

**Department of
Alcoholic Beverage Control**

FINAL STATEMENT OF REASONS

PROPOSED ADOPTION OF REGULATIONS FOR
ONLINE BEER PRICE POSTING

PROPOSED ADOPTIONS TO TITLE 4 SECTION 105. BEER PRICE POSTING

UPDATE OF INITIAL STATEMENT OF REASONS

The Department of Alcoholic Beverage Control (ABC) has no changes to the Initial Statement of Reasons noticed on October 28, 2022, except for the necessity section below for each change made to the proposed regulatory text following comment periods.

UPDATED INFORMATIVE DIGEST

ABC has no changes to the Informative Digest noticed on October 28, 2022.

REGULATORY PACKAGE HISTORY

The first public comment period concluded on December 13, 2022, and a public hearing was held on December 13, 2022. The modifications to the initial regulation text were made to incorporate alternatives that had been suggested by commenters during the first 45-day comment period. These changes clarified the intent of the proposed regulation and made the proposed amendments less restrictive, but as effective, as detailed in the response to comments. Specifically, these changes were as follows:

- 1) Clarifying the definition of “Package Configuration.”
- 2) Clarifying when the requirement of suppliers to post prices in a county or trading area occurs.
- 3) Clarifying that wholesalers retain discretion in choosing to participate in a price promotion program offered and the prices they choose to sell their products.
- 4) Allowing suppliers to set limits rather than requiring wholesalers to participate in exact increments. This gives wholesalers more discretion and flexibility for how they choose to participate and set their prices when participating.

5) Clarifying that due to its nature as a joint action, both suppliers and wholesalers are responsible for a price promotion program that does not comply with the requirements of the proposed regulation. Both suppliers and wholesalers may have administrative actions taken against them when they are joining together in a non-compliant price promotion program. Also clarifying the exception to this joint liability if a supplier violates the section unbeknownst to the wholesaler, a wholesaler complies in good faith, and the wholesaler otherwise complies with the requirements of this section.

6) Changing the requirement that a request for reimbursement be in writing, and instead requiring the request be documented. Also, specifically allowing for automatic electronic requests.

The first proposed modifications were noticed on January 31, 2023. A 15-day public comment period for the proposed modifications concluded on February 16, 2023. At the close of this period the regulatory text was again modified to alphabetize the definitions, further clarify the intent of the proposed regulatory language, and reconcile some conflicting language due to the changes in the first modification. Specifically, these changes were as follows:

- 1) Alphabetizing the definitions of common terms and adding the term “importer.”
- 2) Further clarifying that wholesalers retain discretion in choosing to participate in a price promotion program offered by a manufacturer or importer.
- 3) Clarifying that a notice to wholesalers in affected areas of a price promotion must still be provided in addition to indicating a promotion within the beer price posting system.
- 4) Clarifying the area in which a wholesaler that participates in a manufacturer’s, or importer’s, price promotion shall adjust its posted pricing to retailers.
- 5) Clarifying that a failure to comply with requirements of beer price posting, or a price promotion as established in the section is a violation of law.

The second proposed modifications were noticed on March 28, 2023. A public comment period for the second proposed modifications concluded on April 12, 2023. No further changes were made to the proposed regulatory text following this public comment period.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE COMMENT PERIOD OF OCTOBER 28, 2022, THROUGH DECEMBER 13, 2022.

ABC received three comments during this comment period. These three comments addressed fifteen issues with the proposed regulatory text. ABC responded to each of these issues individually in the Initial Public Comment Responses attached to this regulatory package.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE COMMENT PERIOD OF JANUARY 31, 2023, THROUGH FEBRUARY 16, 2023.

ABC received one comment during this comment period. This comment addressed six issues with the proposed regulatory text. ABC responded to each of these issues individually in the First Modification Public Comment Responses attached to this regulatory package.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE COMMENT PERIOD OF MARCH 28, 2023, THROUGH APRIL 12, 2023.

ABC received one comment during this comment period. This comment addressed four issues with the proposed regulatory text. ABC responded to each of these issues individually in the Second Modification Public Comment Responses attached to this regulatory package.

