

STATE OF NEW JERSEY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

PETITION FOR RULEMAKING REGARDING)
THE RETAIL INCENTIVE PROGRAM) **CIVIL ACTION**
PURSUANT TO N.J.A.C. 1:30-4.1)

PETITION FOR RULEMAKING PURSUANT TO N.J.A.C. 1:30-4.1 ON BEHALF OF
DIVISION OF ALCOHOLIC BEVERAGE CONTROL ENFORCEMENT BUREAU

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INTRODUCTION

Pursuant to N.J.S.A. 33:1-93, N.J.S.A. 33:1-39 and N.J.A.C. 1:30-4.1, the Division of Alcoholic Beverage Control Enforcement Bureau petitions the Director for rulemaking regarding the Retail Incentive Program (“RIP”) Regulation, N.J.A.C. 13:2-24.1 and related regulations. Pursuant to N.J.A.C. 1:30-4.1, the Enforcement Bureau is an “interested person” with standing to make this petition because it is tasked with prosecuting violations of the Alcoholic Beverage Control Act and its implementing regulations (collectively, the “ABC Act”). For the past seven months, it and the Investigations Bureau have been conducting an investigation into wholesaler-to-retailer trade practices. The investigation, entitled IMO: Trade Practices Investigation, Investigation No. H-DIVISION, has revealed that both of the State’s two largest wine and spirits wholesalers and their largest RIP customers have manipulated the RIP process in a manner that constitutes discrimination in violation of the ABC Act (i.e., N.J.S.A. 33:1-3.1b(10), -89 and -90) and other relevant regulatory requirements (i.e., credit, recordkeeping, etc.).

In some instances, the wholesalers have provided interest-free financing to large retailers in violation of N.J.S.A. 33:1-43. These discriminatory practices, in turn, place small retailers at such a competitive disadvantage that trade instability is an inevitable result, contrary to N.J.S.A. 33:1-3.1b(7). If not checked now, small retailers will go out of business and consumers will have less access to retail stores and the specialized product selections that they offer. Large retailers would continue to exercise their right to advocate for repeal of the two license limitation, N.J.S.A. 33:1-12.31, using the need to fill the void created by their own violative conduct as support.

Moreover, wholesalers that comply with the rules cannot compete with the unlawful financial incentives provided by the two largest wholesalers.

The pattern of institutionalized abuses of RIPs is so startling that immediate action is necessary while the investigation continues. Taking this action now is consistent with the Division of Alcoholic Beverage Control's ("ABC" or "Division") long-standing "policy and practice to nip reasonably apprehended evils while they are in the bud." 279 Club v. Mun. Bd. of A.B.C. of Newark, 73 N.J. Super. 15, 20 (App. Div. 1962).¹

ABC disciplinary actions frequently require individual licensees to take corrective action. In this case, industry-wide corrective action is necessary to address the current situation. If RIPs are to continue, rulemaking is necessary to install bright lines (such as a maximum amount of RIPs a wholesaler, including its affiliates, may pay to a licensee, including its affiliates, in any year) to ensure compliance and to make enforcement practical, effective and efficient. If rulemaking cannot eliminate discrimination and re-establish regulatory compliance, then RIPs should be prohibited.²

PRELIMINARY STATEMENT

Discrimination is the scourge of trade stability. When the Legislature enacted N.J.S.A. 33:1-3.1 in 1985, it intended to "... **prohibit all discrimination in the sale of alcoholic**

¹ The Enforcement Bureau reserves all rights to institute disciplinary actions against licensees mentioned in this petition or others discovered during the course of the investigation.

² Elimination of RIPs would likely lead to greater reliance on quantity discounts that, unlike RIPs, would lower prices for retail customers.

beverages, not only ‘unreasonable’ discrimination.” Senate Law, Public Safety and Defense Committee Statement, Senate, No. 2399 -- L.1985, c. 258 (emphasis added). This matter arises from discriminatory practices by the State’s two largest wine and spirits wholesalers in favor of certain large retailers through the use of RIPs.

In 2018, the five largest wine and spirits wholesalers paid almost \$210 million in RIPs to retailers. Allied Beverage Group (“Allied”) and Fedway Associates (“Fedway”) paid more than \$165 million, or nearly 79% of those RIPs. Allied paid RIPs to its top 50 customers at a ratio of 60:1, compared to its other 6,212 customers. Fedway’s ratio was 41:1. One retailer, B.L.W. World, Inc., t/a Liquor World (Ft. Lee), received more than \$3.2 million combined in RIPs from Allied and Fedway.³

Had these levels been achieved in substantial compliance with the rules, the Enforcement Bureau would not have petitioned for rulemaking. But, as demonstrated below, Allied and Fedway actively contributed to retailer profits by manipulating RIPs through a practice known as RIP Padding, *infra*. Also, Allied provided interest-free loans disguised as RIPs to these retailers *before the retailers paid the underlying invoices*.

RIPs were intended to be a “promotional tool used by wholesalers to influence retailers in the determination of what alcoholic beverage products they choose to feature and promote for sale

³ Information provided by Allied referred to the retailers by their corporate names, but Fedway used the retailers’ “trading” names. For consistency and simplicity, retailers will be referred to by their trading names. For example, B.L.W. World, Inc. will be referred to as “Liquor World (Ft. Lee).” A legend listing the corporate and trading names (as used in this petition) is set forth on page 33.

to New Jersey consumers.” 35 N.J. Reg. 1045(a) (February 18, 2003). “However, ... limitations are necessary ... 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.” Ibid. (emphasis added). The evidence discussed below shows that wholesalers and retailers both abused RIPs and established discriminatory practices that include doctoring of records, interest free financing, and violation of the Credit Regulation and the RIP Regulation through premature RIP payments, credit over-extensions and padding.⁴ These practices are discriminatory and improperly skew the playing field in favor of large retailers. When RIPs are manipulated in favor of a few retailers, other retailers cannot fairly compete. “[C]oncentration of retailing in the hands of an economically powerful few ... would be inimical to ... trade stability.” Grand Union Co. v. Sills, 43 N.J. 390, 402 (1964). More important, when a retailer’s viability is threatened, it may become willing to make prohibited sales (*i.e.*, sales to underage persons or intoxicated patrons), in order to survive. If the other retailers cannot survive, they will go out of business thereby depriving consumers of ready access to alcoholic beverages and resulting in large retailers having even greater economic leverage over wholesalers. Historically, this leverage has been at the center of ABC trade practices investigations.⁵

⁴ RIP Padding is a practice in which the wholesaler pays more than one RIP per purchase transaction. Also, RIP documents are manipulated by inflating the quantity of the purchase to disguise or “justify” the payment of multiple RIPs on a single invoice. Sometimes, the wholesaler pays a higher RIP than listed in its CPL.

⁵ See, In re: Applications for Waiver, A.B.C. Bull. 2485, Items 3-5 (October 1, 2014), published at https://www.nj.gov/oag/abc/downloads/abc_bulletin_2485.pdf.

PROCEDURAL HISTORY

The foundation of trade stability and a level playing field is enforcement of the prohibition of price discrimination in sales of alcohol to retailers. This prohibition includes list prices (pre-discount prices), discounts and rebates. N.J.S.A. 33:1-89 and -90.

Since the mid-1980s, the Division has taken enforcement action in 425 matters involving CPLs and trade practices (Exhibit 25). Nonetheless, in the fall of 2018, ABC became aware of trade practices abuses by large wholesalers. Among the abuses is a practice known as RIP Padding, in which wholesalers would manipulate the RIP system to the benefit of large retailers. ABC requested information and documents from Allied and Fedway so that it could better understand how they implemented RIPs. This petition arises from data collected to date, but the investigation is on-going.

The Enforcement Bureau limited its inquiry to RIP Check payments in excess of \$20,000 issued in 2017 and 2018 to the 50 largest RIP customers and documents related to the RIP Checks. More abuses may have been uncovered had the Enforcement Bureau examined smaller RIP Checks and the related documentation. The wholesalers provided documents and EXCEL spreadsheets. ABC generated reports from those spreadsheets by doing various sorts of the data and calculations (i.e., the number of days between the date the retailer paid the invoice and the day the wholesaler paid the RIP to the retailer). The wholesalers also provided copies of RIP Checks, RIP Check detail reports, invoices and credit memoranda. Some documents were obtained during investigations of retailers. Even at this early stage of investigation, it is clear that Allied and Fedway have committed numerous violations of the ABC Act.

OVERVIEW OF RIPs

A. The Price Posting System and RIPs

The ABC Act created an industry framework that achieves trade stability by limiting price competition to its “beneficial aspects.” N.J.S.A. 33:1-3.1b. The ABC Act not only recognized the need to separate retailers from entities at the upper level of the industry, *i.e.*, wholesalers and manufacturers, N.J.S.A. 33:1-43, it also prohibits *all* discrimination in prices of alcohol sold to retailers. N.J.S.A. 33:1-3.1b(10), -89 and -90. In other words, the Legislature mandated ABC to create a level playing field in which retailers of all sizes could fairly compete.

