

TITLE 4. DEPARTMENT OF FOOD AND AGRICULTURE

NOTICE OF MODIFICATION TO TEXT OF PROPOSED REGULATIONS

In a Notice published August 23, 2010 the Department of Food and Agriculture proposed to amend regulations contained in Title 4, Division 9, Chapter 12, Article 2. These regulations give guidelines to sealers of weights and measures on penalties to impose when taking administrative actions authorized by Sections 12015.3 and 13302 of the Business and Professions Code.

As a result of recommendations received during the comment period, the Department believes that the changes to the proposed modified text are non-substantive changes related to the proposed modified text and that the public was adequately placed on notice that changes could result from the originally proposed regulatory action.

Notice is hereby given that any interested person may present statements or arguments on the modified text to the Division of Measurement Standards, 6790 Florin Perkins Road, Suite 100, Sacramento, CA 95828. Comments may also be submitted by facsimile (FAX) at (916) 229-3026 or by e-mail at DMS@cdfa.ca.gov. Comments may be submitted beginning March 16, 2011 and ending March 31, 2011. All written comments received by April 4, 2011, which pertain to the indicated changes will be reviewed and responded to by the Department as part of the compilation of the rulemaking file. Please limit your comments to the modifications of the original proposal which appears on the attached amendment in underlined text “underlined” for additions, and strikethrough text “~~strikethrough~~” for deletions.

Changes to the modified proposal include the following:

- Section 4800(a): Adds Section 13302 of the Business and Professions Code.
- Section 4800(b): The time frame for appeal of the Sealer’s decision is specified from the date of receipt of the decision. The Business and Professions Code reference replaces the Code of Civil Procedure reference.
- Section 4800(c): The Business and Professions Code reference replaces the Code of Civil Procedure reference.
- Section 4800(d): Clarifies that the final decision is that of the sealer.
- Section 4800(e): Adds Section 13302 of the Business and Professions Code.
- Section 4801: Changes the title of this section from “Admission” to “Administration”.
- Section 4802(a)(1): Changes “Serious” to “Category A” and amends the definition to include actual monetary loss and removes arising out of two or more visits.

- Section 4802(a)(2): Changes “Moderate” to “Category B” and removes arising out of two or more visits.
- Sections 4802(a)(3): Changes “Minor” to “Category C” and amends the definition to replace “minimal effect” with “typically less egregious effect.”
- Section 4802(b) – Table A: Changes are made to various sections to reflect changes caused by Business and Professions Code section changes.

These documents, in addition to the rulemaking file which contains all written comments on the original proposal, are available for public inspection at the Division between the hours of 8:00 a.m. and 4:30 p.m. Inquires about this action may be directed to:

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DEPARTMENT OF FOOD AND AGRICULTURE
DIVISION OF MEASUREMENT STANDARDS



3/10/2011
Date

Kristin J. Macey, Director

**DEPARTMENT OF FOOD AND AGRICULTURE
DIVISION OF MEASUREMENT STANDARDS**

The Department has illustrated changes to the original text in the following manner:

