

BEFORE THE
DEPARTMENT OF THE ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

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IN RE:

PROPOSED RULEMAKING

(Section 106 of Title 4,
Article 16 of the California
Code of Regulations)

**CERTIFIED
COPY**

PUBLIC HEARING

MARCH 4, 2009

9:00 A.M.

Reported By: Lauri A. Gallagher, CSR No. 8726, RPR



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I N D E X

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1 BE IT REMEMBERED, that on March 4, 2009,
2 commencing at the hour of 9:00 A.M., at
3 Board of Equalization, 450 N Street, Room 121, Sacramento,
4 California, before me, LAURI A. GALLAGHER, a Certified
5 Shorthand Reporter in and for the county of Sacramento,
6 state of California, the following proceedings were had:

7 MR. BOTTING: Good morning. I do have prepared
8 comments for the record.

9 We are here today, March 4, 2009, at the Board
10 of Equalization, 450 N Street, Room 121, Sacramento, to
11 receive public comments on the proposed rulemaking action
12 by the California Department of Alcoholic Beverage
13 Control. The Department has proposed amendments to
14 Section 106 of Title 4, California Code of Regulations,
15 concerning the advertising and merchandising of alcoholic
16 beverages, commonly known as Rule 106.

17 My name is Matthew Botting, and I'm the
18 Department's General Counsel. With me today is Deputy
19 Division Chief Chris Albrecht, the Department's
20 Legislative Officer, and Elana Chambliss, our Legal
21 Analyst.

22 Under the rulemaking provisions of the
23 California Administrative Procedure Act, this is the time
24 and place set for the presentation of statements,
25 arguments and contentions, orally or in writing, for or

1 against the Department's proposed amendments to Rule 106.
2 The purpose of today's hearing is to provide an
3 opportunity for all interested parties to participate in
4 the rulemaking process. This hearing has been scheduled
5 for 9:00 A.M. through 3:00 P.M. today, so we should have
6 more than enough time to allow everyone to make their
7 comments for the record.

8 This is a quasi-legislative hearing in which the
9 Department carries out a rulemaking function delegated to
10 it by the legislature. Witnesses presenting testimony at
11 this hearing will not be sworn in, nor will we engage in
12 cross-examination of witnesses, although we may ask
13 questions to assist us in clarifying any comments made.

14 We will take under submission all written and
15 oral statements submitted or made during this hearing. We
16 will respond to these comments in writing in the final
17 statement of reasons.

18 Although it is purely voluntary, we have asked
19 you to sign-in as you entered this morning and to indicate
20 if you would like to make an oral presentation. In
21 addition, even if you do not wish to make a presentation,
22 we do ask that you sign-in if you wish to receive any
23 future notices regarding this or any other Department
24 rulemaking action. If you have not already signed in,
25 please check in with Ms. Chambliss. With respect to oral

1 presentations, we will take people in the order in which
2 they have signed in.

3 As you can see, we do have a court reporter
4 present. She will be preparing a transcript of today's
5 proceedings, and along with any exhibits or evidence
6 presented at the hearing, will become part of the
7 rulemaking record. Also, because the reporter will be
8 taking down everything said here today, when you make your
9 presentation, please speak slowly and clearly.

10 The record of this hearing is being kept open
11 until the close of business today, in order to receive any
12 additional written comments from interested parties. If
13 you have brought any comments with you, please give them to
14 Ms. Chambliss.

15 We have a copy of the rulemaking record
16 available for inspection at the back room, should you wish
17 to review it. It contains the notice of this proposed
18 action, which was published in the California Regulatory
19 Notice Register on January 16, 2009, the text of the
20 proposed amendments to Rule 106, the initial statement of
21 reasons for the proposed amendments, and the letters of
22 comment we have received thus far. We do ask that you not
23 remove the record from the back of the room, but there are
24 additional copies of the draft regulation available if you
25 need a copy. In addition, the rulemaking file is

1 available on the Department's internet website at
2 www.abc.ca.gov.

3 A couple of housekeeping matters. First the
4 Board of Equalization has kindly made this lovely room
5 available for our use. The rules are, there is no
6 drinking in here. And third, please make sure all cell
7 phones are off or on vibrate.

8 We will now begin taking oral comments on the
9 proposed amendments to Rule 106. If you agree with
10 comments made by the prior speaker, you may simply state
11 that fact and add any new information you feel is
12 pertinent to the issue. If you have submitted written
13 comments, there's no need to read them orally as they will
14 be included in the record, but you may certainly add any
15 additional information.

