

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, INC.

4059 CRABTREE CT * CARMICHAEL, CA 95608 * 916-944-1470 * FAX 916-944-2001

MANUEL R. ESPINOZA
EXECUTIVE DIRECTOR

VIA FEDERAL EXPRESS

February 5, 2013

Jacob Appelsmith, Director
Department of Alcoholic Beverage Control
3927 Lennane Dr., Ste 100
Sacramento, CA 95834

RECEIVED

FEB 06 2013

Dept of Alcoholic Beverage Control
Director's Office

Re: Petition to amend Rule 106(d)
Chapter 1, Title 4, Article 16, California Code of Regulations

Dear Director Appelsmith:

Pursuant to Section 11340.6 of the Government Code, the Wine & Spirits Wholesalers of California, Inc. herewith requests that the Department amend Rule 106(d) to raise the monetary limit of alcoholic beverage lists (wine and spirits) from \$25.00 per unit to \$50.00 per unit.

Substance or nature of the amendment requested.

Rule 106(d) of the Department's Rules and Regulations specifies, in pertinent part, that suppliers of wine and distilled spirits may furnish to retailers lists of alcoholic beverages other than beer sold and produced by the licensee and/or other suppliers, provided that the material for such lists and all components thereof shall not cost more than \$25 per unit original cost to the supplier. The Wine & Spirits Wholesalers of California, Inc. is requesting that the \$25 limit be amended and set at \$50. No other changes in Rule 106(d) are being requested.

Reason and necessity for the request.

To achieve the original goals of the adoption of the current alcohol beverage list "tied house law" exception set forth in Rule 106(d), it is necessary to amend Rule 106(d).

The \$25 limit has been in effect for 27 years. It is necessary to increase the \$25 per unit cost limit to \$50 in order to reflect current market costs and use of wine and distilled spirits lists and/or Captains books and to adjust for inflation since the adoption of the current Rule 106(d) in 1986. For the past several years, our members have found it increasingly difficult to have quality wine lists produced, including "Captains Books," for not more than \$25 per unit as required by the current rule.

In its 1986 rulemaking, the Department recognized the need to "modernize outdated" portions of Rule 106 so that the rule "more accurately reflected modern-day business practices"¹ and therefore proceeded to raise the monetary limit on wine and spirits lists from \$.20 per unit to \$25 per unit. The same need exists now. There has been no cost adjustment for more than twenty five years and the current market value of these lists and Captain's Books has more than doubled. The cost limitation of \$25 for wine and spirits lists is no longer reasonable and has become inconsistent with the purposes and intent of the 1986 rule change to reflect accurately current business practices and, with respect to monetary limits, which in part was intended to recognize inflationary pressures and higher costs.² Amending the current \$25 limit to \$50 will bring the cost limit in Rule 106(d) in line with the current Consumer Price Index; \$25.00 is now equivalent to approximately \$52.00. Failure to make a CPI adjustment will result in a *de facto* roll back with respect to the quality of wine and distilled spirits lists that can be legally furnished by suppliers. In other words, what was legal then is not legal now only because of inflation and it is unfair to take away a privilege because of inflationary factors beyond the control of wine and distilled spirits suppliers. The \$25 limit was set in 1985 to allow lists of a certain quality although "not be so elaborate as to constitute a 'thing of value.'"³ "Elaborate" wine lists were not furnished because of the 1985 adjustment and elaborate wine and distilled spirits lists will not be furnished because of the adjustment we are proposing. The quality of the wine or distilled spirits lists or books that can legally be furnished will not change because of the adjustment we are proposing. But to allow for the same quality of lists and books that was intended in 1985 to match the market trends and practices at the time, the \$25 limit needs to be increased to \$50. Raising the limit to adjust for inflation will not result in wine lists with greater intrinsic value. It will only authorize the same quality of wine lists to be furnished that were permitted by the 1985 price cost limit. The cost of a \$25 wine and spirits list or Captain's Book produced in 1985 has more than doubled in cost in present day dollars.

¹ See Department of Alcoholic Beverage Control December 20, 1985 letter to Office of Administrative Law Re Adoption of Section 106 of title 4 of the California Administrative Law, p. 1.

