

LAW AND PUBLIC SAFETY

DIVISION OF ALCOHOLIC BEVERAGE CONTROL

Trade Member Discrimination, Marketing and Advertising: Discrimination in
Terms of Sale; Disciplinary Proceedings: Penalty Schedule, definition of violation,
successive violations

Proposed Amendments: N.J.A.C. 13:2-24.1; 13:2-19.11

Authorized By: _____

Jerry Fischer, Director

Division of Alcoholic Beverage Control

Authority: N.J.S.A. 33:1-12.38

Calendar Reference: See Summary below for explanation of exception to
calendar requirement.

Proposal Number: PRN 2003 - 70

Submit written comments by *(60 day comment period)* to:

Jerry Fischer, Director

Division of Alcoholic Beverage Control

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The agency proposal follows:

Summary

The Division of Alcoholic Beverage Control (Division) is proposing to amend N.J.A.C. 13:2-24.1 to recognize existing industry promotions known as Retail Incentive Programs (“RIPs”), subject to certain limitations. The Division also proposes to amend its penalty regulation, N.J.A.C. 13:2-19.11, to reflect the amendment to N.J.A.C. 13:24.1. A RIP is an incentive for quantity purchases by a retailer given by a wholesaler to either encourage purchases by the retailer or to encourage the retailer to promote certain brands purchased from the wholesaler.

After the federal appellate court decision in Fedway Associates, Inc. v. U.S. Treasury, B.A.T.F., 976 F.2d 1416 (C.A.D.C. 1992), alcoholic beverage wholesalers began to offer incentives in the form of appliances and non-alcoholic beverage merchandise to retailers purchasing certain quantities of alcoholic beverages on a single invoice. Subsequently, the wholesale industry shifted from offering actual merchandise items in promotions to the use of vouchers for such items from a catalog, to the use of American Express gift checks. Wholesalers and retailers now seek the ability to use corporate checks in place of the American Express gift checks. From a record keeping and auditing perspective, this is a

desirable alternative. However, definitions and limitations are necessary to place all industry members on notice of the parameters under which such promotions may be offered, to ensure a stable marketplace and allow for the beneficial aspects of competition without discriminating between purchaser competitors in violation of N.J.S.A. 33:1-90.

As proposed, N.J.A.C. 13:2-24.1(a)(3) defines a RIP as a form of “rebate” in which a wholesaler provides a financial incentive to purchase a specific quantity of alcoholic beverages in one purchase transaction and places no other obligation on the retailer. A rebate is defined in subsection (a)(2) of the proposed amendment as an inducement or allowance to purchase a product which is not reflected on the wholesaler’s invoice at the time the sale of the subject alcoholic beverages is completed, but which is payable no less than 30 days and no more than 9- days after the payment for the product on which it is given. A rebate is not reflected in the cost of the product. While the rebate must be listed on the Current Price List (“CPL”), it is not considered in the sale price for purposes of determining cost pursuant to N.J.A.C. 13:2-24.8.

The proposed amendment distinguishes a rebate, such as a RIP, from a discount. Subsection (a)(1) defines a discount as an inducement or allowance to purchase a product which is reflected on the wholesaler’s invoice at the time of the

sale. A discount is reflected in the cost of the product on which it is given, as it relates to the retailer's sale price for purposes of N.J.A.C. 13:2-24.8.

As proposed, N.J.A.C. 13:2-24.1(d) outlines the requirements of a RIP rebate. The proposed amendment provides that all wholesalers participating in a RIP rebate program shall provide the rebate in the form of a monetary payment, payable only by business checks issued by the wholesaler. No RIP rebate shall be offered on a quantity in excess of 50 cases and for every RIP rebate, there shall be a corresponding small quantity RIP rebate on the same product for a quantity that is 5 cases or less. The minimum quantity shall be 1 bottle. RIP rebates may be based on a combination of various sizes and products, but no single RIP rebate shall exceed \$1,000.00. No limit is placed on the number of single RIPs for which a retailer may qualify. If a proposed RIP rebate does not meet these requirements, it must be pre-approved by the Director in order to ensure that the proposal is non-discriminatory and will not have a negative impact on the industry or the public.