16 When you come up to speak, we ask that you do
17 certain things so the audience may hear you and that your
18 comments are entered in the record. First, we ask that
19 you come to the microphone. Second, please begin by
20 stating your name and identifying the organization you
21 represent, if any. And third, while this hearing pertains
22 solely to Rule 106, there are two distinct parts to it --
23 the change in value of items beer manufacturers may give
24 to consumers, and rules pertaining to signs that may be
25 sold or rented to retailers. Please identify which part

1 of the proposed amendments you wish to discuss.

2 Once again, if you have not already signed-in to
3 speak today, please identify yourself to Ms. Chambliss.
4 Also, if you would like to be on the Department's
5 rulemaking mailing list, but are not presently, please
6 give your information to Ms. Chambliss.

7 Finally, before we get going with the oral
8 comments, thank you for taking the time to attend this
9 hearing. The rulemaking process is very important to the
10 Department, and we appreciate your assistance in
11 developing these amendments.

12 First up, we have Ms. Stephanie Shah.

13 MS. SHAH: My name is Stephanie Shah, I'm with
14 Anheuser-Busch Companies. We're here in support of
15 today's proposed amendments to Rule 106.

16 The proposed amendments in regards to the
17 consumer novelty items, Subsection E2, is consistent with
18 the legislative intent of AB-1245, which was passed in
19 last fall and became effective January 1st, 2009. As far
20 as the policy debated last year, the \$3.00 limit is
21 reasonable and responsible, and we are supportive of the
22 proposed amendments as drafted.

23 We are also supportive of the amendments as
24 drafted, to Subsection C2, which was the Legislative Bill
25 -- or Senate Bill 1246, which will change the enforcement

1 on value of signs for retailers.

2 With that, I welcome any questions. Thank you
3 very much.

4 MR. BOTTING: Thank you very much, Ms. Shah.

5 That's it for people who wanted to speak.

6 Anyone else want to take the floor and make a
7 comment?

8 MR. SCHMIDT: Herb Schmidt, representing Crown
9 Imports.

10 We submitted written comments. I believe Manny
11 Espinoza is going to be here or is not here yet. Do you
12 want me to submit these, or do you already have them?

13 MR. BOTTING: I don't believe we have yet
14 received written comments from you. If you want,
15 Ms. Chambliss, in the back, can receive those, and if you
16 want to add anything, that's fine.

17 Anyone else want to say anything or submit
18 comments? Like I said before, we're going to be here for
19 a while.

20 Perhaps this was a rookie mistake. We noticed a
21 beginning time and end time to this hearing. You, of
22 course, do not have to stay. So feel free to leave if you
23 don't wish to stick around, and we will wait to see if
24 anyone else turns up to say anything.

25 Thank you.

1 (Recess.)

2 MR. BOTTING: Back on the record.

3 Mr. Manny Espinoza has signed in and wishes to
4 make some comments.

5 If you could, please, for the record, state your
6 name and who you represent and make the comments.

7 MR. ESPINOZA: Special Counsel Botting, Chief
8 Seck, and District Administrator Chris Albrecht. It's a
9 pleasure to be here. My name is Manny Espinoza. I'm an
10 consultant for the Law Firm of Holland and Knight. We're
11 here representing Crown Imports, LLC.

12 I understand my colleague Herb Schmidt presented
13 our written comments, and I believe, a copy of the bill
14 was introduced last week that will redefine -- not
15 redefined, I think we're going to ask you to do that.
16 It's going to include certain beer shippers that were left
17 out of the bill last year, that can give away consumer
18 advertising specialties. The bill last year, it just
19 identified beer manufacturers. This bill is the so-called
20 fix-it bill and will include beer and wine import
21 generals, out-of-state beer shippers, and a few other
22 people that compete in that same arena that beer
23 manufacturers do with respect to promotional merchandising
24 and the other things that were covered in the previous
25 bill, I believe, AB-1245.

1 My question for the Department, and we hope to
2 have an urgency clause placed on this legislation that was
3 put in last week, and if it takes effect before we finish
4 the rules hearings, our question was, if the definition of
5 beer manufacturers clarified in this new piece of
6 legislation, will the Department have to hold a rules
7 hearing in order to implement the provisions of this new
8 bill?

