

**LAW AND PUBLIC SAFETY**

**DIVISION OF ALCOHOLIC BEVERAGE CONTROL**

**Solicitor's Permits; Trade Member Discrimination; Marketing and Advertising**

**Adopted Amendments: N.J.A.C. 13:2-16.3, 16.11, 16.14, 19.11 and 24.2**

Proposed: June 15, 2009 at 41 N.J.R. 2436(a).

Adopted: June 15, 2010 by Jerry Fischer, Director, Division of Alcoholic Beverage Control.

Filed: June 15, 2010 as R.2010 d.160, **with substantive changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 33:1-3.1, 33:1-39 and 33:1-67.

Effective Date: August 2, 2010.

Operative Date: October 1, 2010.

Expiration Date: January 19, 2011.

**Summary of Public Comments and Agency Responses:**

The Department of Law and Public Safety, Division of Alcoholic Beverage Control ("Division" or "ABC") timely received written comments from the following:

1. Martin D. Zachary;
2. Vincent Fyfe, President, United Food & Commercial Workers Union Local 2D;
3. Richard J. Whalen, International Vice President Director, United Food & Commercial Workers International Union, Region 1;
4. Edward G. D'Alessandro, Esq., D'Alessandro, Jacovino & Gerson, Attorney for Allied Beverage Group;

5. David K. Cuneo, Esq.;
6. Edwin T. Ferren, III, Esq., Richman & Ferren, Attorney for Kerry Canal;
7. Shelly Novick-Leighton;
8. Rory McCormick;
9. Donna J. McAdam;
10. Thomas Harris;
11. Robert J. Pinard, Esq., Executive Director, Beer Wholesalers Association of New Jersey;
12. Jeffrey A. Warsh, Esq., Executive Director and General Counsel, New Jersey Wine & Spirits Wholesalers Association;
13. John F. Vassallo, Jr.; Esq.
14. Scott N. Silver, Esq., Attorney for Vishnu C. Reddy;
15. Scott N. Silver, Esq., Attorney for Rory McCormick; and
16. Gerald N. Griffin, Esq., Attorney for R&R Marketing, L.L.C.

1. COMMENT: Several commenters addressed the Division's proposal to delete the existing "grandfather" clause in N.J.A.C. 3:2-16.11. These commenters complained that eliminating the grandfather clause would financially harm solicitors servicing family-owned retail accounts, including solicitors who claim they meet the definition of "bona fide" solicitors and who are hard working sales representatives. One commenter explained that eliminating the grandfather clause would end her job as a solicitor and she would find it hard to change careers at this time in her life. Some commenters stated that they believe they are suffering unjustifiably because of a few greedy retailers and wholesalers, and that prohibiting long-standing solicitors from servicing

accounts because the solicitor is related is overbroad. One commenter described this as a “classic case of collateral damage.” Several commenters suggested that the Division rely upon the other amendments in this proposal and use the Division’s enforcement powers to prevent the abuses discussed, thus eliminating the need for blanket restrictions. Another commenter suggested that the problem described by the Division could be solved by continuing the grandfather provision “as long as the solicitor actually provides to related retailers the services normally and customarily provided by a solicitor.” Two commenters contended that the grandfather clause should be retained, but with a limit on the percentage of commissions earned or accounts serviced on behalf of the solicitor’s relatives. Finally, one commenter noted that eliminating the grandfather clause was unfair since a solicitor may not have control over whether a relative decides to become a licensee.

