

UPDATED INFORMATIVE DIGEST

No changes to be made. The Informative Digest in the Notice of Proposed Rulemaking is incorporated as if fully set forth in this section.

FINAL STATEMENT OF REASONS

SECTION 106. "ADVERTISING AND MERCHANDISING OF ALCOHOLIC BEVERAGES"

UPDATE OF INITIAL STATEMENT OF REASONS

Assembly Bill 1245 (Chapter 629), included with this final statement of reasons as Attachment 1, prohibits the Department from imposing a limit of greater than \$3.00 per unit original cost for consumer advertising specialties given away by beer manufacturers. Section 106 presently limits such promotional items to \$0.25. Senate Bill 1246 (Chapter 395) authorizes alcoholic beverages suppliers to sell exterior signs advertising beer at not less than the suppliers' cost for such signs, as defined in Business and Professions Code Section 17026. Section 106 requires such signs to be sold at "current market price," which would be greater than actual cost.

No changes are made to the Initial Statement of Reasons, which is incorporated as if fully set forth in this section.

SUMMARY OF COMMENTS AND RESPONSES

Overview

The Department received four (4) written comments and four (4) witnesses testified at the public hearing. Comments were from an individual, industry members, attorneys, and consultants representing industry members, as well as an industry trade association. All but one of the comments supported the proposed amendments.

Comment #1 [Max Kerstein]

Permitting retail licensees to purchase or rent external alcohol advertising promotional signs works against the community and the ABC in its mandate to promote temperance

Department Response to Comment #1: The Department agrees that one of the stated purposes of the ABC Act is to "promote temperance in the use and consumption of alcoholic beverages." (Bus. and Prof. Code § 23001.) Even prior to these amendments to Rule 106, retail licensees were permitted to rent or purchase exterior signs advertising beer. The amendment to the ABC Act in 2008 specifically authorizes retail licensees to

rent or purchase exterior signs advertising beer from beer wholesalers at the wholesalers' cost (as defined) for such signs. The amendments to Rule 106 now conform the regulation to the statutory authority and resolve a conflict between the regulation and the express intent of the amendment to the ABC Act. No changes are being made to the regulation in response to this comment.

Comment #2 [Max Kerstein]

The amendments will allow alcohol suppliers to reward retailers who use their signs through manipulation of promotional practices thus leading to a breakdown of the three tier system.

Department Response to Comment #2: The Department agrees that rewarding retailers can be problematic. However, the Legislature has, over the years, provided for many exceptions to the strict three tier structure in the manufacture, distribution and sale of alcoholic beverages. The amendment to the ABC Act permitting retailers to rent or purchase exterior signs advertising beer at the wholesaler's cost (as defined) is one such exception. The amendments to Rule 106 merely implement the Legislative intent. Failure to comply with the statutory and regulatory requirements will still result in a violation of the tied-house laws. Moreover, since all retailers and beer wholesalers are subject to the same limits, the market balance is maintained. No changes are being made to the regulation in response to this comment.

Comment #3 [Holland & Knight]

Query as to whether pending amendments to Business and Professions Code Section 25600 would impact the amendments to Rule 106.

Department Response to Comment #3: The proposed amendments (AB 1282) to the statutory authority underlying the consumer advertising specialties provisions contained within Rule 106 would expand the definition of "beer manufacturer" for purposes of Business and Professions Code Section 25600. As such, this definition would apply with equal effect to Rule 106. There would thus be no conflict if the proposed amendments to Section 25600 were enacted into law and would automatically apply to Rule 106 without the need for further amendment to the regulation. No changes are being made to the regulation in response to this comment.

Comment #4 [Anheuser Busch]

General Support

Department Response to Comment #4: No changes are being made to the regulation in response to this comment.

Comment #5 [Victoria G. Horton]
General Support

Department Response to Comment #5: No changes are being made to the regulation in response to this comment.