9 I don't know if you had a chance to read the
10 piece of legislation over. It's our position when we
11 looked at this, if the statute gives you the definition of
12 beer manufacturer and the regulation just has the term in
13 it, instead of "beer manufacturer," then there's no need
14 for the Department to have further rulemaking, because if
15 the statute is going to give the definition of "beer
16 manufacturer," then I think that places the Department in
17 the position to have to go back to legislation to
18 determine just what a beer manufacturer is.

19 So we're hoping -- because without this new
20 piece of legislation, it puts beer and wine importer
21 generals at a competitive disadvantage from the brewers in
22 terms of who can give out these advertising specialties up
23 to a limit of \$3.00.

24 I guess that is our question. We don't think
25 you should have to go through a new rulemaking process if

1 this new legislation takes effect immediately. I don't
2 know if you can answer that today. We hope we could avoid
3 any rule hearing which would further delay and pretty much
4 exacerbate the problem we have now, the competitive
5 problem we have with our folks against the brewers.

6 By the way, did I say I represent Crown Imports?

7 MR. BOTTING: Yes, you did.

8 And certainly to address the question you asked,
9 we cannot comment on that today. But I could ask you a
10 couple clarifying questions for the record.

11 I do have a copy of AB-1282 here, and note that
12 the relevant provision does specifically state that a beer
13 manufacturer may give consumers advertising specialties to
14 the general public that do not exceed \$3.00 per unit cost
15 to the beer manufacturer.

16 First of all, would you contend that that would
17 be self-enacting without need for any regulatory action by
18 the Department to change the dollar amount? Even this
19 proceeding that we're here today for, would you argue that
20 regardless of whether this amendment goes forward raising
21 the amount to \$3.00, if this amendment is adopted and
22 enacted, would still allow beer manufacturers to give
23 \$3.00 items away?

24 MR. ESPINOZA: Yes, I think all it does, if the
25 statute is going to define what a beer manufacturer is,

1 what you have in the proposed regulation is sufficient to
2 allow the new folks that are now defined as a beer
3 manufacturer to take part in these consumer advertising
4 specialties.

5 MR. BOTTING: Is it your contention that this
6 proposed amendment of Section 25600 of the ABC Act, do you
7 contend that the Department's rulemaking authority in this
8 regard is derived from that specific section?

9 MR. ESPINOZA: Yes.

10 MR. BOTTING: So likewise, if this specific
11 section expands the definition of what a beer manufacturer
12 is, for the purposes of these consumers advertising
13 specialties, then the section would prevail over any
14 conflicting or more restrictive definition imposed by the
15 regulation; would that be your contention?

16 MR. ESPINOZA: Yes.

17 MR. BOTTING: I understand.

18 Anything else?

19 MR. ESPINOZA: No. It's good to see you.

20 MR. BOTTING: I would note for the record, the
21 Department's director, Mr. Steve Hardy, has come into the
22 room.

23 The record is open until 3:00 this afternoon.
24 So if you think of anything else you want to say, let me
25 know.

1 Does anybody else want to chime in?

2 MR. ESPINOZA: Just one last thing. Did you get
3 copies of the package?

4 MR. BOTTING: You provided a copy to
5 Ms. Chambliss at the back?

6 MR. ESPINOZA: Yes.
7 And you have copies up there?

8 MR. BOTTING: I do.

9 MR. HANEY: I am Roger Haney of Haney &
10 Associates. Strictly impromptu, mostly to keep you guys
11 away.

12 My comments for the record don't deal with
13 specifically with either one of the rule amendments, but
14 indirectly it pertains to the issue of exterior signs and
15 the allowances thereof.

16 We have had many discussions in the past,
17 representing many of the beer wholesalers and brewers over
18 30 years in the industry. What historically has been a
19 problem and continues to be to this day, is the issue of
20 sign content and what is allowed by the Department, either
21 by statute or by rule.

22 At a minimum, it's extremely confusing
23 particularly for the industry and the wholesalers trying
24 to determine what type of a sign is able to be furnished
25 without charge, what type of sign requires to be charged

1 at fair market value over and above the placement of the
2 sign.

3 I think the issue of exterior signage being
4 cause for charge is pretty simple in itself. But the
5 issue of interior signage and customized signage continues
6 to be a problem. I might add too, as you all know me and
7 my reputation, I am all for enforcement. I have always
8 encouraged the highest degree of enforcement. I wish,
9 Matt Seck had a doubling of the budget, Mr. Hardy, so you
10 had more enforcement people out there to keep this
11 industry honest.