**RESPONSE:** The Division thanks the commenters for their comments. As the Division explained in the Summary of the notice of proposal, the Division proposes to delete the “grandfather” clause set forth in N.J.A.C. 13:2-16.11(e), to remedy the abuse uncovered by the Division’s recent investigation. This investigation demonstrated that the current grandfather clause is being used to undermine the regulatory intent of the section. For example, one aspect of the investigation showed that wholesalers were swapping solicitor accounts, so that commissions would be received based on family relations with other solicitors. Moreover, the Division’s recent investigation established that the wholesalers were only offering or agreeing to hire the spouse or immediate family members of large-volume retailers. Because the commissions earned by the relative solicitor provided an incentive for the retailer to purchase from the

wholesaler, this practice is antithetical to free competition. Moreover, the evidence obtained during the Division's investigation confirmed that at least two large wholesalers in the State, in some instances at the request of large retailers, hired those retailers' relatives with the understanding that the relatives would perform no services whatsoever, but would be paid commissions based upon the purchases made by their relatives accounts (that is, "no-show" jobs). In addition, the ability to have a spouse or immediate family member hired by a wholesaler to reap the benefits of commissions on that retailer's purchases (as well as automobile allowances and health benefits) was not offered to all retailers, but rather only to high-volume retailers on a cost-benefit analysis. This practice is discriminatory and placed the lower volume retailers at a competitive disadvantage, in violation of N.J.S.A. 33:1-89 and 33:1-90. As a result of the investigation, the Division realized that further restrictions are necessary to continue to prevent illegal rebates, maintain trade stability and foster a competitive three-tier system of distribution in the liquor industry. The proposed amendments are intended to combat this abuse uncovered by the Division's recent investigation.

Initially, it is important to note that a review of the Division's records indicates that out of over 2,000 solicitors with permits in New Jersey, only 42 reported that they have any relatives in the industry and merely 15 of those actually report servicing relatives. Thus, less than one percent of the solicitors in the State will be affected by the proposed amendments, a figure grossly disproportionate to the large amount of money the Division discovered was being paid to those affected by the rule.

Moreover, nothing in the proposed amendments requires a wholesaler to terminate the employment of any of its solicitors. On the contrary, only the conditions of employment are

affected. Also, for those wholesalers having unionized solicitors, the contracts provide that when a solicitor is removed from an account, the solicitor will be reassigned to accounts of similar volume. See, Collective Bargaining Agreement Between UFCW Local 2-D United Food Commercial Workers International Union AFL-CIO/CLC and Allied Beverage Group, LLC, et al., Section 10:01. Thus, the solicitors are not penalized by enactment of the proposed amendments. In addition, retailers may benefit by obtaining different product and marketing ideas from a change in solicitors. In the long run, this may stimulate more sales, which can inure to the financial benefit of the employing wholesaler, the solicitor and the retail account.

Furthermore, pursuant to N.J.A.C. 13:2-9.1, ABC rules provide an opportunity for individualized assessment of hardship claimed by any solicitor who is affected by these amendments. Specifically, the ABC Director may relax the restrictions prohibiting the servicing of retail accounts by solicitors who are relatives, upon a showing of undue hardship, economic or otherwise; that a waiver of the rule would not unduly burden any affected parties; and that a waiver is consistent with the underlying purposes of alcoholic beverage law. Such waiver requests must be submitted to the Director in writing with supporting documentation.

Additionally, in order to allow those solicitors who may be negatively impacted by these amendments sufficient time to file a petition for a waiver under N.J.A.C. 13:2-9.1, and to allow wholesalers time to make any necessary changes in order to comply with the amendments, the effective date of these amendments shall be 60 days after the date of publication (October 1, 2010).

2. COMMENT: Two commenters alleged that the elimination of the grandfather clause in the

Division's proposal is a breach of a settlement agreement between Allied (and/or Kelly Canal) and the Division in 1997, and thus is in bad faith. Another commenter contended that some solicitors and wholesalers were already punished for the acts described in the Division's proposal, so eliminating the grandfather clause now is an act of bad faith.

RESPONSE: The Division's records demonstrate that the referenced settlement agreement in 1997 is not a factor with regard to the proposed amendments. In 1997, then Director John Holl had issued a Notice and Order to Solicitor Permittees prohibiting solicitors from servicing accounts where an immediate family member held an interest in a retail license. In response to appeals filed from two affected parties and numerous inquiries, the Division agreed to withdraw the Notice and Order at that time, thus settling the matter. Later, in 1999, the Division promulgated the current form of this section through the administrative rulemaking process. See N.J.A.C. 13:2-16.11; 30 N.J.R. 4316(a), 31 N.J.R. 545(a). The 1997 "settlement agreement" was not implicated at that time and is certainly not relevant now.