In 1951, former Director Erwin B. Hock exercised his statutory authority in N.J.S.A. 33:1-93 to establish a “price posting system.” Heir v. Degnan, 82 N.J. 109, 114 (1980). N.J.S.A. 33:1-93 authorizes the Director to promulgate regulations governing the “maintenance and publication of invoice prices, discounts, rebates, free goods, allowances and other inducements” in the sale of wines and spirits to retailers. The price posting system requires each wholesaler to file its own CPL with ABC by the 15th of the month (or the first workday thereafter if the 15th falls on a weekend or holiday) preceding the month during which the CPL’s terms, conditions and price schedule will be effective. N.J.A.C. 13:2-24.6(a)4. These are “blind” filings that help prevent horizontal price fixing, because no wholesaler may examine its competitors’ CPLs until after it has submitted its own CPL and all CPLs have become public records, two workdays after the filing date. N.J.A.C. 13:2-24.6(a)7. Once filed, the prices contained in a wholesaler’s CPL cannot be changed until the next monthly filing date except by Order of the Director, N.J.A.C. 13:2-24.6(a)5. Nor may wholesalers deviate from the prices in their CPLs. N.J.A.C. 13:2-24.6(a)6.

Deviations from the CPL are indicia of discrimination. Thus, the CPL is an investigatory tool that facilitates investigation of discriminatory practices. It also, for example, enabled ABC to calculate a \$43,800 RIP overpayment to Stirling Fine Wines. See, Statement of Facts, §D, Example 1. See also, Addendum: Post and Hold is an Essential Investigatory Tool to Enforce the Antidiscrimination Provisions of the Alcoholic Beverage Control Act.

The RIPs regulation was adopted approximately 15 years ago. When ABC amended N.J.A.C. 13:2-24.1 to allow RIPs, former Director Jerry Fischer explained that 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. 35 N.J. Reg. 1045(a). Subsequently, the wholesale industry shifted from offering actual merchandise items in promotions through the use of vouchers for such items from a catalog, to the use of American Express gift checks. Ibid. The 2004 amendments required wholesalers and retailers to use corporate checks in place of the American Express gift checks. N.J.A.C. 13:2-24.1(e)1. Director Fischer noted that, “[f]rom a record-keeping and auditing perspective, this is a desirable alternative.” 35 N.J. Reg. 1045(a). Thus, all wholesalers and all retailers 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.” N.J.A.C. 13:2-24.1(e)3.

Fresh in ABC’s mind was the 1990’s Operation Dolus investigation, which concluded in or about 2001. Operation Dolus was the largest kickback investigation in ABC history. ABC

proved that many of the State's largest wine and spirits wholesalers and at least one beer wholesaler had paid cash kickbacks to Bayway World of Liquor, one of the State's largest retailers of package goods. In re: Applications for Waiver, A.B.C. Bull. 2485, Item 5 at 2-4.

The RIP regulation supported the promotional goals of wholesalers and suppliers. But, it placed strict limits on RIPs to limit their impact and to prevent them from becoming a new form of kickback. RIPs can be paid to a retailer that purchases a specific quantity of alcoholic beverages "in one purchase transaction." N.J.A.C. 13:2-24.1(b)3. A purchase transaction is a *single* order (not exceeding 50 cases) of a *single* product (or combination of related products) delivered in a *single* delivery that is reflected on a *single* invoice. Ibid. To prevent RIPs from becoming just another form of kickback, the largest permissible RIP is \$1,000 on a "purchase transaction." N.J.A.C. 13:2-24.1(e)2i. RIPs are "payable no less than 30 days and no more than 90 days *after* the payment for the product on which it is given." N.J.A.C. 13:2-24.1(b)2. Like other terms of sale, RIPs must be posted in the wholesaler's CPL. N.J.A.C. 13:2-24.1(e)4.

B. RIPs, Invoices and Resale Pricing

RIPs and quantity discounts must be included in the wholesaler's CPL. Wholesalers offer RIPs and quantity discounts in order to stimulate sales. Both strategies lower the retailer's *actual* product cost, but this is where the similarities end. A quantity discount is a reduction in the sale price for buying a large quantity of a product, given to the buyer at the time of purchase. See, Black's Law Dictionary 498 (8th ed. 2004). Hence, a quantity discount is reflected on the invoice as a deduction from the "list price" (i.e., pre-discount price) at the time of sale. The net amount

that the buyer has to pay is the “invoice cost,” which under ABC law is also the buyer’s minimum resale price. N.J.A.C. 13:2-24.8.

Conversely, RIPs are a form of rebate, N.J.A.C. 13:2-24.1(b)3, and rebates are a “return of part of a payment,” Black’s Law Dictionary at 1295. RIPs do not reduce the buyer’s invoice cost, ibid., because RIP payments are *supposed* to be paid *after* the retailer pays for the qualifying purchase. Hence, RIPs do not lower the retailer’s minimum resale price because no licensee may legally sell a product at less than its invoice cost. N.J.A.C. 13:2-24.8. The following hypothetical example may be helpful:

		<u>Retailer</u>
Quantity Purchased		20 Cases
Front Line Price	\$375.54 per case	\$7,510.80
Less: Quantity Discount	\$81 per case	\$1,620.00
Equals: Invoice Cost (Minimum Resale Price)	\$294.54	\$5,890.80
Less: CPL RIP (Maximum: 1 RIP per Order per Regulation)	\$350 on 15 cases	\$350.00
Equals: Actual Cost		\$5,540.80
Profit if Sold at Invoice Cost		\$350.00

Here, assuming the retailer sells at the minimum resale price (invoice cost), the \$350 RIP becomes its profit. When a wholesaler pads the RIP, it is padding the retailer’s profit margin.

STATEMENT OF FACTS

A. Wholesalers discriminate against small retailers and subsidize profits for favored retailers through RIPs.

In 2017, the State’s six largest wine and spirits wholesalers had gross sales of \$2,294,949,811, on which they paid \$200,147,800 in RIPs (Exhibit 1, Columns B and C). (The “six” shrank to five by 2018, because Allied acquired R&R Marketing, LLC, in 2017.) The reported RIP numbers for 2018 remained relatively consistent:⁶

Wholesaler	2018 Gross Sales	2018 Total RIPs Amount Paid	Number of Customers Receiving RIPs	RIPs as Percent of Sales 2018
Allied Beverage Group	\$1,090,948,917	\$92,028,109	6,262	8%
Fedway Associates	\$847,550,665	\$73,129,505	6,568	9%
Gallo	\$221,758,537	\$21,109,753	3,147	10%
American BD	\$170,673,446	\$17,943,332	2,750	11%
Winebow	\$52,723,160	\$5,603,782	2,522	11%
	\$2,383,654,725	\$209,814,481		9%

Source: As Reported by the Above Wholesalers

[Exhibit 1, Columns F, G, H and I (and supporting documents)]. Thus, Allied and Fedway paid approximately 79% of all RIPs in the wine and spirits sector paid by these wholesalers.

In 2018, these four licensees received the most RIPs from Allied and Fedway (combined):

Liquor World (Ft. Lee)	\$3,214,299
Joe Canal’s (Lawrenceville)	\$2,868,095
BJ’s (E. Rutherford)	\$1,687,395
Roger Wilco (Pennsauken)	\$1,608,048

⁶ All figures attributed to Allied for 2018 include R&R Marketing’s information, unless otherwise noted. Allied figures related to 2017 do not include R&R Marketing.

[Exhibits 2 & 3]. Additionally, Joe Canal's (Woodbridge), which has the same ownership as Joe Canal's (Lawrenceville), i.e., Birchfield Ventures, LLC, received an additional \$633,852 in RIPs from Allied (Exhibit 2). Fedway's RIP payments to Joe Canal's (Woodbridge) were not included because this retailer did not appear in Fedway's list of its 50 largest RIP customers.

