority: RCW 66.24.055 and 66.08.030. WSR 12-21-057, § 314-23-025, filed 10/15/12, effective 11/15/12.]

RCW 66.24.055
Spirits distributor license.

(1) There is a license for spirits distributors to (a) sell spirits purchased from manufacturers, distillers, or suppliers including, without limitation, licensed Washington distilleries, licensed spirits importers, other Washington spirits distributors, or suppliers of foreign spirits located outside of the United States, to spirits retailers including, without limitation, spirits retail licensees, special occasion license holders, interstate common carrier license holders, restaurant spirits retailer license holders, spirits, beer, and wine private club license holders, hotel license holders, sports entertainment facility license holders, and spirits, beer, and wine nightclub license holders, and to other spirits distributors; and (b) export the same from the state.

(2) By January 1, 2012, the board must issue spirits distributor licenses to all applicants who, upon December 8, 2011, have the right to purchase spirits from a spirits manufacturer, spirits distiller, or other spirits supplier for resale in the state, or are agents of such supplier authorized to sell to licensees in the state, unless the board determines that issuance of a license to such applicant is not in the public interest.

(3)(a) As limited by (b) of this subsection and subject to (c) of this subsection, each spirits distributor licensee must pay to the board, for deposit into the liquor revolving fund, a license issuance fee calculated as follows:

(i) In each of the first twenty-seven months of licensure, ten percent of the total revenue from all the licensee's sales of spirits made during the month for which the fee is due, respectively; and

(ii) In the twenty-eighth month of licensure and each month thereafter, five percent of the total revenue from all the licensee's sales of spirits made during the month for which the fee is due, respectively.

(b) The fee required under this subsection (3) is calculated only on sales of items which the licensee was the first spirits distributor in the state to have received:

(i) In the case of spirits manufactured in the state, from the distiller; or

(ii) In the case of spirits manufactured outside the state, from an authorized out-of-state supplier.

(c) By March 31, 2013, all persons holding spirits distributor licenses on or before March 31, 2013, must have paid collectively one hundred fifty million dollars or more in spirits distributor license fees. If the collective payment through March 31, 2013, totals less than one hundred fifty million dollars, the board must, according to rules adopted by the board for the purpose, collect by May 31, 2013, as additional spirits distributor license fees the difference between one hundred fifty million dollars and the actual receipts, allocated among persons holding spirits distributor licenses at any time on or before March 31, 2013, ratably according to their spirits sales made during calendar year 2012. Any amount by which such payments exceed one hundred fifty million dollars by March 31, 2013, must be credited to future license issuance fee obligations of spirits distributor licensees according to rules adopted by the board.

(d) A retail licensee selling for resale must pay a distributor license fee under the terms and conditions in this section on resales of spirits the licensee has purchased on which no other distributor license fee has been paid. The board must establish rules setting forth the frequency and timing of such payments and reporting of sales dollar volume by the licensee, with payments due quarterly in arrears.

(e) No spirits inventory may be subject to calculation of more than a single spirits distributor license

issuance fee.

(4) In addition to the payment set forth in subsection (3) of this section, each spirits distributor licensee renewing its annual license must pay an annual license renewal fee of one thousand three hundred twenty dollars for each licensed location.

(5) There is no minimum facility size or capacity for spirits distributor licenses, and no limit on the number of such licenses issued to qualified applicants. License applicants must provide physical security of the product that is substantially as effective as the physical security of the distribution facilities currently operated by the board with respect to preventing pilferage. License issuances and renewals are subject to RCW 66.24.010 and the regulations promulgated thereunder, including without limitation rights of cities, towns, county legislative authorities, the public, churches, schools, and public institutions to object to or prevent issuance of local liquor licenses. However, existing distributor premises licensed to sell beer and/or wine are deemed to be premises "now licensed" under RCW 66.24.010(9)(a) for the purpose of processing applications for spirits distributor licenses.

[2013 2nd sp.s. c 12 § 1; 2012 c 2 § 105 (Initiative Measure No. 1183, approved November 8, 2011).]

Notes:

Application -- 2013 2nd sp.s. c 12 § 1: "The changes made in section 1 of this act apply to spirits distributors licensed on or after January 1, 2012." [2013 2nd sp.s. c 12 § 2.]

Effective date -- 2013 2nd sp.s. c 12: See note following RCW 66.24.632.