3. COMMENT: Three commenters opined that the Division's proposed amendment is not constitutional and violates the right to employment opportunity, which they claim is a liberty interest and a property right. One of these commentors argued that the solicitors affected by the Division's elimination of the grandfather clause have a cognizable property right in the continuation of their existing jobs. Another of these commenters asserted that a constitutional problem would arise if a solicitor who serviced a certain retail account decided to marry that retailer, but would then lose the account. This comment suggests that the elimination of the

grandfather clause would infringe on the right to marry.

RESPONSE: This issue was discussed by the New Jersey Superior Court, Appellate Division in a prior lawsuit brought by a solicitor appealing the ABC Director's determination that pursuant to N.J.A.C. 13:2-16.11, based on her marriage, she was prevented from servicing her in-laws' retail accounts. See *In the Matter of Denise L. Sobczak Solicitor's Permit Application*, Appellate Division, Docket No. A-3286-03T3, decided March 16, 2005. The Appellate Division affirmed the Director's decision, holding that the solicitor's constitutional challenge to the rule as an interference with her right to marry failed. The court concluded that the rule was neutral and did not violate the State or Federal constitutions. Moreover, participation in the alcoholic beverage industry is a revocable privilege and not a right. Thus, the Division disagrees with the commenters and finds that the proposed rule is constitutionally valid.

4. COMMENT: Several commenters complained that the fines proposed in the Division's rule proposal in N.J.A.C. 13:2-16.14(c) through (e) are excessive for wholesalers. One commenter reasoned that a wholesaler would only know if a solicitor has a relative in the industry if that solicitor disclosed the fact. Thus, this commenter asserted that the fine shifts the burden of knowledge to the wholesaler in violation of notions of fairness and justice. Another commentator opined that the wholesaler does not have the ability to do an independent investigation regarding the relative of each solicitor and so the wholesaler should not be penalized. Another commenter added that the penalties should fall on the violators, not innocent parties, so sanctions should be imposed only on those intentionally engaged in wrongdoing. A commenter suggested that the

Division change the language in the proposal to reflect that wholesalers should not “knowingly” assign a solicitor to work on a relative’s account. Another commenter asked about what would happen if a solicitor does not disclose a relative, and a wholesaler hires the solicitor for the relative’s account. This commenter suggested that the Division could mirror the language in the agency’s regulations regarding the disclosure requirements for the employment of criminally disqualified persons. A commenter requested that similar conforming requirements be imposed on retailers. This commenter also maintained that wholesalers should not be required to keep records regarding solicitors, since the solicitors already provide this information directly to the ABC themselves.

RESPONSE: The Division thanks the commenters for their input, but believes that the provisions as proposed are appropriate. First, the proposed regulations do not impose any unique fines on wholesalers. Rather, the penalty for violations of the proposed regulations by wholesalers is the same as for other violations of the regulations governing the wholesaling of alcoholic beverages. The penalties are stated in terms of license suspension. To the extent that licensees may pay monetary offers in compromise in lieu of a suspension, the Division’s formula was affirmed in *Div. of ABC v. MAG Entertainment, LLC, t/a Cheerleaders Gentlemen’s Club*, App. Div. Docket No. A-2508-0872 (November 19, 2009), published in *ABC Bull.* 2848 (January 4, 2010).

