

## December 2022 - February 2023 Response to Comments

### Beer Price Posting

#### **There should be no beer price posting laws**

**Written Comments: 1**

#### **Comments Summary:**

Commenters request that ABC get rid of beer price posting laws.

#### ***CA Dept of Alcoholic Beverage Control Response:***

ABC does not have the authority to remove the beer price posting requirements from law. The beer price posting scheme is created by statute, and only the Legislature can change those requirements. As discussed in the published Initial Statement of Reasons, ABC is promulgating these regulations to streamline and clarify the process required by statute. This comment does not require changes to the proposed regulations.

**Remove the definition of “loose” from the proposed regulation**

**Written Comment:** 2a, 4

**Comment Summary:**

Commenter requests ABC remove the definition of “loose” because it is ambiguous and can be misconstrued to how the industry uses the term.

***CA Dept of Alcoholic Beverage Control Response:***

ABC agrees with commenter’s definition of loose as packages that are designed to be separated and sold in individual containers, even though those containers might not be single individual products, which would be considered a “single.” Therefore, ABC has included both “single” and “loose” and does not consider this definition ambiguous or misleading. This comment does not require a change in the proposed regulations.

**Specify a retailer determines the configuration in which containers are sold**

**Written Comment: 2b**

**Comment Summary:**

Commenter requests the proposed regulation definition for “package configuration” specify that it is for the retailer to determine the configuration in which containers are sold.

***CA Dept of Alcoholic Beverage Control Response:***

ABC agrees with the suggestion for clarification that the intention of the seller in a price posting line item does not prohibit the reseller from repackaging and changing how they are sold, and neither price posting nor the laws surrounding it limit the reseller from selling how they see fit. ABC has modified the proposed regulations in response to this comment.

**Correct typo resulting in incorrect citation**

**Written Comment:** 2c

**Comment Summary:**

Commenter points out that there is a reference to Business and Professions Code section 25502, when the correct section that is being referred to in the regulation is Business and Professions Code section 25002.

***CA Dept of Alcoholic Beverage Control Response:***

ABC has made the appropriate change to the proposed regulations.

**Clarify that the exception to one line item**

**Written Comment:** 2d

**Comment Summary:**

Commenter requests a clarification for the exception to the one-line-item limit by using a specific citation to the proposed Title 4 California Code of Regulations section 105.2.

***CA Dept of Alcoholic Beverage Control Response:***

ABC agrees the proposed change does provide increased clarity to the proposed regulation. The proposed regulation has been changed in accordance with this comment.

## **Change the posting county requirements based on where beer is sold**

**Written Comment: 2e**

### **Comment Summary:**

Commenter suggests that the language proposed would require manufacturers, importers, wholesalers, or certificate of compliance holders to file price schedules to counties in which they do sell beer because their customers have additional locations licensed within the state. Commenter proposes changes to ensure that the requirement is limited to counties where their customers required to price post have a licensed premises where they sell beer.

### ***CA Dept of Alcoholic Beverage Control Response:***

As shown in the initial statement of reasons, ABC never intended for an outcome as outlined by commenter and thanks commenter for bringing to light the interpretation that was not considered by ABC in preparing its proposed regulations. The initial intent of the proposed regulation was that price posting must occur in each county or trading area where a manufacturer, importer, wholesaler, or certificate of compliance holder sells or delivers beer to a customer. ABC has modified the proposed regulation to better meet the initial intent of the proposed regulation.

**Clarify that wholesalers retain discretion to participate in price promotions and set their own prices**

**Written Comment:** 2f

**Comment Summary:**

Commenter suggests that ABC clarify that price promotions are optional and that the wholesaler retains all discretion when deciding to participate or change their prices to meet the requirements offered by the manufacturers, importers, wholesalers, or certificate of compliance holders.

***CA Dept of Alcoholic Beverage Control Response:***

ABC had no intention of modifying the discretion of wholesalers to set their own prices for products or require wholesalers to participate in a price promotion offered by manufacturers, importers, wholesalers, or certificate of compliance holders. ABC does not believe the language proposed in any way abridged the wholesaler's statutory autonomy through their separate licensure. However, given the concern expressed, ABC has modified the proposed regulation to further clarify that the wholesaler has full discretion to participate in price promotions and to determine their own prices for products.

## **Give multiple options in creating a price promotion**

**Written Comment:** 2g

### **Comment Summary:**

Commenters suggest that the language surrounding a manufacturer, importer, wholesaler, or certificate of compliance holder creating a price promotion was too restrictive to allow for the wholesaler to partially participate and dictate their own prices and receive some benefit of the price promotion. Commenter provided a real-world example of a price promotion and a wholesaler's partial participation.