12 AUDIENCE MEMBER: I wish we did too.

13 MR. HANEY: I understand that, and I appreciate
14 that too.

15 It is a problem and the more high profile
16 enforcement we have, the better off this industry is. We
17 don't seem to be able to operate without restraints on us.
18 Self restraint doesn't work in the alcohol industry; it
19 never has. I applaud you for the directive on the bar
20 promotions. We have gotten off kilter with what we are
21 doing with these bar promotions. It isn't backed up
22 statutorily as I can tell either, so I applaud you for
23 your efforts.

24 The issue of customization of these signs has
25 always been a problem. As much as I encourage enforcement

1 of the laws and regulations, I also on the other hand
2 think it has to be a two-way street. We have to be able
3 to inform the industry what the limits are, at least
4 conceptually, as to what you will allow them to furnish or
5 to sell. We know what the cost is. We have to be able to
6 advertise the industry as to exactly what their limits
7 are.

8 My point being here, if you look at a few of the
9 statutes, you look at 25611.1, the wording that I get is
10 that one of the rules that interprets that is the co-op
11 advertising section of Rule 106, which says in part, that
12 it prohibits the listing of a retailer's name or business
13 on a sign. Pretty simple to understand. But when looking
14 at 25611.3 in part, it says that any customized signs must
15 be sold at fair market value. So it begs the issue of how
16 do we define "customized." Obviously, by the way that the
17 rule is set up in 106 and the statute referring to a name
18 of a retailer's business and place of business is
19 apparently not considered customized, because it is
20 strictly prohibited.

21 It seems to be, we need to allow what the
22 customization of signage relative to the issue of selling
23 it to a retail licensee. If you look at 25.1, it says, in
24 part, that a beer and wine wholesalers can sell or rent
25 any lawful product, any lawful product.

1 So again, in fairness to the industry, I would
2 like to at some point propose you may have a clarifier of
3 some sort so we can publicize that for the benefit of the
4 industry members to give them better parameters as to what
5 would be allowed to sell to a retail licensee at fair
6 market value, as a customized sign.

7 For instance, if you put on a banner, a happy
8 hour special, okay, customized, it does not say the
9 retailer's place of business or his name. How about a
10 "pint night" promotion wordage on a banner?
11 Customization, it doesn't have the retailer's name, place
12 of business on it.

13 "Light entertainment here, Friday night." I
14 don't know where we are going to draw the line on these
15 things. It would be helpful if the industry could have a
16 better feel on how you might interpret some of the limits.
17 I think the entertainment thing you have done is good. If
18 you have a model in a brand of shirt that hands out
19 trinkets and trash, that's not entertainment. That's my
20 way of thinking. Some people might not see it that way.

21 Again, depending on what else is going on from
22 an entertainment standpoint, I think you have helped to
23 draw a clear vision of what the limits are of
24 entertainment, at least to the extent you can.

25 I just put it on the record today, because I

1 have nothing better to do and I needed to do something and
2 keep you awake.

3 MR. BOTTING: We do appreciate your input, and I
4 have a couple questions for you.

5 I just note, first of all, that there's a
6 proposed amendment to Rule 106F, with respect to the
7 cooperative advertising to add onto the end -- just for
8 the record, it does state that no advertising or
9 promotional materials or decorations furnished by supplier
10 may refer to the retailer's name or business, as you
11 stated. That statement means that except for exterior
12 signs advertising beer sold pursuant to the proposed
13 subdivision (c)(2)(c), which is the customization.

14 I think you are correct, this is the first time
15 the word "customization" is being used, and that comes
16 straight from the new statutory provision.

17 You have thrown out a couple questions as to
18 specific types of language or content on signs. Do you
19 have a suggestion as to whether or not a sign saying "Beer
20 and Bait" is customized for purposes of this provision, or
21 not?

22 MR. HANEY: My personal opinion, for what it's
23 worth, and the fact that I represent a large number of the
24 non retail industry, particularly on the beer side, where
25 I go out and do compliance workshops regularly for those

1 folks, my advice and simply my opinion of the way things
2 have worked in the past and have been allowed by the
3 Department in the past, is simply to say -- I take a
4 conservative point of view on it, to my clients, the
5 25611.1 says for the sake of beer, for instance, it has to
6 be conspicuous brand advertising, slogans, logos trade
7 marks associated with the supplier and or its products,
8 period. It does not say anything else. "Beer and Bait,"
9 to me, I don't know of any alcoholic beverage supplier
10 that has a promotion that they run beer and bait. To me,
11 that's a customized sign that is allowed to be sold at
12 whatever the determined cost would be, cost plus six, fair
13 market value. That's what I have interpreted.

