

**STATE OF NEW JERSEY  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF ALCOHOLIC BEVERAGE CONTROL**

IN RE ANTI-COMPETITIVE AND/OR )  
POTENTIALLY DISCRIMINATORY ) SPECIAL RULING  
PRACTICES IN WHOLESALE ALCOHOLIC )  
BEVERAGE INDUSTRY )  
\_\_\_\_\_ )

BY THE DIRECTOR:

As Director of the Division of Alcoholic Beverage Control, I am duty bound “to supervise the manufacture, distribution and sale of alcoholic beverages in such a manner as to fulfill the public policy and legislative purpose” of the Alcoholic Beverage Control Act, N.J.S.A. 33:1-1, *et seq* (“Act”). The legislative policy and legislative purpose as set forth in N.J.S.A. 33:1-3.1 requires the Division to:

- (1) protect the interests of consumers against fraud and misleading practices in the sale of alcoholic beverages. [N.J.S.A. 33:1-3.1b(4)];
- (2) provide a framework for the alcoholic beverage industry that recognizes and encourages the beneficial aspects of competition [N.J.S.A. 33:1-3.1b(6)];
- (3) maintain trade stability [N.J.S.A. 33:1-3.1b(7)];
- (4) maintain a three-tier (manufacturer, wholesaler, retailer) distribution system [N.J.S.A. 33:1-3.1b(8)] and;
- (5) prohibit discrimination in the sale of alcoholic beverages to retail licensees [N.J.S.A. 33:1-3.1b(10)]

Consistent with the Division's authority to promulgate regulations to implement the Act, an entire subchapter of the Division's regulations addresses discriminatory sales. [See N.J.S.A. 33:1-12.38 and N.J.S.A. 33:1-39] The Division's regulations are intended "to promote competition while preserving an orderly marketplace, including, but not limited to, the prevention of destructive price wars..." N.J.A.C. 13:2-24.1(a).

The Division has identified specific practices within New Jersey's wholesale liquor industry which fall within the ambit of N.J.A.C. 13:2-24 *et seq.* and, if left unchecked, could be used by wholesalers as tools to manipulate and circumvent the Act's and regulations' anti-discrimination and trade practice provisions. These practices include (A) "blind posting," (B) closing-out of products below cost, (C) wholesaler warehousing of product purchased by retailers, commonly referred to as "bill and hold," (D) allocation of limited product to retail consumers and (E) "channel pricing." Due to the potential such practices hold for discriminatory manipulation of the marketplace, it is necessary for me to clarify that the foregoing practices, when engaged in outside of the parameters of this ruling, are violations of the applicable statute and regulations. This Special Ruling is intended to address how each of the practices set forth above are, and have been, viewed by the Division:

A. "BLIND POSTING"

Every licensee privileged to sell alcoholic beverages to retailers in New Jersey is required to file and maintain a "Current Price List." ("CPL"). N.J.A.C. 13:2-24.6(a)(3). Among the information that must be included in the CPL are the prices, inclusive of per unit costs, all discounts, allowances and differentials and other terms of sale, at which all products are offered for sale to retailers during the calendar month following the CPL filing. N.J.A.C. 13:2-

24.6(a)(3)(1). The CPL must be filed with the Division no later than the 15<sup>th</sup> day of each calendar month and is effective the first day of the following calendar month and remains effective for that entire month. N.J.A.C. 13:2-24.6(a)(4). Wholesalers must adhere to the prices listed in their CPLs and must sell products listed therein to retailers on a non-discriminatory basis. N.J.S.A. 33:1-89.