In 2018, Allied paid more than \$92 million in RIPs to its 6,262 customers (Exhibit 1). Allied paid more than \$30 million in RIPs (or 32.6% of all of its RIPs) to its top 50 RIP customers (less than 1% of its 6,262 customers) (Exhibit 2), for an annual average of \$600,475 per customer. In contrast, Allied paid an annual average of less than \$10,000 to its remaining 6,212 customers, a 60:1 ratio. Allied paid \$18.7 million in RIPs (20% of all of its RIPs) to these RIP customers:

Allied's Top 20 RIP Customers 2018				
Retailer Name	License Number	Gross Purchases	Total RIPs Paid	RIPs as % (Added)
LIQUOR WORLD (FT. LEE)	21944011004	\$15,105,407	\$2,530,057	17%
JOE CANAL'S LAWRENCEVILLE	110744028002	\$8,474,352	\$2,036,669	24%
BJ'S (E RUTHERFORD)	21244002006	\$7,387,435	\$1,322,041	18%
BAYWAY WOLRD OF LIQUOR	200432133004	\$9,914,481	\$1,067,894	11%
ROGER WILCO (PENNSAUKEN)	42732003006	\$9,161,536	\$996,508	11%
STIRLING FINE WINES	143044015005	\$6,993,329	\$930,234	13%
BUY RITE (JERSEY CITY)	90644375005	\$7,423,979	\$877,943	12%
TOTAL WINE (RIVER EDGE)	25244005003	\$6,898,694	\$851,830	12%
COSTCO (EDISON TWP.)	120544021005	\$5,477,925	\$818,330	15%
CANAL'S (PENNSAUKEN)	42732016003	\$4,214,740	\$806,914	19%
BOTTLE KING (RAMSEY)	24844004007	\$8,667,867	\$804,627	9%
SAM'S EAST (FREEHOLD)	131644019002	\$3,693,089	\$798,963	22%
JOE CANA'S (RIO GRANDE)	50644003005	\$5,267,327	\$737,464	14%
COSTCO (WAYNE TWP.)	161444019008	\$5,161,682	\$726,880	14%
JOE CANAL'S (WOODBIDGE)	122532007006	\$2,846,654	\$633,852	22%
WEGMAN'S (OCEAN)	133744011009	\$4,810,511	\$595,932	12%
SHOP RITE (WHARTON)	143944011007	\$2,385,605	\$577,346	24%
FINE SPIRITS (TENAFLY)	26144004007	\$6,036,604	\$553,256	9%
NORTHFIELD LIQUORS	11844004001	\$3,096,520	\$522,809	17%
BUY RITE (MANAHAWKIN)	153044012005	\$3,359,914	\$512,851	15%
Total		\$126,377,651	\$18,702,398	
Source: Allied/2018/Demand 1-A			Avg. Percent	15%

[Exhibit 2]. Allied paid each of its top 20 RIP customers more than \$500,000 in RIPs, or an average of 15% of their combined gross purchases. Allied refunded at least 20% of the invoice cost to nine of its top 50 RIP customers via RIPs.⁷

Fedway paid \$73,129,505 in RIPs to its 6,568 retail customers in 2018 (Exhibit 1), of which, it paid \$17.4 million (or 24% of all of its RIPs) to its top 50 customers (Exhibit 3), less than

⁷ Technically, “refunded” is not accurate because Allied paid many RIP rebates before the retailers paid the underlying invoice, *infra*.

1% of its 6,568 customers, for an annual average of \$348,000. Fedway paid \$55,725,234 to its other 6,518 customers, an annual average of \$8,549, or a 41:1 ratio in favor of its largest RIP customers. Fedway's top 20 RIP customers was as follows:

Fedway's Top 20 RIP Customers 2018				
Retailer Name	License Number	Gross Purchases	Total RIPs Paid	% (Added)
JOE CANAL'S (LAWRENCEVILLE)	110744028002	\$5,803,680	\$831,426	14%
LIQUOR WORLD (FORT LEE)	21944011004	\$5,005,084	\$684,242	14%
TOTAL WINE (RIVEREDGE)	25244005003	\$5,516,025	\$672,604	12%
LITTLE BROS BEV (FLEMINGTON)	100944004006	\$5,128,289	\$654,137	13%
ROGER WILCO (PENNSAUKEN)	42732003007	\$4,625,963	\$611,540	13%
BOTTLE KING (RAMSEY)	24844004006	\$4,549,057	\$547,226	12%
STIRLING FINE WINES (STIRLING)	143044015005	\$3,276,305	\$507,938	16%
BUYRITE (MANAHAWKIN)	153044012005	\$3,667,026	\$507,617	14%
OCEAN WINE & SPIRITS(OCEAN)	133744011008	\$3,827,986	\$470,878	12%
BOTTLE KING (WAYNE)	161444027005	\$3,846,969	\$414,848	11%
JOE CANAL'S (RIO GRANDE)	50644003005	\$3,046,553	\$409,287	13%
WINE CHATEAU	121044011007	\$3,823,846	\$404,230	11%
SHOPRITE LIQUORS (FREEHOLD)	131644011004	\$2,950,607	\$392,104	13%
GARYS MARKETPLACE (MADISON)	141744013010	\$3,434,967	\$370,071	11%
BJ'S WHOLESALE (E RUTHERFORD)	21244002006	\$4,311,477	\$365,354	8%
FINE SPIRITS (TENAFLY)	26144004005	\$3,196,706	\$360,965	11%
CHERRY HILL FINE (CHERRY HILL)	40944001006	\$2,694,313	\$346,408	13%
THE WINE RACK	71244006008	\$2,475,096	\$345,055	14%
BOTTLE KING (GLEN ROCK)	22244006002	\$3,143,633	\$344,341	11%
TOTAL WINE (UNION)	201944071005	\$2,756,879	\$328,102	12%
Total		\$77,080,461	\$9,568,373	
			Avg Percent	12%
Source: Fedway/2018/Demand 1-A				

[Exhibit 3]. Thus, Fedway paid \$9.5 million in RIPs to its 20 largest RIP customers in 2018, for an average of \$478,419 each, or 12% of their invoice cost overall. Fedway paid eight retailers more than \$500,000 in RIPs. The tables demonstrate that Allied and Fedway refunded between 8-24% to their largest customers.

B. Wholesalers use RIPs to make purchase money loans to retailers in violation of the Credit and RIP Regulations.

1. Over-extensions of Credit.

“Extension of credit as an evil to be controlled in the business of selling intoxicating drink has long been a matter of public concern. ... The Director issued [the Credit Regulation] because of a belief that the granting of credit ... would undermine an orderly market ‘within the trade itself’ and would eventuate in public harm.” F. & A. Distrib. Co. v. Div. of A.B.C., 36 N.J. 34, 36 (1961). “The maximum period for which credit may be extended in sales made to retailers is 30 days from the date of delivery in the case of all sales of any type of alcoholic beverage.” N.J.A.C. 13:2-24.4(a)1. However, Allied allowed retailers to pay their RIP invoices well beyond the 30-day limit set forth in the Credit Regulation, N.J.A.C. 13:2-24.6. To filter out the various notice provisions related to unpaid invoices, the Enforcement Bureau examined RIP invoices paid in more than 38 days. According to the information provided by Allied for 2018, RIP items receive extended credit as follows:

Licensee	RIP Items For Which Invoice Was Paid In More Than 38 Days
JOE CANAL'S (Lawrenceville and Woodbridge)	677
BAYWAY WORLD OF LIQOUR	1,044
STIRLING FINE WINES	335

Exhibit 14, Column O (Lines 10723, 29061 and 40199). Thus, Allied improperly extended credit to these retailers in violation of N.J.A.C. 13:2-24.4.⁸

⁸ Exhibit 14 lists approximately 149 RIPs over \$1,000 for which Allied provided no payment date. Thus, it was not possible to determine the number of days between the retailer’s invoice payment and Allied’s RIP payment.

2. RIPs Paid Before Retailers Pay Invoices.

“The mere business assistance of aiding a retailer to pay bills and supporting that aid with a transition case loan [is] forbidden.” IMO Lewis Lo Presti, A.B.C. Bull. 2100, Item 6 at 10 (April 6, 1973) aff’d App. Div. A-2215-72 (December 26, 1973). Both wholesalers paid RIPs to retailers before the retailers paid the invoices containing the items on which the RIPs were paid. In 2017, Allied financed retailer purchases with interest free loans to the retailers listed below. Allied paid every one of the RIP checks below *before* the retailer paid its invoice. It is also notable that all of the listed RIP payments relate to “Invoice 999999.” The table below measures the number of days between the date an invoice was paid and the date on which Allied paid the largest RIPs in 2017.