Finding -- Application -- Rules -- Effective date -- Contingent effective date -- 2012 c 2 (Initiative Measure No. 1183): See notes following RCW 66.24.620.

WSR 12-12-065

PERMANENT RULES

LIQUOR CONTROL BOARD

[Filed June 5, 2012, 12:49 p.m. , effective July 6, 2012]

Effective Date of Rule: Thirty-one days after filing.

Purpose: New permanent rules are needed to implement Initiative 1183 that passed on November 8, 2011. Parts of the initiative became effective on December 8, 2011. New license types were created and the state of Washington changed from a controlled liquor system to a privatized liquor system. Emergency rules were adopted on December 7, 2011, and on April 4, 2012, to clarify the language in the new laws created in Initiative 1183. Permanent rules are needed to replace the emergency rules and further clarify the new laws.

Citation of Existing Rules Affected by this Order: Amending WAC 314-28-010, 314-28-050, 314-28-060, 314-28-070, 314-28-080, and 314-28-090.

Statutory Authority for Adoption: RCW 66.08.030, 66.24.055, 66.24.160, 66.24.630, 66.24.640.

Adopted under notice filed as WSR 12-09-088 on April 18, 2012.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 16, Amended 6, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 16, Amended 6, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform

Agency Procedures: New 16, Amended 6, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: May 30, 2012.

Sharon Foster

Chairman

OTS-4509.11

NEW SECTION

WAC 314-02-103 What is a wine retailer reseller endorsement? (1) A wine retailer reseller endorsement is issued to the holder of a grocery store liquor license to allow the sale of wine at retail to on-premises liquor licensees.

(2) No single sale to an on-premises liquor licensee may exceed twenty-four liters. Single sales to an on-premises licensee are limited to one per day.

(3) A grocery store licensee with a wine retailer reseller endorsement may accept delivery at its licensed premises or at one or more warehouse facilities registered with the board.

(4) The holder of a wine retailer reseller endorsement may also deliver wine to its own licensed premises from the registered warehouse; may deliver wine to on-premises licensees, or to other warehouse facilities registered with the board. A grocery store licensee wishing to obtain a wine retailer reseller endorsement that permits sales to another retailer must possess and submit a copy of their federal basic permit to purchase wine at wholesale for resale under the Federal Alcohol Administration Act. A federal basic permit is required for each location from which the grocery store licensee holding a wine retailer reseller endorsement plans to sell wine to another retailer.

(5) The annual fee for the wine retailer reseller endorsement is one hundred sixty-six dollars.

[]

NEW SECTION

WAC 314-02-104 Central warehousing. (1) Each retail liquor licensee having a warehouse facility where they intend to receive wine and/or spirits must register their warehouse facility with the board and include the following information:

(a) Documentation that shows the licensee has a right to the warehouse property;

(b) If a warehouse facility is to be shared by more than one licensee, each licensee must demonstrate to the board that a recordkeeping system is utilized that will account for all wine and/or spirits entering and leaving the warehouse for each license holder. The system must also account for product loss;

(c) Licensees in a shared warehouse may consolidate their commitment for the amount of product they plan to order, but their orders must be placed separately and paid for by each licensee; and

(d) Alternatively, if the warehouse does not have a recordkeeping system that provides the required information, wine and/or spirits for each licensee in a shared warehouse must be separated by a physical barrier. Where physical separation is utilized, a sketch of the interior of the warehouse facility must be submitted indicating the designated area the licensee will be storing product. (Example: If ABC Grocery and My Grocery, each licensed to a different ownership entity, both lease space in a warehouse facility, the wine and/or spirits must be in separate areas separated by a physical barrier.)

(2) Upon the request of the board, the licensee must provide any of the required records for review. Retail liquor licensees must keep the following records for three years:

(a) Purchase invoices and supporting documents for wine and/or spirits purchased;

(b) Invoices showing incoming and outgoing wine and/or spirits (product transfers);

(c) Documentation of the recordkeeping system in a shared warehouse as referenced in subsection (1)(b) of this section; and

(d) A copy of records for liquor stored in the shared warehouse.

(3) Each licensee must allow the board access to the warehouse for audit and review of records.

(4) If the wine and/or spirits for each licensee in a shared warehouse is not kept separate, and a violation is found, each licensee that has registered the warehouse with the board may be held accountable for the violation.

