

**State of California
Office of Administrative Law**

In re:
Department of Alcoholic Beverage Control

Regulatory Action:

Title 04, California Code of Regulations

Adopt sections: 105.1, 105.2

Amend sections: 105

Repeal sections:

NOTICE OF APPROVAL OF REGULATORY
ACTION

Government Code Section 11349.3

OAL Matter Number: 2023-0905-01

OAL Matter Type: Regular (S)

This rulemaking action amends beer price posting requirements to further implement standards for promotional allowances, define beer price posting terminology, and update the method in which beer price schedules are posted by switching to an online platform.

OAL approves this regulatory action pursuant to section 11349.3 of the Government Code. This regulatory action becomes effective on October 17, 2023 pursuant to Government Code section 11343.4, subdivision (b)(3).

Date: October 17, 2023



Nicole C. Carrillo
Senior Attorney

For: Kenneth J. Pogue
Director

Original: Joseph McCullough, Director

Copy: Robert de Ruyter

REGULAR

STATE OF CALIFORNIA—OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

For use by Secretary of State only

STD. 400 (REV. 10/2019)

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z-2022-1017-01	2023-0905-015	
For use by Office of Administrative Law (OAL) only			
NOTICE		REGULATIONS	

ENDORSED - FILED
in the office of the Secretary of State
of the State of California

OCT 17 2023

1:53 PM

OFFICE OF ADMIN. LAW
2023 SEP 5 PM 1:58

AGENCY WITH RULEMAKING AUTHORITY
Department of Alcoholic Beverage Control

AGENCY FILE NUMBER (If any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
OAL USE ONLY	ACTION ON PROPOSED NOTICE <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn	NOTICE REGISTER NUMBER 2022, 43-2	PUBLICATION DATE 10/28/22

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Beer Price Posting	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)	
SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT 105.1, 105.2 PER AGENCY REQUEST NCC
TITLE(S)	REPEAL

3. TYPE OF FILING

<input checked="" type="checkbox"/> Regular Rulemaking (Gov. Code § 11346)	<input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§ 11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.	<input type="checkbox"/> Emergency Readopt (Gov. Code, § 11346.1(h))	<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, § 100)
<input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§ 11349.3, 11349.4)	<input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, § 11346.1)	<input type="checkbox"/> File & Print	<input type="checkbox"/> Print Only
<input type="checkbox"/> Emergency (Gov. Code, § 11346.1(b))		<input type="checkbox"/> Other (Specify)	

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, § 44 and Gov. Code § 11347.1)
Jan. 31, 2023 - Feb. 16, 2023; Mar. 28, 2023 - Apr. 12, 2023; Aug. 16, 2023 - Sept. 1, 2023.

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, § 100)
 Effective January 1, April 1, July 1, or October 1 (Gov. Code § 11343.4(a)) Effective on filing with Secretary of State \$100 Changes Without Regulatory Effect Effective other (Specify)

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY
 Department of Finance (Form STD. 399) (SAM § 6660) Fair Political Practices Commission State Fire Marshal
 Other (Specify)

7. CONTACT PERSON
Robert de Ruyter
TELEPHONE NUMBER: 916-419-8958
FAX NUMBER (Optional)
E-MAIL ADDRESS (Optional)

8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE
Joseph McCullough
DATE
Sept. 1, 2023
TYPED NAME AND TITLE OF SIGNATORY
Joseph McCullough Chief Deputy Director

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ENDORSED APPROVED
OCT 17 2023
Office of Administrative Law

TITLE 4. BUSINESS REGULATIONS

DIVISION 1. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

ARTICLE 15. PRICES.

Final Regulation Text

§ 105. Beer Price Posting.

(a) The schedule of prices for the sale of beer, as required by Section 25000 of the Alcoholic Beverage Control Act, shall be filed with the department on a form prescribed by the department, in accordance with instructions thereon. All prices filed shall be for immediate delivery. Contract prices for future deliveries of beer and quantity discounts shall not be filed with the department.