² See Department of Alcoholic Beverage Control December 20, 1985 letter to Office of Administrative Law Re Adoption of Section 106 of title 4 of the California Administrative Law, p. 8.

³ See Department of Alcoholic Beverage Control December 20, 1985 letter to Office of Administrative Law Re Adoption of Section 106 of title 4 of the California Administrative Law, p. 8.

In many instances, because of the increase in prices for the materials needed, our members have not been able to provide to restaurants the same quality and nature of wine distilled spirits lists and books they have been furnishing since the inception of the new rule in 1986. Wine and distilled spirits lists are an important tool in providing educational information to consumers about the products produced, distributed, and sold by the wine and distilled spirits industry in this State. It is important to our members that they be able to continue to provide lists of the same nature and quality that have been furnished in past years. Correcting this regulatory lag will not only avoid compliance challenges for wine and spirits suppliers (and enforcement challenges for the Department) but will also prevent our members being forced to provide lower quality lists that would be detrimental to the image of the brands they have worked hard to develop.

Enclosed is a pricing analysis one of our members, Southern Wine & Spirits, prepared of 32 available representative wine/spirits lists. Photographs of the lists (numbered accordingly) are also enclosed. The average unit price for these lists is \$36.68. Eight of the lists cost \$25 or less. The majority of the lists, 17 of them, cost between \$25 and \$50. Seven of the lists cost more than \$50.

Increasing the monetary cost limit to \$50 per unit will also achieve greater consistency for Rule 106(d) with the current federal regulation at 27 CFR 6.84 and other state regulations. 27 CFR 6.84 generally provides that an industry member may provide point of sale advertising materials including "alcoholic beverage lists or menus." 27 CFR 6.84 establishes no monetary limit on the cost or value of such items. Enclosed is a current survey of the other states. According to this survey, the vast majority of states have regulations in line with the federal regulation and very few of the states have any level of per unit limitation. Striving for "a greater degree of consistency with similar federal regulations" was a basis previously set forth by the Department in adopting Rule 106.⁴

Economic Impact.

In addition to the economic benefit to the California wine industry as a whole, the economic impact on small businesses (restaurants) will be positive. The use of wine lists is an extremely important tool for California wineries and suppliers in marketing California produced wines and for California restaurants in selling such wines. Of the top 100 wines sold in California restaurants, 77% are California wines. Wine is one of the state's most important industries. Captain's books and wine lists are critical in promoting and advertising California wines to the millions of wine consumers and tourists who visit California restaurants each year. Wine lists and Captain's books that present California wines in an elegant and economically viable method are extremely

⁴ See *Initial Statement of Reasons*. See also Department of Alcoholic Beverage Control December 20, 1985 letter to Office of Administrative Law re Adoption of Section 106 of title 4 of the California Administrative Law, p. 1.

important to the California wine and restaurant industries. The wine list (“Can I see a wine list, please?”) is an integral part of the restaurant experience. Captain’s books in particular, with their ability to carry multiple page listings containing vintage, appellation, varietal designation and other detailed information are critical in assisting consumers and exposing them to the wide range of wines produced by California wineries and offered in California restaurants.

Authority to take action requested.

Authority for the proposed amendment is provided by Business & Professions Code Sections 25750 and 25600. Business & Professions Code Sections 25500 and 25600 express prohibitions on an alcohol beverage supplier (*i.e.*, a manufacturer, importer, or wholesaler) from furnishing a “things of value” or “free good” to an alcohol beverage retailer. In particular, §25600(a)(1) provides that:

No licensee shall, directly or indirectly, give any premium, gift, or free goods in connection with the sale or distribution of any alcoholic beverage, *except as provided by rules that shall be adopted by the department to implement this section or as authorized by this division.*

Rule 106, in its entirety, constitutes the Department’s regulatory exception authorized specifically by §25600(a)(1). We are hereby seeking to amend Paragraph (d), the portion of Rule 106 that addresses and implements the §§25500/25600 exception for alcohol beverage lists.

Please accept this letter as our petition for the adoption of the proposed amendment at the earliest opportunity.

Sincerely,



Manuel R. Espinoza

Enclosures

cc: Laurence Chaplin
Don Robbins
Michael Newman