Second, solicitors, like all other liquor licensees, must renew their permits annually. See, N.J.A.C. 13:2-16.7. The solicitor’s permit renewal application requires solicitors to identify all retail alcoholic beverage licenses in which any of their immediate family members have an

interest or participate in the operation thereof. The failure on the part of a solicitor to provide the required information is, itself, a violation of the alcoholic beverage rules. The failure of a solicitor to provide the aforementioned information may be asserted by the wholesaler in mitigation of any alleged violation of the proposed rules. Similarly, the disclosure of a prohibited relationship triggers the responsibility of the wholesaler to take appropriate action. A wholesaler's failure to do so could be the basis upon which the Division takes administrative action against the wholesaler.

Third, the proposed regulations do not impose any new recordkeeping obligations on wholesalers. Rather, wholesalers have always been required to maintain records regarding their solicitors, just as they are required to maintain other records related to their alcoholic beverage activities.

Fourth, the proposed regulations make clear that a solicitor may not sell alcoholic beverages to retail licensees within the scope of the regulations' prohibitions. Thus, any such sale would constitute a violation. As a participant in a violative sale, the retailer, by application of N.J.S.A. 33:1-31 and N.J.A.C. 13:2-23.12(a), is subject to liability. However, because this liability is by inference and application, rather than by explicit prohibition, when the Division readopts its rules in 2011, the Division may consider amending N.J.A.C. 13:2-23.12(a) to impose an explicit prohibition on such purchases.

5. COMMENT: Two commenters requested more clarification with regard to the provisions contained in N.J.A.C. 13:2-16.3. The first request asked for clarification on what "participation

in operation” means in the context of N.J.A.C. 13:2-16.3(b). For example, does it include an employee at a retailer or is it limited to the owner or manager? The second commenter asked that the Division further define “direct” and “indirect” in the context of N.J.A.C. 13:2-16.3. The commenter was concerned that the rule might encompass low level jobs at retailers. This commenter also asked the Division to discuss what would happen if a solicitor changes employers or if a solicitor’s relative leaves a retailer or a new relative becomes employed by a retailer.

RESPONSE: Two commenters request the Division to define the term “direct or indirect interest or participates in the operation of a retail license.” To clarify, the Division understands “participates in the operation” to refer to individuals who can make decisions that materially affect the manner in which alcoholic beverages are sold by the retail licensee. Thus, a manager would be covered by this definition, but a worker who only stocks shelves would not be included. In other words, this phrase limits the applicability of the proposed amendments to anyone with financial interest in a retail liquor license or authority to influence the manner in which a retail license is operated. This includes interests or authority held personally, by the immediate family member, or through a proxy, agent or representative. Thus, a janitor, for example, has no financial interest in the licensed business (even though he receives a paycheck) and does not fall within the scope of the prohibition, whereas an owner does; nor is the janitor authorized to make decisions that affect the manner in which alcoholic beverages are sold, whereas a manager does.

The commenters also request guidance regarding changes in the solicitor’s employer-

wholesaler or if an immediate family member becomes involved in the operation of a retail licensee. As to changes in a solicitor's employment, the solicitor is required to turn in his or her solicitor's permit, N.J.A.C. 13:2-16.10, and to fill out a new solicitor's permit application, which identifies his or her new employing wholesaler. N.J.A.C. 13:2-16.8. Upon filing, the Division will process the application and issue a new solicitor's permit. If an immediate family member becomes involved in the operation of a retail licensee during the permit term, the solicitor is required, like all licensees, to amend his or her solicitor's permit application within 10 days of the change. See, N.J.A.C. 13:2-16.9 and 2.14(b). The solicitor can do this by timely filing with the Director a notice in writing of such change. In addition, the solicitor should immediately notify his employer in writing to insure compliance with the proposed amendments. As noted above, the solicitor must file a complete solicitor's permit application at the end of its term, that is, May 31st following its issuance, N.J.A.C. 13:2-16.7, which requires disclosure of this information.

6. COMMENT: A commenter explained that beer wholesalers have exclusive territories by agreement with suppliers. Thus, this commenter believes that the Division should eliminate the initial employment ban in N.J.A.C. 13:2-16.3(b) and 16.4(c).

