

Washington's New Wine, Beer & Spirits Law: HB 2040

Intent, Impact & Implementation

Prepared for Law Seminars International Telebriefing, 2 June 2009

R. Corbin Houchins, Esq.
CorbinCounsel.com

© R. Corbin Houchins 2009. All rights reserved

I. Introduction

The bill (now Chapter 506 of the 2009 session laws¹) will change the Washington liquor code in three areas, effective July of this year:

- (1) Trade practices by suppliers, such as point-of-sale merchandising.
- (2) Interests a supplier-tier industry member may hold in a retailer-tier business, and *vice versa*.
- (3) Prices charged by suppliers to wholesalers and retailers.

Impetus for the bill came from a broadly based “three-tier task force“ convened by the Washington State Liquor Control Board (“LCB”), which issued its [report](#) in late 2006 with relatively liberal recommendations and was followed by a select joint legislative committee that received input from various sources, including wineries. There is little doubt that most industry supporters, including the LCB, intended the legislation to broaden permissible methods of supplier-paid merchandising, permit investment and cross-ownership between supplier tiers and retailers, and clarify certain pricing restraints. How the bill text accomplishes those goals is a more complex issue and the primary subject of this teleconference.

At this point, the new law’s ultimate impact appears to depend heavily on implementation decisions by the LCB. Washington has granted the LCB a degree of rule-making power that is without parallel elsewhere in the executive branch. Under RCW 66.08.030, the LCB need hew only to the “spirit,” *vice* the letter, of Chapter 506, and can in effect amend it to conform to the “true intent” of Title 66.² The regulators therefore appear able to close whatever gap may exist between expectations for the bill and its actual wording. We are fortunate to have participation in the teleconference by both the chair of the LCB and its deputy director.

¹ Chapter 506 and RCW 66.28.010, which the bill repeals, are attached at the end of these materials.

² The first subsection of section 030 reads, “For the purpose of carrying into effect the provisions of this title according to their true intent or of supplying any deficiency therein, the board may make such regulations not inconsistent with the spirit of this title as are deemed necessary or advisable. All regulations so made shall be a public record and shall be filed in the office of the code reviser, and thereupon shall have the same force and effect as if incorporated in this title. . . .”

II. “Tied House”

Like most states, Washington regulates wine and beer³ at each of the three basic “tiers” of distribution (manufacturer or importer, wholesaler, and retailer). A federal agency, the Alcohol & Tobacco Tax & Trade Bureau of the Department of the Treasury (“TTB”), licenses supplier-tier (manufacturer/importer and wholesaler) businesses and regulates interstate commerce in alcoholic beverages.

Both federal and state regulatory regimes make particular reference to commercial and financial relationships between suppliers and retailers, with a view to preventing supplier influence over retailer purchase decisions. The pertinent statutes and regulations are called tied house laws, after the pre-Prohibition practice of “tying” a saloon to a particular supplier (typically a brewery) through supplier subsidies to the retail proprietor or investment in the retail business.

Tied house laws vary by jurisdiction, but commonly prohibit suppliers’ furnishing anything of value to a retailer, with only specific exceptions expressly stated in a statute or regulation. They also radically restrict vertically integrating or adopting alternative distribution structures that would result in bypassing a middle tier of wholesalers, inserted in the stream of commerce by law, originally with the aim of putting an independent business between brewer and saloon to decrease the influence of manufacturers on retailers. At the time, that structural requirement for distribution was presented as an antidote to the highly effective sales techniques of tied houses, with the goal of reducing consumption.

We are now in an era of reexamination of the policy objectives behind tied house laws, of taking into account the post-Repeal shift in balance of economic power toward the retail tier and away from manufacturers, and of cautiously inquiring whether more competitive trade practices and business structures that lead to lower consumer prices for table wine and beer might not be a *good* thing.

III. Trade Practices

Trade practice restrictions of the bill start with revision of the core concept.

Because of the typical tied house orientation that all is forbidden unless expressly permitted, both current law and the Chapter 506 version are relatively lengthy, to accommodate exceptions. Their basic prohibitions are, however, quite succinct.

Present RCW 66.28.010(1)(a):

“Except as provided in subsection (3) of this section, no manufacturer, importer, distributor, or authorized representative shall advance⁴

³ Distilled spirits are handled differently in Washington, which controls distribution directly and permits sale at restaurants and a limited number of other businesses serving individual drinks for consumption on the premises (“on sale” accounts), though not in grocery stores, bottle shops and other elements of the “off sale” packaged goods segment. However, tied house laws apply to relations between manufacturers or other suppliers to the LCB and retail licensees. A recently created “craft distillery” license category grants privileges that in effect combine manufacturing with some retail operations, but does not alter the basic “control state” approach to packaged spirits.

⁴ The bill makes no change in use of the term “advance,” rather than a more general term, such as “furnish.” Thus, both current and tied house laws and Chapter 506 stop short of applying to

moneys or moneys' worth to a licensed person⁵ under an arrangement, nor shall such licensed person receive, under an arrangement, an advance of moneys or moneys' worth."

Chapter 506, § 6:

"Except as provided in section 7 of this act, no industry member⁶ shall advance and no retailer⁷ shall receive moneys or moneys' worth under . . . any . . . agreement[,] . . . business practice or arrangement."

The above change removes the specification "to a licensed person" from the prohibition of advancing (implying that advances to anyone are covered), but clarifies the nature of the recipient as a retail licensee. It seems clear that the intent is to apply only to advances to retailers as well as receipts by retailers. What is less clear is whether the statute supports the existing LCB regulation cited in note 7 above, which forbids retailers to "give or offer to any manufacturer, distributor or importer, or his employee, any gifts, discounts, loans of money, premiums, rebates, free liquor of any kind, treats or services of any nature whatsoever, except such services as are authorized in this regulation." It is, of course, arguable that the LCB does not need statutory support to add a "reverse tied house" provision via its own legislative powers under RCW 66.08.030(1).

The new Chapter 506 text also abandons the present limitation of the law to advances "under an arrangement," thereby expanding the reach of the law to any business practice. Although there is no judicial definition of "under an

all transfers of things or services of value. For example, because there is no exception for ordinary sales of goods, either in § 7 of the bill or in current law, if the basic prohibition applied to all transfers of value, it would be illegal for a supplier to deliver wine to a retailer (thereby furnishing "money's worth"), even if the wine were paid for. One theory on why an ordinary delivery is lawful is that "advance" does not include transactions generally regarded as equal exchanges. Later statutes and LCB regulations do not, however, consistently apply that understanding of the term.

⁵ The LCB has consistently interpreted "licensed person" in this section as a person, natural or juridical, holding a *retail* license, as seems necessary to avert absurd results. The same phrase in WAC 314-12-020(3), regarding license eligibility, appears to refer to persons holding any kind of liquor license.

⁶ "Industry member" is defined in § 2(3) of the bill as a manufacturer, importer, wholesaler or similar supplier and its affiliates, subsidiaries, officers, directors, partners, employees and representatives. The list does not explicitly include shareholders or LLC members, but "affiliates" includes all investors with control shares, § 2(2).