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NEW SECTION

WAC 314-02-106 What is a spirits retailer license? (1) A spirits retailer licensee may not sell spirits under this license until June 1, 2012. A spirits retailer is a retail license. The holder of a spirits retailer license is allowed to:

(a) Sell spirits in original containers to consumers for off-premises consumption;

(b) Sell spirits in original containers to permit holders (see chapter 66.20 RCW);

(c) Sell spirits in original containers to on-premises liquor retailers, for resale at their licensed premises, although no single sale may exceed twenty-four liters, and single sales to an on-premises licensee are limited to one per day; and

(d) Export spirits in original containers.

(2) A spirits retailer licensee that intends to sell to another retailer must possess a basic permit under the Federal Alcohol Administration Act. This permit must provide for purchasing distilled spirits for resale at wholesale. A copy of the federal basic permit must be submitted to the board. A federal basic permit is required for each location from which the spirits retailer licensee plans to sell to another retailer.

(3) A sale by a spirits retailer licensee is a retail sale only if not for resale

to an on-premises spirits retailer. On-premises retail licensees that purchase spirits from a spirits retail licensee must abide by RCW 66.24.630.

(4) A spirits retail licensee must pay to the board seventeen percent of all spirits sales. The first payment is due to the board October 1, 2012, for sales from June 1, 2012, to June 30, 2012 (see WAC 314-02-109 for quarterly reporting requirements).

Reporting of spirits sales and payment of fees must be submitted on forms provided by the board.

(5) The annual fee for a spirits retail license is one hundred sixty-six dollars.

[]

NEW SECTION

WAC 314-02-107 What are the requirements for a spirits retail license?

(1) The requirements for a spirits retail license are as follows:

(a) Submit a signed acknowledgment form indicating the square footage of the premises. The premises must be at least ten thousand square feet of fully enclosed retail space within a single structure, including store rooms and other interior areas. This does not include any area encumbered by a lease or rental agreement (floor plans one-eighth inch to one foot scale may be required by the board); and

(b) Submit a signed acknowledgment form indicating the licensee has a security plan which addresses:

(i) Inventory management;

(ii) Employee training and supervision; and

(iii) Physical security of spirits product with respect to preventing sales to underage or apparently intoxicated persons and theft of product.

(2) A grocery store licensee or a specialty shop licensee may add a spirits retail liquor license to their current license if they meet the requirements for the spirits retail license.

(3) The board may not deny a spirits retail license to qualified applicants where the premises is less than ten thousand square feet if:

(a) The application is for a former contract liquor store location;

(b) The application is for the holder of a former state liquor store operating rights sold at auction; or

(c) There is no spirits retail license holder in the trade area that the applicant proposes to serve; and

(i) The applicant meets the operational requirements in WAC 314-02-107 (1)(b); and

(ii) If a current liquor licensee, has not committed more than one public safety violation within the last three years.

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NEW SECTION

WAC 314-02-109 What are the quarterly reporting and payment requirements for a spirits retailer license? (1) A **spirits retailer** must submit quarterly reports and payments to the board.

The required reports must be:

(a) On a form furnished by the board;

(b) Filed every quarter, including quarters with no activity or payment due;

(c) Submitted, with payment due, to the board on or before the twenty-fifth day following the tax quarter (e.g., Quarter 1 (Jan., Feb., Mar.) report is due April 25th). When the twenty-fifth day of the month falls on a Saturday, Sunday, or a legal holiday, the filing must be postmarked by the U.S. postal service no later than the next postal business day; and

(d) Filed separately for each liquor license held.

(2) **What if a spirits retailer licensee fails to report or pay, or reports or pays late?** If a spirits retailer licensee does not submit its quarterly reports

and payment to the board as required in subsection (1) of this section, the licensee is subject to penalties.

A penalty of two percent per month will be assessed on any payments postmarked after the twenty-fifth day quarterly report is due. When the twenty-fifth day of the month falls on a Saturday, Sunday, or a legal holiday, the filing must be postmarked by the U.S. postal service no later than the next postal business day.