**Allied 2017 Early RIP Payment
RIP Amount Paid > 1000**

License Name	License #	RIP Check Number	RIP Check Date	Rip Invoice Date	Invoice Number	Invoice Paid Date	Days from Inv Pd to Rip		RIP Amount
							Ck Date <30	Paid	
BAYWAY WOULD OF LIQUOR	200432133004	851756	1/27/2017	12/31/2016	999999	2/6/2017	-10		200,000
JOE CANAL'S (Lawrenceville)	110744028002	851724	1/16/2017	12/31/2016	999999	2/10/2017	-25		133,605
JOE CANAL'S (Lawrenceville)	110744028002	889486	7/14/2017	6/30/2017	999999	8/4/2017	-21		107,724
BAYWAY WOULD OF LIQUOR	200432133004	896753	8/3/2017	6/30/2017	999999	8/7/2017	-4		99,999
LIQUOR WORLD (Ft. Lee)	21944011004	910949	10/11/2017	9/30/2017	999998	10/25/2017	-14		87,832
JOE CANAL'S (Lawrenceville)	110744028002	924801	12/12/2017	11/30/2017	999999	1/5/2018	-24		86,381
JOE CANAL'S (Lawrenceville)	110744028002	882504	6/13/2017	5/31/2017	999999	7/7/2017	-24		76,274
HUDSON WINE MARKET INC	21944060014	879159	5/25/2017	4/30/2017	999999	6/2/2017	-8		72,000
HUDSON WINE MARKET INC	21944060014	855257	2/10/2017	1/31/2017	999999	3/3/2017	-21		72,000
HUDSON WINE MARKET INC	21944060014	872006	4/19/2017	4/30/2017	999999	5/22/2017	-33		72,000
CANAL'S (Pennsauken)	42732016003	851732	1/16/2017	12/31/2016	999999	2/8/2017	-23		71,585
JOE CANAL'S (Lawrenceville)	110744028002	868448	4/11/2017	3/31/2017	999999	5/4/2017	-23		66,808
JOE CANAL'S (Lawrenceville)	110744028002	917779	11/8/2017	10/31/2017	999999	12/3/2017	-25		65,983
JOE CANAL'S (Woodbridge)	122532007006	851725	1/16/2017	12/31/2016	999999	2/2/2017	-17		62,070
JOE CANAL'S (Lawrenceville)	110744028002	910929	10/11/2017	9/30/2017	999999	11/3/2017	-23		61,300
LIQUOR WORLD (Ft. Lee)	21944011004	889478	7/14/2017	6/30/2017	999999	7/17/2017	-3		60,978
CANAL'S (Pennsauken)	42732016003	889494	7/14/2017	6/30/2017	999999	7/31/2017	-17		57,645
JOE CANAL'S (Lawrenceville)	110744028002	903806	9/12/2017	8/31/2017	999999	10/9/2017	-27		50,203

(License Name Changed to DBA Name)
Source: Allied 2017 Response to Demand 2

[Exhibit 4].⁹

Bayway World of Liquor, Joe Canal's (Lawrenceville), Canals (Pennsauken), and Liquor World (Ft. Lee) received significant advance RIP payments from Allied before the retailer paid the underlying invoice. Because the wholesalers paid the above-referenced RIPs before the retailers paid their invoices, they are purchase money loans and not RIPs or rebates, as Allied characterized them. Consequently, on January 27, 2017, Allied advanced Bayway World of Liquor \$200,000 through a RIP, but the retailer did not pay the invoice until February 6, 2017. Similarly, on August 3, 2017, Allied paid Bayway World of Liquor a \$99,999 RIP on another invoice, but the retailer did not pay the invoice until August 7, 2017 (Exhibit 4). Bayway's owner, Fred Leighton, told ABC Investigator Nancy Foz "that he had 'a cash flow problem' twice during 2017 and that he requested Allied to issue his RIP Checks early so he 'did not have to go on COD'" (Exhibit 5, Certification of Nancy E. Foz at ¶7). Not only did this transaction violate the RIP Regulation, it also violated the Credit Regulation, N.J.A.C. 13:2-24.4 and N.J.S.A. 33:1-43.^{10,11}

⁹ A negative number indicates that the wholesaler paid the RIP before the retailer paid the invoice.

¹⁰ "The basic concept embodied in N.J.A.C. 13:2-24.4 is that a failure to timely pay credit obligations due [to] a wholesaler from the sale of alcoholic beverages will result in a retailer sanction of loss of credit privileges." Proposed Amendment: N.J.A.C. 13:2-24.4 at 2 (1988). "[E]xtension of credit to retailers beyond 30 days represents an impermissible encroachment on the independence of retailers and wholesalers from influence by the other party [i.e., tied house] and most often encourages discriminatory treatment." Id. at 4. Also, the primary objective of the Credit Regulation is to establish industry stability and protect the alcoholic beverage tax base. Rule Proposals, 47 N.J.R. 1236(a) (2015).

¹¹ That Allied and Fedway have reported multiple invoices with the same number ("999999" or "9999999") indicates that they are not keeping separate, complete and accurate RIP records, in violation of N.J.A.C. 13:2-24.1(e)3, or possibly that this code represents a form of system override that permits the issuance of "adjustment checks" outside of the wholesaler's regular practice.

Moreover, regarding yet another invoice bearing the number 999999 (December 31, 2017), Allied paid \$83,416 by RIP Check No. 939143 (January 31, 2018) to Bayway World of Liquor and the retailer paid the invoice two days later on February 2, 2018 (Exhibit 16, Line 10). Allied identified the item on which RIP Check No. 939143 was paid as “Adjustment Check” (ibid.). In 2018, Allied paid 113 RIPs of \$20,000 or more (id., Column R, Lines 2-114). Almost all of these invoices bore the number “999999” and, for each invoice with that number, Allied identified the item on which the RIP was paid as “Adjustment Check” (ibid.).

Also, Allied provided the information in the above table in response to the request that it identify the specific RIP item (product) on which the rebate was paid. Instead of identifying the product as a particular alcoholic beverage, such as “Smirnoff Vodka” or “Hennessy VS,” Allied reported that these RIP payments were “Adjustment Checks.” Exhibit 4; Exhibit 16, Column Q.

In 2018, Fedway paid 275 RIPs before the retailers paid the underlying invoice (Exhibit 17). For example, Fedway paid RIP Check No. 333022 (January 7, 2019) in the amount of \$226,827 to Joe Canal’s (Lawrenceville) on Invoice No. 86389 (December 31, 2018) (id., Line 7, Column F), 23 days *before* the retailer paid the invoice on January 30, 2019 (id., Line 7, Column I). But, the “purchase transaction” was not complete until February 26, 2019, when Fedway delivered the product (id. at Line 7, Column G).

C. Wholesalers pay RIPs to retailers in less than 30 days from retailer payment of invoice.

RIP payments are “payable no less than 30 days and no more than 90 days after the payment for the product on which it is given.” N.J.A.C. 13:2-24.1(b)2. The purpose of this requirement is to ensure that the purchase transaction is complete (including delivery to the retailer’s licensed premises or to a public warehouse space for which the retailer or a third party holds a public warehouse license) and to ensure that the transaction still qualified for the RIP after credit offsets, before the RIP rebate is paid.¹² As demonstrated below, the largest RIP retailers received their RIP rebates in less than 30 days from the date of payment.

By RIP Check dated July 16, 2018, Allied made a \$45,000 RIP payment to Stirling Fine Wines in less than the minimum 30-day period because Stirling Fine Wines paid the May 31, 2018 invoice on June 30, 2018 (Exhibit 7) or on July 4, 2018 (Exhibit 6, Line 39241). That is, Allied paid the RIP to Stirling Fine Wines, either 16 or 12 days after invoice payment (Exhibit 7 or Exhibit 6, respectively), in violation of the 30-day RIP payment requirement (Ibid.). This payment included a \$43,800 RIP overpayment. See, Statement of Facts, §D, Example 1.

A sort of Allied’s 2018 RIPs over \$1,000 shows that it paid 1,375 RIPs in less than 30 days after the retailer paid the underlying invoice (Exhibit 18, Worksheet 1, Line 2-1376).¹³ Under

¹² Inventory stored by the selling wholesaler does not constitute delivery to the retailer because the product is not physically segregated, nor is it moved. It is merely a computer entry on the records of the wholesaler. See, In re: Anti-Competitive and/or Potentially Discriminatory Practices in Wholesale Alcoholic Beverage Industry, A.B.C. Bull. 2486, Item 8, at 1-117-120 (June 30, 2015), published at <https://www.nj.gov/oag/abc/downloads/abc-bulletin-2486.pdf>.

¹³ Sort of Column K (smallest to largest), Lines 2-1376.

RIP Check No. 982283 (August 14, 2018), Allied paid \$132,388 in RIPs on 22 RIPs over \$1,000 to Liquor World (Ft. Lee) in violation of the 30-day RIP payment rule, because all of these invoices were paid between July 16 and August 7, 2018 (Exhibit 18 at Worksheet 2, Lines 240-261).¹⁴

When 2018 RIP Checks of all sizes, including those less than \$1,000, are counted, Allied prepaid thousands of RIPs in less than 30 days from the date that these retailers paid their invoices:

Licensee	Items For Which RIP Checks Were Paid in Less Than 30 Days From Invoice Payment
JOE CANAL'S (Lawrenceville and Woodbridge)	3,073
BAYWAY WORLD OF LIQUOR	2,977
STIRLING FINE WINES	1,434

See, Exhibit 14 (Lines 10723, 29061 and 40199).¹⁵

In 2018, Fedway paid 857 RIPs in less than 30 days after payment by, and delivery to, the retailer. This includes the 275 RIPs paid before the retailer paid its invoice, supra, (Exhibit 17). For example, Fedway RIP Check No. 333022 paid RIPs on Invoices 86389, 14553, 11420, 14447, 11421, 14553, 14116, 11455 and 11190 (Exhibit 17, Worksheet 2, at Lines 244-254). Notably all but one of these invoices were dated November 30, 2018, and all but one of these invoices were paid on December 30, 2018, but Fedway's RIP Check was dated January 7, 2019, eight days later (Exhibit 17, Worksheet 2, Lines 245-254). Moreover, review of the information submitted by Fedway for 2018 shows as follows:

¹⁴ Column D sorted (descending order), Lines 240-261.