RESPONSE: Although the Division acknowledges that beer wholesalers may have exclusive territories by agreement, the Division disagrees that this contractual arrangement should affect the initial employment ban in N.J.A.C. 13:2-16. The Division believes that separating out members of the beer industry in this context is not appropriate and would treat similarly situated

solicitors differently. Thus, the Division is adopting this amendment as proposed.

7. COMMENT: Three commenters requested reconsideration of the proposal's definition of "bona fide solicitor" in N.J.A.C. 13:2-16.3(e). One commenter suggested that the Division substitute "may include" for the list of duties to be performed by a bona fide solicitor. This commenter explained that some solicitors may not perform all of the duties enumerated in the proposal, but are nonetheless actual bona fide solicitors. Another commenter stated that pursuant to the terms of the proposal, the requirements for a "bona fide solicitor" would apply to almost every owner of a beer distributorship in New Jersey, but these individuals, although required to obtain a solicitor permit to do their duties, do not necessarily perform all of the duties required in the proposal. This commenter also indicated that the same situation applies for merchandisers and supervising solicitors who have obtained solicitor permits since they might accept orders. A third commenter asserted that the definition of "bona fide solicitor" may conflict with the requirements contained in collective bargaining agreements negotiated with solicitors. This commenter suggested that the Division add language to the proposal stating that the rule is not intended to supersede labor contracts.

RESPONSE: The proposed regulations require a "bona fide solicitor" to "perform substantial duties and responsibilities for each retail account assigned to the solicitor." N.J.A.C. 13:2-16.3(e). The regulation continues by stating, "These duties and responsibilities include, but are not limited to, ..." followed by a non-exhaustive list of services that a solicitor might perform for retail accounts. The commenter suggests that the regulation may be interpreted to exclude from

the status of bona fide solicitors any solicitor who does not perform each and every one of the enumerated services for each and every retail account. The Division does not believe that the proposed regulation is properly interpreted in this manner, because both N.J.A.C. 13:2-16.3(f) (in the future tense, for initial solicitor permit applicants) and (g) (in the past tense, for existing solicitor permit holders) make clear that applicants for solicitor's permits "substantially perform[s] the duties referenced in (e) above . . ." In other words, a bona fide solicitor need not perform each and every one of the listed services. Instead, the inquiry is whether under the totality of the circumstances the solicitor can be properly viewed as having substantially performed these services. In this context, "substantially" means "being of considerable . . . degree, value, amount or extent." Webster's II New College Dictionary, at 1099 (rev. ed. 2001). Merchandisers and supervising solicitors are subject to the foregoing requirements; however, these requirements do not apply to individuals covered by N.J.S.A. 33:1-67.

Contrary to the concerns raised by the third commenter, that is, that the services listed in N.J.A.C. 13:2-16.3(e) may conflict with the requirements contained in the collective bargaining agreement, the Division notes that these requirements were primarily derived from that agreement. See, Collective Bargaining Agreement Between UFCW Local 2-D United Food Commercial Workers International Union AFL-CIO/CLC and Allied Beverage Group, LLC, et al., Section 10:07 and Schedule #1. Thus, the proposed amendments are not intended to supersede the existing collective bargaining agreement. However, the Division notes that the collective bargaining agreement was written so that the contract terms are superseded in the event of a conflict with the laws of the jurisdiction (in this case New Jersey), or rules of any administrative agency (in this case, the Division). See, Collective Bargaining Agreement

Between UFCW Local 2-D United Food Commercial Workers International Union AFL-CIO/CLC and Allied Beverage Group, LLC, et al.,Section 10:02.

8. COMMENT: Two commenters questioned the requirement in N.J.A.C. 13:2-16.3(h) that signatures be notarized by a notary public. The commenters suggested that the proposal be amended to allow certification by a person is legally able to take oaths in the State of New Jersey.