(b) Each manufacturer, importer or wholesaler of beer shall file a price schedule for each county in which his customers have their premises, whether the price which is posted is f.o.b. or delivered, or both. Trading areas within a county must be based on natural geographical differences justifying different prices, and shall not be established for special customers

(a) The following definitions shall apply to beer price posting and to the information required as indicated on a schedule, and in sections 105, 105.1, and 105.2 of this Article:

- (1) “Competitive Price” means a change to an active price to meet lower filed competing price for the same package configuration, size, county, type of customer, and receiving method in a trade area. For purposes of this provision, “trade area” means a county or trading area within a county. A competitive price shall not be lower than the competitor’s filed price. Competitive prices are effective pursuant to Business and Professions Code section 25002.
- (2) “Container Charge” means a refundable deposit that may be assessed for kegs.
- (3) “Customer” means another licensee that is purchasing beer from either a manufacturer, importer, or wholesaler.
- (4) “Delivered” means the delivery of purchased beer to a customer.
- (5) “Effective Date” means either immediately or on the tenth day following the submission of the schedule, pursuant to Business and Professions Code section 25002.

- (6) “FOB” means free on board and is to be used if a customer assumes liability at the seller’s licensed premises.
- (7) “Importer” means an entity that imports beer from manufacturers outside California for resale to wholesalers within California.
- (8) “Line Item” means the combination of “manufacturer,” “trade name,” “product name,” and “package configuration,” together with the related price and other information recorded on the schedule.
- (9) “Manufacturer” means the actual manufacturer of the beer.
- (10) “Package Configuration” means the specific configuration of the package of beer that is sold as a unit, which may include packages that are also sold as separate units. If a package configuration is identified as containing a specified number of single, or loose, containers, then the package must be physically or stylistically different from a package configuration that comprises the same number of individual containers sold as a unit. For purposes of this provision, “single” or “loose” means that it is intended that the package will be separated at the retailer’s licensed premises and sold to consumers as individual containers or in other combinations determined by the retailer.
- (11) “Posted By” means the licensee that actually establishes prices and posts the schedule.
- (12) “Price” means the price for the beer to be actually charged to a purchasing customer. Except as otherwise expressly authorized, the price shall include all charges, surcharges, fees, assessments, discounts, and California Redemption Value (CRV), but shall not include any refundable container charge that is separately identified on the schedule for any particular line item.
- (13) “Price Promotion” or “Price Promotion Program” means that a manufacturer or importer will reimburse a wholesaler for a portion of a reduction in price posted by the wholesaler for the sale of beer to retailers as authorized by section 105.2 of this Article.

- (14) “Prices To,” for purposes of the field required within the online price posting system, means manufacturers, wholesalers, retailers, or customers located within a federal enclave.
- (15) “Product Name” means the common identification of the beer and shall be the same as the fanciful name identified on the certificate of label approval on file with the Alcohol and Tobacco Tax and Trade Bureau. If no fanciful name is listed on the certificate of label approval, the product name shall be the same as the trade name, or if no certificate of label approval is required to be filed then it shall have the same meaning as if a certificate of label approval was required.
- (i) If the “Trade Name” and the “Product Name” are identical, only the “Product Name” shall be included.
 - (ii) If a line item is a package that contains different beers of more than one trade name or product name in a combination pack, for purposes of identification on the schedule the “product name” shall be the name given to the combination package.
- (16) “Promotional Item” means an additional item included in a package that is not beer, such as, for example, a glass.
- (17) “Receiving Method” means either FOB or delivered.
- (18) “Schedule” means the listing of beer prices as required by Chapter 12 of the Alcoholic Beverage Control Act, commencing with Business and Professions Code section 25000, and sections 105, 105.1 and 105.2 of this Article.
- (19) “Size” or “Product Size” means the volume of beer in each container and shall also include the type of container used. In the case of a bulk upload of price schedules, “Product Size” shall identify the volume in each container and “Container Type” shall identify the type of container used.
- (20) “Status” means that a particular line item is either active, inactive, or old.
- (21) “Trade Name” means the name of the beer and shall be the same as the brand name identified on the certificate of label approval on file with the Alcohol and Tobacco

Tax and Trade Bureau, or if no certificate of label approval is required to be filed then it shall have the same meaning as if a certificate of label approval was required.