¹⁵ In 2017, Allied paid the following number of RIP items in less than 30 days: 194 RIPs to STIRLING FINE WINES, 88 RIPs to JOE CANAL'S (Lawrenceville), 98 RIPs to BAYWAY WORLD OF LIQUOR (Exhibit 13).

Licensee	Items For Which RIP Checks Were Paid in Less Than 30 Days From Invoice Payment
JOE CANAL'S (Lawrenceville)	6,718
ROGER WILCO (Pennsauken)	4,461
BOTTLE KING (Ramsey)	4,377

See, Exhibit 15, Column K, Lines 69990, 104319 and 16149. Clearly, Allied and Fedway routinely pay RIPs to retailers in less than 30 days from the invoice payment date.

D. RIP Padding results in RIP overpayments and unfair competition.

Some of the RIP practices uncovered by the Enforcement Bureau include RIP Padding by Allied and Fedway. Here are a few examples:

Example 1: On July 16, 2018, Allied issued a \$104,962 RIP check to Stirling Fine Wines for its May 31, 2018 purchase on Invoice 321440. Exhibit 7. By comparing the invoice to Allied's May 2018 CPL, it is clear that this check included a \$43,800 RIP overpayment as follows:

Invoice 321440 (May 31, 2018):	Cases	RIP PMT
<u>Product</u>		
Absolut 80	900	\$30,000
Bacardi Gold	400	\$15,000 (both products)
(4 lines @ 99 cases; 1 line @ 4 cases)		
Bacardi Sup	1,100	
(10 lines @ 99 cases; 1 line at 11 cases)		
<i>Total RIP Payment:</i>		\$45,000

[Exhibit 7].

According to Allied's May 2018 CPL (Exhibit 19), the biggest applicable RIPs were:

Product	Cases	RIP
Absolut 80 LT SKU#: 3976020	30 cases	\$1,000
CPL RIP Tab Line: 1200 & 12127		
Bacardi Rum (various) SKU#: 1430060	10 cases	\$ 100
CPL RIP Tab Line: 4344 & 11130		
Bacardi Rum (various) SKU#: 1431060	10 cases	\$ 100
CPL RIP Tab Line: 4347 & 11133		
Equals: Total RIPs Allowable per CPL		\$1,200

Total RIP Payment:	\$ 45,000
Less: Total RIPs Allowable per CPL	\$ 1,200
Total RIP Overpayment	\$ 43,800 [Id.]

Allied paid the equivalent of **30** RIPs on the Absolut 80 and **150** RIPs on the Bacardi. Allied's RIP overpayment to Stirling Fine Wines was **\$43,800**.

The following analysis is limited to the retailer's purchase of Absolut 80 LT¹⁶ and demonstrates how RIP Padding benefitted Stirling Fine Wines over a hypothetical competitor for which Allied followed the rules:

Allied Sale of 900 Cases of Absolut 80 1 LT to Stirling Fine Wines			
Statement of Facts, Example 1			
		<u>Retailer</u>	<u>Stirling Fine Wines</u>
Quantity Purchased		900 Cases	900 Cases
Front Line Price	\$230.94 per case	\$207,846.00	\$207,846.00
Less: Quantity Discount	\$56.40 per case	\$50,760.00	\$50,760.00
Equals: Invoice Cost (Minimum Resale Price)	\$174.54	\$157,086.00	\$157,086.00
Less: CPL RIP (Maximum: 1 RIP per Order per Regulation)	\$1,000 on 30 cases	\$1,000.00	n/a
Less: RIP Padding (more than 1 RIP)		n/a	\$30,000.00
Equals: Actual Cost		\$156,086.00	\$127,086.00
Profit if Sold at Invoice Cost		\$1,000.00	\$30,000.00
Entitled Retailer Advantage			\$29,000.00

Because of the overpayment of \$29,000, Stirling Fine Wines' cost per case was \$142.32, or \$32.22 per case *less* than the \$174.54 cost per case paid by the retailer that received RIPs according to the rules. On the acquisition of 900 cases, this is the equivalent of 166 free cases at \$174.54 per case. Although the maximum RIP is only \$1,000 per purchase transaction per item, Allied paid \$30,000

¹⁶ "LT" refers to liters; "ml" refers to milliliters.

to Stirling Fine Wines creating an unfair profit margin (\$29,000) in favor of this retailer at the expense of the competition. Retailers that do not benefit from Allied’s RIP abuses are competitively disadvantaged because their minimum resale prices (i.e., their invoice cost) is \$174.54 and if they sell at or near invoice cost, they are likely losing money. Conversely, Stirling Fine Wines made at least \$32.22 per case (or \$2.68 per bottle) more than its retail competitor on Absolut 80.

Regarding the two Bacardi Rum products, Allied’s “best case price” was \$119.76 on both products (Exhibit 19, Lines 1763 and 1878, Column U). Thus, when Allied made a RIP overpayment of \$14,800 to Stirling Fine Wines, this was the equivalent of 124 free cases ($\$14,800/\$119.76=123.6$). In reality, Allied’s “best case price” was “free” for Stirling Fine Wines. Competitor retailers that received RIPs in accordance with the rules were at a significant competitive disadvantage to Stirling Fine Wines as a result of this violative transaction.

Example 2: Similarly, Fedway padded the number of cases of Tito’s Vodka it sold to Gary’s Wine & Marketplace (Wayne). Fedway Invoice 72103 (November 30, 2017) (Exhibit 20) indicates:

Invoice 72103 (November 30, 2017):		
<u>Product</u>		<u>Cases</u>
Tito’s Vodka 1.75 LT (SKU#: 101660)		147
Tito’s Vodka 375 ml (SKU#: 101630)		3
Tito’s Vodka 50 ml (SKU#: 101600)		3
<i>Total RIP Payment:</i>		<i>\$6,600</i>

However, according to Fedway’s November 2017 CPL (Exhibit 21), the maximum RIPs on these products were:

<u>Product</u>	<u>Cases</u>	<u>RIP</u>
Tito's Vodka 1.75 LT (SKU#: 101660) CPL RIP Tab Line: 6239	25 cases	\$825
Tito's Vodka 375 ml (SKU#: 101630) CPL RIP Tab Line: 6235 (5 cases @ \$80)		N/A
Tito's Vodka 50 ml (SKU#: 101600) CPL RIP Tab Line: 6233 (5 cases @ \$80)		N/A
<i>Equals: Total RIPs Allowable per CPL</i>		\$ 825

Total RIP Payment:	\$ 6,600
Less: Total RIPs Allowable per CPL	<u>\$ 825</u>
Total RIP Overpayment	\$ 5,775 [Id.]

As noted, according to Fedway's November 2017 CPL (Exhibit 21), the only RIP for which the retailer qualified was \$825 on the purchase of 25 cases of Tito's vodka 1.75 LT. Fedway not only padded the RIP Check Detail Report by inflating the purchase from **153** cases to **200** cases, it also rebated the equivalent of eight RIPs ($8 \times \$825 = \$6,600$), resulting in a RIP overpayment of \$5,775. See, Exhibit 20.

Example 3: In another transaction, Allied made a RIP overpayment equal to 54% of the invoice price to Gary's Wine & Marketplace (Somerset). Invoice 143065 (December 31, 2017) indicates that the retailer purchased 60 cases of Provenance Sauvignon Blanc at the invoice price of \$10,144.20 (Exhibit 22). Allied's December 2017 CPL (RIP Line 1186) (Exhibit 23) indicates that the applicable RIP was \$500 on the purchase of 5 cases. Nevertheless, Allied paid a \$6,000 RIP to the retailer (Exhibit 22), which was the equivalent of 12 RIPs ($\$6,000 / \$500 = 12$), 11 more than allowed by the regulation, resulting in a RIP overpayment of \$5,500 ($\$6,000 - \500).

Example 4: In a sale to Gary's Wine & Marketplace (Madison) (Exhibit 12), Fedway inflated the number of cases purchased by the retailer. Focusing on just one of the many problems

with Fedway's Invoice 08358 (November 2, 2017), the invoice indicates that Gary's Wine & Marketplace (Madison) (see, Exhibit 12) made the following purchase:

Invoice 08358 (November 2, 2017):		
<u>Product</u>	<u>Cases</u>	<u>RIP</u>
1.75LT Grey Goose Vodka	20	\$3,000
1LT Grey Goose Vodka	20	<u>\$1,250</u>
<i>Total RIP Payment:</i>		<i>\$4,250</i>

However, according to Fedway's November 2017 CPL (Exhibit 21), the maximum RIPs on these products were:

<u>Product</u>	<u>Cases</u>	<u>RIP</u>
1.75LT Grey Goose Vodka SKU#: 116760	15 cases	\$350
CPL RIP Tab Line: 5348 (25 cases @ \$1,000 (N/A))		
1LT Grey Goose Vodka SKU:287000	10 cases	<u>\$180</u>
CPL RIP Tab Line: 5363 (25 cases @ \$625 (N/A))		
<i>Less: Total RIPs Allowable per CPL</i>		<i>\$530</i>

Total RIP Payment:	\$ 4,250
Less: Total RIPs Allowable per CPL	<u>\$ 530</u>
Total RIP Overpayment	\$ 3,720 [Id.]

