NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT
CHAPTER 845
OREGON LIQUOR CONTROL COMMISSION

FILING CAPTION: The amendments clarify the categories of ownership interest and expand a section on intervening circumstances.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 05/31/2019 5:00 PM
The Agency requests public comment on whether other options should be considered for achieving the rule’s substantive goals while reducing negative economic impact of the rule on business.

CONTACT: Dan Croy
503-872-5137
dan.croy@oregon.gov

9079 SE McLoughlin Blvd
Portland, OR 97222

Filed By:
Emily Febles
Rules Coordinator

HEARING(S)
Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 05/17/2019
TIME: 10:00 AM
OFFICER: Emily Febles
ADDRESS: OLCC
9079 SE McLoughlin Blvd
Portland, OR 97222

NEED FOR THE RULE(S):
The rules clarify the three categories of ownership interest by specifically naming them. These are already categories that the OLCC considers to have an ownership interest. However, because they are not now specifically listed; and thus, not readily apparent, they can be difficult to comprehend and navigate. The rules also add three categories where the OLCC could automatically waive an ownership interest. The rules further expand on circumstances when intervening circumstances may overcome a license denial by removing the term “good cause” and detailing these actual circumstances in rule. These rules are the Commission’s attempt to provide needed clarity for liquor licensees and the general public.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:
ORS 471.710; available from Legislative Counsel upon request.
OLCC Rulemaking file (OAR 845-005-0311 and 845-005-0325); available upon request from the OLCC.

FISCAL AND ECONOMIC IMPACT:
This statement takes into account the fiscal impact on: (a) Licensees; (b) Local Government; (c) State Agencies; and (d) the Public.
(a) Liquor Licensees.

The Commission expects the proposed amendments to have a positive fiscal impact on licensees, as the amendments both clarify ownership interests and add categories in which the OLCC could automatically waive ownership interests.

(b) Local Government.

The Commission expects the proposed amendments to have no impact upon local governments, as the rules do not apply to them.

(c) State Agencies.

The Commission expects the proposed rules to have no fiscal impact on outside state agencies because these rules do not apply to outside state agencies.

(d) The Public.

The Commission expects the proposed rules to have a neutral fiscal impact on the public since the amendments simply clarify when a business may or may not have ownership interest in a liquor license issued by the Commission.

COST OF COMPLIANCE:
(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

The Commission anticipates no new costs to comply with the proposed amendments for most state agencies and local government.

2. Cost of compliance effect on small business (ORS 183.336):

a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:
Currently, the Commission has 18,426 licensees that sell alcohol.

b. Projected reporting, record keeping and other administrative activities required for compliance, including costs of professional services:

The Commission anticipates no increased costs of compliance for small business, as the amendments simply clarify when an ownership interest may apply.

c. Equipment, supplies, labor and increased administration required for compliance:

An applicant for a liquor license would need to apply in a form and manner prescribed by the Commission and complete all subsequent licensing requirements.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

The Commission held an advisory committee on the topic on March 6, 2019.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:
845-005-0311, 845-005-0325

AMEND: 845-005-0311

RULE SUMMARY: The rules describe ownership interest categories with regards to liquor licenses.

CHANGES TO RULE:

845-005-0311
True Name on Application; Interest in Business ¶

(1) Definitions. As used in this rule: ¶
(a) "Licensee of Record" means an individual or entity who the Commission has listed on the license certificate as a license holder for a license. There may be more than one licensee of record for the same license. ¶
(b) "Entity" means an association, corporation, limited liability company, partnership, trust, or any similar entity that has legal standing under the laws of Oregon or another state within the United States. ¶
(2) True name on application. An application for a license must specify the real and true names of all persons and legal entities that have an ownership interest in the business proposed to be licensed. The Commission may waive the ownership interest and may waive any materials required by the Commission to accept or process an application. ¶
(23) License privileges. License privileges are available only to the persons and legal entities specified in the application [licensee of record] and only for the premises designated on the license. ¶
(24) Ownership Interest. Under ORS 471.313(4)(h), the Commission may refuse to issue a license if the applicant is not the owner of the business proposed to be licensed or an undisclosed ownership interest exists. For purposes of this rule, an "ownership interest" is indicated by the following behaviors, benefits or obligations: ¶
(a) Any person or legal entity unless allowed by a waiver of the ownership interest under (6) of this rule, any person or
entity, other than an employee, agent, or representative acting under the direction of the owner, that exercises control over, or is entitled to exercise control over, the business or the premises;¶
(b) Any person or legal entity, other than an employee, agent, or representative acting under the direction of the owner, that incurs, or is entitled to incur, debt or similar obligations on behalf of the business;¶
(c) Any person or legal entity, other than an employee, agent, or representative acting under the direction of the owner, that enters into, or is entitled to enter into, a contract or similar obligations on behalf of the business; or¶
(d) Any person or legal entity identified as the lessee of the premises proposed to be licensed.¶