⁷ The bill retains the current one-way perspective of regulating only benefits running from supplier tier members to retailers and does not prohibit benefits retailers may confer on suppliers. However, by regulation the LCB maintains a reverse restriction on suppliers' receipt of benefits from retailers in WAC 314-12-140(3). If inter-tier interests permitted under Chapter 506 exist, the issue is more complicated, as "retailer," defined in § 2(5), includes agents, officers, directors, partners, shareholders and employees. Thus, a winery parent of, or investor in, a retailer is explicitly a retailer (and therefore forbidden to receive money's worth from, e.g., another winery), but a retailer parent of a winery would be an industry member (and therefore forbidden to advance money's worth to, e.g., another retailer) only if it is an "affiliate" of the winery, a status that requires direct or indirect control.

arrangement,” the law of statutory construction suggests that the phrase must have some effect.⁸ A plausible (but far from compelled) meaning is an arrangement with the retailer, a definition that would exclude third party transactions incidentally benefitting the retailer –e.g., the business practice of a manufacturer’s advertising the brand in local media, which is worth money to the retailer, but involves an arrangement only with the advertising medium, historically viewed by the LCB as not a tied house violation. If that is the meaning, a wide range of marketing activities that are probably not forbidden under current law because they are not under an arrangement with the retailer may be prohibited under Chapter 506 because they are, of course, business practices.

Chapter 506 also removes an important tied house exception, now found in RCW 66.28.010(3)(a):

“ . . . Nothing in this section shall prohibit a retail licensee, or any person financially interested, directly or indirectly, in such a retail licensee from having a financial interest, direct or indirect, in a business which provides, for a compensation commensurate in value to the services provided, . . . services to a manufacturer, so long as the retail licensee or person interested therein has no direct financial interest in or control of said manufacturer.”

The § 7 exceptions referred to in § 6 of the bill do not parallel the subsection 3 exceptions of the current code, which the bill repeals. Any marketing plan involving payments to a retailer in exchange for services –e.g., buying a listing or ad in a retailer-affiliated publication– currently defensible as a subsection 3 exception will be forbidden when Chapter 506 becomes law, unless specifically described in § 7 or regarded as something other than an “advance.”

Compared to the range of packaged goods marketing practices already common in other industries, let alone those that creativity may produce, the list of permitted activities for licensed beverages at § 7 is quite limited, reflecting the inherent ambivalence of liquor law regarding the propriety of stimulating business. Moreover, even the listed items and activities by which suppliers may confer benefits on retailers are made illegal by Chapter 506 (but not expressly by current law) if the LCB finds providing them likely to influence the buying or selling decisions of the retailer. If the purpose of merchandising efforts is to have a favorable influence on purchase decisions, it might appear that only ineffective measures would be assured of legality, even if listed in § 7.

Branded advertising novelties illustrate the numerous areas in which LCB clarifications will be helpful. Chapter 506 impliedly allows furnishing such items without charge, as compared to current law, which requires a supplier to charge the retailer at least cost for them, but the new law introduces the restriction that the retailer may not sell or give any of the items to its customers. It is unclear whether the sale option will still exist and, if so, will remain free of the Chapter

⁸ See *Edmonds Shopping Center Assoc. v. City of Edmonds*, 117 Wash. App. 344, 356, 71 P.3d 233, 238 (2003).

506 prohibition on, for example, a patron's taking a brand-identified coaster home.

Novelties furnished to retailers must be of no more than “nominal value,” which is an independent requirement, not necessarily met by the examples of novelties listed in Chapter 506. Items are not deemed to be of nominal value by virtue of their appearance on the § 7 list. Rather, furnishing listed items is permissible (assuming it meets other § 7 requirements) only if the items are in fact of nominal value *in the aggregate*. The listing of shirts, for example, suggests there are some shirts that individually would qualify as of nominal value, thereby providing a clue to what is meant by “nominal” for a single item (presumably as great as the value of the cheapest imprinted T-shirt, or around \$7.50). There is, however, no guidance from the text as to how many such shirts could be furnished without going over aggregate nominal value.

Wine tasting provisions of § 7 illustrate how Chapter 506 raises questions about the ability of the LCB to allow and regulate an activity under existing law. With respect to presenting wines at private club and special event premises, present RCW 66.28.155 appears to permit those activities at “the licensed premises of a retailer.” Thus, one may ask whether the LCB’s administrative authority to include the locations of private club licenses (RCW 66.24.440-.452) and special occasion licensees (RCW 66.24.380) in the category of licensed retail premises was already allowed by statute, without the Chapter 506 requirement that it have no positive effect on the retailer’s purchase decisions.

IV. Inter-Tier Interests

With narrow “custom” exceptions created to allow specific transactions, under current law parties licensed as suppliers (primarily manufacturers, importers, and wholesalers) and their investors and officers are forbidden to hold financial interests, such as stock, LLC membership, promissory notes, or outright ownership, in a licensed retail business.

Present RCW 66.28.010(1)(a):

“No manufacturer, importer, distributor, or authorized representative, or person financially interested, directly or indirectly, in such business; whether resident or nonresident, shall have any financial interest, direct or indirect, in any licensed retail business”

Oddly enough, there is currently no *direct* statutory prohibition of a manufacturer’s obtaining financing from, or even being owned by, a retailer. However, a person financially interested in a retailer would necessarily have an indirect interest in a business in which the retailer holds a direct interest. As a “person financially interested” in the manufacturer, the person could no longer hold the interest in the retailer consistently with RCW 66.28.010.

Chapter 506 permits some interests between suppliers and retailers that are currently forbidden, but only if operation of the enterprise meets certain conditions. The conditions for legality are drawn in a manner that raises questions about practical operation of, for example, a winery-owned wine bar or a restaurateur-owned winery – questions that appear to require a regulatory response from the LCB. Among the financial issues the LCB could usefully address is what a retailer owning stock in a

supplier should do to safely receive dividends, as those transfers fall, facially at least, within the prohibition of Chapter 506, § 6, but are not found in the § 7 list of exceptions.

Chapter 506 will repeal current RCW 66.28.010, which prohibits such interests with specific limited exceptions, leaving the code with no explicit prohibition of inter-tier interests. However, taking together the “unless” clause of § 3(1), the preamble’s favorable recitation regarding a three-tier distribution system in § 1, and the possibility of adverse action by the LCB in § 5, such an interest is in effect declared illegal *if one entity directly or indirectly influences the buying or selling decisions of the other* or if the LCB finds the interest has at any time resulted, or is likely to result, in:

- a. Any of the disqualifying conditions listed in § 2(6), or
- b. Making alcohol significantly more attractive⁹ or available to minors, or
- c. Overconsumption, or
- d. Any consumption by minors, or
- e. Any other harmful or abusive form of consumption.

As industry members are in the business of buying and selling, and the objective of owning or holding a significant interest in another business is usually accompanied by some degree of consolidation or participation in business decision-making, it would be helpful to have a regulatory safe harbor definition of the circumstances under which the bill’s dispensation can be relied upon.

Another part of the problem for inter-tier integration and capitalization is the interlocked nature of § 2 definitions. (See note 7 above.) For example, a winery subsidiary of a retailer is also a retailer under Chapter 506, and the retailer parent or other control-share investor, as an “affiliate” of the winery, is deemed a supplier. Thus, trade practice provisions purportedly aimed at protecting retailer independence may apply in reverse, introducing uncertainty as to the effect of the investment on day-to-day operations, unless the matter is clarified by rule-making.