UPDATED NECESSITY OF EACH SECTION IN THE PROPOSED REGULATION

§ 105 (a)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons.

§ 105 (a) (1)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in § 105 (a) (18). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (2)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in § 105 (a) (13). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (3)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in § 105 (a) (11). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (4)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in § 105 (a) (15). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (5)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in § 105 (a) (10). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (6)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in § 105 (a) (5). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (7)

The proposed subparagraph was added in the second modification to establish the definition for “importer” as used in the proposed regulation and within the online price posting system. This definition is necessary to inform ABC, licensees, and the public of the complete definition of “importer” within the proposed regulation and which persons qualify as an importer required to post prices in the online price posting system.

§ 105 (a) (8)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in § 105 (a) (2). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (9)

The first modification added additional language to emphasize that the package combinations would be determined based upon how the retailer might offer them to consumers at the retailer’s

location. This was necessary to provide clarity to the definitions of “single” or “loose” as these packages may be separated by the retailer into various configurations and not be sold to consumers in in the configuration received. The section was previously found in § 105 (a) (6) and the necessity of the rest of the original language can be found in the initial statement of reasons. This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (10)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in § 105 (a) (14). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (11)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in § 105 (a) (12). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (12)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in § 105 (a) (19). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (13)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in § 105 (a) (8). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (14)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in § 105 (a) (4). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (14) (i)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in

§ 105 (a) (4) (i). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (14) (ii)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in § 105 (a) (4) (ii). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (15)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in § 105 (a) (20). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (16)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in § 105 (a) (9). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (17)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in § 105 (a) (1). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (18)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in § 105 (a) (7). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (19)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in § 105 (a) (16). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (20)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in § 105 (a) (3). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (a) (21)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons, but the section was previously found in § 105 (a) (17). This formatting change was necessary to put all definitions in alphabetical order, so they are easier to find within the proposed format.

§ 105 (b)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons.

§ 105 (c)

This subsection clarifies the language in Business and Professions Code section 25000 when it refers to “a written schedule of selling prices,” and “a price schedule for each county.” The proposed subsection is necessary to establish that a beer manufacturer, importer, or wholesaler must only have one posted price for all sales of a particular line item in a specific county or trading area and that prices cannot be variable just for “special customers.” This subsection is necessary to inform licensees that they must note an established trading area when posting multiple prices in the same county but different trading areas. This subsection was modified to increase clarity by stating that reimbursements paid through a compliant price promotion program do not constitute selling at a price other than the single price posted. This is necessary to avoid confusion and increase clarity for the public, stakeholders, licensees, and ABC staff as to the applicability of this subsection being modified by Title 4 California Code of Regulations section 105.2.

§ 105 (d)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons.

§ 105 (e)

This subsection requires beer manufacturers, importers, and wholesalers to post prices for every county in which their customers have a licensed premises for the storage or sale of beer. This subsection clarifies the requirement to post prices pursuant to Business and Professions Code section 25000 et seq. The proposed subsection is necessary to establish how many price schedules are required from each manufacturer, importer, wholesaler, and certificate of

compliance holder. It is also necessary to foster and encourage the orderly wholesale marketing and wholesale distribution of beer in California by having the transparent posting of beer prices available throughout the state. This subsection was modified to better comply with the stated intent above based on an understanding brought out in the initial public comment period. This change was necessary to ensure licensees, stakeholders, ABC staff, and the public know when schedules of beer prices are required to be posted relate to the actual deliveries made by the manufacturer and not where their customers are located. The change was also necessary to determine which price was to be used when the sale and delivery of a product occur in two separate counties.

§ 105 (f)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons.

§ 105 (g)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons.

§ 105 (g)(1)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons.

§ 105.1 (a)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons.