(4) Unless allowed by a waiver of the ownership interest under (6) of this rule, any person or entity, other than an employee, agent, or representative acting under the direction of the owner, who sells or manufactures alcoholic beverages at the premises or who imports alcoholic beverages to the premises or is entitled to sell or manufacture alcoholic beverages at the premises or import alcoholic beverages to the premises;¶
(e) Unless allowed by a waiver of the ownership interest under (6) of this rule, any person or entity identified as a lessee, tenant, or renter (or similar term) of the premises proposed to be licensed;¶
(f) Unless allowed by a waiver of the ownership interest under (6) of this rule, any person or entity owning the real or personal property of the premises proposed to be licensed, unless the owner of the property has given control over the property to another party via a lease or rental agreement or similar agreement; or¶
(g) When an applicant is an entity, any person or entity defined as an applicant or licensee as per OAR 845-006-0301.¶

(5) Financial Interest. Under ORS 471.757, the Commission may require the licensee or applicant to identify the persons and legal entities with a financial interest in the business. The Commission may evaluate any such person as if he or she or the legal entities as if they were the actual licensee or license applicant. If that evaluation reveals any circumstances that would support grounds for the denial, cancellation or suspension of such a license or license application, the Commission may deny, cancel or suspend the license of the actual licensee or issue the license with restrictions. For purposes of this rule, a "financial interest" exists if the performance of the business causes, or is capable of causing, a person or legal entity to benefit or suffer financially. Examples of a financial interest include, but are not limited to:¶
(a) A licensee;¶
(b) An employee or agent who receives out-of-the-ordinary compensation. "Out-of-the-ordinary compensation" includes both over- and under- compensation;¶
(c) Any person who rents or leases real property to a licensee or applicant for use by the business;¶
(d) Any person who rents or leases personal property to a licensee or applicant for use in the business for a commercially unreasonable rate;¶
(e) Any person who lends money, real property or personal property to a licensee or applicant for use in the business;¶
(f) Any person who gives money, real property or personal property to a licensee or applicant for use in the business; and¶
(g) A spouse or domestic partner of the licensee or license applicant. For purposes of this subsection, "domestic partners" includes adults who share the same regular and permanent address and would be financially effected by the success or failure of the business as well as adults who qualify for a "domestic partnership" as defined under ORS 106.310.¶

(6) For good cause shown, the Commission may waive the requirements in this rule to take into account unusual or extraordinary circumstances. The Commission may waive the ownership interest requirements in this rule. Examples of waivers include, but are not limited to:¶
(a) The ownership interest of non-applicants fitting under subsection (4)(e) or (4)(f) of this rule when the only area of the proposed licensed premises that the non-applicant has a right of access to is a common area and the owner of the property has given the applicant or licensee the exclusive right to engage in alcohol sales and service and permit individuals to consume alcohol in the licensed portion of the common area. A common area is an area shared by more than one tenant, including the applicant for the license, that is appurtenant, adjacent, or in the
immediate vicinity of an area leased or rented exclusively by the applicant(s) and that is also part of the licensed premises. The right of multiple tenants to use the area in common is typically described in the lease or rental agreement.

(b) The ownership interest of non-applicants who manage or control the premises or aspects of the business at the premises provided the management or control does not involve the sale, service, or manufacture of alcoholic beverages at the premises, or importation of alcoholic beverages to the premises, and there is at least one other party licensed at the premises who is or will be a licensee of record. Examples of non-applicants who may qualify for a waiver under this section include:

(A) Operators selling and serving food, nonalcoholic beverages, and other nonalcoholic items on the premises; and

(B) Operators who lease, rent, or otherwise occupy a portion of the licensed premises in order to provide services as a part of the business that don't involve the sale, service, or manufacture of alcoholic beverages on the licensed premises.

(c) The ownership interest of non-applicants fitting under subsections 4(a) or 4(d)-(f) of this rule who hold their own manufacturer or wholesaler liquor licenses, or who are eligible to hold such licenses, at the premises to be licensed. For purposes of this subsection, a brewery-public licensee is a manufacturer. Examples of this include, but are not limited to, licensees operating under an alternation of proprietors, custom crush, or other similar agreement.

(7) The Commission may waive the requirement to submit certain application materials identified in OAR 845-005-0312 when the applicant has provided written documentation to the Commission that control of the day-to-day operation of the business has been relinquished through a management agreement, or similar written agreement, to one or more parties who are also applying for the same license at the same premises. Relinquishing control over the day-to-day operation of the business includes not managing or controlling the sale or service of alcohol or directly supervising any person who sells or serves alcohol. Examples of materials waived for the applicant who has relinquished control of the day-to-day operation of the business include, but are not limited to, the Individual History form and the Statement of Funding form.