### ***CA Dept of Alcoholic Beverage Control Response:***

ABC's initial intent was to limit participation by wholesalers in the proposed regulations to specific benchmarks of either a suggested price or a reduction in price. After receiving comments, ABC has modified this restriction to allow a manufacturer, importer, wholesaler, or certificate of compliance holder offering a price promotion to set either a lowest suggested price or a maximum amount or percentage by which participating wholesalers would lower their prices. The change in the proposed regulations will allow a wholesaler to participate in the promotion at a level it deems appropriate and to receive payment based on how they choose to lower their prices in response to the price promotion. This will allow more wholesalers to participate and will provide a manufacturer, importer, wholesaler, or certificate of compliance holder creating a price promotion more flexibility to institute price promotion programs statewide.



## **Remove state-wide basis and make it by county or trading area**

**Written Comment:** 2h

### **Comment Summary:**

Commenter suggests that requiring a price promotion to be available statewide is contrary to the statute because suppliers and wholesalers are not required to set their pricing on a statewide basis. Commenter suggests that ABC limiting price promotions by a county or trading area will not create an opportunity to create favored customers as stated in ABC's initial statement of reasons. Commenter suggests that statewide price promotions would lower participation and raise prices for consumers.

### ***CA Dept of Alcoholic Beverage Control Response:***

Commenter suggests that the proposed regulation subsection would decrease the number of price promotions and increase consumer prices and should therefore be removed. The focus of the price posting statute is not to lower prices but ensure that suppliers and wholesalers are fairly competing within an orderly marketplace. The price posting statute is an anti-trust protection that by its very definition is intended to foster competition and ensure the market is not dominated by those with more money or power or marketplace influence. ABC has the statutory mandate to ensure the fair and transparent use of price promotions within the beer industry while still fostering and encouraging the orderly wholesale marketing and wholesale distribution of beer in California. ABC believes that price promotions can be used by large manufacturers to limit the independence of wholesalers through the elements of price promotions including price, timing, location, and longevity, effectively forcing the market to their desired prices through the rebate of funds to wholesalers. These manipulations of the price posting requirement and some form of secret rebates or even in some cases free gifts of money in connection with the sales and distribution of alcohol are exactly the types of behavior the statute was created to stop, and ABC attempted to regulate in line with that intent.

However, upon consideration of the comment, ABC believes that the less restrictive alternative to allow price promotions on a county-by-county basis by the commenters that the industry claims will be as effective as the previous proposed language, with appropriate safeguards to mitigate potential tied house concerns. ABC continues to be concerned that this change could lead to market and price manipulation by manufacturers and wholesalers to provide favored large retail customers with better prices than smaller retailers, which is contrary to the purpose and intent of the price posting statute and the tied-house laws generally. This could occur in circumstances when a price promotion is done in a county in which a large retailer warehouses goods (for self-distribution to its own stores) that will allow that large retailer to purchase a large quantity of product and then transport it throughout the state to all of its retail locations, including counties in which a price promotion is not offered and smaller retailers located in those other counties are thus not able to purchase at that same discounted price. ABC will continue to watch this area and may conduct investigations going forward to ensure price promotions are not being manipulated in this way.

ABC has modified the proposed regulation consistent with the submitted comment because it is less restrictive on affected persons and is asserted to be as effective at meeting the statutory and regulatory intent.

## **Change the notice requirement to wholesalers**

**Written Comment: 2i**

### **Comment Summary:**

Commenter requests that the 15-day notice requirement be removed to allow the speedy implementation of price promotion programs. Commenter asks for a relief from informing customers for which the price promotion does not apply if changes otherwise asked for were implemented.

Commenter states that since price reductions to meet competitors pricing can be effective immediately under statute, the 15-day requirement is burdensome and contrary to statutory scheme. Commenter requests the change be to provide notice prior to the first day of the price promotion program.

### ***CA Dept of Alcoholic Beverage Control Response:***

The notice requirement is necessary to allow all a supplier's customers to participate in a price promotion program equally. This notice will ensure all wholesalers in a county or trading area have an equal opportunity to participate in a price promotion thereby fostering and encouraging an orderly wholesale marketing and wholesale distribution of beer in California. Commenter asserts that the posting of price reductions is always immediate under the statute. However, price reductions are only allowed to be effective immediately in response to a competitor's price or for new products. A supplier cannot guarantee that the wholesaler's price reduction would be able to be effective without the required 10-day waiting period, so the minimum lead time for notice should be longer than the statutorily mandated waiting period for price changes.

In addition, even if the supplier could guarantee a wholesaler could immediately lower their prices based on a competitor's price in a price promotion, the language suggested by commenters would allow a supplier to pick and choose favored customers by giving them more notice of a price promotion while springing a price promotion program on unfavored customers with only one day notice. This behavior would not foster nor encourage the orderly wholesale marketing and wholesale distribution of beer in California and is correctly prohibited by ABC under its statutory mandate.