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OTS-4510.8

Chapter 314-23 WAC

SPIRITS DISTRIBUTORS, SPIRITS CERTIFICATE OF APPROVAL LICENSES, AND SPIRITS IMPORTERS

NEW SECTION

WAC 314-23-001 What does a spirits distributor license allow? (1) A spirits distributor licensee may not commence sales until March 1, 2012. A spirits distributor licensee is allowed to:

(a) Sell spirits purchased from manufacturers, distillers, importers, or spirits certificate of approval holders;

(b) Sell spirits to any liquor licensee allowed to sell spirits;

(c) Sell spirits to other spirits distributors; and

(d) Export spirits from the state of Washington.

(2) The price of spirits sold to retailers may not be below acquisition cost.

[]

NEW SECTION

WAC 314-23-005 What are the fees for a spirits distributor license? (1) The holder of a spirits distributor license must pay to the board a monthly license fee as follows:

(a) Ten percent of the total revenue from all sales of spirits to retail licensees made during the month for which the fee is due for the first two years of licensure; and

(b) Five percent of the total revenue from all sales of spirits to retail licensees made during the month for which the fee is due for the third year of licensure and every year thereafter.

(c) The license fee is only calculated on sales of items which the licensee was the first spirits distributor in the state to have received:

(i) In the case of spirits manufactured in the state, from the distiller; or

(ii) In the case of spirits manufactured outside the state, from a spirits certificate of approval holder.

(d) Reporting of sales and payment must be submitted on forms provided by the board.

(2) The annual fee for a spirits distributor license is one thousand three hundred twenty dollars.

□

NEW SECTION

WAC 314-23-020 What are the requirements for a spirits distributor license? (1) In addition to any application requirements in chapter 314-07 WAC, applicants applying for a spirits distributor license must submit:

(a) A copy of all permits required by the federal government;

(b) Documentation showing the applicant has the right to the property;

(c) An acknowledgment form certifying the applicant has a security plan which addresses:

(i) Inventory management; and

(ii) Physical security of spirits product with respect to preventing theft.

(2) Spirits distributors must sell and deliver product from their licensed premises.

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NEW SECTION

WAC 314-23-021 What are the monthly reporting and payment requirements for a spirits distributor license? (1) A **spirits distributor** must submit monthly reports and payments to the board.

(2) The required monthly reports must be:

(a) On a form furnished by the board;

(b) Filed every month, including months with no activity or payment due;

(c) Submitted, with payment due, to the board on or before the twentieth day of each month, for the previous month. (For example, a report listing transactions for the month of January is due by February 20th.) When the twentieth day of the month falls on a Saturday, Sunday, or a legal holiday, the filing must be postmarked by the U.S. Postal Service no later than the next postal business day; and

(d) Filed separately for each liquor license held.

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NEW SECTION

WAC 314-23-022 What if a distributor licensee fails to report or pay, or reports or pays late? (1) If a spirits distributor licensee does not submit its monthly reports and payment to the board as required in WAC 314-23-021(1), the licensee is subject to penalties.

(2) A penalty of two percent per month will be assessed on any payments postmarked after the twentieth day of the month following the month of sale. When the twentieth day of the month falls on a Saturday, Sunday, or a legal holiday, the filing must be postmarked by the U.S. Postal Service no later than the next postal business day.

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NEW SECTION

WAC 314-23-030 What does a spirits certificate of approval license allow? (1) A spirits certificate of approval licensee may not commence sales until March 1, 2012. A spirits certificate of approval license may be issued to spirits manufacturers located outside of the state of Washington but within the United States.

(2) A holder of a spirits certificate of approval may act as a distributor of spirits they are entitled to import into the state by selling directly to distributors or importers licensed in Washington state. The fee for a certificate of approval is two hundred dollars per year.

(3) A certificate of approval holder must obtain an endorsement to the certificate of approval that allows the shipment of spirits the holder is entitled to import into the state directly to licensed liquor retailers. The fee for this endorsement is one hundred dollars per year and is in addition to the fee for the certificate of approval license. The holder of a certificate of approval license that sells directly to licensed liquor retailers must:

(a) Report to the board monthly, on forms provided by the board, the amount of all sales of spirits to licensed retailers.

(b) Pay to the board a fee of ten percent of the total revenue from all sales of spirits to retail licensees made during the month for which the fee is due for the first two years of licensure.

(c) Pay to the board five percent of the total revenue from all sales of spirits to retail licensees made during the month for which the fee is due for the third year of licensure and every year thereafter.