In the past, licensees subject to N.J.A.C. 13:2-24.6(a) have engaged in a sales practice known as “blind posting.” This involves a licensee producing the above-referenced information in a manner that does not conspicuously identify a product’s required information so as to be readily accessible to the interested community of retailers. An example of this practice is the posting of multiple prices for a specific product in the CPL but only listing the highest of these prices in trade journals distributed to retailers. Retailers who reasonably rely upon the trade journals to obtain the pricing information upon which their purchasing decisions are based, would not be aware of a potentially lower price for the products they seek to purchase from the wholesaler. Wholesalers that “blind post” increase the possibility and/or likelihood of discriminatory sales in violation of Subchapter 24 of the Division’s regulations since the wholesalers could be selective in determining which retail customers will have the opportunity to purchase the product at the lower price.

I FIND that the practice of blind posting and resulting discriminatory sales practices are inconsistent with and detrimental to the Act’s goals of competitive pricing, preserving an orderly marketplace, avoidance of destructive price wars, and the practices that foster moderate and responsible use and consumption of alcoholic beverages. Blind posting weakens the Division’s ability to enforce these legislative mandates. Moreover, the drain on the Division’s limited

investigative resources and efforts that would be needed to uncover the discriminatory sale(s) would be highly disruptive to the Division's operations as well as the suppliers, wholesalers, and retailers in the industry.

Therefore, in order to discourage future instances of blind posting or blind posts, the act of multiple filings in the CPL in such a manner so that different prices for the same product are not readily accessible to either the Division or all retail licensees is a violation of N.J.A.C. 13:2-24.6(a). If the Division becomes aware of a violation of N.J.A.C. 13:2-24.6(a) by the placement of a blind posting or conduct similar to that outlined above, the offending wholesaler will be notified and have 10 days to provide the Division with an explanation for the violation. If there is no satisfactory explanation provided, the wholesaler will be charged pursuant to N.J.S.A. 33:1-19.1 et seq. In addition to any penalties resulting from charges related to CPL and discrimination violations, the Division may seek as a penalty that sales of the product at the center of the violation may be suspended for up to 30 days for each violation, during which time the wholesaler will be prohibited from any sale, service, or delivery of the product to any retailer in New Jersey.

#### B. CLOSE OUT OF PRODUCTS BY SELLING BELOW COST

No wholesaler, distributor, or other licensee, privileged to sell to retailers in the State of New Jersey, is permitted to sell or offer to sell alcoholic beverages at a price below "cost."

N.J.A.C. 13:2-24.8(a). "Cost" is defined as the actual proportionate invoice price and freight charge to a distributor or wholesaler... of any given container of an alcoholic beverage product,

plus applicable State and Federal taxes. The actual invoice price shall be determined by the ‘last-in-first-out’ method applying generally accepted accounting principles.” N.J.A.C. 13:2-24.8(b).

An exception to the sale below cost prohibition is a bona fide “close out” sale that has been approved by the Director. N.J.A.C. 13:2-24.8(a). The regulations require a wholesaler intent on closing out a brand registered product or a specific vintage of a product to petition the Division for a permit to sell the product below cost. The cost of the permit is a dollar per case that is being sold below cost, with a minimum fee of \$20.00. Wholesalers typically apply for close out permits for a product that has not sold in sufficient quantities, in order to make space for a new vintage, or where a manufacturer has instituted a change in its labeling. Once a product has been “closed-out” it may not be re-acquired by the wholesaler for one year after the product on hand is exhausted. Inquiries made by the Division have revealed that wholesalers have taken steps to entice sales of these products to specific retailers prior to a petition being filed to close out the product below cost. This method is known as “steering” and directs the product to favored retailers at prices discounted below what the market would otherwise bear without the permit. This practice could be used to circumvent the anti-discrimination regulations and has the potential to be used beyond the scope for which the permit was intended to be used.

I FIND that the use of the close out permit process for anything other than a legitimate close out, i.e., end of vintage, label change, product otherwise going “out of date,” etc. combined with the distribution of the closed-out product to a single or a small number of retailers, may be a violation of the anti-discrimination provisions set forth at N.J.A.C. 13:2-24, et seq. Where such practices come to the attention of the Division, they will be referred to the Enforcement Bureau for appropriate enforcement action. In addition, the close-out permit application will be modified

to require the wholesaler to set forth in writing its procedure for allocation of close out products, and to demonstrate that it is acting in compliance with the non-discrimination requirements of the Act and regulations.

