

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

IN THE MATTER OF THE APPLICATION)	SR 2020-02
REQUESTING RELAXATION OF CERTAIN)	
REGULATORY REQUIREMENTS)	SPECIAL RULING GRANTING
AFFECTING WHOLESALERS AND)	RELAXATION OF N.J.A.C. 13:2-20.4,
RETAILERS DUE TO THE COVID-19)	N.J.A.C. 13:2-24.4 AND N.J.A.C. 13:2-39.1
PANDEMIC)	AND JUNE 2015 SPECIAL RULING
_____)	

BY THE ACTING DIRECTOR:

As a result of the unprecedented health hazard posed by the novel Coronavirus disease 2019 (“COVID-19”), Governor Murphy declared a Public Health Emergency and State of Emergency in Executive Order (“EO”) No. 103 (2020). In EO No. 107 (2020), the Governor adopted social mitigation strategies, such as “social distancing” and placed limitations on unnecessary person-to-person contact in order to prevent the spread of COVID-19. In furtherance of the Governor’s mandates, he ordered all restaurants, cafeterias, dining establishments and bars to cease on-premises sales and consumption of alcoholic beverages and permitted only take-out or delivery of alcoholic beverages in original sealed containers for off-premises consumption. See Paragraph 8 of EO No. 107. Liquor stores, on the other hand, were determined to be “essential retail businesses” that could remain open during their normal business hours. See Paragraph 6(l) of EO No. 107. While the Governor’s actions are necessary to protect the health, safety and welfare of the citizens of New Jersey, they are having a direct impact on the alcoholic beverage industry in this State.

The alcoholic beverage industry is comprised of a three-tier system, consisting of suppliers,

wholesalers and retailers. The Division of Alcoholic Beverage Control (the “Division”) is responsible for regulating this industry in a manner that maintains market stability, beneficial competition, and the three-tier system. See N.J.S.A. 33:1-3.1. This requires an appreciation of the different interests in each tier and a sensitive balancing of those interests.

The COVID-19 outbreak has affected each tier of the industry differently, and even within the retail tier, the bars and restaurants face different economic realities than the liquor stores do. For example, liquor stores are “essential retail businesses” and have generally remained open throughout the public health crisis, while bars and restaurants have seen significant curtailments of their businesses. As a result of this reality, the Division has received requests from the Beer Wholesalers Association of New Jersey (“BWANJ”), the New Jersey Wine and Spirits Wholesale Association (“NJWSA”), the New Jersey Licensed Beverage Association (“NJLBA”) and the New Jersey Liquor Store Alliance (“NJLSA”) seeking relaxation of several regulations, as well as a provision in a June 12, 2015 Special Ruling (“June 2015 Special Ruling”). Specifically, relaxation of the following has been sought: N.J.A.C. 13:2-20.4(b) (signatures on invoices); N.J.A.C. 13:2-39.1 (returns of merchandise); N.J.A.C. 13:2-24.4(a)(1) and (b)(1) (extension of credit and electronic Notices of Obligations); and extension of the Bill and Hold requirements contained in Section C of the June 2015 Special Ruling.

Pursuant to N.J.S.A. 33:1-39, the Director has the authority to make such general rules and regulations and such special rulings and findings “as may be necessary for the proper regulation and control of the manufacturer, sale and distribution of alcoholic beverages ..., and [to] alter, amend, repeal and publish the same from time to time.” This authority is implemented by N.J.A.C. 13:2-9.1, which allows the Director to relax certain regulations or special rulings upon a showing by a licensee of undue hardship, economic or otherwise; that the waiver of the rule will not unduly

burden any affected parties; and that the waiver is consistent with the underlying purposes of the Alcoholic Beverage Control Act (the “ABC Act”).

After reviewing the submissions made by the industry members from both the wholesale and retail tiers, the Director has determined that relaxation of certain regulations, as described below, is appropriate and necessary to provide relief to retail licensees if they are able to continue their businesses under the current circumstances, without undermining the legislative purposes of the ABC Act. While the Division has determined that the relaxation provided herein establishes an appropriate balance within the industry, the economic and social effects of this emergency are evolving and circumstances are likely to change in the future. If that occurs, the Division may consider further additional relief.

1. **Signature on Invoices.** The Division has received requests to temporarily suspend N.J.A.C. 13:2-20.4(b), which requires a licensee to sign and date a delivery slip, invoice, manifest, waybill or similar document at the time of delivery of any alcoholic beverage by a licensed manufacturer, importer or wholesaler. The request is based on recommendations by the Centers for Disease Control, as adopted by the Governor’s Executive Orders, to avoid person-to-person contact and to practice “social distancing.” The requesters suggested that alternative methods should be used by a wholesaler to ensure that deliveries of alcoholic beverages are properly acknowledged.