(4) An authorized representative out-of-state spirits importer or brand owner for spirits produced in the United States but outside of Washington state may obtain an authorized representative certificate of approval license which allows the holder to ship spirits to spirits distributors, or spirits importers located in Washington state. The fee for an authorized representative certificate of approval for spirits is two hundred dollars per year.

(5) An authorized representative out-of-state spirits importer or brand owner for spirits produced outside of the United States may ship spirits to licensed spirits distributors, or spirits importers located in Washington state. The fee for an authorized representative certificate of approval for foreign spirits is two hundred dollars per year.

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NEW SECTION

WAC 314-23-040 What are the requirements for a certificate of approval license? The following documents are required to obtain a certificate of approval license:

(1) Copies of all permits required by the federal government;

(2) Copies of all state licenses and permits required by the state in which your operation is located; and

(3) Licensing documents as determined by the board.

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NEW SECTION

WAC 314-23-041 What are the monthly reporting and payment requirements for a spirits certificate of approval licensee? (1) A spirits certificate of approval licensee must submit monthly reports and payments to the board.

(2) The required monthly reports must be:

(a) On a form furnished by the board;

(b) Filed every month, including months with no activity or payment due;

(c) Submitted, with payment due, to the board on or before the twentieth day of each month, for the previous month. (For example, a report listing transactions for the month of January is due by February 20th.) When the twentieth day of the month falls on a Saturday, Sunday, or a legal holiday, the filing must be postmarked by the U.S. Postal Service no later than the next

postal business day; and

(d) Filed separately for each liquor license held.

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NEW SECTION

WAC 314-23-042 What if a certificate of approval licensee fails to report or pay, or reports or pays late? (1) If a spirits certificate of approval licensee does not submit its monthly reports and payment to the board as required by this subsection (1), the licensee is subject to penalties.

(2) A penalty of two percent per month will be assessed on any payments postmarked after the twentieth day of the month following the month of sale. When the twentieth day of the month falls on a Saturday, Sunday, or a legal holiday, the filing must be postmarked by the U.S. Postal Service no later than the next postal business day.

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NEW SECTION

WAC 314-23-050 What does a spirits importer license allow? (1) A spirits importer license is issued to an in-state spirits importer. A spirits importer is allowed to:

(a) Import spirits into the state of Washington;

(b) Store spirits in the state of Washington;

(c) Sell spirits to spirits distributors; and

(d) Export spirits in original containers.

(2) An out-of-state spirits importer is required to obtain an authorized representative certificate of approval license as referenced in WAC 314-23-030.

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AMENDATORY SECTION(Amending WSR 10-19-066, filed 9/15/10, effective 10/16/10)

WAC 314-28-010 Records. (1) All distilleries licensed under RCW 66.24.140 and 66.24.145, including craft, fruit, and laboratory distillers must:

(a) ((~~Must~~)) Keep records ((~~concerning~~)) regarding any spirits, whether produced or purchased, for three years after each sale. A distiller ((~~may be~~)) is required to report on forms approved by the board;

(b) ((~~Must,~~)) In the case of spirits exported or sold, preserve all bills of lading and other evidence of shipment; ((~~and~~))

(c) ((~~Must~~)) Submit duplicate copies of transcripts, notices, or other data that ((~~are~~)) is required by the federal government to the board if requested, within thirty days of the notice of such request. A distiller shall also furnish copies of the bills of lading, covering all shipments of the products of the licensee, to the board within thirty days of notice of such request;

(d) Preserve all sales records to spirits retail licensees, sales to spirits distributors, and exports from the state; and

(e) Submit copies of its monthly records to the board upon request.

(2) In addition to the above, a craft distiller must:

(a) Preserve all sales records((~~, in the case~~)) of retail sales to consumers; and

(b) Submit ((~~duplicate copies of~~)) its monthly ((~~returns~~)) records to the board upon request.

[Statutory Authority: RCW 66.24.145 and 66.08.030. 10-19-066, § 314-28-010, filed 9/15/10, effective 10/16/10; 09-02-011, § 314-28-010, filed 12/29/08, effective 1/29/09. Statutory Authority: RCW 66.08.030. 86-07-022 (Order 172, Resolution No. 181), § 314-28-010, filed 3/13/86; Order 14, § 314-28-010, filed 12/1/70, effective 1/1/71; Rule 84, filed 6/13/63.]

