



## Washington State Liquor Control Board

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### Washington State Liquor Control Board Meeting

Wednesday, September 11, 2013, 10:00 a.m.

Headquarters Building

3000 Pacific Avenue SE, Olympia WA 98501

### Meeting Minutes

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#### CALL TO ORDER

Chair Sharon Foster called the regular meeting of the Washington State Liquor Control Board to order at 10:00 a.m. on Wednesday, September 11, 2013. Member Ruthann Kurose and Member Chris Marr were also present.

#### APPROVAL OF MINUTES

**MOTION:** Member Kurose moved to approve the September 4, 2013, meeting minutes as presented.

**SECOND:** Member Marr seconded.

**ACTION:** Motion passed unanimously.

#### FAIR TRADE PRACTICES WORK SESSION

Patrick Woods, LCB Education Outreach Manager, opened the work session with an overview of the Fair Trade Practices Rules beginning with the background.

##### Background

A Volume Discount Advisory was issued on November 21, 2012 in response to complaints from on-premise licensees, that distributors were pressuring them to dedicate a percentage of their back-bar to a particular distributor's products, in order to receive discounted prices.

Prior to the Advisory, WSLCB staff met with distributors to better understand the industry perspectives on this issue and learned that a least one distributor was not aware that imposing a percentage of back-bar requirements to obtain a price discount was a prohibited practice. Staff explained why this practice is prohibited under the "undue influence" provisions of the Washington law, along with Federal rules issued by Alcohol, Tobacco and Trade Bureau TTB. The LCB has not received complaints regarding this type of "undue influence" since the advisory was issued. However we continue to receive complaints from off-

premise licensees, in particular former contract stores, regarding other types of discounts that they view to be "discriminatory pricing practices". These retail licensees assert that on-premise licensees are receiving greater discounts on smaller volumes from their distributors, even though they are in the same "market area". In addition the Board has received requests from industry members to clarify the application of "volume discounts" in regards to industry practices such as purchases of liquor products over time and deliveries to licensed locations.

The LCB has issued a CR101 (public comment 4/23/2013) regarding "Fair Trade Practices" and are considering rule making to clarify policies in this area.

### **"Fair Trade Practices" - Four Primary Issues Currently Under Consideration**

#### 1. Volume Discounts based on percentage of back-bar etc

This practice includes a distributor providing a percentage discount, only if the licensee dedicates a percentage of their spirits back-bar, well drinks, wine by the glass, or any combination of sales items of that distributor's products, in order to receive a price discount.

Summary: The Board issued an "advisory" on this issue in November of 2012 clarifying that this practice is prohibited, as it constitutes "undue influence" over the retailer's business practices. In addition the Board noted that it is the opinion of the Board that the "advisory" is consistent with Federal TTB CFR: Title 27.

Reference: RCW 66.28.170 Wine or malt beverage manufacturers - discrimination in price to purchaser for resale prohibited - price differentials

*It is unlawful for a manufacturer of spirits, wine, or malt beverages holding a certificate of approval or the manufacturer's authorized representative, a distillery, brewery, or a domestic winery to discriminate in price in selling to any purchaser for resale in the state of Washington. Price differentials for sales of spirits or wine based upon competitive conditions, costs of servicing a purchaser's account, efficiencies in handling goods, or other bona fide business factors, to the extent the differentials are not unlawful under trade regulation laws applicable to goods of all kinds, do not violate this section.*

Reference: RCW 66.28.285 (6) Three-tier system - Definitions

*(6) "Undue Influence" means one retailer or industry member directly or indirectly influencing the purchasing, marketing, or sales decisions of another retailer or industry member by any agreement written or unwritten or any other business practices or arrangements such as but not limited to the following:*

*(a) Any form of coercion between industry members and retailers or between retailers and industry members through acts or threats of physical or economic harm, including threat of loss of supply or threat of curtailment of purchase;*

*(b) A retailer on an involuntary basis purchasing less than it would of another industry member's product;*

*(c.) Purchases made by a retailer or industry member as a prerequisite for purchase of other items;*

*(d) A retailer purchasing a specific or minimum quantity or type of a product or products from an industry member;*

*(e) An industry member requiring a retailer to take and dispose of a certain product or quota of an industry member's products;*

*(f) A retailer having a continuing obligation to purchase or otherwise promote or display and industry member's product;*

*(h) A retailer having a commitment not to terminate its relationship with and industry member with respect to purchase of the industry member's products or an industry member having a commitment not to terminate its relationship with a retailer with respect to the sale of a particular product or products;*

*(i) An industry member being involved in the day-to-day operations of a retailer or a retailer being involved in the day-to-day operations of an industry member in a manner that violate the provisions of this sections;*

*(j) Discriminatory pricing practices as prohibited by law or other practices that are discriminatory in that the product is not offered to all retailers in the local market on the same terms.*

## 2. Different Discount Pricing for On-Premise and Off-Premise Licensees (Channeling)

This practice involves a distributor providing different volume discounts to on-premise licensees than they offer to off-premise licensees in the same "market area".