Perhaps the most serious wild card in Chapter 506 is its post-acquisition treatment of inter-tier interests acquired either under the new law or under one of the specific exceptions in RCW 66.28.010. According to Chapter 506, § 5, anyone, whether or not involved in the industry and whether or not harmed or threatened to be harmed, at any time before or after creation of an inter-tier financial interest, can require the LCB to determine whether any of the disqualifying conditions exists. The following are non-exclusive examples of conditions that commonly exist in affiliated supplier-retailer relationships, but could trigger a divestiture order under §§ 2(6) and 5 in the hypothetical case of a winery selling wine to a retail licensee that owns shares of the winery’s stock, even in the absence of any effect on buying or selling decisions:

⁹ Presumably, any vertical integration of distribution or inter-tier capitalization that brings a substantially cheaper wine or beer to market would make “alcohol” more attractive to persons under 18 (“minors”) along with everyone else, even if no underage purchases occur. The bill, like much else of the liquor code, depends on willingness of regulators to apply common sense rather than literal meaning.

- a. The retailer orders a specific number of cases of any product, § 2(6)(d).
- b. A commitment exists between the winery and the retailer to continue doing business with one another, § 2(6)(h).

The LCB must upon complaint investigate “as it deems appropriate” to ascertain whether influence over buying or selling decisions, or other influence defined as “undue,” or an influence on public health and safety defined as “adverse,” has occurred any time or is more likely than not to occur at any future point. If so, the LCB must begin administrative violation proceedings and/or deny any pending license application by a party to the interest and, if the interest already exists, may require the parties to “undo” the transaction.

Risk of forced divestiture complicates counseling on inter-tier investment, to put it mildly. Because managers with responsibilities to shareholders may tend to avoid acquisitions or investments that could be ruinously reversed under unpredictable circumstances, the bill seems limited in encouraging economic development unless the LCB articulates practical safe harbors.

In addition to providing only a highly qualified invitation to new investment, the bill creates uncertainties for business relationships that either were given a tied house pass by LCB interpolation of a *de minimis* exception in the old law for a specific case or that fit under one of the repealed special exemptions for hotels, amphitheaters and “institutional investors.” There is no grandfather provision for, e.g., existing indirect financial interests in hotel chains held by manufacturers or by pension funds also holding shares in manufacturers. As a result, some investors will be newly in the position of holding their interests subject to the contingency that any influence they may have on a licensed subsidiary will at some time be declared “undue” –unless the LCB uses its legislative power to stabilize those relationships.

V. Pricing

Laws against predatory pricing and price discriminations that harm competition operate throughout the United States and apply to goods of all types. However, around a third of the states go farther for alcoholic beverages, with laws that prohibit ordinary commercial practices such as cost-justified quantity discounts, individually negotiated sales between merchants, or short-term changes in list prices.

About a dozen states have laws that go farther still by requiring suppliers to file prices with the liquor control agency (which makes them available to competitors no later than their effective dates), to charge only those prices, and to refrain from changing them for a specified period, usually thirty days –a system known as price posting or post-and-hold. Washington is one of those states, but a federal court invalidated its post-and-hold law under the Sherman Act as an illegal restraint on price competition in *Costco Wholesale Corp. v. Hoen*, 407 F. Supp. 2d 1247 (W.D. Wash. 2005), affirmed on that point in *Costco v. Maleng*, 522 F.3d 874 (9th Cir. 2008). The *Costco* litigation did not invalidate Washington’s laws requiring suppliers to sell wine and beer at the same price to all trade buyers and forbidding quantity discounts; federal courts elsewhere have differed on whether similar legislation is consistent with the Sherman Act.

Chapter 506, § 10, removes filing and public posting of prices, the requirement that they be unchanged for thirty days, and the 10% minimum markup on sales

by wholesalers to retailers. The uniform pricing requirement remains in RCW 66.28.170, which will not be repealed, and in § 10(2)(d) of Chapter 506. The bill also retains prohibition of quantity discounts and sales below acquisition cost, § 10(1)(d). The bill is ambiguous regarding the effect of “close-out” status of prices under § 10(1)(e), which probably creates an exception to the acquisition cost pricing floor.

Chapter 506, § 10(2)(a), requires wineries and breweries to maintain price lists at their licensed premises, to facilitate the LCB’s auditing sales for conformity with the uniform pricing statute. The new law is silent on how frequently suppliers may modify prices and on how price changes are to be communicated to the trade. Thus, how much pricing flexibility will result from the *Costco* changes depends on policies and procedures yet to be formally adopted by the LCB. If the LCB is guided by federal experience with enforcing Robinson-Patman restrictions on price discrimination, the touchstone will be whether a temporary price reduction was communicated to all buyers in a manner allowing a reasonable opportunity to respond, an approach intended to prevent non-discrimination requirements from reducing the vigor of price competition.

Deleting the 10% minimum wholesale markup will not affect traditional full-service three-tier distribution, whose economics involve a substantially larger margin. However, it could have beneficial effects on innovative variations, such as no-frills “guerilla” wholesaling and three-tier distribution combined with direct delivery that skips one or more physical locations in the chain of sale and resale (“drop shipment”).

VI. Conclusion

Chapter 506 is highly dependent on LCB rule-making if it is to realize its supporters’ hopes of relaxing, rather than tightening, tied house restrictions. In the area of pricing, changes responding to the *Costco* requirement that the state reduce its restraints on competition may produce effects ranging from the trivial to the significant, depending on LCB regulations and enforcement policies related to uniform trade pricing.

#

66.28.010. Manufacturers, importers, distributors, and authorized representatives barred from interest in retail business or location--Advances prohibited--“Financial interest” defined--Exceptions

(1)(a) No manufacturer, importer, distributor, or authorized representative, or person financially interested, directly or indirectly, in such business; whether resident or nonresident, shall have any financial interest, direct or indirect, in any licensed retail business, unless the retail business is owned by a corporation in which a manufacturer or importer has no direct stock ownership and there are no interlocking officers and directors, the retail license is held by a corporation that is not owned directly or indirectly by a manufacturer or importer, the sales of liquor are incidental to the primary activity of operating the property as a hotel, alcoholic beverages produced by the manufacturer or importer or their subsidiaries are not sold at the licensed premises, and the board reviews the ownership and proposed method of operation of all involved entities and determines that there will not be an unacceptable level of control or undue influence over the operation or the retail licensee; nor shall any manufacturer, importer, distributor, or authorized representative own any of the property upon which such licensed persons conduct their business; nor shall any such licensed person, under any arrangement whatsoever, conduct his or her business upon property in which any manufacturer, importer, distributor, or authorized representative has any interest unless title to that property is owned by a corporation in which a manufacturer has no direct stock ownership and there are no interlocking officers or directors, the retail license is held by a corporation that is not owned directly or indirectly by the manufacturer, the sales of liquor are incidental to the primary activity of operating the property either as a hotel or as an amphitheater offering live musical and similar live entertainment activities to the public, alcoholic beverages produced by the manufacturer or any of its subsidiaries are not sold at the licensed premises, and the board reviews the ownership and proposed method of operation of all involved entities and determines that there will not be an unacceptable level of control or undue influence over the operation of the retail licensee. Except as provided in subsection (3) of this section, no manufacturer, importer, distributor, or authorized representative shall advance moneys or moneys' worth to a licensed person under an arrangement, nor shall such licensed person receive, under an arrangement, an advance of moneys or moneys' worth. “Person” as used in this section only shall not include those state or federally chartered banks, state or federally chartered savings and loan associations, state or federally chartered mutual savings banks, or institutional investors which are not controlled directly or indirectly by a manufacturer, importer, distributor, or authorized representative as long as the bank, savings and loan association, or institutional investor does not influence or attempt to influence the purchasing practices of the retailer with respect to alcoholic beverages. Except as otherwise provided in this section, no manufacturer, importer, distributor, or authorized representative shall be eligible to receive or hold a retail license under this title, nor shall such manufacturer, importer, distributor, or authorized representative sell at retail any liquor as herein defined. A corporation granted an exemption under this subsection may use debt instruments issued in connection with financing construction or operations of its facilities.