(22) “Trading Area” means a specifically identified area within a county based upon natural geographical differences justifying different prices, as authorized by Business and Professions Code section 25000(a).

(c) Schedules of prices for the sale of beer shall be filed only through the department’s online price posting system.

(d) Except as provided herein, and as authorized by section 105.2 of this Article, only one line item may be posted by the posting licensee for any single county. If different prices for a line item are permitted for different trading areas, the licensee shall identify the trading area within the schedule.

(e) If a line item is discontinued or no longer offered for sale by the posting licensee, its status shall be identified as inactive by the posting licensee. This prohibition does not apply to line items that are not currently offered for sale due to being out of stock and which will be offered for sale once the line item is available. No line item may be sold unless its status is active.

(f) Each manufacturer, importer, wholesaler, or certificate of compliance holder shall file a price schedule for each county in which their customers have their premises. If a customer has premises in multiple counties, prices must be posted for each county in which either the sale, or the delivery, or both the sale and delivery, of beer occurs. If the sale of beer occurs in one county and the delivery of such beer occurs in a different county, the price charged for the beer shall be the price posted for such beer for the county in which the delivery occurs. Prices need not be posted in counties in which a customer has premises but to which beer is neither sold nor delivered by the posting licensee.

(g) All prices filed shall be for immediate delivery. Contract prices for future deliveries of beer and quantity discounts are prohibited.

(h) A licensee may establish different trading areas within a county for sales to retailers based upon natural geographic differences justifying different prices. Upon request by the department, a licensee shall provide information necessary to justify the establishment of different trading areas due to natural geographical differences.

(1) Natural geographical differences for purposes of establishing separate trade areas may include bodies of water, mountains, or deserts. They do not include manmade structures, barriers, or roads.

Authority: Sections 25006 and 25750, Business and Professions Code; Section 22, Article XX of the California Constitution.

Reference: Sections 25000, 25001, 25002, 25003, 25004, Business and Professions Code.

§ 105.1 Promotional Allowances.

- (a) Depletion allowances, or any agreement or promotion involving depletion allowances, are expressly prohibited. For purposes of this paragraph, a “depletion allowance” is the practice, or any agreement, written or oral, explicit or implicit, by which a seller of beer credits, pays, or reimburses, directly or indirectly, by any means whatsoever, a portion of the price paid by the customer based upon the quantity of beer the customer subsequently sells.
- (b) A manufacturer or importer may offer to wholesalers a price promotion program, and a wholesaler may participate in a price promotion program, only pursuant to the limitations and requirements in California Code of Regulations, title 4, section 105.2. Participation by a wholesaler in any price promotion program is solely at its discretion, and it retains the independent discretion to set its own prices to retailers when participating in a price promotion program.

Authority: Sections 25006 and 25750, Business and Professions Code; Section 22, Article XX of the California Constitution.

Reference: Section 25000, 25001, 25002, 25003, 25004, Business and Professions Code.

§ 105.2 Authorized Rebates to Wholesalers for Participation in Price Promotion.

(a) To be a lawful price promotion program between a manufacturer or importer and a wholesaler allowing for a manufacturer or importer to reimburse the wholesaler for a reduction in price to retailers over a specific time period, all of the following must be adhered to:

(1) When creating a price promotion program that wholesalers may choose to participate in, a manufacturer or importer shall establish either a lowest suggested price at which participating wholesalers may post prices to retailers or a specific maximum amount or percentage by which participating wholesalers may reduce their posted price at which the beer is offered for sale to retailers;

(2) When creating a price promotion program that wholesalers may choose to participate in, a manufacturer or importer shall state the amount of its reimbursement to participating wholesalers as either a specific percentage of the amount by which the wholesaler reduces its posted price to retailers or a specific monetary amount per sale;