Statutory/Other Authority: ORS 471, including 471.030, 471.040, 471.730(1)-(5)

Statutes/Other Implemented: ORS 471.757
AMEND: 845-005-0325

RULE SUMMARY: The rule describes reasons for license denial and lists intervening circumstances that may overcome a license denial.

CHANGES TO RULE:

845-005-0325
License Refusal Reasons: Applicant Qualifications

The Commission will refuse to license an applicant if any of the following criteria apply unless the applicant shows good cause that overcomes each relevant criterion in this rule apply. Upon a finding that a license should be refused, the Commission will consider intervening circumstances to determine whether the refusal basis is supported or overcome. The intervening circumstances may have occurred before or after the incident or incidents that are relevant to the specific criterion. The intervening circumstances may be weighed in favor of the applicant, weighed against the applicant, or weighed neither for nor against the applicant. The criteria are as follows:

1. The applicant has inadequate financial resources to build or operate the premises proposed to be licensed, or has inadequate financial resources to meet the financial obligations of the proposed business. This section does not apply to license renewal applications.

2. The applicant has not built the licensed premises, or has not operated the licensed business, substantially as proposed by the applicant and previously approved by the Commission.

3. The applicant cannot or will not provide an employee who can communicate effectively with customers and Commission employees. This person must be on the licensed premises during the licensee's business hours. For the purposes of this rule, "Communicate effectively" means:
   (a) Knowing how to lawfully sell and serve alcoholic beverages and being able to explain these practices to customers; and
   (b) Understanding a Commission employee when he or she explains lawful sale and service of alcoholic beverages and responding in a way that the employee can reasonably understand.

4. The applicant has a recent history or record of using alcohol or controlled substances to excess. Some of the records the Commission may use to evaluate this criterion include: court documents; Department of Motor Vehicles reports; police records; or medical records. The applicant may establish sufficient good cause to overcome this criterion by demonstrating that he or she no longer uses alcohol or controlled substances to excess and is not likely to do so in the future. Some of the factors the Commission considers in determining good cause include: successful participation in treatment program(s); counselor, employer or probation officer recommendations; severity of the applicant's record; passage of time since last relevant incident; and the applicant's previous record of compliance with the laws and rules of the Commission.

5. The applicant has been convicted of violating any general or local law of this state, or any other state, or of violating a federal law, if the conviction is substantially related to the fitness and ability of the applicant to lawfully carry out activities under the license. In determining whether the applicant presents an acceptable future risk of compliance, the Commission will consider any applicable intervening circumstances that have occurred before or after the relevant incident or incidents that resulted in the conviction.

(a) Definitions. For this subsection:
   (A) "Compliance Risk Factors" means factors that show the individual's tendency to disobey laws, rules, and regulations; such as probation and parole violations and non-relevant convictions.
   (B) The applicant provides material false or misleading information to the Commission. "Relevant Conviction" means a conviction that involved violence or the threat of violence; dishonesty or deception; drugs, alcohol, or other regulated substances; non-compliance with driver license requirements; or a conviction as a felon in possession of a weapon.
   (C) "Successful Treatment" means:
(i) The Commission receives written confirmation from the individual's licensed treatment provider that the individual completed treatment that is related to a relevant conviction and the Commission has determined that the individual has not had another conviction for a similar incident since the completion of the treatment; or

(ii) The individual is still in a treatment program that is related to a relevant conviction; however, the Commission receives written confirmation from the individual's licensed treatment provider that the individual has demonstrated sufficient success towards stopping the behavior that led to the conviction and the Commission has determined that the individual has not had another conviction for a similar incident since the date the provider determined that the individual demonstrated sufficient success towards stopping the behavior that led to the conviction.

(7b) The applicant is under 21 years of age. The applicant may establish sufficient good cause. Upon the Commission's determination that a basis to refuse the application has been established under this criterion, the Commission may consider the following intervening circumstances and may consider other intervening circumstances, depending on the facts of the case:

(A) Passage of time from the date of the most recent incident that led to a relevant conviction or from the date of the most recent compliance risk factor, whichever date is later. In calculating the passage of time, the Commission does not count time spent incarcerated after the date of the most recent incident that led to a relevant conviction or after the date of the most recent compliance risk factor, whichever date is later.

(B) Compliance risk factors.

(C) Successful treatment.

(D) The severity of the individual's relevant conviction record as shown by both the number of convictions and whether a conviction was a felony or non-felony.

(E) The individual's record of compliance with the Commission.

(6) The applicant provides material false or misleading information to the Commission.

(7) The applicant is under 21 years of age. The applicant may establish a basis to overcome this criterion by demonstrating that he or she will not participate in the management or control of any alcohol-related business decisions or any employees responsible for the sale or service of alcoholic beverages.

(8) The applicant does not have a good record of compliance with ORS Chapter 471, 473, 474, 475B, or any rules adopted thereunder.

Statutory/Other Authority: ORS 471, 471.030, 471.040, 471.730(1), (5)

Statutes/Other Implemented: ORS 471.313