The amendment to N.J.A.C. 13:2-24.1(b)(1)(ii) allows a wholesaler to exclude retail cooperatives from a rebate program, only if it meets the requirements of a RIP rebate or has received the prior approval of the Director. If a wholesaler wishes to exclude retail cooperatives from a rebate program that does not comply with subsection (d), that wholesaler shall first petition the Director for approval of

its program at least 75 days in advance of the first date of the program proposed to appear on the CPL . Subsection (e) of the proposed amendment provides that upon an investigation or prosecution of any discount, rebate, allowance or advertising service, the party offering such program must make a prima facie showing to the Division that the program is consistent with these proposed amendments.

Existing rule N.J.A.C. 13:2-19.11 is amended to reflect the correct citation to the amendment to N.J.A.C. 13:24.1 in the penalty schedule.

A 60-day comment period is provided for this notice of proposal and, therefore, pursuant to N.J.A.C. 1:30-3.3(a)5, the proposal is not subject to the provisions of N.J.A.C. 1:30-3.1 and 3.2 governing rulemaking calendars.

Social Impact

The Alcoholic Beverage Control Act charges the Division to encourage competition, but also maintain the stability of the alcoholic beverage industry. The proposed amendments strike a balance between these competing interests. For several years, RIPS have been a primary promotional tool used by wholesalers to influence retailers in the determination of what alcoholic beverage products they choose to feature and promote for sale to New Jersey consumers. The proposed amendment to N.J.A.C. 13:2-24.1 defines the scope of permissible RIPS in order to increase the Division's ability to properly monitor their use in the alcoholic

beverage industry. The proposal clearly defines discounts, rebates and RIPS in the context of the Alcoholic Beverage Control Act's prohibition of discrimination against purchaser competitors of the same brand or trade name of product of like age, quality or quantity, including, but not limited to, proof and size. It requires specific record keeping and notice in order to regulate these promotional programs, including separate, complete and accurate accounting of all RIP rebates disbursed and a detailed publishing of such programs in the wholesaler's Marketing Manual and Current Price List. The amendment proposed currently by the Division, therefore, is appropriate and consonant with the State's alcoholic beverage laws and thus, there is a positive social benefit to the public at large. The amendment to N.J.A.C. 13:2-19.11 reflects the correct citation to the amendment to N.J.A.C. 13:24.1 in the penalty schedule.

RIPs are not factored into the cost calculation for retailers. Retailers may not sell an alcoholic beverage below its invoice price from wholesalers. Since RIPs do not appear as a reduction of cost on invoicing, a retailer cannot reduce his prices to the consumer through participation in a RIP. Thus, the proposed amendments balance the industry's marketing efforts with a check on prices to the public to prevent overconsumption of alcohol in accordance with the legislative mandate set forth in N.J.S.A. 33:1-3.1(b)(2).

Consequently, these proposed amendments enable the Division to enforce the legislative intent expressed in the Alcoholic Beverage Control Act, N.J.S.A. 33:1-1, *et seq.*, to strictly regulate the sale of alcoholic beverages to protect the health, safety and welfare of the people of this State. Therefore, a positive social impact is realized by the adoption of these amended rules.

Economic Impact

The proposed amendment to N.J.S.A. 13:2-24.1 is intended to regulate the use of rebates, including RIPs, in the alcoholic beverage industry. It is anticipated that this oversight will have a beneficial economic impact in the marketplace. Pursuant to the proposed amendment, RIPs would be available to all individual retailers. The amendment allows the exclusion of retail cooperatives if the RIP program complies with the standards outlined at subsection (d) in the amendment or by application to the Director explaining why the program meets the standards set out at subsection (b)(1)(ii), subject to the Director's prior written approval. However, despite the permitted exclusion of retail cooperatives from RIPs as discussed in subsection (d), the Division believes that the proposed amendment will assist smaller buyers that might belong to such retail cooperatives by requiring the offer of corresponding small quantity RIP rebates, while allowing the beneficial aspects of competition.