(i) If the reimbursement is based upon a percentage, the manufacturer or importer may also establish a maximum amount that will be reimbursed per sale;

(3) Any price promotion program offered by a manufacturer or importer shall be available on the same terms to all wholesalers in the county or trading area in which the manufacturer offers the promotion;

(i) No price promotion shall be offered, implemented, or conducted in a manner that affords preferential treatment to any retailer or retailers;

(4) The manufacturer or importer shall indicate in a designated field within the online price posting system that a specific item is part of a manufacturer's price promotion program and provide notice to all wholesalers to which they sell beer in the county or trading area in which a price promotion is offered of the specific terms of the price promotion program required under this section. This notice shall be provided to wholesalers at the same time, at least one day prior to the start of a price promotion program. Merely posting the notice to a website, or indicating a price promotion for a line item within the online price posting system, shall not be sufficient for notice required pursuant to this subsection;

(5) A price promotion program notice shall specify the product name, product size, container type, and package configuration to which the price promotion program applies;

(i) A price promotion program notice may include multiple product names, product sizes, or package configurations. However, only one price promotion for any

specific combination of product name, product size, and package configuration shall occur during the specified period in which the price promotion program is offered;

- (6) If a wholesaler accepts participation in a manufacturer's or importer's price promotion program, it shall adjust its posted prices to retailers in accordance with the terms of the price promotion program in the county or trading area of where the price promotion programs is occurring;
 - (7) When changing its posted price due to an offered price promotion pursuant to this section, a wholesaler shall indicate in the designated field within the online price posting system that the posted price for the specific line item has been changed pursuant to a price promotion program;
 - (8) A participating wholesaler shall request reimbursement no later than 30 calendar days following the last date of the price promotion program, and this request shall be documented in records required by section 105.2(a)(10) of this Article;
 - (i) If the manufacturer or importer verifies participation based on sales data and automated inventory systems, that shall be deemed as a request for reimbursement under this subsection;
 - (9) The manufacturer or importer shall pay a participating wholesaler the amount to be reimbursed no later than 30 calendar days following the wholesaler's request for reimbursement;
 - (10) Valid records of compliance with all requirements of California Code of Regulations, title 4, section 105.2 must be retained by both the manufacturer or importer and the wholesaler for at least three years following the completion of a transaction. The department may request or inspect these records at any time pursuant to Business and Professions Code section 25753; and
 - (11) If a wholesaler in good faith relies upon a price promotion program offered by a manufacturer or importer and changes its posted price in anticipation of a reimbursement, and otherwise complies with all requirements of wholesalers in this section and under law, any violation of this section by the manufacturer or importer does not remove a manufacturer's or importer's civil liability for agreed upon reimbursement funds pursuant to the price promotion program.
- (b) For purposes of this section and of determining the commencement of the limitation period pursuant to Business and Professions Code section 24208, the date of the "transaction" shall be deemed to be the last date upon which reimbursement is due or is made pursuant to subsection (9), whichever is later, except that a failure to provide records pertaining to a price promotion program to the department upon request shall be

deemed to constitute concealment, tolling the limitation pursuant to Business and Professions Code section 24208.

(c) If the manufacturer or importer or wholesaler fail to comply with any of the requirements of this section any reimbursement requested, paid, or accepted constitutes a violation of this section and administrative action pursuant to Business and Professions Code section 24200 may be taken against both licensees involved in an improper price promotion program.

(1) The only exception to section 105.2(c) of this Article is if either licensee notifies the Department of the manufacturer or importer violation and the request, payment, and acceptance is made to discharge liability of the manufacturer or importer pursuant to California Code of Regulations, title 4, section 105.2(a)(11).

Authority: Sections 25006 and 25750, Business and Professions Code; Section 22, Article XX of the California Constitution.

Reference: Section 24200, 24208, 25000, 25001, 25002, 25003, 25004, 25503 and 25753 Business and Professions Code.