Thus, the RIP Check Detail Report that accompanied the RIP Check, indicates that the RIP was paid on **75** cases of 1.75LT Grey Goose and **50** cases of 1LT Grey Goose to support the overpayment (Exhibit 12, RIP Check Detail Report). This created the impression that the retailer qualified for a bigger RIP (the 25 case RIP of \$1,000) on the 1.75LT bottles instead of the smaller RIP (15 case RIP of \$350) and likewise for the 1LT bottles. (Exhibit 21, RIP Tab Line: 5348). Fedway overstated the number of cases purchased by the retailer on the RIP Check Detail Report leading to Fedway's RIP *overpayment* of \$3,720 to Gary's Wine & Marketplace (Madison) (\$4,250-\$530=\$3,720). The overpayment of \$3,720 equaled **37.3%** of the total invoice purchase cost of \$9,981.60. In addition, Fedway provided Gary's Wine & Marketplace a profit subsidy of \$2,650 just on its purchase of Grey Goose 1.75 LT, as follows:

Fedway Sale of 20 Cases of Grey Goose 1.75 LT to Gary's Wine & Marketplace (Madison)
Statement of Facts, Example 4

		<u>Retailer</u>	<u>Gary's (Madison)</u>
Quantity Purchased		20 Cases	20 Cases
Front Line Price	\$375.54 per case	\$7,510.80	\$7,510.80
Less: Quantity Discount	\$81 per case	\$1,620.00	\$1,620.00
Equals: Invoice Cost (Minimum Resale Price)	\$294.54	\$5,890.80	\$5,890.80
Less: CPL RIP (Maximum: 1 RIP per Order per Regulation)	\$350 on 15 cases	\$350.00	n/a
Less: RIP Padding (more than 1 RIP)		n/a	\$3,000.00
Equals: Actual Cost		\$5,540.80	\$2,890.80
Profit if Sold at Invoice Cost		\$350.00	\$3,000.00
Entitled Retailer Advantage			\$2,650.00

Additionally, Fedway paid multiple RIPs on this transaction, even though only one RIP is permissible per item on a single purchase transaction. N.J.A.C. 13:2-24.1. Thus, it is clear that Allied and Fedway regularly engage in RIP Padding that results in RIP overpayments.

E. Wholesalers pay RIPs in excess of the \$1,000 maximum per purchase transaction.

The largest permissible RIP is \$1,000 on a single "purchase transaction." N.J.A.C. 13:2-24.1. By paying multiple RIPs per invoice item, Allied paid more than 1,400 and 1,700 individual RIPs that exceeded \$1,000 in 2017 and 2018, respectively (Exhibit 8, Lines 7-1450 and Exhibit 9, Lines 2-1741). Similarly, Fedway paid more than 1,400 and 1,300 RIPs that exceeded \$1,000 in 2017 and 2018, respectively (Exhibits 10, Lines 8-1443 and Exhibit 11, Lines 2-1741).

F. Wholesalers use inaccurate RIP documents to “justify” excessive RIP payments.

As previously discussed, Allied paid a \$45,000 RIP on Invoice 321440 to Stirling Fine Wines that included a RIP overpayment of \$43,800 on the purchase of three products, because the RIPs listed in the wholesaler’s CPL indicate that the RIPs applicable for these purchases were \$1,200 (i.e., \$1,000, \$100 and \$100) (Exhibit 19). See, Statement of Facts §D, Example 1.

In one transaction, Fedway paid a RIP to Gary’s Wine & Marketplace (Madison) on its purchase of two sizes of vodka in November 2017. Fedway inflated the number of cases on its RIP Check Detail Report by reporting the purchase as **50** cases of 1 LT bottles and **75** cases of 1.75 LT bottles, when the invoice reported that only **20** cases of each size were purchased (Exhibit 12). By inflating the number of cases on the RIP Check Detail Report, Fedway created a false justification to pay a RIP *overpayment* of \$3,720 equaling **37.3%** of the total invoice purchase cost ($\$3,720/\$9,981.60=37.27\%$)(Id.).

Similarly, Fedway padded the number of cases of Tito’s Vodka it sold to Gary’s Wine & Marketplace (Wayne) under Invoice 72103 (November 30, 2017) (Exhibit 20). Fedway padded the RIP Check Detail Report by inflating the purchase from **153** cases to **200** cases, leading to a RIP overpayment of \$5,775. See, Exhibit 20.

The above examples show that Allied and Fedway engaged in discriminatory practices through manipulation of RIPs. Accordingly, the Enforcement Bureau petitions for rulemaking.

LEGAL ARGUMENT

YOUR HONOR SHOULD GRANT THE PETITION FOR RULEMAKING REGARDING THE RIP REGULATION, N.J.A.C. 13:2-24.1, AND RELATED REGULATIONS BECAUSE NEW JERSEY'S TWO LARGEST WINE AND SPIRITS WHOLESALERS AND CERTAIN LARGE RETAILERS HAVE USED RIPS TO VIOLATE THE ABC ACT.

N.J.S.A. 33:1-93(c) vests Your Honor with “power to promulgate such rules and regulations on the maintenance and publication of invoice prices, discounts, rebates, free goods, allowances and other inducements.” See also, N.J.S.A. 33:1-39 (authorizing the Director to promulgate rules regarding unfair competition and such other matters whatsoever as are or may become necessary in the fair, impartial, stringent and comprehensive administration of the ABC Act).

RIPs provide a built-in profit margin because they are not considered in the retailer's cost. Because retailers cannot sell below invoice cost, RIPs have provided the “special” retailers with the ability to reap increased profits while smaller retailers derive far less profit when they sell at competitive retail prices. This is compounded by the payment of multiple RIPs on single purchase transactions, over-extension of credit and interest free financing. The regulatory violations set forth in the Statement of Facts show that Allied and Fedway have manipulated RIPs so as to place their favored retailers in dominant positions within their geographic areas thereby harming unfavored retailers and trade stability. The only lasting remedy is to engage in rulemaking regarding RIPs.

As “a matter of law, acts by a liquor licensee's employees are no different than those of the licensee itself.” Div. of A.B.C. v. Maynards Inc., 192 N.J. 158, 182 (2007). Hence, licensees

are strictly liable for acts of their employees. *Id.* at 181. “The fact that the licensee did not participate in the violation or that his agent, servant or employee acted contrary to instructions given to him by the licensee or that the violation did not occur in the licensee’s presence shall constitute no defense to the charges preferred in such disciplinary proceedings.” N.J.A.C. 13:2-23.28(c). Thus,

[it] is not necessary ... to establish actual or constructive notice on the part of the licensee, or circumstances imputing notice to it on principles of *Respondeat superior*, of violation of the regulation by an agent or employee. For reasons of public policy it has long been the law of this State that the licensee is responsible for such infraction regardless of notice; ... [F. & A. Distrib. Co., 36 N.J. at 37].

A single paperwork mistake might be a clerical error. But, it is difficult to believe that these widespread abuses of RIPs took place without anyone in authority having knowledge thereof.

Pursuant to N.J.A.C. 13:2-24.1(e)3,

All wholesalers and all retailers 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; and ... [Emphasis added].

See also, N.J.A.C. 13:2-23.32 (requiring licensees to maintain accurate business records). As demonstrated above, both Allied and Fedway have violated this requirement by creating false records related to RIPs.

Allied paid millions in RIPs to its top accounts. In fact, Allied paid its top 50 accounts 60 times more than its remaining accounts. Fedway also paid RIPs to its favored customers at a rate of 41:1. Both wholesalers did so by committing numerous violations of the ABC Act. Discrimination in the sale of alcohol to retailers is expressly prohibited (N.J.S.A. 33:1-3.1(b)10, -

89 and -90). RIPS were never intended to encourage discrimination in favor of favored retailers by paying RIPS for fictitious purchases, or for padding to artificially “*justify*” increased RIP payments. Certainly, there cannot be any legal support for the practice of extending credit beyond 30 days, for wholesalers advancing interest free financing to retailers or for aiding and abetting credit violations to keep a retailer off of COD. *Ibid.* Exhibit 4, another report generated from Allied’s submission, shows retailers that received credit for more than 30 days, in violation of the Credit Regulation, N.J.A.C. 13:2-24.4(a)1.