Proposed additions are underlined

Proposed deletions are ~~strikethrough~~

**Article 2. Weights and Measures
Penalty Guidelines**

4800. Notice of Proposed Action and Disposition.

- (a) When a county sealer takes administrative action, the person charged with a violation(s) shall be notified of the proposed penalty(s) and the right to request a hearing. The notification shall also include the right to appeal to the Secretary pursuant to the procedures provided in Section 12015.3(c) or Section 13302 as appropriate of the Business and Professions Code.
- (b) When the State Sealer takes administrative action, the person charged with the violation(s) shall be notified of the proposed penalty(s), and the right to request a hearing. The notification shall also include the right to have the decision reviewed, within 30 days of receiving the sealer's date of the decision, pursuant to Section 12015.3(c) of the Business and Professions Code. ~~Section 1094.5 of the Code of Civil Procedure.~~
- (c) When a respondent in an administrative action agrees to stipulate to the notice of proposed action, a signed stipulation with the payment of the proposed administrative penalty shall be returned to the county/ State Sealer within 45 days of the postmark of the notice of proposed action. If the stipulation and payment of the proposed administrative penalty are not received within 45 days, the county/State Sealer may file a certified copy of a final decision that directs the payment of a civil penalty with the clerk of the superior court of any county, pursuant to Section 12015.3(d) of Business and Professions Code. ~~Judgment shall be entered immediately by the clerk in conformity with the decision. No fees shall be charged by the clerk of the superior court for the performance of any official service required in connection with the entry of judgment pursuant to this section.~~
- (d) If an administrative hearing is requested, a ~~final~~ proposed decision and order shall be made by a hearing officer within 60 days of the conclusion of the hearing. The final decision and order shall be made by the sealer. This order will be mailed to the respondent. Any penalty imposed shall be due and payable within 45 days of the postmark of such order. If a respondent fails to pay the penalty and fails to timely file a written appeal pursuant to Business and Professions Code Section 12015.3(c) or 13302(c), the sealer may take action as provided in Business and Professions Code Sections 12015.3(d) or 13302(d). Action may be taken to collect the penalty and the collection costs actually incurred.
- (e) In the event that a respondent fails to comply with the provisions of Business and Professions Code Sections 12015.3 or 13302, the sealer may take the action proposed without a hearing. This action may include collection of the penalty and the collection costs actually incurred.

NOTE: Authority cited: Sections 12015.3(b) and 13302(b), Business and Professions Code. Reference: Sections 12015.3(b) and 13302(b), Business and Professions Code.

4801. Administration. Admission.

- (a) When a county sealer initiates an action, the sealer shall send a copy of the notice of proposed action to the State Sealer at the time of notice to the person charged with the violation(s). Additionally, the county sealer shall inform the State Sealer of violations for which penalties have been assessed. On at least an annual basis, the State Sealer shall inform county sealers throughout the State of violations for which penalties have been assessed.
- (b) When the State initiates the action, the State Sealer shall send a copy of the notice of proposed action to the county sealer involved. This notice shall also be sent, at the time of notice, to the person charged with the violation(s). The State Sealer shall also inform the county sealer in which the action has been initiated of violations for which penalties have been assessed.

NOTE: Authority cited: Sections 12027 ~~and 12028~~, Business and Professions Code. Reference: Sections 12027 ~~and 12028~~, Business and Professions Code.

4802. Penalty Guidelines. In applying Sections 12015.3 or 13302 of the Business and Professions Code, the sealer shall use the provisions of this section to determine the types of violations for which penalties may be assessed and the amounts of the penalties. Nothing in this article prohibits a sealer from seeking other relief through the criminal or civil court process in lieu of administrative action.

- (a) For the purposes of this article, violation types are designated as “Category A” “Category B” and “Category C” ~~“Serious,” “Moderate,” and “Minor.”~~
- (1) ~~“Serious”~~ “Category A” violations are violations in which there are actual, or there is the potential for actual false, deceptive, or misleading business practices; or significant monetary loss to consumers; or repeated violations of subparagraph (2), ~~arising out of two or more visits~~, that occurred within a two-year period at the same location and which resulted in an action and subsequent penalty. Included in this category are certain violations subject to prior legislated fine levels pursuant to Business and Professions Code Section 12729. The appropriate penalty range for these violations is \$400-\$1,000; however, such penalty shall not exceed the maximum criminal fine specified in the charging section.
 - (2) ~~“Moderate”~~ “Category B” violations are violations in which there is a reasonable potential for intermediate level of consumer or competitive harm; or repeated violations of subparagraph (3), ~~arising out of two or more visits~~, that occurred within a two-year period at the same location and which resulted in an action and subsequent penalty. The appropriate penalty range for these violations is \$150-\$600; however, such penalty shall not exceed the maximum criminal fine specified in the charging section.
 - (3) ~~“Minor”~~ “Category C” violations are primarily violations that would typically have a less egregious effect on consumers or equitable ~~have minimal effect on the accuracy of the transaction or the level of competition in the marketplace~~. Included in this category are other violations included in Business and Professions Code, Division 5 that are not included in Table A. The appropriate penalty range for these violations is \$50-\$250; however, such penalty shall not exceed the maximum criminal fine specified in the charging section.
- (b) Table A shall be used to establish the level of severity of a particular violation and its corresponding penalty range. Except where specific violation parameters are provided, the violation column in Table A is an abbreviated description of the corresponding section in the California Business and Professions Code, Division 5, Weights and Measures.