(b) Nothing in this section shall prohibit a licensed domestic brewery or microbrewery from being licensed as a retailer pursuant to chapter 66.24 RCW for the purpose of selling beer or wine at retail on the brewery premises and at one additional off-site retail only location and nothing in this section shall prohibit a domestic winery from being

licensed as a retailer pursuant to chapter 66.24 RCW for the purpose of selling beer or wine at retail on the winery premises. Such beer and wine so sold at retail shall be subject to the taxes imposed by [RCW 66.24.290](#) and [66.24.210](#) and to reporting and bonding requirements as prescribed by regulations adopted by the board pursuant to chapter 34.05 RCW, and beer and wine that is not produced by the brewery or winery shall be purchased from a licensed beer or wine distributor. Nothing in this section shall prohibit a microbrewery holding a beer and/or wine restaurant license under [RCW 66.24.320](#) from holding the same privileges and endorsements attached to the beer and/or wine restaurant license. Nothing in this section shall prohibit a licensed craft distillery from selling spirits of its own production under [RCW 66.24.145](#).

(c) Nothing in this section shall prohibit a licensed distiller, domestic brewery, microbrewery, domestic winery, or a lessee of a licensed domestic brewer, microbrewery, or domestic winery, from being licensed as a spirits, beer, and wine restaurant pursuant to chapter 66.24 RCW for the purpose of selling liquor at a spirits, beer, and wine restaurant premises on the property on which the primary manufacturing facility of the licensed distiller, domestic brewer, microbrewery, or domestic winery is located or on contiguous property owned or leased by the licensed distiller, domestic brewer, microbrewery, or domestic winery as prescribed by rules adopted by the board pursuant to chapter 34.05 RCW. Nothing in this section shall prohibit a microbrewery holding a spirits, beer, and wine restaurant license under [RCW 66.24.420](#) from holding the same privileges and endorsements attached to the spirits, beer, and wine restaurant license. This section does not prohibit a brewery or microbrewery holding a spirits, beer, and wine restaurant license or a beer and/or wine license under chapter 66.24 RCW operated on the premises of the brewery or microbrewery from holding a second retail only license at a location separate from the premises of the brewery or microbrewery.

(d) Nothing in this section prohibits retail licensees with a caterer's endorsement issued under [RCW 66.24.320](#) or [66.24.420](#) from operating on a domestic winery premises.

(e) Nothing in this section prohibits an organization qualifying under [RCW 66.24.375](#) formed for the purpose of constructing and operating a facility to promote Washington wines from holding retail licenses on the facility property or leasing all or any portion of such facility property to a retail licensee on the facility property if the members of the board of directors or officers of the board for the organization include officers, directors, owners, or employees of a licensed domestic winery. Financing for the construction of the facility must include both public and private money.

(f) Nothing in this section prohibits a bona fide charitable nonprofit society or association registered under [section 501\(c\)\(3\) of the internal revenue code](#), or a local wine industry association registered under [section 501\(c\)\(6\) of the internal revenue code](#) as it exists on July 22, 2007, and having an officer, director, owner, or employee of a licensed domestic winery or a wine certificate of approval holder on its board of directors from holding a special occasion license under [RCW 66.24.380](#).

(g)(i) Nothing in this section prohibits domestic wineries and retailers licensed under chapter 66.24 RCW from producing, jointly or together with regional, state, or local wine industry associations, brochures and materials promoting tourism in Washington state which contain information regarding retail licensees, domestic wineries, and their products.

(ii) Nothing in this section prohibits: (A) Domestic wineries, domestic breweries, microbreweries, and certificate of approval holders licensed under this chapter from listing on their internet web sites information related to retailers who sell or promote their products, including direct links to the retailers' internet web sites; and (B) retailers licensed under this chapter from listing on their internet web sites information related to domestic wineries, domestic breweries, microbreweries, and certificate of approval holders whose products those retailers sell or promote, including direct links to the domestic wineries', domestic breweries', microbreweries', and certificate of approval holders' web sites.

(h) Nothing in this section prohibits the performance of personal services offered from time to time by a domestic winery or certificate of approval holder licensed under [RCW 66.24.206\(1\)\(a\)](#) for or on behalf of a licensed retail business when the personal services are (i) conducted at a licensed premises, and (ii) intended to inform, educate, or enhance customers' knowledge or experience of the manufacturer's products. The performance of personal services may include participation and pouring at the premises of a retailer holding a spirits, beer, and wine restaurant license, a wine and/or beer restaurant license, or a specialty wine shop license; bottle signings; and other similar informational or educational activities. A domestic winery or certificate of approval holder is not obligated to perform any such personal services, and a retail licensee may not require a domestic winery or certificate of approval holder to conduct any personal service as a condition for selling any alcohol to the retail licensee. Except as provided in [RCW 66.28.150](#), the cost of sampling may not be borne, directly or indirectly, by any liquor manufacturer, importer, or distributor. Nothing in this section prohibits domestic wineries and retail licensees from identifying the wineries on private labels authorized under RCW *66.24.400, 66.24.425, and 66.24.450.

(i) Until July 1, 2007, nothing in this section prohibits a nonprofit statewide organization of microbreweries formed for the purpose of promoting Washington's craft beer industry as a trade association registered as a 501(c) with the internal revenue service from holding a special occasion license to conduct up to six beer festivals.

(j) Nothing in this section shall prohibit a manufacturer, importer, or distributor from entering into an arrangement with any holder of a sports/entertainment facility license or an affiliated business for brand advertising at the licensed facility or promoting events held at the sports entertainment facility as authorized under [RCW 66.24.570](#).

(2) Financial interest, direct or indirect, as used in this section, shall include any interest, whether by stock ownership, mortgage, lien, or through interlocking directors, or otherwise. Pursuant to rules promulgated by the board in accordance with chapter 34.05 RCW manufacturers, distributors, and importers may perform, and retailers may accept the service of building, rotating and restocking case displays and stock room inventories; rotating and rearranging can and bottle displays of their own products; provide point of sale material and brand signs; price case goods of their own brands; and perform such similar normal business services as the board may by regulation prescribe.

(3)(a) This section does not prohibit a manufacturer, importer, or distributor from providing services to a special occasion licensee for: (i) Installation of draft beer dispensing equipment or advertising, (ii) advertising, pouring, or dispensing of beer or wine at a beer or wine tasting exhibition or judging event, or (iii) a special occasion licensee from receiving any such services as may be provided by a manufacturer,

importer, or distributor. Nothing in this section shall prohibit a retail licensee, or any person financially interested, directly or indirectly, in such a retail licensee from having a financial interest, direct or indirect, in a business which provides, for a compensation commensurate in value to the services provided, bottling, canning or other services to a manufacturer, so long as the retail licensee or person interested therein has no direct financial interest in or control of said manufacturer.

(b) A person holding contractual rights to payment from selling a liquor distributor's business and transferring the license shall not be deemed to have a financial interest under this section if the person (i) lacks any ownership in or control of the distributor, (ii) is not employed by the distributor, and (iii) does not influence or attempt to influence liquor purchases by retail liquor licensees from the distributor.

(c) The board shall adopt such rules as are deemed necessary to carry out the purposes and provisions of subsections (1)(g) and (h) and (3)(a) of this section in accordance with the administrative procedure act, chapter 34.05 RCW.