§ 105.1 (b)

The proposed subsection establishes the only type of “price promotion program” allowed within the beer price posting framework, ensuring fairness while fostering and encouraging the orderly wholesale marketing and wholesale distribution of beer in California by having transparent posting of beer prices available throughout the state. The reimbursements of the manufacturer or importer in response to a contractual agreement with a wholesaler who has lowered their prices to retailers in the specific contractual way for a certain period can receive these reimbursements without changing the initial purchase price. These price promotion programs, when executed pursuant to Title 4 California Code of Regulations section 105.2, are available to all customers, regardless of location or volume, and will not inhibit the orderly wholesale marketing and wholesale distribution of beer in California. This subsection is necessary to establish what a “price promotion program” is and its broadest boundaries while remaining in compliance with the legal requirements of Business and Professions Code sections 25000 et seq. Licensees required to post prices, after learning the transparency of the online price posting program,

petitioned ABC to clarify by this regulation how price promotion programs could legally occur. This request by the industry was the initial request by which ABC began the process of promulgating this proposed regulation. This subsection was necessary to inform ABC staff, licensees, and the public what types of price promotions are allowed under the current statutory structure, ensure uniform enforcement, and aid licensees in compliance with the law.

This subsection was modified to clarify that any price promotion program created and offered by a manufacturer was not mandated upon a wholesaler for participation. This modification does not change the intent of the proposed regulation but was necessary to alleviate a clarity issue that arose in the comments received, and to ensure there was no reasonable way a person would understand the regulation as allowing a manufacturer to dictate the prices and participation in a price promotion of its wholesaler customers.

§ 105.2 (a)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons.

§ 105.2 (a) (1)

The proposed subparagraph establishes the types of offers that a beer manufacturer or importer can make to its wholesalers when creating a price promotion program. The offer must consist of either a lowest price the wholesaler must sell to retailers, or a maximum amount of reduction from the wholesaler's currently posted price for retailers. Given that beer must be sold only at the prices listed in the schedule, these authorized programs allow for the manufacturer or importer to reimburse a wholesaler for a portion of the posted price to retailers as a part of a transparent and noticed program to all wholesalers, not creating a second posted price in the system. This subparagraph is also necessary to ensure agreements do not allow any special customers to take advantage of a price promotion program in any way that is different from other customers of the beer manufacturer or importer to foster and encourage the orderly wholesale marketing and wholesale distribution of beer in California by having the transparent posting of beer prices available throughout the state.

This subsection was modified twice during the regulatory process. The first modification was adding "lowest" and "maximum" to the language allowing for partial participation by wholesalers. This change was less restrictive and as effective to implement price promotions allowing wholesalers to partially participate and receive a reimbursement from a manufacturer, which was not possible under the initially proposed language. Beyond providing this increased flexibility, this change did not change the intent or necessity of the section discussed above. ABC also modified the "shall" to "may" regarding wholesaler actions to conform to the flexibility granted in this modification. This was necessary to ensure there was no misunderstanding that a manufacturer shall not dictate the wholesaler's prices through a price

promotion program. The second modification was to clarify that these actions were done when a manufacturer creates a price promotion program. This further change was also necessary to clarify the intent that the manufacturer is creating the program, and a wholesaler is choosing when, how, and if they participate in that program.

§ 105.2 (a) (2)

The proposed subparagraph establishes the types of reimbursements a beer manufacturer or importer can offer to its wholesalers when reimbursing them at the end of a price promotion program. These must be established as a part of the offer as consideration for a wholesaler lowering their price to retailers as a part of the contractual agreement. This subparagraph is necessary to provide options for beer manufacturers and importers regarding the amount reimbursements can be set at to allow beer manufacturers and importers with options for making economically sound choices when creating a price promotion program offered to wholesalers. This subparagraph is also necessary to ensure agreements are transparent when made pursuant to Title 4 California Code of Regulations section 105.2, and do not allow any special customers to take advantage of a price promotion program in any way that is different from other customers of the beer manufacturer or importer, in order to foster and encourage the orderly wholesale marketing and wholesale distribution of beer in California by having the transparent posting of beer prices available throughout the state.