### C. WHOLESALER WAREHOUSING OF PRODUCTS FOR RETAILERS

Within the State, wholesalers have offered to “warehouse” product for its retail customers. This practice is also known as “bill and hold.” Specifically, a wholesaler will sell product to a retailer and not deliver all of that order to the retailer’s licensed premises. Rather, it will keep a portion of the paid-for product at its place of business (for which a public warehouse license has been issued) and allow the retailer to receive delivery at its discretion. A retailer will partake in this practice in order to purchase more of a product at what it perceives a good price even if it does not have the space to hold this product. It is alleged that wholesalers often will agree to hold the product for an unspecified period of time before charging a fee for storage of the product, or may never charge a fee.

This practice has the potential of undermining trade stability and could allow for discrimination in terms of sales. For example, a wholesaler, in order to compete for business could allow a larger customer to store more of a product at its facilities and for longer periods of time than it would for its smaller accounts. A retailer may also want to purchase larger quantities than it can store so as to take advantage of Retail Incentive Programs (“RIP”) that require larger orders. This practice can also be used to manipulate the sale of close-out products.

This practice has not been considered a “Term of Sale” by the industry and has not been disclosed on the CPL pursuant to N.J.A.C. 13:2-24.6 (a)(3). It is the Division’s determination

that the practice of holding product for later delivery, as well as the charges for same, must be disclosed on the CPL as a term of sale. It also is the long-standing view of the Division that storage or warehousing services must be equally available to all retailers, at equivalent prices.

Division inquiries have also revealed that in many cases wholesalers do not segregate the “stored” product being held for its retailer customers from its own product. This has resulted, due to fluctuating inventory and supplier deliveries, in a “virtual” warehouse of product where a wholesaler may not have physical custody of a product that has already been sold to a retailer. Among other concerns, such a practice could result in violation of N.J.A.C. 13:2-25.1, which prohibits deliveries to a licensed retailer unless it is from inventory in a warehouse located in New Jersey (inventory is deemed to include alcoholic beverages stored in the warehouse for at least 24 continuous hours).

At other times, the Division has found that, due to this virtual warehouse, product from a given vintage may be “sold out” even though a retailer has been “storing” its purchased product from that vintage with the wholesaler. The subsequent vintage is then substituted for the original vintage, with no change in price or terms, regardless of the actual price of the subsequent vintage.

To limit the potential abuses that could arise from this practice, I FIND, consistent with the Divisions existing policy, that any and all “warehousing” or “bill and hold” done by wholesalers for retail licensees must comply with the following conditions:

- 1) The availability of warehousing by a wholesaler and all associated costs to be charged to the retailer must be disclosed as a term of sale on the CPL and made available on equal terms to all retailers;
- 2) The wholesaler shall document and provide to the retailer, at the time of original invoicing, in addition to the requirements of N.J.A.C. 13:2-20.3, 13:2-24.4, 13:2-39.1 and 13:2-23.32, the full amount and price of the product purchased, and

designate how much product is to be delivered and how much is being stored. It shall designate the cost of storage and specify that a separate invoice for storage will issue.