NEW SECTION

WAC 314-28-030 Changes to the distiller and craft distiller license. (1) Beginning March 1, 2012, all distilleries licensed under RCW 66.24.140 and 66.24.145 may sell spirits of their own production directly to a licensed spirits distributor in the state of Washington and to a licensed spirits retailer in the state of Washington.

(2) Beginning June 1, 2012, a distiller may sell spirits of its own production to a customer for off-premises consumption, provided that the sale occurs when the customer is physically present at the licensed premises.

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AMENDATORY SECTION(Amending WSR 10-19-066, filed 9/15/10, effective 10/16/10)

WAC 314-28-050 What does a craft distillery license allow? (1) A craft distillery license allows a licensee to:

(a) Produce sixty thousand proof gallons or less of spirits per calendar year. A "proof gallon" is one liquid gallon of spirits that is fifty percent alcohol at sixty degrees Fahrenheit;

(b) Sell spirits of its own production directly to a customer for off-premises consumption, provided that the sale occurs when the customer is physically present on the licensed premises. A licensee may sell no more than two liters per customer per day. A craft distiller may not sell liquor products of someone else's production;

(c) ((~~Sell spirits of its own production to the board provided that the product is "listed" by the board, or is special-ordered by an individual Washington state liquor store~~)) For sales on or after March 1, 2012, sell spirits of its own production to a licensed spirits distributor;

(d) For sales on or after March 1, 2012, sell spirits of its own production to a licensed spirits retailer in the state of Washington;

((~~(d)~~)) (e) Sell to out-of-state entities;

((~~(e)~~)) (f) Provide, free of charge, samples of spirits of its own production to persons on the distillery premises. Each sample must be one-half ounce or less, with no more than two ounces of samples provided per person per day. Samples must be unaltered, and anyone involved in the serving of such samples must have a valid Class 12 alcohol server permit. Samples must be in compliance with RCW 66.28.040;

((~~(f)~~)) (g) Provide, free of charge, samples of spirits of its own production to retailers. Samples must be unaltered, and in compliance with RCW 66.28.040, 66.24.310 and WAC 314-64-08001. Samples are considered sales and are subject to taxes;

((~~(g)~~)) (h) Contract ((~~produced~~)) produce spirits for holders of a distiller or manufacturer license.

(2) A craft distillery licensee may not sell directly to in-state retailers or in-state distributors until March 1, 2012.

[Statutory Authority: RCW 66.24.145 and 66.08.030. 10-19-066, § 314-28-050, filed 9/15/10, effective 10/16/10; 09-02-011, § 314-28-050, filed 12/29/08, effective 1/29/09.]

AMENDATORY SECTION(Amending WSR 10-19-066, filed 9/15/10, effective 10/16/10)

WAC 314-28-060 What are the general requirements for a craft distillery license? Per RCW 66.24.140 and 66.24.145, a craft distillery licensee is required to:

(1) Submit copies of all permits required by the federal government;

(2) Submit other licensing documents as determined by the board;

(3) Ensure a minimum of fifty percent of all raw materials (including any neutral grain spirits and the raw materials that go into making mash, wort or wash) used in the production of the spirits product are grown in the state of Washington. Water is not considered a raw material grown in the state of Washington((~~;~~

~~(4) Purchase any spirits sold at the distillery premises for off-premises~~

~~consumption from the board, at the price set by the board;~~

~~(5) Purchase any spirits used for sampling at the distillery premises from the board; and~~

~~(6) Purchase any spirits used for samples provided to retailers from the board~~)).

[Statutory Authority: RCW 66.24.145 and 66.08.030. 10-19-066, § 314-28-060, filed 9/15/10, effective 10/16/10; 09-02-011, § 314-28-060, filed 12/29/08, effective 1/29/09.]

AMENDATORY SECTION(Amending WSR 10-19-066, filed 9/15/10, effective 10/16/10)

WAC 314-28-070 What are the monthly reporting and payment requirements for a distillery and craft distillery license? (1) A distiller or craft distiller must submit monthly reports and payments to the board.

The required monthly reports must be:

(a) On a form furnished by the board ((~~or in a format approved by the board~~));

(b) Filed every month, including months with no activity or payment due;

(c) Submitted, with payment due, to the board on or before the twentieth day of each month, for the previous month. (For example, a report listing transactions for the month of January is due by February 20th.) When the twentieth day of the month falls on a Saturday, Sunday, or a legal holiday, the filing must be postmarked by the U.S. postal service no later than the next postal business day; and

(d) Filed separately for each liquor license held.