The proposal is designed to fairly regulate a practice that has been conducted in the industry for the past several years. The approval of the use of corporate checks payable to specific retailers as RIPs provides increased accountability. Additionally, this policy makes clear the requirement, inherent, but not explicitly stated, that wholesalers and retailers keep true and complete records of business transactions.

The Division does not anticipate a negative economic impact upon the public, since suppliers and wholesalers will continue to seek an expanded market share for their products. RIPs continue to be permitted under the proposal and there is a requirement to offer smaller RIPs. If RIPs prove to be less beneficial as a marketing tool for suppliers and wholesalers, the Division anticipates that they will continue to be able to offer a number of promotions and discounts provided that they are neither discriminatory nor disruptive to trade stability. The proposed amendments will not have any economic impact on the Division.

Federal Standards Statement

A Federal standards analysis is not required since the proposed amendments are dictated and in accordance with N.J.S.A. 33:1-1, *et seq.* There are no federal requirements or standards applicable to this rulemaking.

Jobs Impact

The Division is not directly aware of any jobs that are likely to be generated or lost as a consequence of the proposed amendments.

Agriculture Industry Impact

The proposed amendments will have no impact on the agricultural industry in this State.

Regulatory Flexibility Analysis

Pursuant to the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16, *et seq.*, a “small business” means any business resident in this State that employs fewer than 100 full-time employees; is independently owned and operated; and is not dominant in its field. A percentage of the wholesalers and retailers in New Jersey’s alcoholic beverage industry could be considered "small businesses" within the meaning of the Regulatory Flexibility Act. The proposed amendments do not require professional services for compliance. The proposal imposes some recordkeeping and reporting obligations, such as the requirement to keep separate, complete and accurate accounting of all such RIP rebates disbursed or received and publication of the detail of the programs in Marketing Manuals and Current Price Lists to ensure compliance. However, the Division does not believe that the

amendments will impose any undue burden on small businesses, in that the record keeping requirements imposed by the proposed amendments are not beyond those required by existing law and regulations. There is no distinction made for a small business licensee since the requirements imposed are considered the minimum to effectuate the requirements of due process and to lessen the requirements would frustrate the pertinent statutory provisions. These rules impose compliance requirements that are uniform for all licensees regardless of size.

Smart Growth Impact

The Division does not believe that the proposed amendments will have any impact upon the achievement of smart growth or the implementation of the State Development and Redevelopment Plan.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 19. DISCIPLINARY PROCEEDINGS

13:2-19.11 Penalty schedule, definition of violation, successive violations

(i) Penalty Schedule¹

N.J.A.C. 13:2-23.32, <u>24.1(b) and (d)</u>	BOOKS1
N.J.A.C. 13:2-23.32, <u>24.1(b) and (d)</u>	BOOKS2

SUBCHAPTER 24. TRADE MEMBER DISCRIMINATION, MARKETING AND ADVERTISING

13:2-24.1 Discrimination in terms of sale

(a) For purposes of this Subchapter:

1. A discount is an inducement or allowance to purchase a product which is reflected on the wholesaler's invoice at the time the sale of the subject alcoholic beverages to a retailer is completed. A discount is reflected in the cost of the product on which it is given, as it relates to the retailer's sale price for purposes of N.J.A.C. 13:2-24.8.

Discounts may include quantity discounts;

2. A rebate is an inducement or allowance to purchase a product which is not reflected on the wholesaler's invoice at the time the sale of the subject alcoholic beverages to a retailer is completed, but which is payable no less than 30 days and no more than 90 days after the payment for the product on which it is given. A rebate is not reflected in the cost of the product on which it is given, as it relates to the retailer's sale price for purposes of N.J.A.C. 13:2-24.8;

3. A retail incentive program (RIP) is a form of rebate in which a wholesaler provides a financial incentive to a retailer to purchase a specific quantity of alcoholic beverages in one purchase transaction and places no other obligation on the retailer. A purchase transaction is a single order and a single delivery of a specific quantity of a specific alcoholic beverage or combination of beverages, as reflected on a single wholesaler's

invoice. More specific requirements for this type of rebate are set forth in Subsection (d) below.