(4) A license issued under [RCW 66.24.395](#) does not constitute a retail license for the purposes of this section.

(5) A public house license issued under [RCW 66.24.580](#) does not violate the provisions of this section as to a retailer having an interest directly or indirectly in a liquor-licensed manufacturer.

[[2008 c 94 § 5](#), eff. June 12, 2008. Prior: [2007 c 370 § 2](#), eff. July 22, 2007; [2007 c 369 § 1](#), eff. July 22, 2007; [2007 c 222 § 3](#), eff. July 22, 2007; [2007 c 217 § 1](#), eff. July 22, 2007; prior: [2006 c 330 § 28](#), eff. June 7, 2006; [2006 c 92 § 1](#), eff. June 7, 2006; [2006 c 43 § 1](#), eff. June 7, 2006; prior: [2004 c 160 § 9](#), eff. Jan. 1, 2005; [2004 c 62 § 1](#), eff. June 10, 2004; [2002 c 109 § 1](#); [2000 c 177 § 1](#); prior: [1998 c 127 § 1](#); [1998 c 126 § 11](#); [1997 c 321 § 46](#); prior: [1996 c 224 § 3](#); [1996 c 106 § 1](#); [1994 c 63 § 1](#); [1992 c 78 § 1](#); 1985 c 363 § 1; 1982 c 85 § 7; 1977 ex.s. c 219 § 2; 1975-'76 2nd ex.s. c 74 § 3; 1975 1st ex.s. c 173 § 6; 1937 c 217 § 6; 1935 c 174 § 14; 1933 ex.s. c 62 § 90; RRS § 7306-90; prior: 1909 c 84 § 1.]

CERTIFICATION OF ENROLLMENT

ENGROSSED HOUSE BILL 2040

Chapter 506, Laws of 2009

61st Legislature
2009 Regular Session

BEER AND WINE REGULATION

EFFECTIVE DATE: 07/26/09

Passed by the House March 9, 2009
Yeas 92 Nays 3

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 22, 2009
Yeas 46 Nays 0

BRAD OWEN

President of the Senate

Approved May 15, 2009, 2:11 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED HOUSE BILL 2040** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

Chief Clerk

FILED

May 18, 2009

**Secretary of State
State of Washington**

ENGROSSED HOUSE BILL 2040

Passed Legislature - 2009 Regular Session

State of Washington 61st Legislature 2009 Regular Session

By Representatives Conway and Condotta

Read first time 02/06/09. Referred to Committee on Commerce & Labor.

1 AN ACT Relating to the work of the joint select committee on beer
2 and wine regulation; amending RCW 66.28.180; adding new sections to
3 chapter 66.28 RCW; and repealing RCW 66.28.010.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** A new section is added to chapter 66.28 RCW
6 to read as follows:

7 The legislature recognizes that Washington's current three-tier
8 system, where the functions of manufacturing, distributing, and
9 retailing are distinct and the financial relationships and business
10 transactions between entities in these tiers are regulated, is a
11 valuable system for the distribution of beer and wine. The legislature
12 further recognizes that the historical total prohibition on ownership
13 of an interest in one tier by a person with an ownership interest in
14 another tier, as well as the historical restriction on financial
15 incentives and business relationships between tiers, is unduly
16 restrictive. The legislature finds the modifications contained in this
17 act are appropriate, because the modifications do not impermissibly
18 interfere with the goals of orderly marketing of alcohol in the state,
19 encouraging moderation in consumption of alcohol by the citizens of the

1 state, protecting the public interest and advancing public safety by
2 preventing the use and consumption of alcohol by minors and other
3 abusive consumption, and promoting the efficient collection of taxes by
4 the state.

5 NEW SECTION. **Sec. 2.** A new section is added to chapter 66.28 RCW
6 to read as follows:

7 The definitions in this section apply throughout sections 1 through
8 8 of this act unless the context clearly requires otherwise.

9 (1) "Adverse impact on public health and safety" means that an
10 existing or proposed practice or occurrence has resulted or is more
11 likely than not to result in alcohol being made significantly more
12 attractive or available to minors than would otherwise be the case or
13 has resulted or is more likely than not to result in overconsumption,
14 consumption by minors, or other harmful or abusive forms of
15 consumption.

16 (2) "Affiliate" means any one of two or more persons if one of
17 those persons has actual or legal control, directly or indirectly,
18 whether by stock ownership or otherwise, of the other person or persons
19 and any one of two or more persons subject to common control, actual or
20 legal, directly or indirectly, whether by stock ownership or otherwise.

21 (3) "Industry member" means a licensed manufacturer, producer,
22 supplier, importer, wholesaler, distributor, authorized representative,
23 certificate of approval holder, warehouse, and any affiliates,
24 subsidiaries, officers, directors, partners, agents, employees, and
25 representatives of any industry member. "Industry member" does not
26 include the board or any of the board's employees.

27 (4) "Person" means any individual, partnership, joint stock
28 company, business trust, association, corporation, or other form of
29 business enterprise, including a receiver, trustee, or liquidating
30 agent and includes any officer or employee of a retailer or industry
31 member.

32 (5) "Retailer" means the holder of a license issued by the board to
33 allow for the sale of alcoholic beverages to consumers for consumption
34 on or off premises and any of the retailer's agents, officers,
35 directors, shareholders, partners, or employees. "Retailer" does not
36 include the board or any of the board's employees.

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

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

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

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

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

16 (e) An industry member requiring a retailer to take and dispose of
17 a certain product type or quota of the industry member's products;

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

20 (g) An industry member having a continuing obligation to sell a
21 product to a retailer;

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

27 (i) An industry member being involved in the day-to-day operations
28 of a retailer or a retailer being involved in the day-to-day operations
29 of an industry member in a manner that violates the provisions of this
30 section;

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

34 NEW SECTION. **Sec. 3.** A new section is added to chapter 66.28 RCW
35 to read as follows:

36 (1) Notwithstanding any prohibitions and restrictions contained in
37 this title, it shall be lawful for an industry member or affiliate to

1 have a direct or indirect financial interest in another industry member
2 or a retailer, and for a retailer or affiliate to have a direct or
3 indirect financial interest in an industry member unless such interest
4 has resulted or is more likely than not to result in undue influence
5 over the retailer or the industry member or has resulted or is more
6 likely than not to result in an adverse impact on public health and
7 safety. The structure of any such financial interest must be
8 consistent with subsection (2) of this section.

9 (2) Subject to subsection (1) of this section and except as
10 provided in section 4 of this act:

11 (a) An industry member in whose name a license or certificate of
12 approval has been issued pursuant to this title may wholly own or hold
13 a financial interest in a separate legal entity licensed pursuant to
14 RCW 66.24.320 through 66.24.570, but may not have such a license issued
15 in its name; and

16 (b) A retailer in whose name a license has been issued pursuant to
17 this title may wholly own or hold a financial interest in a separate
18 legal entity licensed or holding a certificate of approval pursuant to
19 RCW 66.24.170, 66.24.206, 66.24.240, 66.24.244, 66.24.270(2),
20 66.24.200, or 66.24.250, but may not have such a license or certificate
21 of approval issued in its name; and

22 (c) A supplier in whose name a license or certificate of approval
23 has been issued pursuant to this title may wholly own or hold a
24 financial interest in a separate legal entity licensed as a distributor
25 or importer under this title, but such supplier may not have a license
26 as a distributor or importer issued in its own name; and

27 (d) A distributor or importer in whose name a license has been
28 issued pursuant to this title may wholly own or hold a financial
29 interest in a separate legal entity licensed or holding a certificate
30 of approval as a supplier under this title, but such distributor or
31 importer may not have a license or certificate of approval as a
32 supplier issued in its own name.