Furthermore, Business and Professions Code section 25503 specifically requires that no supplier or distributor provide secret rebates to any licensee. Unless the rebate given through a price promotion is noticed, documented, and linked to a verifiable singular program the rebate can quickly become secret through obfuscation and manipulation of otherwise legal actions. Without the general notice to all customers in a county or trading area and notification through the price posting system of a running price promotion, the public, the beer industry, and ABC will not understand exactly how all rebates given are created, thus resulting in a secret rebate through obfuscation.

ABC does acknowledge that the industry has proposed a less restrictive alternative that they claim is as effective as a fifteen-day prior notice, and if the regulation ensures that all those who may participate are notified at the same time, the notice can be as little as the day prior to the start of the price promotion program as commenters suggest. When all wholesalers receive notice at the same time, even

if a price drop is not able to be done immediately, all participants remain on equal footing. ABC has modified the proposed language accordingly.

## **Allow multiple price promotions on the same products at the same time**

**Written Comment:** 2j

### **Comment Summary:**

Commenter requests to have multiple price promotions concurrently to allow for more price promotions to reduce prices for customers. The requested change would allow long term price promotions while also allowing short term special deeper price promotions concurrently.

### ***CA Dept of Alcoholic Beverage Control Response:***

Commenter suggests that this proposed regulation would decrease the number of price promotions and increase consumer prices. The focus of the price posting statute is not to lower prices but ensure that suppliers and wholesalers are fairly competing within an orderly marketplace. The price posting statute is an anti-trust protection that by its very definition is intended to foster competition and ensure the market is not dominated by those with more money or power. Without the proposed regulations limiting price promotions to ensure fairness and equity in treatment of all customers, the orderly wholesale marketing and wholesale distribution of beer in California would be hindered.

It is necessary to establish the limit of one price promotion program for certain items or set of items at any given time. Without the restriction to one price promotion at a time, suppliers can pick special customers by running concurrent price promotion programs for the same product for a certain customer and then offering different ones to others. This is not aligned with the statute or the statutory mandate of ABC to foster and encourage a fair and orderly market through rulemaking.

Commenter's description of two juxtaposed price promotions, one for a two-week holiday, and one an "everyday low-price program" shows the exact situation ABC wished to limit to ensure price promotions were fair, orderly, and true price promotions; and not just lower prices that are unposted. The "long term price promotion" practice that is mentioned by commenters confirms several of ABC's concerns that price promotions may be utilized by large manufacturers who are able to leverage their economic and market clout to manipulate or unduly influence wholesalers' prices by providing monetary incentives to keep the price of the beer at a certain price point in the marketplace. Such practices may not be available to smaller manufacturers.

A limited duration price promotion for a holiday period or in connection with some specific events were the types of price promotions ABC intended to support when drafting the proposed regulations because these are an actual price reduction shared by the supplier and wholesaler to lower prices for a short-term period for a specific purpose. However, an "everyday low-price" program (or any other long-term rebate) is not a price promotion. It is a manipulation of the market and an action that may limit or substantially undermine the wholesaler's independence and discretion to set their own prices by unduly pressuring and incentivizing the wholesaler to sell the supplier's product at lower prices. Moreover, this practice appears to more accurately reflect a post-sale adjustment of the price at which the beer is sold based upon wholesaler compliance, which is determined at some later point in time, meaning that the

beer is thus sold at other than the posted price in violation of the statute. If a manufacturer wishes to implement an “everyday low-price” it may certainly do so by reducing the price of its products sold to its customers and posting that price as statutorily mandated. Further, if the manufacture wishes to establish a “recommended price to retailers” for independent wholesaler consideration, it may do so under current law and nothing in the proposed regulation would preclude that.

Business and Professions Code section 25503 specifically requires that no supplier or distributor provide secret rebates to any licensee. Unless the rebate given through a price promotion is noticed, documented, and linked to a verifiable singular program the rebate can quickly become secret through obfuscation and manipulation. If multiple price promotions are offered at the same time, the public, the beer industry, and ABC cannot know how the rebates given are derived and thus become secret through obfuscation. This comment does not require changes to the proposed regulations.

## **Change who is responsible for failure to notify ABC of participation in a price promotion**

**Written Comment:** 2k

### **Comment Summary:**

Commenter suggests that the manufacturer should not be held responsible for wholesaler's actions when participating in a price promotion, and that the wholesaler should be held responsible for requesting and accepting an improper rebate when they do not comply with the proposed regulation.

### ***CA Dept of Alcoholic Beverage Control Response:***

Commenter correctly points out that only one party to the price promotion was held responsible in the proposed regulation and that was not the intent of ABC in drafting the proposed regulation.