(2) For reporting purposes, production is the distillation of spirits from mash, wort, wash or any other distilling material. After the production process is completed, a production gauge shall be made to establish the quantity and proof of the spirits produced. The designation as to the kind of spirits shall also be made at the time of the production gauge. A record of the production

gauge shall be maintained by the distiller. The completion of the production process is when the product is packaged for distribution. Production quantities are reportable within thirty days of the completion of the production process.

(3) ((~~Payments to the board. A distillery must pay the difference between the cost of the alcohol purchased by the board and the sale of alcohol at the established retail price, less the established commission rate during the preceding calendar month, including samples at no charge.~~)) On sales on or after March 1, 2012, a distillery or craft distillery must pay ten percent of their gross spirits revenue to the board on sales to a licensee allowed to sell spirits for on- or off-premises consumption during the first two years of licensure and five percent of their gross spirits revenues to the board in year three and thereafter.

(a) ((~~Any on-premises sale or sample provided to a customer is considered a sale reportable to the board.~~)) On sales after June 1, 2012, a distillery or craft distillery must pay seventeen percent of their gross spirits revenue to the board on sales to customers for off-premises consumption.

(b) ((~~Samples provided to retailers are considered sales reportable to the board.~~

~~(c)~~)) Payments must be submitted, with monthly reports, to the board on or before the twentieth day of each month, for the previous month. (For example, payment for a report listing transactions for the month of January is due by February 20th.) When the twentieth day of the month falls on a Saturday, Sunday, or a legal holiday, payment must be postmarked by the U.S. postal service no later than the next postal business day.

[Statutory Authority: RCW 66.24.145 and 66.08.030. 10-19-066, § 314-28-070, filed 9/15/10, effective 10/16/10; 09-02-011, § 314-28-070, filed 12/29/08, effective 1/29/09.]

AMENDATORY SECTION(Amending WSR 09-02-011, filed 12/29/08, effective 1/29/09)

WAC 314-28-080 What if a distillery or craft distillery licensee fails to report or pay, or reports or pays late? If a distillery or craft distiller ((~~fails to~~)) does not submit its monthly reports ((~~or~~)) and payment to the board((~~, or submits late, then~~)) as required in WAC 314-28-070(1), the licensee is subject

to penalties ((~~and surety bonds~~)).

((~~(1)~~)) Penalties. A penalty of two percent per month will be assessed on any payments postmarked after the twentieth day of the month following the month of sale. When the twentieth day of the month falls on a Saturday, Sunday, or a legal holiday, the filing must be postmarked by the U.S. postal service no later than the next postal business day.

((~~(2) Surety bonds. A "surety bond" is a type of insurance policy that guarantees payment to the state, and is executed by a surety company authorized to do business in the state of Washington. Surety bond requirements are as follows:~~

~~(a) Must be on a surety bond form and in an amount acceptable to the board;~~

~~(b) Payable to the "Washington state liquor control board"; and~~

~~(c) Conditioned that the licensee will pay the taxes and penalties levied by RCW 66.28.040 and by all applicable WACs.~~

~~(3) The board may require a craft distillery to obtain a surety bond or assignment of savings account, within twenty-one days after a notification by mail, if any of the following occur:~~

~~(a) A report or payment is missing more than thirty days past the required filing date, for two or more consecutive months;~~

~~(b) A report or payment is missing more than thirty days past the required filing date, for two or more times within a two-year period; or~~

~~(c) Return of payment for nonsufficient funds.~~

~~(4) As an option to obtaining a surety bond, a licensee may create an assignment of savings account for the board in the same amount as required for a surety bond. Requests for this option must be submitted in writing to the board's financial division.~~

~~(5) The amount of a surety bond or savings account required by this chapter must be either three thousand dollars, or the total of the highest four~~

~~months' worth of liability for the previous twelve month period, whichever is greater. The licensee must maintain the bond for at least two years.~~

~~(6) Surety bond and savings account amounts may be reviewed annually and compared to the last twelve months' tax liability of the licensee. If the current bond or savings account amount does not meet the requirements outlined in this section, the licensee will be required to increase the bond amount or amount on deposit within twenty-one days.~~

~~(7) If a licensee holds a surety bond or savings account, the board will immediately start the process to collect overdue payments from the surety company or assigned account. If the exact amount of payment due is not known because of missing reports, the board will estimate the payment due based on previous production, receipts, and/or sales.~~))

[Statutory Authority: RCW 66.08.030, 66.24.145. 09-02-011, § 314-28-080, filed 12/29/08, effective 1/29/09.]