33 NEW SECTION. **Sec. 4.** A new section is added to chapter 66.28 RCW
34 to read as follows:

35 Nothing in section 3 of this act shall prohibit:

36 (1) A licensed domestic brewery or microbrewery from being licensed

1 as a retailer pursuant to chapter 66.24 RCW for the purpose of selling
2 beer or wine at retail on the brewery premises and at one additional
3 off-site retail only location.

4 (2) A domestic winery from being licensed as a retailer pursuant to
5 chapter 66.24 RCW for the purpose of selling beer or wine at retail on
6 the winery premises. Such beer and wine so sold at retail shall be
7 subject to the taxes imposed by RCW 66.24.290 and 66.24.210 and to
8 reporting and bonding requirements as prescribed by regulations adopted
9 by the board pursuant to chapter 34.05 RCW, and beer and wine that is
10 not produced by the brewery or winery shall be purchased from a
11 licensed beer or wine distributor.

12 (3) A microbrewery holding a beer and/or wine restaurant license
13 under RCW 66.24.320 from holding the same privileges and endorsements
14 attached to the beer and/or wine restaurant license.

15 (4) A licensed craft distillery from selling spirits of its own
16 production under RCW 66.24.145.

17 (5) A licensed distiller, domestic brewery, microbrewery, domestic
18 winery, or a lessee of a licensed domestic brewer, microbrewery, or
19 domestic winery, from being licensed as a spirits, beer, and wine
20 restaurant pursuant to chapter 66.24 RCW for the purpose of selling
21 liquor at a spirits, beer, and wine restaurant premises on the property
22 on which the primary manufacturing facility of the licensed distiller,
23 domestic brewer, microbrewery, or domestic winery is located or on
24 contiguous property owned or leased by the licensed distiller, domestic
25 brewer, microbrewery, or domestic winery as prescribed by rules adopted
26 by the board pursuant to chapter 34.05 RCW.

27 (6) A microbrewery holding a spirits, beer, and wine restaurant
28 license under RCW 66.24.420 from holding the same privileges and
29 endorsements attached to the spirits, beer, and wine restaurant
30 license.

31 (7) A brewery or microbrewery holding a spirits, beer, and wine
32 restaurant license or a beer and/or wine license under chapter 66.24
33 RCW operated on the premises of the brewery or microbrewery from
34 holding a second retail only license at a location separate from the
35 premises of the brewery or microbrewery.

36 (8) Retail licensees with a caterer's endorsement issued under RCW
37 66.24.320 or 66.24.420 from operating on a domestic winery premises.

1 (9) An organization qualifying under RCW 66.24.375 formed for the
2 purpose of constructing and operating a facility to promote Washington
3 wines from holding retail licenses on the facility property or leasing
4 all or any portion of such facility property to a retail licensee on
5 the facility property if the members of the board of directors or
6 officers of the board for the organization include officers, directors,
7 owners, or employees of a licensed domestic winery. Financing for the
8 construction of the facility must include both public and private
9 money.

10 (10) A bona fide charitable nonprofit society or association
11 registered under Title 26 U.S.C. Sec. 501(c)(3) of the federal internal
12 revenue code, or a local wine industry association registered under
13 Title 26 U.S.C. Sec. 501(c)(6) of the federal internal revenue code as
14 it existed on July 22, 2007, and having an officer, director, owner, or
15 employee of a licensed domestic winery or a wine certificate of
16 approval holder on its board of directors from holding a special
17 occasion license under RCW 66.24.380.

18 (11) A person licensed pursuant to RCW 66.24.170, 66.24.240, or
19 66.24.244 from exercising the privileges of distributing and selling at
20 retail such person's own production or from exercising any other right
21 or privilege that attaches to such license.

22 (12) A person holding a certificate of approval pursuant to RCW
23 66.24.206 from obtaining an endorsement to act as a distributor of
24 their own product or from shipping their own product directly to
25 consumers as authorized by RCW 66.20.360.

26 (13) A person holding a wine shipper's permit pursuant to RCW
27 66.20.375 from shipping their own product directly to consumers.

28 (14) A person holding a certificate of approval pursuant to RCW
29 66.24.270(2) from obtaining an endorsement to act as a distributor of
30 their own product.

31 NEW SECTION. **Sec. 5.** A new section is added to chapter 66.28 RCW
32 to read as follows:

33 Any industry member or retailer or any other person seeking a
34 determination by the board as to whether a proposed or existing
35 financial interest has resulted or is more likely than not to result in
36 undue influence or has resulted or is more likely than not to result in
37 an adverse impact on public health and safety may file a complaint or

1 request for determination with the board. Upon receipt of a request or
2 complaint the board may conduct such investigation as it deems
3 appropriate in the circumstances. If the investigation reveals the
4 financial interest has resulted or is more likely than not to result in
5 undue influence or has resulted or is more likely than not to result in
6 an adverse impact on public health and safety the board may issue an
7 administrative violation notice or a notice of intent to deny the
8 license to the industry member, to the retailer, or both. If the
9 financial interest was acquired through a transaction that has already
10 been consummated when the board issues its administrative violation
11 notice, the board shall have the authority to require that the
12 transaction be rescinded or otherwise undone. The recipient of the
13 administrative notice of violation or notice of intent to deny the
14 license may request a hearing under chapter 34.05 RCW.

15 NEW SECTION. **Sec. 6.** A new section is added to chapter 66.28 RCW
16 to read as follows:

17 Except as provided in section 7 of this act, no industry member
18 shall advance and no retailer shall receive moneys or moneys' worth
19 under an agreement written or unwritten or by means of any other
20 business practice or arrangement.

21 NEW SECTION. **Sec. 7.** A new section is added to chapter 66.28 RCW
22 to read as follows:

23 (1)(a) Nothing in section 6 of this act prohibits an industry
24 member from providing retailers branded promotional items which are of
25 nominal value, singly or in the aggregate. Such items include but are
26 not limited to: Trays, lighters, blotters, postcards, pencils,
27 coasters, menu cards, meal checks, napkins, clocks, mugs, glasses,
28 bottles or can openers, corkscrews, matches, printed recipes, shirts,
29 hats, visors, and other similar items. Branded promotional items:

30 (i) Must be used exclusively by the retailer or its employees in a
31 manner consistent with its license;

32 (ii) Must bear imprinted advertising matter of the industry member
33 only;

34 (iii) May be provided by industry members only to retailers and
35 their employees and may not be provided by or through retailers or
36 their employees to retail customers; and

1 (iv) May not be targeted to or appeal principally to youth.

2 (b) An industry member is not obligated to provide any such branded
3 promotional items, and a retailer may not require an industry member to
4 provide such branded promotional items as a condition for selling any
5 alcohol to the retailer.

6 (c) Any industry member or retailer or any other person asserting
7 that the provision of branded promotional items as allowed in (a) of
8 this subsection has resulted or is more likely than not to result in
9 undue influence or an adverse impact on public health and safety, or is
10 otherwise inconsistent with the criteria in (a) of this subsection may
11 file a complaint with the board. Upon receipt of a complaint the board
12 may conduct such investigation as it deems appropriate in the
13 circumstances. If the investigation reveals the provision of branded
14 promotional items has resulted in or is more likely than not to result
15 in undue influence or has resulted or is more likely than not to result
16 in an adverse impact on public health and safety or is otherwise
17 inconsistent with (a) of this subsection the board may issue an
18 administrative violation notice to the industry member, to the
19 retailer, or both. The recipient of the administrative violation
20 notice may request a hearing under chapter 34.05 RCW.