- 3) A retailer on COD may not participate in bill and hold until all outstanding charges have been paid and the retailer has been removed from COD pursuant to N.J.A.C. 13:2-24.4. Further, all charges for bill and hold storage must be invoiced separately from the purchase transaction and paid on a 30 day basis. This is to be considered an extension of credit, and as such the provisions of N.J.A.C. 13:2-24.4 shall apply in the event a retailer does not timely satisfy its "bill and hold" obligation, including the placing of the retailer on "COD".
- 4) Wholesale licensees who extend "bill and hold" must charge all retailers the same amount, and in order to avoid illegal financial ties between retailers and wholesalers, that amount should be within a range of 5% of the average public warehouse price for storage in the geographic area of the warehouse, rounded to the nearest cent. Wholesalers should review public warehouse charges at least quarterly, and must publish this rate in their CPL. (Currently, for example, public warehouses charge approximately 32 cents per month per case for storage, meaning that wholesalers may charge between 30 and 34 cents per case per month)
- 5) Storage of product under "bill and hold" defeats one of the primary purposes of the "close out" permit. Therefore, "bill and hold" shall not be available on close out products.
- 6) While I am not requiring segregation of each retailer's product *at this time*, wholesale licensees who offer "bill and hold" to retail licensees must maintain the retailer's physical product on hand, at all times, and may not substitute one product for another. However, with regard to vintages, one vintage may be substituted for another ONLY in the event of a *bona fide* warehouse picking or inventory control error, AND if the price between vintages as filed in the CPL remains identical.
- 7) In order to limit the use of this practice that has such a potential for abuse, all product stored on behalf of a retailer must be delivered to the retailer within 75 days of the date of the initial sales invoice. Further, each retailer who wishes to take advantage of "bill and hold" with a wholesaler must place on file, with the wholesaler, a written certification identifying the location for the product(s) to be delivered on the 76<sup>th</sup> day. Failure of the retailer to accept delivery on the 76<sup>th</sup> (or first business day following the 75<sup>th</sup> day) and/or failure of the wholesaler to deliver the product(s) may constitute a violation of N.J.A.C. 13:2-24.1 and 13:2-24.4 in that it is discriminatory, and a violation of the terms of sale. Further, the failure to accept delivery of the product may constitute a violation of the terms of



sale, which will require the wholesaler to comply with the provisions of N.J.A.C. 13:2-24.4 et seq and placing the retailer on "COD" status. Such a failure may be treated by the Division as a violation of the foregoing provisions, the penalty for which may include, in addition to a suspension of the license, a prohibition upon participating in "bill and hold" in the future.

- 8) Wholesalers who engage in the practice of bill and hold shall submit a report to the Division at least quarterly setting forth the retail participants in bill and hold and the number and amount of time product has been stored pursuant to this provision.
- 9) This provision of the Special Ruling shall take effect on the first day of January, 2016, at which time all product then in storage with wholesalers shall begin at "Day 0" of the 75 day time frame.

There are a multitude of public warehouses licensed by the Division that could store product on behalf of retailers. Further, N.J.A.C. 13:2-23.21 permits retailers to petition the Director for a permit allowing the storage of alcoholic beverages in other than the licensed premises or a public warehouse. Therefore, nothing prevents a retailer from purchasing more than a 75 day supply of product and storing the excess product in their licensed premises, with a public warehouse, or in a third location pursuant to a special permit. In fact, some retailers currently maintain their own warehouses. The foregoing provisions are intended to eliminate the potential discriminatory practice and potential tied house violations that wholesalers and retailers currently face. These conditions, while implementing the Division's existing policy may be further evaluated and be subject to future rulemaking.

#### D. ALLOCATION OF LIMITED AVAILABILITY PRODUCT

A recurring issue brought to the Division's attention by retailers is the allocation of limited availability product, whether a certain vintage of wine or a highly regarded spirit. Due to demand, a wholesaler in New Jersey may only receive, for example, 5 cases of a particular

product, and have most of the 9,000 retail licensees in the state seeking to order that product. Alternatively, the wholesaler may have 2,500 cases of a product for which he has sought a legitimate close-out permit, and the pricing is attractive enough to drive up demand beyond supply for those 2,500 cases.

The Division finds that there are legitimate business purposes as to why a wholesaler may sell limited availability products to a single retailer or a small group of retailers. For example, a wine vintage may be near the end of its shelf life, and only certain large retailers may be able to sell the volume of product necessary in a timely manner to protect the brand's integrity. However, the method by which a wholesaler determines to allocate products under those circumstances could run afoul of the anti-discrimination regulation, N.J.A.C. 13:2-24.1 et seq.