This subparagraph was modified to clarify that these actions were done when a manufacturer creates a price promotion program. This change was necessary to clarify the intent that the manufacturer is creating the program, and a wholesaler is choosing when, how, and if they participate in that program.

§ 105.2 (a) (2) (i)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons.

§ 105.2 (a) (3)

The proposed subparagraph requires a manufacturer or importer to offer a price promotion under the same terms to all wholesalers they sell beer in a county where the price promotion is running in any given period. The proposed subparagraph ensures that a manufacturer or importer cannot choose special customers for price promotions authorized by this section. The proposed subparagraph is necessary 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 as statutorily mandated by Business and Professions Code section 25006.

This subparagraph was changed to allow price promotion to be on a county or trading area basis and not on a statewide basis. This modification was necessary to allow more flexibility to a manufacturer or importer while still creating an orderly beer market as required by statute.

§ 105.2 (a) (4)

The proposed subparagraph provides that a manufacturer or importer establishing a price promotion program must make it available to all wholesalers with which they do business and have made sales in the past. The proposed subparagraph is necessary to give all of a seller's wholesale customers notice of a price promotion program. This is to prevent tied-house violations by the manufacturer or importer providing things of value to "special customers" through unique access to specific price promotions. This universal notice will ensure all a manufacturer's, or importer's, wholesale customers have an equal opportunity to partake in the program, thereby fostering and encouraging the orderly wholesale marketing and wholesale distribution of beer in California.

This subparagraph has been extensively modified through the various comment periods to accomplish the intent of the above paragraph while also being the least restrictive possible and conforming to the new online system. Each modification was necessary to increase clarity and flexibility of the notice given, while still ensuring all wholesalers in the county or trading area where a price promotion is occurring are on equal ground.

§ 105.2 (a) (4) (i)

The proposed subparagraph requires manufacturers and importers to provide the notice required under Title 4 California Code of Regulations section 105.2(a)(4) at least 15 calendar days prior to the commencement of a price promotion period. The proposed subparagraph is necessary to give sufficient time to wholesale customers to respond to the price promotion program, and that the notice given to wholesale customers is not merely nominal.

This subparagraph was removed because the time requirement for notice was changed to be less restrictive and added into the foregoing subsection for clarity.

§ 105.2 (a) (5)

The proposed subparagraph requires a manufacturer or importer to establish the product name, product size, container type, and package configuration for each price posting period it notices to its wholesaler customers pursuant to Title 4 California Code of Regulations section 105.2(a)(3). The proposed subparagraph is necessary to describe what information must be included in the price promotion program notice for the sake of transparency and for wholesalers to be able to make a fully informed decision whether to participate in any potential price promotion program offered by a manufacturer or importer. This limitation fosters and encourages the orderly wholesale marketing and wholesale distribution of beer in California.

The proposed subparagraph removed the requirement that notice be in writing but did not change the things included in the notice or that notice was required. This change was necessary to allow manufacturers and importers flexibility on how to provide notice of a price promotion to their wholesaler customers.

§ 105.2 (a) (5) (i)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons.

§ 105.2 (a) (6)

The proposed subparagraph establishes the wholesaler's contractual acceptance of the manufacturer's, or importer's, offer of a price promotion program by facilitating the requested price changes within ABC's online price posting system. The proposed subparagraph requires a participating wholesaler to participate in a price promotion program in the county or trading area where the price promotion is occurring. The proposed subparagraph is necessary for establishing what a wholesalers' responsibilities are if a wholesaler chooses to participate in a price promotion program.

This subparagraph was modified to conform with changes made to the proposed language in Title 4 California Code of regulations § 105.2 (a) (3) that allows price promotions to be on a county or trading area basis and not statewide. This provides more flexibility to manufacturers and wholesalers to set their prices competitively and participate in price promotions while still ensuring an orderly beer market.