In Statement of Facts, §D, Example 1, Allied made a \$43,800 RIP overpayment as compared to its CPL-listed RIP. As explained in that example, Allied paid the equivalent of **30** RIPS on the Absolut 80 and **150** RIPS on Bacardi Rum. This manipulation resulted in a **\$43,800** RIP overpayment to Stirling Fine Wines, which was little more than a kickback. Stirling Fine Wines received the equivalent of 166 free cases of Absolut 80 and 124 free cases of Bacardi Rum on this single invoice. There can be no doubt that competitor retailers that received RIPS in accordance with the rules were at a significant competitive disadvantage to Stirling Fine Wines as a result of this transaction.

In Example 2, Fedway padded the number of cases of Tito’s Vodka it sold to Gary’s Wine & Marketplace (Wayne). According to Fedway’s November 2017 CPL, the only RIP for which the retailer qualified was \$825 on the purchase of 25 cases. However, Fedway not only padded the RIP Check Detail Report by inflating the purchase from **153** cases to **200** cases, it also rebated the equivalent of eight RIPS (8x\$825=\$6,600), a RIP overpayment of \$5,775.

In Example 3, Allied made a RIP overpayment equal to 54% of the purchase price to Gary's Wine & Marketplace (Somerset). Allied paid a \$6,000 RIP to the retailer. However, Allied's CPL indicated that the applicable RIP was \$500 on the purchase of 5 cases. Allied paid 12 RIPS, instead of the allowable one on the retailer's purchase of 60 cases of Provenance Sauvignon Blanc at the invoice price of \$10,144.20. Thus, Allied made a RIP overpayment of \$5,500.

In Example 4, Fedway inaccurately reported on its RIP Check Detail Report that Gary's Wine & Marketplace (Madison): (1) purchased 55 *more* cases of the 1.75LT bottles than its invoice indicates and (2) purchased 30 *more* cases of the 1LT bottles than the invoice indicates. Fedway inflated the number of cases purchased by the retailer on its RIP Check Detail Report to prop up a RIP *overpayment* of \$3,720 to Gary's Wine & Marketplace (Madison). This created the illusion that the retailer qualified for a bigger RIP (the 25 case RIP of \$1,000) on the 1.75LT bottles instead of the smaller RIP (15 case RIP of \$350) and did the same with the 1LT bottles (Fedway November 2017 CPL RIP Tab Line: 5348). Additionally, it paid multiple RIPS when only one RIP is permissible per item on a single purchase transaction. N.J.A.C. 13:2-24.1(b)3.

RIP payments are "payable no less than 30 days and no more than 90 days *after* the payment for the product on which it is given." N.J.A.C. 13:2-24.1(b)2. Notwithstanding, some of the RIP payments were made by the wholesalers before the retailer paid its bill. Mr. Leighton, the owner of Bayway World of Liquors, admitted that two pre-payments, totaling \$299,999, were made so he could avoid being placed on COD. (Exhibit 5, Certification of Nancy E. Foz at ¶7). This is not only a violation of the Credit Regulation, N.J.A.C. 13:2-24.4, it is also a violation of

N.J.A.C. 33:1-43.¹⁷ “The mere business assistance of aiding a retailer to pay bill and supporting that aid with a transition case loan [is] forbidden.” IMO Lewis Lo Presti, A.B.C. Bull. 2100, Item 6 at 10, supra; see also, In re: Jersey National Liquor Company Case, A.B.C. Bull. 1550, Item 2 (February 13, 1964) (Plenary wholesaler licensee suspended for 55 days for furnishing money and inducements to retailers and credit violations). Similarly, a “solicitor is forbidden to loan money or to arrange for ... a loan to a retailer.” IMO Lewis Lo Presti, A.B.C. Bull. 2100 at 10, citing In re: Schlosser, A.B.C. Bull. 1550, Item 3 (February 13, 1964) (solicitor suspended for 95 days for arranging a loan from his employer, Jersey National Liquor Company); In re: Bauman, A.B.C. Bull. 1550, Item 5 (February 13, 1964) (solicitor suspended for 45 days for arranging a loan from his employer, Jersey National Liquor Company).

In the Statement of Facts are reports generated from the wholesaler’s submissions to ABC. These reports show that they paid retailers *before* the retailer paid the invoices as well as paying multiple RIPs to retailers before the 30-day period expired (Exhibit 14 - Allied; Exhibit 17 - Fedway). It is clear that the RIP process is broken. Remedial action through rulemaking is necessary to address this situation.

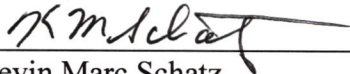
¹⁷ “Tied house” refers to an impermissible beneficial interest that a wholesaler has in a retailer and vice versa, that permits one to exert undue influence over the other. Such interest includes any payments or delivery of money or property by way of loan or otherwise accompanied by an agreement to sell the product of the wholesaler. See, N.J.S.A. 33:1-43.

CONCLUSION

For these reasons, Your Honor should grant the Enforcement Bureau's petition for rulemaking.

Respectfully submitted,

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: 

Kevin Marc Schatz
Senior Deputy Attorney General

**LEGEND OF RETAILERS' CORPORATE NAMES, TRADE
NAMES AND LICENSE NUMBERS**

72 Liquors LLC, Buyrite (Manahawkin), License No. 1530-44-012-005
Abrol Inc., Wine Chateau (Piscataway), License No. 1217-44-016-005
Ashburn Corporation, t/a Roger Wilco (Pennsauken), License No. 0427-32-003-008
Birchfield Ventures, LLC, t/a Joe Canal's (Lawrenceville), License No. 1107-44-028-003
Birchfield Ventures, LLC, t/a Joe Canal's (Woodbridge), License No. 1614-44-019-009
BLW World, Inc., t/a Liquor World (Fort Lee), License No. 0219-44-011-006
Bootlegger's Discount Liquors, Northfield Liquors (Northfield), License No. 0118-44-004-001
Costco Wholesale Corp., t/a Costco (Edison Twp.), License No. 1205-44-021-005
Costco Wholesale Corp., t/a Costco (Wayne Twp.), License No. 1614-44-019-009
DGK Beverage Co., Inc., t/a Shop Rite (Wharton), License No. 1439-44-011-007
Flemington Central Liquors, Inc., Little Bros Bev (Flemington), License No. 1009-44-004-007
Jersey City Buy Rite, LLC, t/a Buy Rite (Jersey City), License No. 0906-44-375-005
JWC Beverage Corp., t/a BJ's Wholesale Club (E Rutherford), License No. 0212-44-002-006
Leiham Corp., t/a Bayway World of Liquor, License No. 2004-32-133-004
Majac, Inc., t/a Canal's (Pennsauken), License No. 0427-32-016-003
Matteras Liquors, t/a Joe Canal's (Rio Grande), License No. 0506-44-003-007
Ocean Wine & Spirits, Inc., t/a Wegmans (Ocean), License No. 1337-44-011-010
Ramsey Bottle King, Inc., t/a Bottle King (Ramsey), License No. 0248-44-004-007
Richard McAdam, Inc., t/a Stirling Fine Wines, License No. 1430-44-015-006
Tenafly Fine Food & Spirits, Corp., t/a Fine Spirits (Tenafly), License No. 0261-44-004-005
Walmart Stores, Inc., t/a Sam's Club (Freehold Twp.), License No. 1316-44-019-002

ADDENDUM

POST AND HOLD IS AN ESSENTIAL INVESTIGATORY TOOL TO ENFORCE THE ANTIDISCRIMINATION PROVISIONS OF THE ALCOHOLIC BEVERAGE CONTROL ACT.

When it enacted N.J.S.A. 33:1-3.1 in 1985, the Legislature intended to “... **prohibit all discrimination** in the sale of alcoholic beverages, **not only ‘unreasonable’ discrimination.**” Senate Law, Public Safety and Defense Committee Statement, Senate, No. 2399 -- L.1985, c. 258 (emphasis added). N.J.S.A. 33:1-93 vests the Director

... with power to promulgate such rules and regulations on the following subjects as will assist in properly supervising the alcoholic beverage industry: ... (c) **maintenance and publication of invoice prices, discounts, rebates, free goods, allowances and other inducements**; and (d) such other matters as may be necessary to fulfill the **restrictions** embodied in this act.