14 Obviously, price information, personally I tell
15 my clients if it's not happy hour price, because happy
16 hour to me becomes a promotion of the retailer. It's not
17 a slogan, logo, or trademark of a particular brand
18 supplier. But price board allows you to put the price of
19 your product on a banner and have that be furnished
20 without charge, if I'm reading the rules correctly.

21 That's where I draw the line, for instance.
22 "Beer and Bait," to me, as an example, would be a
23 chargeable sign.

24 MR. BOTTING: Thank you.

25 Does anyone else have any comments at this

1 point?

2 Okay. We will take another break for the
3 record.

4 (Recess.)

5 MR. BOTTING: We're going back on the record.

6 Please state your name and your organization and
7 who you represent.

8 Just for the record, I would like to note,
9 Matthew Seck, the chief of our enforcement unit, was also
10 present for earlier testimony.

11 MS. STOLBERG: Hello, my name is Becky Stolberg,
12 and I am here on behalf of California Beer and Beverage
13 Distributors Association. We're the sponsors of SB-1246,
14 which implemented the changed -- the proposed changes
15 relative to exterior signs, and we're here in full support
16 of the changes that are proposed in Rule 106.

17 MR. BOTTING: An issue was presented in some
18 earlier testimony, that I would like to get your thoughts
19 on, if I might, regarding customization. The implementing
20 statute in the regulation is the first time the word
21 "customizing" is used, and the restrictions on cooperative
22 advertising talk about naming the name and business of
23 retailers, and we're proposing to amend that provision to
24 accept as authorized by this new provision on the sale of
25 exterior signs that are customized by the retailer.

1 If we can get your thoughts on what you,
2 CB&BD, consider customized. Things like "beer and bait,"
3 "happy hour, one to two" or "one to three," or whatever,
4 are somewhat generic in nature but reflecting a particular
5 component of a retail business.

6 MS. STOLBERG: Specifically "beer and bait," we
7 consider a customized sign. We consider anything that
8 can't be placed -- making a distinction between on and off
9 sale accounts, anything that could not be placed in all of
10 your on sale accounts, for instance, because it pertains
11 to a particular activity of that retailer, is a customized
12 sign. The same for off sale accounts, not every off sale
13 account sells bait. We would consider that a customized
14 sign.

15 MR. BOTTING: Even though it could be used at
16 another bait shop that sells beer --

17 MS. STOLBERG: But not all of your off sale
18 accounts.

19 MR. BOTTING: Anything else?

20 MS. STOLBERG: Relative to happy hour, we have
21 consulted with ABC over the past few years about that. As
22 long as there are not times included or reference to
23 entertainment, simply the sign "Happy Hour," we have been
24 generally understood with the Department that that's not
25 considered a customized sign.

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MR. BOTTING: Thanks very much.

Anything further?

MS. STOLBERG: No, that's all.

MR. BOTTING: Does anyone else have any comments
at this stage?

Okay. We will go back off the record.

(Off the record at 10:34 a.m.)

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(Proceedings ended at 3:00 P.M.)

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REPORTER'S CERTIFICATE

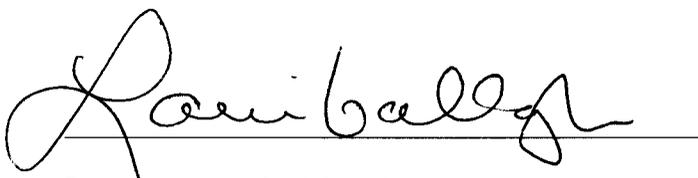
STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I, LAURI A. GALLAGHER, a Certified Shorthand Reporter, licensed by the state of California and empowered to administer oaths and affirmations pursuant to Section 2093 (b) of the Code of Civil Procedure, do hereby certify:

That the said proceedings were recorded stenographically by me and were thereafter transcribed under my direction via computer-assisted transcription; That the foregoing transcript is a true record of the proceedings which then and there took place;

That I am a disinterested person to said action.

IN WITNESS WHEREOF, I have subscribed my name on March 20, 2009.



Lauri A. Gallagher

Certified Shorthand Reporter No. 8726