Comment #6 [Public Hearing Transcript, page 8, line 12 through page 6, line 3;
Stephanie Shaw, Anheuser Busch]
General Support

Department Response to Comment #6: No changes are being made to the regulation in response to this comment.

Comment #7 [Public Hearing Transcript, page 10, line 3, through page 13, line 18;
Manny Espinoza, Holland & Knight, representing Crown Imports]
Legislative Fix-It Bill will be forthcoming. Will there be additional rulemaking?

Department Response to Comment #7: If future legislation is self-enacting, then no further rulemaking on the topic would be necessary. Legislative enactments prevail over regulations. No changes are being made to the regulation in response to this comment.

Comment #8 [Public Hearing Transcript page 14, line 9 through page 19, line 23; Roger Haney, Haney & Associates]
There is some confusion as to what would constitute “customization” of a sign for a retailer.

Department Response to Comment #8: The underlying statute requires that exterior signs advertising beer that are “customized” for a retailer must be sold by the wholesaler. Rule 106 prohibits any sign, among other things, furnished by a supplier as permitted by the regulation from referring to the retailer’s “name or business.” The amendment to the regulation adds the phrase “except for exterior signs advertising beer sold pursuant to subdivision (c)(2)(C).” The Department’s interpretation of Section 25611.3 is that exterior signs that include a retailer’s name or refers to specific business activities of a retailer are “customized” and thus must be sold. In contrast, if the information provided in a sign is generic in nature, such that it is not retailer-specific and could be used interchangeably by a number of retailers, then it is not “customized.” During the public hearing, this was also confirmed to be the understanding of the intent of Section 25611.3 by the California Beer and Beverage Distributors, the sponsor of the enacting legislation (see Public Hearing Transcript page 20, line 11 through page 21, line 25).

No changes are being made to the regulation in response to this comment.

Comment #9 [Public Hearing Transcript, page 20, line 11; Becky Stolberg, on behalf of CBBDA (California Beer and Beverage Distributors)]
Full Support

Department Response to Comment #9: No changes are being made to the regulation in response to this comment.

REQUIRED DETERMINATIONS

LOCAL MANDATE

These amendments do not impose a mandate on local agencies or school districts.

IMPACT ON PRIVATE PERSONS/BUSINESSES

The Department has determined that there are no cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the action.

IMPACT ON BUSINESS

The Department has determined that the amendments will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. The amendments will not create or eliminate jobs within California, will not create new businesses or eliminate existing businesses within California, and will not affect the expansion of businesses currently doing business within California.

IMPACT ON SMALL BUSINESSES

The Department has determined that the amendments will not have a significant impact on small businesses. The amendments simply insure that the regulation conforms to the statutory authority and affords licensed businesses the opportunity to take advantage of the expanded limits provided by amendments to the ABC Act.

SIGNIFICANT EFFECT ON HOUSING COSTS

The Department has determined that the regulatory action will not affect housing costs.

COSTS OR SAVINGS TO ANY STATE AGENCY

None.

COST TO ANY LOCAL AGENCY OR SCHOOL DISTRICT
THAT MUST BE REIMBURSED IN ACCORDANCE
WITH GOVERNMENT CODE SECTIONS 17500-17630

None.

OTHER NON-DISCRETIONARY COST OR SAVINGS
IMPOSED UPON LOCAL AGENCIES.

None.

COST OR SAVINGS IN FEDERAL FUNDING TO THE STATE

None.

CONSIDERATION OF ALTERNATIVES

The Department has determined that no reasonable alternative considered by the Department, or that has otherwise been identified and brought to the attention of the Department, would be more effective in carrying out the purpose for which the action is proposed, or would be as effective as and less burdensome to affected persons than the proposed action. No other reasonable alternatives were presented to or considered by the Department.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDIES,
REPORTS, OR DOCUMENTS RELIED UPON.

The Department did not rely on any technical, theoretical, or empirical studies, reports or documents in adopting these amendments.