Summary: WSLCB staff considers "channel pricing" to be a prohibited practice as violates the provision in state statute that makes it unlawful to "discriminate in price in selling to any purchaser for resale". Staff believes a statutory change is required in order for "channeling" to be allowed in Washington State.

However some licensed distributors and retailers believe the statutory references allowing price differentials for "bona fide business factors" provides flexibility to allow this practice. In addition they contend that the provision in the statute referring to "local markets" can be understood to apply to different industry markets (on-premise versus off-premise retailers) and is not limited to the geographic markets that the Board has historically used, when providing guidance.

Reference: RCW 66.28.170 Wine or malt beverage manufacturers-Discrimination in price to purchaser for resale prohibited-Price Differentials

*It is unlawful for a manufacturer of spirits, wine, or malt beverage holding a certificate of approval or the manufacturer's authorized representative, a distillery, brewery, or a domestic winery to discriminate in price in selling to any purchaser for resale in the state of Washington. Price differentials for sales of spirits or wine based upon competitive conditions, costs of servicing a purchasers account, efficiencies of handling goods or other bona fide business factors to the extent the differentials are not unlawful under trade regulation laws applicable to goods of all kinds, do not violate this section.*

Reference: RCW 66.285 Three - tier system-Definitions

*(6) "Undue Influence" means one retailer or industry member directly or indirectly influencing the purchasing, marketing, or sales decisions of another retailer or industry member by any agreement written or unwritten or any other business practices or arrangements such as but not limited to the following:....*

*(j) Discriminatory pricing practices as prohibited by law or other practices that are discriminatory in that product is not offered to all retailers in the local market on the same terms.*

### 3. Discounts Limited to Day of Purchase or Extended Time Periods

This practice involves whether to use the current daily time frame for determining the level of volume discount as opposed to an extended time period such as a weekly or monthly billing cycle to determine volume discount rates.

Summary: WSLCB staff currently considers there to be a "Money's Worth" issue with anything other than daily transactions. In addition, allowing orders accumulated over a period of time to qualify for quantity discount is currently considered an extension of credit by the distributor. The statutory and rule reference includes:

Reference: RCW 66.28.305 Three-tier system-Money advances- Prohibition

*Except as provided in RCW 66.28.310, no industry member shall advance and no retailer shall receive moneys or money's worth under an agreement written or unwritten or by means of any other business practices or arrangement.*

Reference: WAC 314-12-140 Prohibited practices-Contracts-Gifts-Rebates, etc

*Sub (2) No Industry member shall advance and no retailer, any employee thereof, or applicant for a retail liquor license shall receive money or money's worth under any written or unwritten agreement or any other business practice or arrangement such as: (a) Gifts; (b) Discounts; (c.) Loans of money; (d) Premiums; (e) Rebates; (f) Free liquor; or (g) Treats or services of any nature whatsoever except such services as are authorized in this regulation.*

Reference: WAC 314-13-015 What method of payment can a retailer use to purchase spirits, beer, or wine from an industry member?

*Per RCW 66.28.270, a retail licensee must pay cash for spirits, beer, and wine prior to or at the time of delivery by an industry member.....*

### 4. Discounts Limited to One Delivery Site or Multiple Delivery Sites

This practice concerns whether a group of licensees can receive a combined volume discount even if they do not have a "central warehouse".

Summary: WSLCB staff currently holds that discounts are limited to the licensed location to which they are delivered and that this position most appropriately reflects the provisions in statute and corresponding rule that reference the ability of licensees to establish a "central warehouse".

Reference: RCW 66.24.620 Sale of Spirits by a holder of a spirits distributor or spirits retail license  
*"Notes Finding..... (O) Allow retailers and restaurants to distribute wine to their own stores from a central warehouse"*

Reference: WAC 314-02-104

*(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;*

Chair Foster then thanked the work session guests for coming and invited them to come forward as she called on them.

John Gaudnola - Executive Director of AWSWD

Mr. Gaudnola agrees with the recommendation of volume discounts. He added that distributors are in favor of channel pricing but he does not agree with basing this on other business practices.

Harold McGregor - Young's Market

Mr. McGregor said they are studying the efficiencies model and noted that standard industry practices in Arizona reflect this model. He stressed that suppliers communicate with their customer directly and those customers are supported in a different way.

Chad Mackey - El Gaucho Hospitality

Mr. Mackey spoke about their important role in marketing brands. He noted how they are big promoters for brands carried in their restaurants and this sets a precedent. Restaurants have long played a role in product introductions and it's a critical role in the entire industry for product launches. Restaurants have a unique role in the marketing of brands and there should be differentials.

Holly Chisa - NW Grocery Association

Ms. Chisa expressed strong concern for these rules and particular sections. She referenced the subjective language. You need to allow for competition in the market place whether on-premise or off-premise. Smaller retailers cannot afford warehousing for quantity purchases.