RESPONSE: The investigation referenced in the notice of proposal found that solicitor permit applications submitted by at least one large wholesaler in the alcoholic beverage industry were notarized out of the presence of the affiant, thus ignoring the requirement for a sworn certification on the application, and contrary to the express representation that the application was “sworn and subscribed to” before the notary. The notary public requirement in the proposed amendment was intended to alleviate such practices. However, the Division recognizes that N.J.S.A. 41:2-1 sets out the list of persons authorized to administer oaths in the State of New Jersey. Notary Public is one of those empowered by law to take oaths, affirmations and affidavits. Other titles listed include attorneys-at-law, municipal judges, sheriffs of any county, members of the State Legislature and surrogates, registers of deeds, county clerks and their deputies. Based on the suggestion of the commenters, the Division agrees that the requirement in N.J.A.C. 13:2-16.3(h) should be broadened to include those who have authority to administer oaths pursuant to N.J.S.A. 41:2-1, and has made this change upon adoption. The change was made in response to comments received and, although substantive, is not one that should require additional comment. The revision does not change the extent of the group being regulated, and

actually broadens the ability of the group regulated to comply with the regulation, by allowing them additional options to obtain the sworn certification, without reducing the protections of the proposed amendment.

9. COMMENT: One commenter opined that the definition of immediate family in the proposal is too broad. This commenter suggested that this definition should not include relatives who do not reside in the same household or have a commonality of economic interests with a solicitor.

RESPONSE: This issue was discussed by the New Jersey Superior Court, Appellate Division in *In the Matter of Denise L. Sobczak Solicitor's Permit Application*, Appellate Division, Docket No. A-3286-03T3, decided March 16, 2005. One of the arguments advanced by the litigant in that matter was that the list of relatives in N.J.A.C. 13:2-16.11 was not appropriate. The court disagreed, recognizing that, as long as classifications do not discriminate arbitrarily between persons who are similarly situated, the matter is one of legislative prerogative. The Division believes the definition of immediate family in the proposed amendment is appropriate and nondiscriminatory, since all persons who are connected with solicitors in the specified relationships are included. To clarify, the definition is intended to include all familial relationships set out in N.J.A.C. 13:2-16.11 in all of their forms, including "step" relatives. Thus, similarly situated persons are treated identically.

As fully explained in the notice of proposal statements, the purpose of these amendments is to eliminate the influence that familial relationships have upon free competition. The familial relationships listed in N.J.A.C. 13:2-16.11 have been shown in Division investigations to have

had a negative effect on business judgment in the alcoholic beverage industry. The investigations uncovered that it was the interaction of family relationships, and not specifically biological connections, that were influential in fostering the abuse in the industry discovered by the Division investigations. As a result, the Division realized that further restrictions are necessary to continue to prevent illegal rebates, maintain trade stability and foster a competitive three-tier system of distribution in the liquor industry. The proposed amendments are intended to combat this abuse uncovered by the Division's recent investigation and past investigations.

#### **Federal Standards Statement**

A Federal standards analysis is not required since the adopted 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.

**Full text** of the adoption follows: (additions to proposal indicated in boldface with asterisks **\*thus\***; deletions from proposal indicated in brackets with asterisks **\*[thus]\***):

13:2-16.3 Eligibility for permit

(a)-(b) (No change from proposal.)

(c) A solicitor who has held a solicitor's permit and has been employed by a wholesaler prior to **\*[(the effective date of this subsection)]\* \*October 1, 2010\*** and whose immediate family member has any direct or indirect interest or participates in the operation of a retail license shall

be permitted to remain a solicitor and submit annual renewal applications for his or her solicitor's permit as long as the solicitor is in compliance with the provisions of N.J.A.C. 13:2-16.1\*.\*

(d) –(g) (No change from proposal.)

(h) All applications for solicitors' permits must be notarized by **\*a person before whom oaths may be taken, as set out in N.J.S.A. 41:2-1, which includes\*** a Notary Public. The applicant and the person signing on behalf of the employing wholesaler must personally appear before the Notary Public **\*or other official before whom oaths may be taken\*** at the time of notarization.

(i)-(k) (No change from proposal.)