1 = Serious Category A
(\$400 to \$1,000)

2 = Moderate Category B
(\$150 to \$600)

3 = Minor Category C
(\$50 to \$250)

TABLE A

B&P §	VIOLATION	TYPE		
		1	2	3
<i>12016</i>	Hindering or obstructing sealer.	1		
<i>12018</i>	<u>Neglect or Refusal to exhibit weighing or measuring device for inspection</u>	1		
<i>12021</i>	Marking or stamping false or short weight or measure on containers: Taking false tare (knowingly).	1		
<i>12022.5</i>	Fresh meats or roasts: Advertising/selling on basis of net weight, not including added fat.		2	

B&P §	VIOLATION	TYPE		
12023	Selling according to gross weight or measure.		2	
12024 <i>(Prepacked product – Labeled and sold, but not packed on the same premises)</i>	Selling in less quantity than represented: Prepackaged – Labeled and sold, but not packed on the same premises.			
	- Single Lot:			
	Overcharge less than 50¢.			3
	Overcharge 50¢ to \$2.00.		2	
	Overcharge more than \$2.00.	1		
	- Total of All Lots:			
	Overcharge less than \$2.00.			3
	Overcharge \$2.00 to \$10.00.		2	
	Overcharge more than \$10.00.	1		
Short measure bulk wood deliveries.	1			
12024 <i>(Prepacked product – Packed, labeled, and sold on the same premises)</i>	Selling in less quantity than represented (per BPC §12024.3 criteria) Prepackaged – Packed, labeled, and sold on the same premises			
	- Single Lot (unknowingly):			
	Overcharge of \$2.00 or less			3
	Overcharge more than \$2.00	1		
	- Total of Multiple Lots (unknowingly):			
	Overcharge of less than \$2.00			3
	Overcharge \$2.00 to \$10.00		2	
	Overcharge more than \$10.00	1		
12024 <i>(Wholesale or retail lots – not packed or labeled by retailer)</i>	Selling in less quantity than represented: Prepacked – Wholesale or retail lots – Not packed or labeled by retailer			
	Overcharge not more than \$50.00		2	
	Overcharge more than \$50.00	1		
12024.1	Misrepresenting charge for service rendered (willfully).	1		
	Overcharge less than 5%		2	
	Overcharge 5% or more	1		
12024.2	Unlawful computation of value.			

(A) Test Purchase of Commodities by Weight, Measure, or Count, Determined at Time of Sale: (Applies to any number of items purchased or inspected for pricing integrity)			
- Overcharged on One Item: Overcharge equals 15¢ or more and is 5% or more of correct value for that item.		2	
- Overcharged on Two or More Items: Total Overcharge equals 15¢ or more and is 3% or more of correct total value for those items.	1		
(B) Scanning/Automated and Other Check stand Inspections.			
- Overcharged on fewer than 10% of items purchased or inspected for pricing integrity and <u>or</u> total algebraic overcharge is less than 2% of correct total price [†] <u>of all items purchased or inspected.</u>			3
- Overcharged on 10% or more but on fewer than 12% of items purchased or inspected for pricing integrity.		2	
- Total algebraic overcharge 2% or more but less than 4% of correct total price [†] <u>of all items purchased or inspected.</u>		2	
- Overcharged on 12% or more of items purchased or inspected for pricing integrity.	1		
- Total algebraic overcharge 4% or more of the correct total price [†] <u>of all items purchased or inspected.</u>	1		
<u>Test Sample Size of 10 or Fewer Items</u> (“Initial Standard Inspections” as defined by BPC §13350 or “Special Inspections” as defined by BPC §13356);			
- <u>Overcharge on any item does not exceed 8% of the correct price of that item</u>			3
- <u>Overcharge on any item is greater than 8% but does not exceed 15% of the correct price of that item</u>		2	
- <u>Overcharge on any item is greater than 15% of the correct price of that item</u>	1		