21 (2) Nothing in section 6 of this act prohibits an industry member
22 from providing to a special occasion licensee and a special occasion
23 licensee from receiving services for:

24 (a) Installation of draft beer dispensing equipment or advertising;
25 or

26 (b) Advertising, pouring, or dispensing of beer or wine at a beer
27 or wine tasting exhibition or judging event.

28 (3) Nothing in section 6 of this act prohibits industry members
29 from performing, and retailers from accepting the service of building,
30 rotating, and restocking displays and stockroom inventories; rotating
31 and rearranging can and bottle displays of their own products;
32 providing point of sale material and brand signs; pricing case goods of
33 their own brands; and performing such similar business services
34 consistent with board rules, or personal services as described in
35 subsection (5) of this section.

36 (4) Nothing in section 6 of this act prohibits:

37 (a) Industry members from listing on their internet web sites

1 information related to retailers who sell or promote their products,
2 including direct links to the retailers' internet web sites; and

3 (b) Retailers from listing on their internet web sites information
4 related to industry members whose products those retailers sell or
5 promote, including direct links to the industry members' web sites; or

6 (c) Industry members and retailers from producing, jointly or
7 together with regional, state, or local industry associations,
8 brochures and materials promoting tourism in Washington state which
9 contain information regarding retail licensees, industry members, and
10 their products.

11 (5) Nothing in section 6 of this act prohibits the performance of
12 personal services offered from time to time by a domestic winery or
13 certificate of approval holder to retailers when the personal services
14 are (a) conducted at a licensed premises, and (b) intended to inform,
15 educate, or enhance customers' knowledge or experience of the
16 manufacturer's products. The performance of personal services may
17 include participation and pouring, bottle signing events, and other
18 similar informational or educational activities at the premises of a
19 retailer holding a spirits, beer, and wine restaurant license, a wine
20 and/or beer restaurant license, a specialty wine shop license, a
21 special occasion license, or a private club license. A domestic winery
22 or certificate of approval holder is not obligated to perform any such
23 personal services, and a retail licensee may not require a domestic
24 winery or certificate of approval holder to conduct any personal
25 service as a condition for selling any alcohol to the retail licensee.
26 Except as provided in RCW 66.28.150, the cost of sampling may not be
27 borne, directly or indirectly, by any domestic winery or certificate of
28 approval holder or any distributor. Nothing in this section prohibits
29 wineries, certificate of approval holders, and retail licensees from
30 identifying the producers on private labels authorized under RCW
31 66.24.400, 66.24.425, and 66.24.450.

32 (6) Nothing in section 6 of this act prohibits an industry member
33 from entering into an arrangement with any holder of a sports
34 entertainment facility license or an affiliated business for brand
35 advertising at the licensed facility or promoting events held at the
36 sports entertainment facility as authorized under RCW 66.24.570.

1 NEW SECTION. **Sec. 8.** A new section is added to chapter 66.28 RCW
2 to read as follows:

3 All industry members and retailers shall keep and maintain the
4 following records on their premises for a three-year period:

5 (1) Records of all items, services, and moneys' worth furnished to
6 and received by a retailer and of all items, services, and moneys'
7 worth provided to a retailer and purchased by a retailer at fair market
8 value; and

9 (2) Records of all industry member financial ownership or interests
10 in a retailer and of all retailer financial ownership interests in an
11 industry member.

12 NEW SECTION. **Sec. 9.** A new section is added to chapter 66.28 RCW
13 to read as follows:

14 The board shall adopt rules as are deemed necessary to carry out
15 the purposes and provisions of this chapter in accordance with the
16 administrative procedure act, chapter 34.05 RCW.

17 **Sec. 10.** RCW 66.28.180 and 2006 c 302 s 10 are each amended to
18 read as follows:

19 ~~((It is unlawful for a person, firm, or corporation holding a
20 certificate of approval issued under RCW 66.24.270 or 66.24.206, a beer
21 distributor's license, a domestic brewery license, a microbrewery
22 license, a beer importer's license, a beer distributor's license, a
23 domestic winery license, a wine importer's license, or a wine
24 distributor's license within the state of Washington to modify any
25 prices without prior notification to and approval of the board.~~

26 ~~(1) Intent. This section is enacted, pursuant to the authority of
27 this state under the twenty first amendment to the United States
28 Constitution, to promote the public's interest in fostering the orderly
29 and responsible distribution of malt beverages and wine towards
30 effective control of consumption; to promote the fair and efficient
31 three tier system of distribution of such beverages; and to confirm
32 existing board rules as the clear expression of state policy to
33 regulate the manner of selling and pricing of wine and malt beverages
34 by licensed suppliers and distributors.~~

35 ~~(2))~~ (1) Beer and wine distributors ((price posting)).

1 (a) Every beer or wine distributor shall (~~file with the board at~~
2 ~~its office in Olympia~~) maintain at its liquor licensed location a
3 price (~~posting~~) list showing the wholesale prices at which any and
4 all brands of beer and wine sold by such beer and/or wine distributor
5 shall be sold to retailers within the state.

6 (b) Each price (~~posting shall be made on a form prepared and~~
7 ~~furnished by the board, or a reasonable facsimile thereof, and~~) list
8 shall set forth:

9 (i) All brands, types, packages, and containers of beer or wine
10 offered for sale by such beer and/or wine distributor; and

11 (ii) The wholesale prices thereof to retail licensees, including
12 allowances, if any, for returned empty containers.

13 (c) No beer and/or wine distributor may sell or offer to sell any
14 package or container of beer or wine to any retail licensee at a price
15 differing from the price for such package or container as shown in the
16 price (~~posting filed by the beer and/or wine distributor and then in~~
17 ~~effect~~) list, according to rules adopted by the board.

18 (d) Quantity discounts are prohibited. No price may be (~~posted~~
19 ~~that is~~) below acquisition cost (~~plus ten percent of acquisition~~
20 ~~cost. However, the board is empowered to review periodically, as it~~
21 ~~may deem appropriate, the amount of the percentage of acquisition cost~~
22 ~~as a minimum mark up over cost and to modify such percentage by rule of~~
23 ~~the board, except such percentage shall be not less than ten percent~~)).

24 (e) Distributor prices on a "close-out" item shall be (~~accepted by~~
25 ~~the board~~) allowed if the item to be discontinued has been listed (~~on~~
26 ~~the state market~~) for a period of at least six months, and upon the
27 further condition that the distributor who (~~posts~~) offers such a
28 close-out price shall not restock the item for a period of one year
29 following the first effective date of such close-out price.