§ 105.2 (a) (7)

The proposed subparagraph requires any wholesaler that is changing its posted price within ABC's online beer price posting system pursuant to a price promotion program to notify ABC of that reason for the change by checking the appropriate box within ABC's online beer price posting system. If a wholesaler fails to perform this requirement, the manufacturer is prohibited from reimbursing the wholesaler as a part of the price posting program because participation was not noticed to ABC, other licensees, or the public due to Title 4 California Code of regulations § 105.2 (c). The proposed subparagraph is necessary to prevent wholesalers from collecting reimbursements from a price promotion program without lowering their prices. This proposed subsection is meant to protect manufacturers and importers from fraud and a wholesaler's customers being charged more than they should within the price promotion program. This also provides ABC, licensees, and the public with notice that the price has been changed pursuant to a price promotion program and allows ABC to seek records regarding the price promotion program to ensure compliance by all parties with this section, if deemed necessary.

It was necessary to modify this subparagraph to ensure the clarity of the language in expressing the intent above. In addition, the last sentence was deleted to better clarify by adding Title 4 California Code of regulations § 105.2 (c) to delineate how failure to comply with the proposed regulation would be addressed.

§ 105.2 (a) (8)

The proposed subparagraph establishes that a wholesaler must request reimbursement from the manufacturer or importer that established the price promotion program no later than 30 calendar days following the last date of the price promotion program. The proposed subparagraph is necessary to establish a timeframe within which a wholesaler shall request reimbursement. This is, in part, to maintain good business relations between parties, and to give predictability for the seller as to by when they must provide reimbursements. In addition, this subparagraph aids ABC's enforcement efforts to ensure payments are for a price promotion program, and not some other illegal thing of value.

It was necessary to modify this subparagraph to give more flexibility to wholesalers regarding how a request for reimbursement would be made, but still requiring them to document and have available upon ABC request when the request was made.

§ 105.2 (a) (8) (i)

The proposed subparagraph was added to allow a manufacturer and wholesaler to use an automated system to request reimbursements to comply with the proposed Title 4 California Code of Regulations § 105.2 (a) (8). This subparagraph was necessary to allow the use of electronic means between a manufacturer and wholesaler to be compliant, while still requiring notice within the specified time for those who do not have the electronic means to make a required request.

§ 105.2 (a) (9)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons.

§ 105.2 (a) (10)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons.

§ 105.2 (a) (11)

The proposed paragraph establishes that if a wholesaler participates in a price promotion and relies in good faith upon reimbursement by the manufacturer or importer, but a manufacturer or importer fails to comply with all the requirements, then the civil liability of the manufacturer or importer is not removed, even if the payment of that reimbursement would be a violation of the

ABC Act or these proposed regulations. The proposed subparagraph is necessary to ensure a wholesaler acting in good faith is not financially liable for the failure of a beer manufacturer or importer to comply with the requirements of this regulation. Through retaining civil liability for manufacturers and importers, a wholesaler can file suit if needed to be reimbursed even if that price promotion program was faulty in its execution and reimbursement by the manufacturer or importer would otherwise be a violation of the ABC Act or these regulations.

It was necessary to modify this subparagraph to clarify that the wholesaler acting in good faith must have also otherwise complied with all the requirements of wholesalers within the price promotion to exercise this safe harbor. This was the intent of ABC and was raised as an issue in the comments received by ABC in the initial comment period.

§ 105.2 (b)

No changes in proposed language were made from the initial notice, and the necessity of the language can be found in the initial statement of reasons.

§ 105.2 (c)

It was necessary to add this subparagraph to clarify the portion of Title 4 California Code of regulations § 105.2 (a) (7) that was removed regarding the prohibition of all reimbursement payments made when a price promotion did not comply with all the requirements of the proposed regulation and other law.

§ 105.2 (c)(1)

It was necessary to add this subparagraph to clarify the interaction between the prohibition on reimbursement payments of Title 4 California Code of regulations § 105.2 (c) and the continued liability remaining in a faulty price promotion program in Title 4 California Code of regulations § 105.2 (a) (11).