[†]Algebraic overcharge is the total of the overcharges in a purchase of multiple items, less the total of the undercharges

B&P §	VIOLATION	TYPE		
12024.3	Selling prepackaged commodities in less quantity than represented (packed and labeled on premises):			
	— Single Lot (unknowingly):			
	—— Overcharge of \$2.00 or less.			3
	—— Overcharge more than \$2.00.	1		
	— Total of All Lots (unknowingly):			
	Overcharge less than \$2.00.			3
	Overcharge \$2.00 to \$10.00.		2	
	Overcharge more than \$10.00.	1		
12024.5	Sale of fowl, meat, or fish other than by weight; ready-to-eat items.		2	
12024.55	Door-to-door salespersons; failure to provide price <u>per pound</u> statements on packages.		2	
12024.6	Prohibition of advertising intended to entice customer into transaction other than represented.	1		
12024.7	Failure to provide: A statement of weight and type of cuts of meat sold; itemized statement showing quantity of fruits, vegetables, and other food products delivered in connection with meat sale.		2	
12024.9	Failure to provide a statement of weights supplied to consumer upon direct sale of meat on basis of primal cuts or carcass weight.		2	
12024.10	Failure to retain a document stating weight and cut of meat sold.		2	
12025	Refusal to exhibit commodity being sold at given weight or quantity.	1		
12025.5	Identification of commodity or container ordered “off sale” under §§ 12211 or 12607.	1		
12107	Violation of tolerances and specifications for commercial weighing and measuring apparatus.			3
12107.1	Establishment of commodity standards, weights, measures, and counts: Procedure: Unlawful sales.			3
12500.5	Approval and certification of commercial instruments: Sale or use for commercial purposes of non-approved instruments.		2	
12507	Repair of “out of order” instruments: Time: Disuse: Effect of refusal or neglect to repair: Disposition of seized instruments.	1		
12508	Removal or obliteration of sealer's tag or device.	1		
12509	Incorrect device into service		2	
12510(a)	Presumption of intent to violate law:			
	(1) Using an incorrect device.		2	
	(2) Sells commercial device not sealed within last year.			3
	(3) Using a condemned device contrary to law.	1		
	(4) Uses for commercial purposes an unsealed, incorrect device not kept at fixed location.		2	

VIOLATION		TYPE		
	(5) Used to falsify.	1		
	(6) Location of retail scale.		<u>2</u>	<u>3</u>
	(7) False computation of price.		2	
	(8) Return to zero (knowingly).	1		
	(9) Deliver for test.		2	
	(10) Sells, uses, rents, loans incorrect device.		2	
12512	Purchase of less than true quantity.	1		
12515	(a) Repair, sale, or installation of instrument: Failure to notify county sealer: When notification not required		2	
12516	<u>Location of scale when auctioning livestock</u>		<u>2</u>	
12532	<u>(a) Engaging in business as a service agency device repairman or maintaining device repair service without registration when not registered with the Secretary of Food and Agriculture</u>		<u>2</u>	
12533	<u>(a) (1) Not possessing or having available necessary standards and testing equipment</u>			<u>3</u>
	<u>(2) Standards and testing equipment shall meet specifications and tolerances in NIST 105 Series Handbooks</u>			<u>3</u>
	<u>(b) Ensure every service agent has a current service agent license</u>		<u>2</u>	
	<u>(c) Possess a current copy of Title 4 of the California Code of Regulations, Field Reference Manual</u>			<u>3</u>
12534	<u>Use suitable and sufficient standards, permanently and uniquely identified and have a current certificate of accuracy</u>			<u>3</u>
12536	Enrollment of persons who adjust, repair, or install commercial weighing or measuring devices.			<u>3</u>
12540	<u>Service agent examination and licensing</u>		<u>2</u>	
12548	Registrant's identification of work on device: Adhesive tag or label.			<u>3</u>
12602	Distributing commodity contained in nonconforming package: Exception for wholesale or retail distributors not engaged in packaging or labeling.		2	
12603	Regulations to be established by Secretary: Required provisions of regulations.			
	- Identity of commodity and/or name and place of business of packer/distributor/manufacture.		2	
	- Net quantity of contents not on container or label.		2	