I FIND that there is no need for the Division to mandate a method by which allocation of limited availability product is done by the wholesalers. However, I do recommend that each wholesaler develop a method by which it can ensure that limited availability product be allocated in a manner so as to avoid the appearance of discrimination in violation of N.J.A.C. 13:2-24.1. By way of example, only, a wholesaler might only sell a percentage of the product in the first days of the month, when there is a rush to order under a newly active CPL, and "hold back" a percentage of allocated product until the 15<sup>th</sup> of the month, at which time the remaining product can be divided up proportionately among interested retailers or offered anew to the original purchasers. All wholesalers should reduce their methodology to writing, and add it to their marketing manual as required by N.J.A.C. 13:2-24.6 (a)(2).

## E. CHANNEL PRICING

Many states recognize “channel pricing” wherein the same product may be made available to on-premise retail licenses at a price different than the product is sold to off-premise licensees. While there are often legitimate business purposes behind a supplier or manufacturer wishing to price their product differently, it is clear that even a cursory review of New Jersey statutes and regulations would reveal that such a practice constitutes discrimination by a wholesaler, as it violates N.J.S.A. 33:1-89, which states, in part, “It shall be unlawful for any manufacturer, wholesaler, or other person privileged to sell to retailers to discriminate in price, directly or indirectly, between different retailers purchasing alcoholic beverages....” Likewise, N.J.A.C. 13:2-24.1(b)(2) reiterates and expands upon the prohibition of discrimination, by specifically presenting different prices or credit terms for different purchasers of “alcoholic beverages of the same brand or *trade name of like age, quality and quantity* (including, but not limited, to proof and size).” (Emphasis mine)

I have become aware of a practice in New Jersey that I will call “channel labeling.” Channel labeling, occurs when a product is designated by the supplier or manufacturer for either retail consumption licensees (on-premise) or for retail distribution licensees (off-premise) and the product includes a distinctive additional or supplemental label(s) that differentiates the on-premise and off-premise product, often including the presence or absence of a UPC code. While this practice is permissible, based upon the statute and regulation cited above, wholesalers must offer the product, regardless of labeling, to both on-premise and off-premise retailers on equal terms. In other words, whether the product contains a UPC code or a supplemental label is irrelevant to the product’s pricing, as channel pricing is not permitted. However, suppliers

wholesalers may use various other “disincentives” to discourage the purchase of their product by one channel, such as differential labeling, brand registration, and/or pricing strategies, utilizing discounts or Retail Incentive Programs (“RIPS”), to encourage the purchase by the desired segment and/or discourage purchases by the disfavored segment.

Accordingly it is on this 12 day of June, 2015 ORDERED:

- 1) That the practice of blind posting as referenced herein, or multiple filings for a single product contained in a single CPL in such a manner that the different prices are not readily and conspicuously apparent to either the Division or a retail licensee that researches the product offering shall constitute a violation of N.J.A.C. 13:2-24.6(a). If the Division becomes aware of a violation of N.J.A.C. 13:2-24.6(a) by the placement a blind posting or conduct similar to that outlined above, the offending wholesaler will be notified and have 10 days to provide the Division with an explanation for the violation. If there is no satisfactory explanation provided, the wholesaler will be charged pursuant to N.J.S.A. 33:1-19.1 et seq. In addition to any penalties resulting from charges related to CPL and discrimination violations, the Division may seek as a penalty that sales of the product at the center of the violation may be suspended for up to 30 days for each violation, during which time the wholesaler will be prohibited from any sale, service, or delivery of the product to any retailer in New Jersey.
- 2) That the use of the close out permit process for anything other than a legitimate close out, i.e., end of vintage, label change, product otherwise going “out of date” etc., combined with the distribution of the closed-out product to a single or a small number of retailers, may be a violation of the anti-discrimination provisions set forth at N.J.A.C. 13:2-24 et seq.
- 3) That any and all “warehousing” or “bill and hold” done by wholesalers for retail licensees must comply with the following conditions:
  - a) All costs must be disclosed as a term of sale on the CPL and made available on equal terms to all retailers;
  - b) The wholesaler shall document and provide to the retailer, at the time of original invoicing, in addition to the requirements of N.J.A.C. 13:2-20.3, 13:2-24.4, 13:2-39.1 and 13:2-23.32, the full amount and price of the product purchased, and designate how much product is to be delivered and how much is being stored. It shall designate the cost of storage and specify

that a separate invoice for storage will issue.