Julia Clark - WA Restaurant Association

Ms. Clark noted that her testimony represents thousands of licensees. She requested that the Board discontinue rule making on spirit and wine pricing. She said discrimination is not synonymous with price differentials and she believes the Board's interpretation is incorrect and needs to give more weight to the price differentials. She does not support anti-competition practices such as collusion or price-fixing. Price differentials are customary in this industry and encouraged.

Travis Rosenthal - Tango Rumba

Mr. Rosenthal is the owner of Tango Rumba. He said this is a small business with no partners or investors. He discussed "value added" noting that their establishment is currently getting national press and this adds value to any product they serve. He said that this is one of the ways he is able to compete with the larger business as he is unable to buy in volume. He also noted that they tend to support the smaller brands, which forms a strong partnership.

Pete Hanning - The Red Door

Mr. Hanning is celebrating 25 years in business. He stated that there is a tremendous difference between on-premise and off-premise channeling. He explained that a bar business has many layers of staff duties and the labor it takes to create a cocktail in a bar versus selling a bottle of alcohol in a grocery store is vastly different. He noted his doorman, security guards, bar-backs, bartenders, servers, and chefs and the margins are fundamentally different. The knowledge-base his staff needs to have is far beyond an off-premise employee and the training costs are high. He asked that the Board allow the market to dictate the completion.

Lane Hoss - Anthony's

Ms. Hoss agreed with many of the guests that already spoke so she was brief. She did note that Anthony's is one of the larger restaurants in the community and they have a niche. She stated that the

quality of the service they receive brings value to their decision to use a particular vendor - among many other factors. Focusing only on price does not address the "value added." She also mentioned the value of product promotion. She asked the Board to look beyond just the issue of liquor market.

Jas Sangha & Michael Cho - WALSA

Mr. Sangha first introduced Michael Cho as they presented together. Mr. Sangha then continued by noting he cannot compete in the wholesale business due to the channel pricing in the bars. He stated that they are paying more for products that come in the back door. He also said the price is negligible when you get a product down to the tasting level.

Mr. Cho said he had several issues noting that the law is fundamentally unfair and he does not think that I-1183 was intended to result in that unfairness. He stated that we don't have a free market at this time due to the issues with the rules. Washington State is unique in the sense that retailers are allowed to do wholesaling. We need a different mechanism to manage these issues. There should not be discrimination in retail pricing. Efficiencies are measured by metrics and are measurable but the metrics are not clear. He is not against free competition on the same channel. He said that differential pricing based on class is discrimination. He does not understand why a smaller business only buying one case of alcohol - when he can buy 10 - is receiving a better price.

Randy Thurman - Azteca Mexican Restaurants

Mr. Thurman was brief as he agreed with many of the previous comments. He is responsible for the purchasing for the company and is currently negotiating prices for half a million pounds of pinto beans, rice, chicken, shrimp and other goods. He believes that the passing of I-1183 was an opportunity to negotiate large volumes of liquor as well and sees this as the same negotiating opportunity as other goods.

Paul Beveridge - FWWS

Mr. Beveridge noted that they are celebrating their 25<sup>th</sup> anniversary this year. He also runs two wine shops and understands what the smaller retail outlets are experiencing. He has seen many go out of business suggesting we need to remove barriers to competition rather than create more. The free market is the only fair way to set price. He believes this type of economic regulations is very different than public safety. He needs to provide a "value" to be able to compete with the larger entities such as St. Michele if he expects to succeed. He would like to see the LCB focus on public safety and drop this proposal.

Jean Leonard - WA Wine Institute

Ms. Leonard does believe differential pricing and channel pricing are not discriminatory as they are completely different markets with different issues to overcome. She encouraged the Board to find and understand the differences. She also believes volume pricing should be related to the necessary discounts.

Katie Jacoy - CA Wine Institute

Ms. Jacoy agreed with Ms. Leonard's statements but added that volume discounts need to be justified by the efficiencies.

Dave Ducharm

Mr. Ducharm supports channel pricing and concurs with earlier testimony.

Frances Cho - Premium Wine & Liquor

Ms. Cho purchased three liquor stores and had to close two. When she opened her stores it was difficult to compete with restaurants as she has to charge more per bottle of liquor. She expected to do wholesale and retail. She believes the law was made for stores to do wholesales. She said they too promote new products but they must charge for them. When buying in bulk she believes she should get a better price.

Member Marr then invited Mr. Woods to come forward again to discuss next steps and a timetable.

Mr. Woods indicated that the Board has the option to provide a clarifying advisory. In addition they can clarify the regulatory requirements through the rules process. Staff will be researching what was heard during today's work session especially related to the four primary areas of concern.

Chair Foster thanked everyone for their time and input.

**NEW BUSINESS**

No new business reported.

**OLD BUSINESS**

No old business reported.

**ADJOURN**

Chair Foster adjourned the meeting at 10:40.

Minutes approved this 25<sup>TH</sup> day of SEPTEMBER, 2013



Sharon Foster  
Board Chair



Ruthann Kurose  
Board Member



Chris Marr  
Board Member