Commenter's suggested language limits responsibility to the wholesalers for requesting a reimbursement and suggests that the licensees should not be held responsible for the actions of another licensee. Ordinarily under the ABC Act this is correct, unless specifically tied to an action that the licensees participate in together, such as with a price promotion. Thus, ABC has modified the language to require the wholesaler to note in the price posting system that a price change was made pursuant to a proposed price posting program, and in a separate subsection, stated that no reimbursement shall be requested, paid, or accepted unless both licensees comply with all requirements of the proposed regulation. This required another addition to ensure this specific prohibition did not conflict with Title 4 California Code of Regulations section 105.2(a)(11).

A price promotion program authorized by the proposed regulations requires two licensees, each exercising their own independent discretion to participate, to agree to a joint system of pricing wherein one gives a rebate to the other after compliance. This joint action, when not completed properly, will create a secret rebate as prohibited by Business and Professions Code section 25503, and both licensees would then be subject to administrative action pursuant to Business and Professions Code 25503(c) and the proposed regulations.

**Remove the requirement for a wholesaler to request reimbursement from a manufacturer, and modify when payment is due**

**Written Comment:** 21

**Comment Summary:**

Commenter suggests that this subsection creates an unnecessary administrative burden due to the written notice requirement, and that the record keeping requirements make the additional requirement redundant and unnecessary. Commenter also describes that some price promotion programs rely upon electronic tracking to confirm participation and rebate amounts creating redundancy to written notification.

***CA Dept of Alcoholic Beverage Control Response:***

The 30-day requirement for a request for reimbursement under a price promotion program ensures the records kept pursuant to Title 4 California Code of Regulations section 105.2(a)(10) are limited to an authorized price promotion and provides for the ability of ABC to enforce the prohibition on secret rebates in Business and Professions Code section 25503(c). By allowing a wholesaler to request reimbursement beyond a 30-day period creates an increased risk of secret rebate by obfuscation. However, ABC agrees that a written request is not necessarily needed. Thus, the proposed regulations have been modified to only require a request to be made and documented in the required records, and that an automated request through inventory systems will be deemed a request for reimbursement. By considering the automatic verification system a request for reimbursement, the proposed regulations still require the automatic verification to be done within 30 days from the close of the price promotion, and that payment be made 30 days from the date of the automatic verification without modifying the manufacturer's 30-day requirement for payment under the proposed regulation. The proposed regulations were modified in response to this comment as discussed.



## **The proposed regulations should ensure no quid pro quo in price promotions**

**Written Comment: 3**

### **Comment Summary:**

Commenter requests ABC address the possibility of a quid pro quo relationship between manufacturers and wholesalers in price promotion agreements. Commenter suggests that without these regulations preventing quid pro quo, beer manufacturers may have the power to threaten the three-tier system and discourage market competition from other smaller manufacturers and wholesalers.

### ***CA Dept of Alcoholic Beverage Control Response:***

There need not be additional prohibitions on this type of behavior in the proposed regulations because it is already prohibited by statute and regulation elsewhere such as the current tied house and thing of value restrictions within the Business and Professions Code, Division 9. Current law already restricts quid pro quo agreements between alcoholic beverage tiers. The tied house restrictions, while adjacent to beer price posting rules, is outside the scope of the proposed regulations. As discussed in both the initial statement of reasons and other responses to comments, ABC is attempting to allow for specific price promotions that are noticed, published, and understood by the public, the beer industry, and ABC through these proposed regulations. However, commenter's intent is shared by ABC in these proposed regulations that price promotions should not be used to manipulate and hinder a fair and orderly beer market in California. ABC has attempted establishing clear parameters and requirements to ensure actions addressed by the commenter will be brought to light and administrative actions may be taken against licensees responsible. This comment does not require changes to the proposed regulations.

## **Limiting the amount of product within a price promotion**

**Written Comment: 3**

### **Comment Summary:**

Commenter requests the proposed regulations limit the amount of product that can be sold under an authorized price promotion to ensure all wholesalers are equally benefited.

### ***CA Dept of Alcoholic Beverage Control Response:***

Business and Professions Code section 25000.5 requires territorial agreements between manufacturers and wholesalers that must be agreed to, and filed with ABC, to sell beer in an area. ABC has attempted to set limits within the proposed regulation to ensure a fair and orderly market for the sale of beer in California as required by Business and Professions Code section 25006. Any limits set by rule would need to be different depending on size of manufacturer, number of wholesalers in a trade area, and other various factors that would overcomplicate enforcement and compliance. A limit based on the amount of product sold in a price promotion, or length of the promotion would create an undue burden both upon the beer industry and ABC enforcement of those provisions. ABC has placed other safeguards to ensure the fair and orderly market within the proposed regulation which are not as burdensome and are at least similarly effective. This comment does not require changes to the proposed regulations.