30 (f) (~~The board may reject any price posting that it deems to be in~~
31 ~~violation of this section or any rule, or portion thereof, or that~~
32 ~~would tend to disrupt the orderly sale and distribution of beer and~~
33 ~~wine. Whenever the board rejects any posting, the licensee submitting~~
34 ~~the posting may be heard by the board and shall have the burden of~~
35 ~~showing that the posting is not in violation of this section or a rule~~
36 ~~or does not tend to disrupt the orderly sale and distribution of beer~~
37 ~~and wine. If the posting is accepted, it shall become effective at the~~
38 ~~time fixed by the board. If the posting is rejected, the last~~

1 ~~effective posting shall remain in effect until such time as an amended~~
2 ~~posting is filed and approved, in accordance with the provisions of~~
3 ~~this section.~~

4 ~~(g) Prior to the effective date of the posted prices, all price~~
5 ~~postings filed as required by this section constitute investigative~~
6 ~~information and shall not be subject to disclosure, pursuant to RCW~~
7 ~~42.56.240(1).~~

8 ~~(h))~~ Any beer and/or wine distributor or employee authorized by
9 the distributor-employer may sell beer and/or wine at the distributor's
10 ~~((posted))~~ listed prices to any annual or special occasion retail
11 licensee upon presentation to the distributor or employee at the time
12 of purchase of a special permit issued by the board to such licensee.

13 ~~((i))~~ (g) Every annual or special occasion retail licensee, upon
14 purchasing any beer and/or wine from a distributor, shall immediately
15 cause such beer or wine to be delivered to the licensed premises, and
16 the licensee shall not thereafter permit such beer to be disposed of in
17 any manner except as authorized by the license.

18 ~~((ii))~~ (h) Beer and wine sold as provided in this section shall
19 be delivered by the distributor or an authorized employee either to the
20 retailer's licensed premises or directly to the retailer at the
21 distributor's licensed premises. When a domestic winery, brewery,
22 microbrewery, or certificate of approval holder with a direct shipping
23 endorsement is acting as a distributor of its own production, a
24 licensed retailer may contract with a common carrier to obtain the
25 product directly from the domestic winery, brewery, microbrewery, or
26 certificate of approval holder with a direct shipping endorsement. A
27 distributor's prices to retail licensees shall be the same at both such
28 places of delivery.

29 ~~((3))~~ (2) Beer and wine suppliers' ~~((price filings))~~
30 contracts~~((7))~~ and memoranda.

31 (a) Every domestic brewery, microbrewery, ~~((and))~~ domestic winery,
32 certificate of approval holder, and beer and/or wine importer offering
33 beer and/or wine for sale within the state and any beer and/or wine
34 distributor who sells to other beer and/or wine distributors shall
35 ~~((file with the board at its office in Olympia))~~ maintain at its liquor
36 licensed location a price list and a copy of every written contract and
37 a memorandum of every oral agreement which such brewery or winery may
38 have with any beer or wine distributor, which contracts or memoranda

1 shall contain ~~((a schedule of prices charged to distributors for all~~
2 ~~items and all terms of sale, including all regular and special~~
3 ~~discounts))~~);

4 (i) All advertising, sales and trade allowances, and incentive
5 programs; and

6 (ii) All commissions, bonuses or gifts, and any and all other
7 discounts or allowances.

8 (b) Whenever changed or modified, such revised contracts or
9 memoranda shall ~~((forthwith))~~ also be ~~((filed with the board as~~
10 ~~provided for by rule. The provisions of this section also apply to~~
11 ~~certificate of approval holders, beer and/or wine importers, and beer~~
12 ~~and/or wine distributors who sell to other beer and/or wine~~
13 ~~distributors))~~ maintained at its liquor licensed location.

14 (c) Each price ~~((schedule shall be made on a form prepared and~~
15 ~~furnished by the board, or a reasonable facsimile thereof, and))~~ list
16 shall set forth all brands, types, packages, and containers of beer or
17 wine offered for sale by such licensed brewery or winery ~~((+ all~~
18 ~~additional information required may be filed as a supplement to the~~
19 ~~price schedule forms))~~.

20 ~~((b))~~ (d) Prices ~~((filed by))~~ of a domestic brewery,
21 microbrewery, domestic winery, or certificate of approval holder shall
22 be uniform prices to all distributors or retailers on a statewide basis
23 less bona fide allowances for freight differentials. Quantity
24 discounts are prohibited. No price shall be ~~((filed that is))~~ below
25 acquisition/production cost ~~((plus ten percent of that cost, except~~
26 ~~that acquisition cost plus ten percent of acquisition cost does not~~
27 ~~apply to sales of beer or wine between a beer or wine importer who~~
28 ~~sells beer or wine to another beer or wine importer or to a beer or~~
29 ~~wine distributor, or to a beer or wine distributor who sells beer or~~
30 ~~wine to another beer or wine distributor. However, the board is~~
31 ~~empowered to review periodically, as it may deem appropriate, the~~
32 ~~amount of the percentage of acquisition/production cost as a minimum~~
33 ~~mark up over cost and to modify such percentage by rule of the board,~~
34 ~~except such percentage shall be not less than ten percent))~~.

35 ~~((c) No))~~ (e) A domestic brewery, microbrewery, domestic winery,
36 certificate of approval holder, beer or wine importer, or beer or wine
37 distributor ~~((may sell or offer to sell any beer or wine to any persons~~
38 ~~whatsoever in this state until copies of such written contracts or~~

1 ~~memoranda of such oral agreements are on file with the board))~~ acting
2 as a supplier to another distributor must file a distributor
3 appointment with the board.

4 ~~((d))~~ (f) No domestic brewery, microbrewery, domestic winery, or
5 certificate of approval holder may sell or offer to sell any package or
6 container of beer or wine to any distributor at a price differing from
7 the price list for such package or container as shown in the ~~((schedule~~
8 ~~of prices filed by))~~ price list of the domestic brewery, microbrewery,
9 domestic winery, or certificate of approval holder and then in effect,
10 according to rules adopted by the board.

11 ~~((e) The board may reject any supplier's price filing, contract,~~
12 ~~or memorandum of oral agreement, or portion thereof that it deems to be~~
13 ~~in violation of this section or any rule or that would tend to disrupt~~
14 ~~the orderly sale and distribution of beer or wine. Whenever the board~~
15 ~~rejects any such price filing, contract, or memorandum, the licensee~~
16 ~~submitting the price filing, contract, or memorandum may be heard by~~
17 ~~the board and shall have the burden of showing that the price filing,~~
18 ~~contract, or memorandum is not in violation of this section or a rule~~
19 ~~or does not tend to disrupt the orderly sale and distribution of beer~~
20 ~~or wine. If the price filing, contract, or memorandum is accepted, it~~
21 ~~shall become effective at a time fixed by the board. If the price~~
22 ~~filing, contract, or memorandum, or portion thereof, is rejected, the~~
23 ~~last effective price filing, contract, or memorandum shall remain in~~
24 ~~effect until such time as an amended price filing, contract, or~~
25 ~~memorandum is filed and approved, in accordance with the provisions of~~
26 ~~this section.~~

27 ~~(f) Prior to the effective date of the posted prices, all prices,~~
28 ~~contracts, and memoranda filed as required by this section constitute~~
29 ~~investigative information and shall not be subject to disclosure,~~
30 ~~pursuant to RCW 42.56.240(1).)~~

31 NEW SECTION. Sec. 11. RCW 66.28.010 (Manufacturers, importers,
32 distributors, and authorized representatives barred from interest in
33 retail business or location--Advances prohibited--"Financial interest"
34 defined--Exceptions) and 2008 c 94 s 5 are each repealed.

35 NEW SECTION. Sec. 12. If any provision of this act or its

1 application to any person or circumstance is held invalid, the
2 remainder of the act or the application of the provision to other
3 persons or circumstances is not affected.

Passed by the House March 9, 2009.

Passed by the Senate April 22, 2009.

Approved by the Governor May 15, 2009.

Filed in Office of Secretary of State May 18, 2009.