- c) A retailer on COD may not participate in bill and hold until all outstanding charges have been paid and the retailer has been removed from COD pursuant to the Regulation. Further, all charges for bill and hold must be invoiced separately from the purchase transaction and paid on a 30 day basis. This is to be considered an extension of credit, and as such the provisions of N.J.A.C. 13:2-24.4 shall apply in the event a retailer does not timely satisfy its “bill and hold” obligation, including the placing of the retailer on “COD”.
- d) Wholesale licensees who extend “bill and hold” must charge all retailers the same amount, and in order to avoid illegal financial ties between retailers and wholesalers, that amount should be within a range of 5% of the average public warehouse price for storage in the geographic area of the warehouse, rounded to the nearest cent. Wholesalers should review public warehouse charges at least quarterly, and must publish this rate in their CPL. (Currently, for example, public warehouses charge approximately 32 cents per month per case for storage, meaning that wholesalers may charge between 30 and 34 cents per case per month)
- e) Storage of product under “bill and hold” defeats one of the primary purposes of the “close out” permit. Therefore, “bill and hold” shall not be available on close out products.
- f) While I am not requiring segregation of each retailer’s product *at this time*, wholesale licensees who offer “bill and hold” to retail licensees must maintain the retailer’s physical product on hand, at all times, and may not substitute one product for another. However, with regard to vintages, one vintage may be substituted for another ONLY in the event of a *bona fide* warehouse picking or inventory control error, AND if the price between vintages as filed in the CPL remains identical.
- g) In order to limit the use of this practice that has such a potential for abuse, all product stored on behalf of a retailer must be delivered to the retailer within 75 days of the date of the initial sales invoice. Further, each retailer who wishes to take advantage of “bill and hold” with a wholesaler must place on file, with the wholesaler, a written certification identifying the location for the product(s) to be delivered on the 76<sup>th</sup> day. Failure of the retailer to accept delivery on the 76<sup>th</sup> (or first business day following the 75<sup>th</sup> day) and/or failure of the wholesaler to deliver the product(s) may constitute a violation of N.J.A.C. 13:2-24.1 and 13:2-24.4 in that it is discriminatory, and a violation of the terms of sale. Further, the failure to accept delivery of the product may constitute a violation of the terms of

sale, which will require the wholesaler to comply with the provisions of N.J.A.C. 13:2-24.4 *et seq* and placing the retailer on "COD" status. Such a failure may be treated by the Division as a violation of the foregoing provisions, the penalty for which may include, in addition to a suspension of the license, a prohibition upon participating in "bill and hold" in the future.

- h) Wholesalers who engage in the practice of bill and hold shall submit a report to the Division at least quarterly setting forth the retail participants in bill and hold and the number and amount of time product has been stored pursuant to this provision.
  - i) This provision of the Special Ruling shall take effect on the first day of the January, 2016, at which time all product then in storage with wholesalers shall begin at "Day 0" of the 75 day time frame.
- 4) That each wholesaler shall develop a method by which it can ensure that limited availability product be allocated in a manner so as to avoid the appearance of discrimination in violation of N.J.A.C. 13:2-24.1.
  - 5) Channel labeling as set forth above, is permissible and not a violation if the product is labeled by the supplier or manufacturer in such a fashion so as to be distinguishable from each other (i.e. a distinctive additional label(s) that differentiates the on-premise and off-premise product, including the presence or absence of a UPC code) provided that the product continues to be offered on equal terms to both segments of retailers regardless of labeling.



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