AMENDATORY SECTION(Amending WSR 10-19-066, filed 9/15/10, effective 10/16/10)

WAC 314-28-090 Distilleries or craft distilleries((~~-- Selling in-state, retail pricing and product listing~~)) -- Selling out-of-state((~~-- Special orders~~)). (((~~(1) What steps must a craft distillery licensee take to sell a spirits product in the state of Washington?~~

~~(a) There are two ways to sell a spirits product at a state liquor store:~~

~~(i) Through the special order process; and~~

~~(ii) Through product listing.~~

~~(b) If a craft distillery licensee wants the board to regularly stock its product on the shelf at a state liquor store, a licensee must request the board to list its product. If the board agrees to list the product, a licensee must then sell its product to the board and transport its product to the board's distribution center.~~

~~(c) Before a craft distillery licensee may sell its product to a customer~~

~~(twenty-one years old or older) at its distillery premises, a licensee must:~~

~~(i) Obtain a retail price from the board;~~

~~(ii) Sell its product to the board; and~~

~~(iii) Purchase its product back from the board. Product that a licensee produces and sells at its distillery premises is not transported to the board's distribution center.~~

~~(d) *Listing a product.* A craft distillery licensee must submit a formal request to the board to have the board regularly stock its product at a state liquor store. The board's purchasing division administers the listing process.~~

~~(i) A licensee must submit the following documents and information: A completed standard price quotation form, a listing request profile, bottle dimensions, an electronic color photograph of the product, a copy of the federal certificate of label approval, and a signed "tied house" statement.~~

~~(ii) The purchasing division shall apply the same consideration to all listing requests.~~

~~(iii) A craft distillery licensee is not required to submit a formal request for product listing if a licensee sells its product in-state only by special order (see chapter 314-74 WAC).~~

~~(e) *Obtaining a retail price.* A craft distillery licensee must submit a pricing quote to the board forty-five days prior to the first day of the effective pricing month. A pricing quote submittal includes a completed standard price quotation form, and the product's federal certificate of label approval. The board will then set the retail price.~~

~~(i) Pricing may not be changed within a calendar month.~~

~~(ii) A craft distillery licensee is required to sell to its on-premises customers at the same retail price as set by the board. If and when the board offers a temporary price reduction for a period of time, a licensee may also sell its product at the reduced price, but only during that same period of time.~~

~~(2)~~)) **What are the requirements for a craft distillery licensee to sell its**

spirits product outside the state of Washington?

((~~(a)~~)) (1) A distillery or craft distillery licensee shall include, in its monthly report to the board, information on the product it produces in-state and sells out-of-state. Information includes, but is not limited to, the amount of proof gallons sold, and for a craft distillery, the composition of raw materials used in production of the product.

((~~(b)~~)) (2) Product produced in-state and sold out-of-state counts toward a craft distillery licensee's sixty thousand proof gallons per calendar year production limit (see WAC 314-28-050).

((~~(c)~~)) (3) Product produced in-state and sold out-of-state is subject to the fifty percent Washington grown raw materials requirement for a craft distillery.

((~~(d) Product sold out-of-state is not subject to retail pricing by the board.~~

~~(e)~~)) (4) A distillery or craft distillery licensee is not subject to Washington state liquor taxes on any product the licensee sells out-of-state.

[Statutory Authority: RCW 66.24.145 and 66.08.030. 10-19-066, § 314-28-090, filed 9/15/10, effective 10/16/10; 09-02-011, § 314-28-090, filed 12/29/08, effective 1/29/09.]

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I, Dianne S. Erwin, certify that I served a copy of this document, **Response Brief of Washington State Liquor Control Board**, on all parties or their counsel of record on the date below by US Mail Postage Prepaid via Consolidated Mail Service and e-mail pursuant to agreement of the parties.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 29 day of May, 2014, at Olympia, WA.

DIANNE S. ERWIN, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

May 29, 2014 - 1:42 PM

Transmittal Letter

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Court of Appeals Case Number: 45482-3

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