B&P §	VIOLATION	TYPE		
<i>12605</i>	Prohibition of distribution of packaged commodity containing qualifying words in separate statement of net quantity of contents: Supplemental statements: Prohibited qualifications.		2	
<i>12606</i>	<u>Containers not to be constructed or filled as to facilitate fraud</u>		<u>2</u>	
<i>12606.2</i>	<u>Misleading food containers, prohibited</u>		<u>2</u>	
<i>12611</i>	Selling commodity in nonconforming container or with nonconforming label: Required information not prominently displayed.		2	
<i>12703</i>	<u>Weighmaster License</u> , fee and/or penalty required.		2	
<i>12704</i>	<u>Weighmaster License</u> fee.		2	
<i>12705</i>	Change in legal entity of <u>weighmaster</u> licensee.		2	
<i>12707</i>	<u>Weighmaster License</u> renewal; failure to pay fee when due.		2	
<i>12710</i>	Weighmasters responsible for acts of deputy	1		
<i>12710.5</i>	(b) Failure to notify of replacement/deletion of deputy <u>weighmaster</u> .			3
<i>12711</i>	When weighmaster certificate to be issued.		2	
<i>12712</i>	Issuance of certificate by one other than weighmaster making determination; transfer of weight or measure to other certificate.			
	(a) Weighmaster <u>€</u> certificates issued based on information from another <u>weighmaster</u> party.		2	
	(b) Transfer of weight from one certificate to another.		2	
<i>12713</i>	(a) Responsibility for completeness of <u>weighmaster</u> certificate.		2	
	(b) Omitted information on <u>weighmaster</u> certificate.		2	
<i>12714</i>	<u>Weighmaster €</u> certificate legend/principal licensee name.			3
<i>12714.5</i>	Information on certificate to be legible; consecutive numbering.			3
<i>12715</i>	Contents of <u>weighmaster</u> certificate.			3
<i>12716</i>	<u>Weighmaster R</u> recordkeeping; inspection.		2	
<i>12716.5</i>	Correction of errors (<u>weighmaster</u> certificate).		2	
<i>12717</i>	Approval, testing, and sealing of weighing or measuring device.		2	
<i>12718</i>	(a) Requests a person to weigh, measure, or count falsely.	1		
	(b) Requests a false or incorrect weighmaster certificate.	1		
	(c) Furnishes or gives false information to a weighmaster.	1		
	(d) Knowingly presents for payment a false weighmaster certificate.	1		

B&P §	VIOLATION	TYPE		
<i>12718</i>	(e) Knowingly issues a false weighmaster certificate.	1		
	(f) Alters a weighmaster certificate resulting in a false weight, measure, or count.	1		
	(g) Possesses blank weighmaster certificates if not licensed.	1		
	(h) Issues a <u>weighmaster</u> certificate with alterations or omissions of gross, net, tare weights, net only weights, or measurements.	1		
<i>12719</i>	Change of net contents after recordation of weight.	1		
<i>12720</i>	Alteration of tare weight of vehicle prior to determining net weight of commodity.	1		
<i>12721</i>	Weighing for purposes of certification.	1		
<i>12722</i>	Use of predetermined tare weight; exemption for specified rock products.			
	(a) Violation of tare regulations.	1		
	(b) Rock, sand, and gravel predetermined tares.	1		
<i>12724</i>	Determination of gross and tare weights <u>by a weighmaster</u> ; requirement that all persons be off scale and vehicle; exceptions.		2	
<i>12725</i>	Conditions under which gross weight not to be certified.		2	
<i>12727</i>	Verification of weight, measure, or count.	1		
<i>12728</i>	Requirement that entire vehicle rest on scale; exemption for seed cotton, multiple rail cars containing grain/grain products.		2	
<i>12729 (c)</i>	Tomato cab card tare weight. (See also B&P Section 12729)	1	2	
<i>12730</i>	Farm products.		2	
<i>12731</i>	Livestock.		2	
<i>12732</i>	Adjustments to load; commodity weights determined at other than site where vehicle was loaded.		2	
<i>12733</i>	Scrap metal and salvage materials.		2	
<i>12734</i>	Squid or anchovy.		2	
<u><i>13300</i></u>	<u>Customer display and indicator requirements</u>		<u>2</u>	
<i>13411</i>	Sale of petroleum products contingent upon additional purchase.		2	
<i>13413</i>	Deceptive, false, or misleading statements (Chapter 14) Petroleum Products.	1		