ALTERNATIVES DETERMINATION

ABC considered three main alternatives for the inclusion of promotional pricing allowances. The most restrictive alternative excluded all promotional allowances. This would restrict manufacturers from any promotional pricing schemes preventing beer manufacturers from offering any promotional pricing to distributors. While this option would simplify the execution of this aspect of the regulation and create a fairer playing field in beer marketing, it would heavily restrict beer manufacturers. This restriction could potentially limit some economic growth in the beer industry.

The fairest alternative considered for promotional allowances by manufacturers is to authorize those allowances on a statewide basis instead of targeted counties. If a manufacturer chooses to

offer a promotion, by allowing any wholesaler statewide to participate, more wholesalers will have the opportunity to benefit from those promotions. In turn, the participating wholesalers will offer discounts to their retailers who may pass their savings on to retail customers. Because the beer manufacturer must post their promotional allowances on the online beer price posting system, this allows for greater transparency and a fair and equitable pricing scheme for all involved. This was the initial alternative presented and noticed by ABC. This alternative was deemed as too restrictive upon the industry due to the varied markets throughout the state.

The final promotional allowance alternative considered by ABC, authorizes county-by-county promotional pricing that permits beer manufacturers to target specific counties and exclude others from access to these promotional pricing opportunities. This promotional pricing scheme is the least restrictive of the options considered. While this strategy strongly favors manufacturers and importers and provides them with flexibility, it could be used to give preference to wholesale businesses in targeted counties where only certain wholesalers purchase from a manufacturer, who then are able to sell to retailers throughout the state using the price promotion that is unavailable to their competitors. This same preferential treatment can be given to large retailers by manufacturers, importers, and wholesalers working together, by allowing the retailer to purchase large quantities of beer in the county in which the beer is sold at a reduced price pursuant to the price promotion program that can then be transported throughout the state by the retailer to its other locations in counties where no such price reduction is offered, thus allowing them to purchase at lower prices than their competitors in those other counties. Potential favoritism could create a disproportionate advantage to targeted wholesalers and retailers, ultimately degrading the equitable market, which is contrary to the intent of this proposed regulation. ABC determined through the comment period that the industry has been operating under this county-by-county price promotion scheme in the past prior to ABC establishing rules governing their enforcement. ABC will need to closely monitor and act against any licensee required to post prices if the implementation of price promotions, even if authorized under Title 4 California Code of Regulations section 105.2, constitute a thing of value to a retailer, prohibited by Business and Professions Code section 25500 et sec., by targeting specific counties or trading areas as discussed above. If this becomes a common occurrence, ABC will seek to revert the language of the regulation to a more restrictive alternative in a future proposed regulatory action.

LOCAL MANDATE DETERMINATION

The proposed regulations do not impose any mandate on local agencies or school districts.

ADDITIONAL DOCUMENTS OR INFORMATION IN THE RULEMAKING FILE

ABC did not add any other documents or information to the rulemaking file.

JUSTIFICATION FOR PROPOSED REGULATION BEING EFFECTIVE ON FILING WITH THE SECRETARY OF STATE

It is important that this proposed regulation be effective upon filing with the secretary of state to ensure that the beer market cannot be manipulated, and all prices will be publicly available and subject to the same rules and scrutiny as required by law and the regulation. Currently those who are participating in the online beer price posting program have open and transparent prices that anyone can access. Those who have chosen not to participate in the online price posting program because it is not legally required and continue to file by paper with ABC until the proposed regulations are effective, are not transparent or available to their competitors in the same way and can specifically manipulate their prices in response to those posted in the online system. This has created an unintended consequence of those not using the new online system obtaining a competitive advantage over those that are in the online system. This disparity in the beer market is directly contradictory to the purpose of the statute and the proposed regulations and should be ended as soon as possible.

ABC never intended for this dual price posting system to harm licensees that adopted the online price posting system and aided in its creation, and by making these proposed regulations effective upon filing with the secretary of state will require all licensees to post prices in the online system. ABC considers the two-year time the online system has been available, the existence of this unintended disparity, and this proposed regulatory action that will require all beer manufacturers, importers, and wholesalers to post prices online, to be enough notice to hold licensees accountable for being in the system as required by the proposed regulation the date it becomes effective.