The “Act” referred to in section (d) above, includes the antidiscrimination provisions in N.J.S.A. 33:1-89 and -90. Thus, the Legislature limited competition to its “beneficial aspects.” N.J.S.A. 33:1-3.1b(10) by eliminating discrimination in the sale of alcoholic beverages to retailers.¹⁸

¹⁸ “[O]btaining the absolute lowest price is not always antitrust’s goal.” ZF Meritor LLC v. Eaton Corp., 769 F. Supp.2d 684, 691 (D. Del. 2011), aff’d 696 F.3d 254 (3d. Cir. 2012). Congressional concerns encompass “consumer choice” or non-price competition and not simply lowest price. Robert H. Lande, A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice, 81 Fordham L. Rev. 2349, 2403 (2013). Under the ABC Act, public safety outweighs achieving lowest alcohol prices. The “practice of granting discounts, [and] rebates ... by manufacturers and wholesalers to retailers has contributed largely to destructive price wars which have unduly increased the consumption of alcoholic beverages, and is detrimental to the proper operation of the liquor industry... .” Duff v. Trenton Beverage Co., 4 N.J. 595, 603 (1950); cf., R. Alderson. Study claims minimum pricing cuts alcohol-related deaths, <http://www.bbc.co.uk/news/ukscotland21358995> (February 6, 2013) (“a rise in alcohol prices of 10% had led to a 32% reduction in alcohol-related deaths.”). If the post and hold requirement restrains price competition, it is a logical and intended consequence of

In 1951, former Director Erwin B. Hock exercised his statutory authority in N.J.S.A. 33:1-93 to establish a “price posting system.” Heir v. Degnan, 82 N.J. 109, 114 (1980). N.J.S.A. 33:1-93 authorizes the Director to promulgate regulations governing the “maintenance and publication of invoice prices, discounts, rebates, free goods, allowances and other inducements” in the sale of wines and spirits to retailers. Shortly after Heir upheld the validity of New Jersey’s “deregulation” of the alcoholic beverage industry in 1980, ABC promulgated regulatory changes that implemented the framework of trade practices that largely remains in effect today. See, Notice to All Licensees – Deregulation, A.B.C. Bull. 2342 (March 11, 1980).

New Jersey wholesalers are not limited to one price per product for an entire month. They may change all of their prices every day to whatever new level they desire, so long as they are listed in the price schedule filed by the 15th day of the preceding month. For example, a wholesaler may offer lower prices for Tuesday or Wednesday deliveries to encourage utilization of trucks that might otherwise remain idle due to normal ebb and flow of industry ordering patterns.

Creating a level playing field is a lofty goal, but it is a mere fantasy if there is no practical way to identify discriminatory practices. As demonstrated in the petition to which this Addendum is attached, CPL filing and the one month holding period provide an effective way to prove discriminatory pricing. Without N.J.A.C. 13:2-24.6, the prohibition of price discrimination would be unenforceable. Here is why:

N.J.S.A. 33:1-3.1b, -89 and -90, which mandate the Director to eliminate discrimination in the sale of alcohol to retailers, protect trade stability and to protect the public health, safety and welfare.

Although “ABC’s function is only to oversee the filing and publication of the wholesale ... price lists and to enforce adherence to them,” Heir, 82 N.J. at 115, the agency’s longstanding battle against discrimination is well documented.¹⁹ ABC actively supervises its post and hold requirement and has enforced the requirements more than 400 times since the mid-1980s (Exhibit 25 to ABC’s Petition for Rulemaking to which this is Addendum is attached).²⁰ In spite of these efforts, wholesalers continue to discriminate against small retailers without regard for the rules that govern their own privileges to participate in this industry, which highlights the importance of price posting.

Every month each liquor wholesaler files its own CPL and is bound to its terms during the following month. This enables ABC to compare invoice prices against an objective standard, (i.e., the price schedule previously filed by the wholesaler). Otherwise, the agency would have to find the proverbial needle in a haystack of identical looking invoices in the futile hope of identifying comparable sales of the same product, made at the same time, without knowing at the outset which prices were proper and which were deviations. Of course, ABC could ask the wholesaler for its price schedule after the fact, but there would be no way to determine whether the wholesaler’s response was retroactively tailored to fit its discriminatory behavior.

¹⁹ A more complete history of ABC’s trade practices enforcement can be found at In re: Applications for Waiver, A.B.C. Bull. 2485, Items 3-5 (October 1, 2014), published at https://www.nj.gov/oag/abc/downloads/abc_bulletin_2485.pdf.

²⁰ The Director may suspend or revoke any liquor license for any violation of the ABC Act or its implementing regulations. N.J.S.A. 33:1-31. The presumptive penalties for the most common violations are set forth in N.J.A.C. 13:2-19.11(i). Warning Letters are issued for infractions that do not warrant prosecution.

Absent the post and hold mechanism, the generalized ban on price discrimination (N.J.S.A. 33:1-3.1b(10), -89 and -93) would, at best, be uncertain in its application and extremely difficult and costly to enforce. To appreciate this, one need only consider the difficulty of enforcing a generalized ban on price discrimination without a holding requirement. For example, suppose a wholesaler charged Retailer A \$100 for a case of wine on Day 1 and charged Retailer B \$110 for a case of the same wine on Day 2. This might appear to constitute blatant price discrimination. However, if ABC challenged the apparent discrimination, the wholesaler might simply argue that it had raised its prices across the board in the brief period between the two sales, without any prior announcement. Likewise, the wholesaler could just as easily claim that there had been an unannounced price rollback after Retailer B made its \$110 purchase on Day 2 to justify charging Retailer A \$100 on its purchase of the same wine later on that day. Simply put, "special" retailers could always just be "lucky" to purchase when the prices are in their favor.

In attempting to enforce the ban on price discrimination, ABC could no doubt challenge purported across the board price changes as sham, but the cost of enforcement would escalate and the case-by-case outcome would be uncertain. After all, how and where would the line be drawn between price changes in response to genuine market conditions and ad hoc price changes to curry favor with a particular retailer or in acquiescence to pressure applied by that retailer?

Conversely, attempts to enforce the generalized ban on discrimination might encourage unintended price rigidity because wholesalers might become fearful that even legitimate price changes could be adjudicated as being discriminatory. Wholesalers might become reluctant to raise or lower their prices in response to normal fluctuations in conditions of supply and demand.

And so, there appears to be three ways to deal with these problems. First, New Jersey might prescribe a fixed period of time within which a wholesaler could not charge different prices to two or more retailers for the same product. For example, a wholesaler might be prohibited from charging a retailer a different price than the price it charged another retailer for the same product within the past ten days. However, this approach would force wholesalers to refrain from selling the product during the prescribed waiting period (i.e., ten days prior to the anticipated price change). This would be detrimental to the wholesaler, its suppliers and to any of its retail customers whose inventories needed replenishment in the interim. Because the wholesaler would naturally be reluctant to accept the loss of revenue and goodwill it would suffer while it waited for its self-imposed moratorium on sales to expire, it would be less likely to raise or lower its prices in response to genuine changes in market conditions, with price rigidity again being the unintended result.

A second approach would be to permit the wholesaler to change prices only in accordance with a published announcement that would take effect no fewer than a prescribed number of days in the future. For example, wholesalers might be required to announce price changes ten days prior to their effective date. Under this approach, the wholesaler would be permitted to keep the new price in effect for as long or as short a period as it desired, provided that no new price was implemented without the required ten day public notice. This would theoretically permit each retailer to time its purchases to take the maximum advantage of price changes, either up or down. Such an approach, however, has the same post and hold features as in the first approach, because

the wholesaler would have to announce its prices in advance and adhere to them until it had made an advance public announcement of another price change.

Further, this approach would be easy to manipulate. It would give large retailers the ability to use their greater purchasing power and warehousing capacity to take advantage of temporary lower prices, since the wholesaler would be able to time the implementation of price changes to meet the needs of favored customers. Such a scheme would permit the daily filing of price changes, which would be little different than the present system that allows wholesalers to change their prices every day provided the price changes are set forth in their respective CPLs. Moreover, unpredictable price changes would make it unreasonably difficult to identify the proper price schedule against which a particular invoice should be compared. The difficulty of identifying discriminatory practices in a swirling sea of unpredictable price filings would increase and complicate the burden on the agency exponentially and render the antidiscrimination provisions of the ABC Act unenforceable.

The third approach is a refinement of the second and is the one adopted by New Jersey. Wholesalers can freely compete with each other by individually setting their own prices. However, they must all file their price schedules at the same time and they must adhere to them for one calendar month unless the Director extends the holding period by Special Ruling. This system does not allow horizontal price fixing (i.e., adjustments to match prices submitted by the competition) because each wholesaler must submit its CPL before all CPLs become public record, two days after the filing date. More importantly, it brings order and predictability to pricing and purchasing that benefits small retailers who are without the means or influence to obtain advanced

notice of price fluctuations or that lack access to back channels to inside information reserved only for “special” customers. See, In re: Applications for Waiver, A.B.C. Bull. 2485, Item 5 at 62 (Allied solicitor giving favored account pricing information for 90-day period).

When the two largest wholesalers and large retailers participate in discriminatory pricing, they endanger trade stability by placing other licensees at competitive and financial disadvantage. The CPL price posting system is a practical and effective regulatory means by which to fight price discrimination. It allows wholesalers to compete with each other by changing their prices every day on every product, if they wish, so long as the changes are set forth in their respective CPLs. This approach has the advantage of providing all retailers with full pricing information to facilitate their ability to compete on a level playing field by making informed purchasing decisions. For these reasons, the CPL price posting system helps the Director fulfill his legislative mandates set forth in the ABC Act.