B&P §	VIOLATION	TYPE		
<i>13420</i> <i>13421</i> <i>13422</i>	Operators of petroleum dealerships required to make monthly update of advertising medium indicating hours of sale and turn off lights when not open for business.			3
<i>13441</i>	Sale or delivery of nonstandard product.	1		
<i>13442</i>	Sale or delivery of nonstandard product as motor fuel to be labeled "not gasoline".	1		
<i>13451</i>	Sale or delivery of nonstandard diesel, kerosene, or fuel oil.	1		
<i>13460</i> <i>13461</i>	Sale of engine or gear oil which fails to meet specifications.	1		
<i>13470</i>	Display of price sign on dispensing apparatus: Contents of sign.		2	
<i>13470.5</i>	Gallon-to-liter conversion table.		2	
<i>13472</i>	Dual pricing.		2	
<i>13480</i>	Sale, etc., of petroleum products from unlabeled containers, etc: Viscosity rating: Containers with net content of gallon or less.			3
	(d) Sale of unlabeled or mislabeled gasoline containing alcohol.		2	
<i>13482</i>	Sale of lubricant without SAE/API service classification.			3
<i>13486</i>	Filling of tanks with product other than that identified on container label.	1		
<i>13500</i>	Labeling:			
	(a) No product and/or grade on delivery vehicle.			3
<i>13501</i>	Commingling of products.	1		
<i>13502</i> <i>13486</i>	Deliveries into storage tanks.	1		
<i>13520</i>	Temperature-corrected gallonage.		2	
<i>13530</i>	Application of article; display of price per liter or per gallon.			
	(a) Advertising a price that is not identical with the dispenser.		2	
<i>13531</i>	Display requirements; exemption of specified geographic areas; violations.			
	(a) Failure to advertise motor fuel prices.		2	

B&P §	VIOLATION	TYPE		
13532	Motor fuel; contents of display:			
	(a) Advertising price signs.			3
	(b) Violation of discount advertising.			3
	(c) Advertising lower price only. (See also § 13413)		2	
	(d) Failure to advertise price in same form.		2	
13534	Additional advertising matter.			3
13562	Change of designation under which product purchased: Authorization.		2	
13568	Written authority; furnishing copies.		2	
13570	Percentage of alcohol to be stated on normal business records: Certification of antiknock index.		2	
13571	Not providing documentation when requested.		2	
13593	Refusal to permit sampling.	1		
13595	Selling product which does not meet specifications. (See also §§ 13413, 13441, 13451)	1		
	Selling from unlabeled or mislabeled containers. (See also §§ 13413, 13480)			3
13600	Unauthorized breaking, etc., of seal.	1		
13740	Sale or distribution of adulterated or mislabeled product.	1		
13741	Deceptive, false, misleading statement (Chapter 15) Automotive Products	1		

NOTE: Authority cited: Sections 12015.3(a), 13302(a), and ~~12027~~ ~~12028~~, Business and Professions Code.
Reference: Sections 12015.3(a), 13302(a), and ~~12027~~ ~~12028~~, Business and Professions Code.