[(a)](b)Except as may otherwise be authorized by this subchapter, no manufacturer, supplier, importer, brand registrant, wholesaler, or distributor privileged to engage in the commerce of any alcoholic beverage into or within this State shall, directly or indirectly, be a party to, or assist in, any transaction or sale, or contract to sell:

1. Which discriminates against purchaser competitors, in that:
 - i. There is a different price or are different 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); or
 - ii. It is a [Any] discount, rebate, allowance or advertising service granted to a purchaser [is] over and above any discount, rebate, allowance, or advertising service available at the time of such transaction to competitors with respect to a sale of alcoholic beverages of the same brand or trade name of like age, quality and quantity. However, a wholesaler may exclude retail cooperatives from a RIP program without the prior approval of the Director so long as the RIP program complies with (d) below. A wholesaler wishing to exclude retail cooperatives from a RIP program that does not comply with Subsection (d) below shall first petition the Director and seek approval of its program. This petition may include one or more such proposed programs and shall be submitted to the Director at least 75 days in advance of the date on which the program(s) is

proposed to appear on the Current Price List. Such program(s) shall not appear on the Current Price List without the Director's prior approval. The petition shall include the following information upon which the Director shall make his decision:

1. A detailed description of the proposed program(s);
2. A detailed description of how individual retail licensees will be able to participate in the program(s);
3. A detailed explanation of why the program(s) will not destabilize the marketplace, including, but not limited to, the creation of destructive price wars, or unduly increase the consumption of alcoholic beverages; and
4. Any other information the Director deems necessary from a specific petitioner.

2. Alcoholic beverages in any part of the State at prices lower than those charged by that person or entity elsewhere in the State for the purpose of destroying competition, or eliminating a competitor in the State.

3. Alcoholic beverages at unreasonably low prices for the purposes of destroying

competition, or eliminating a competitor.

[(b)](c)The provisions of the foregoing shall not prevent:

1. Differentials which make only due allowance for actual differences in the cost of manufacture, sale or delivery resulting from differing methods or quantities in which alcoholic beverage products are sold or delivered to, or paid for by, purchasers including discounts for prompt payment.

(d) Except as approved by the Director under (b) 1 ii above, a retail incentive program (RIP) rebate shall conform to the following requirements:

1. All wholesalers participating in such programs shall provide the rebate in the form of a monetary payment, payable only by business checks issued by the participating wholesalers;

2. No RIP rebate shall be offered on a quantity in excess of 50 cases. For every RIP rebate, there shall be a corresponding small quantity RIP rebate on the same product(s), for a quantity that is 5 cases or less. The minimum quantity of any RIP rebate shall be 1 bottle;

i. RIP rebates may be based on a combination of various sizes and products.

However, no single RIP rebate shall exceed \$1,000;

ii. Nothing in this regulation shall be deemed to limit the number of single RIP rebates which can be earned for qualifying purchases;

iii. If a wholesaler wishes to offer a RIP rebate using any formula or dollar amount other than that specified in this Subsection (d), it shall obtain the written approval of the Director prior to offering such RIP rebate and prior to publication thereof in the wholesaler's Marketing Manual and Current Price List applicable to the period during which the RIP rebate will be offered;

3. All wholesalers and all retailer participating in such programs shall keep a separate, complete and accurate accounting of all such rebates disbursed or received and all documents that reflect same;

4. All wholesalers participating in such programs shall publish the details in its Marketing Manual and its Current Price List.

(e) If the Division investigates and or prosecutes any discount, rebate, allowance or advertising service offered by any manufacturer, supplier, importer, brand registrant, wholesaler, or distributor, the party offering it must make a prima facie showing that the program is consistent with the applicable statutes and regulations.