In light of the public health crisis and the need to take appropriate steps to prevent and reduce the spread of COVID-19, I FIND that allowing alternative methods of acknowledging receipt of an alcoholic beverage delivery is reasonable, would not unduly burden any affected parties, and is in furtherance of the Director’s statutory mandate to protect the public health, safety and welfare of the people of this State. As

such, the Division will relax N.J.A.C. 13:2-20.4(b) and will allow wholesalers to devise alternative methods for retailers to sign and date delivery slips, invoices, manifests, waybills or similar documents, provided the methods used results in an enforceable contract between the retailer and wholesaler, and gives the Division a mechanism to ensure that deliveries are acknowledged and verified. Acceptable alternative methods include, but are not limited to, allowing a retailer to send an e-mail or text message to the wholesaler contemporaneously acknowledging receipt of the delivery, allowing a retailer to photograph the invoice and send an electronic acknowledgment to the wholesaler, or allowing the retailer to use its own pen or stylus to acknowledge receipt. The relief granted herein shall be in place until EO No. 103 is lifted, or the “social distancing” restrictions set forth in EO No. 107 are removed, whichever is earlier.

2. **Return of Product.** The Division’s regulations generally prohibit a manufacturer, brewery, winery, distiller, wholesaler or distributor from accepting returns of alcoholic beverages, except under certain circumstances, such as: defective product, breakage, error in product delivered, product likely to spoil, or other such good cause as approved by the Director. See N.J.A.C. 13:2-39.1. The federal Alcohol Tobacco and Trade Bureau (“TTB”) also generally prohibits the sale or purchase of alcoholic beverages with the privilege of return. See 27 CFR 11.21.

The Division has received requests to authorize wholesalers to accept return of products that were not sold because of the public health emergency. Particularly affected by this request are the numerous bars and restaurants with on-premises retail consumption privileges that planned to hold St. Patrick’s Day gatherings and celebrations. This is one of the biggest holidays of the year for alcoholic beverage

sales. As a result of the public health emergency, these events were cancelled and significant operating restrictions were imposed on these on-premises retail consumption licensees, beginning on March 16, 2020. See EO No. 103 (2020) and EO No. 107 (2020). The Governor's actions were taken to prevent person-to-person contact and the spread of COVID-19, and have resulted in on-premises retail consumption licensees holding large amounts of inventory that they probably cannot sell for the foreseeable future.

Based on these extraordinary circumstances, I FIND that authorizing wholesalers to accept returns of product only from on-premises retail consumption licensees would reduce their economic hardship by enabling them to mitigate losses, would not unduly burden any affected parties, and is in furtherance of the Division's mandate to maintain stability in the alcoholic beverage marketplace. As such, the Division will relax N.J.A.C. 13:2-39.1 and will authorize New Jersey wholesalers, manufacturers, and distribution licensees to accept returns of alcoholic beverages purchased and/or delivered between February 23 and March 16, 2020 for credit. This relaxation applies only to products in unopened and sealed cases in the manufacturer's original configuration.

The authorization provided herein is permissive, and wholesalers, manufacturers or distribution licensees are not required to accept returns. However, should they choose to accept returns, these licensees must comply with all requirements set forth in N.J.A.C. 13:2-39.1(b), (c) and (d), and must apply its return policy on a non-discriminatory basis without regard to the amount of product the retailer wishes to return. The relief granted herein is consistent with guidance provided by the TTB (TTB

Newsletter, March 13, 2020), and shall be in place until EO No. 103 is lifted, or facts or circumstances warrant modification.

3. **Extension of Credit.** Pursuant to N.J.A.C. 13:2-24.4(a)(1), licensed wholesalers generally extend credit to retailers for 30 days from the date of delivery of alcoholic beverages, unless different terms are justified by the financial or credit history or risk of the individual retail accounts. This means that retailers must pay their invoices no later than 30 days after the delivery of products or be placed on Cash on Delivery (“C.O.D.”) status.

As has been widely seen, the operations of bars and restaurants with on-premises retail consumption privileges throughout the State have been severely curtailed and are limited to only take-out and delivery of food and alcoholic beverages. Many of these licensees are facing serious economic hardship and cannot pay their bills because their customer base has dramatically shrunk or they have been forced to close their businesses. Without relaxation of N.J.A.C. 13:2-24.4(a)(1), these licensees will be unable to satisfy their invoices within the 30-day credit period, will be placed on C.O.D. status, and may go out of business.

Based on these unprecedented circumstances, I FIND that temporarily relaxing the credit regulation will relieve the economic hardship suffered by the on-premises retail consumption licensees, will not unduly burden any affected parties, and will further the Division’s mandate to maintain stability in the alcoholic beverage marketplace. As such, the Division is authorizing wholesalers to extend credit until May 15, 2020 to those on-premises retailers that accepted deliveries between February 23 and March 16, 2020. This extension of credit takes into account the fact that these licensed

businesses have been curtailed or almost shuttered, and despite authorizing the wholesalers to accept returns of product to mitigate losses, these retailers simply do not have the cash flow to satisfy their invoices. Please note that the relief granted herein is only available to those on-premises retail consumption licensees that are not on C.O.D. status as of February 23, 2020, and must be made available to all on-premises retail consumption licensees on a non-discriminatory basis. For any purchase orders submitted after March 16, 2020, the usual credit terms contained in N.J.A.C. 13:2-24.4(a)(1) shall apply.

The Division is aware that, even during these extraordinary times, liquor or package good stores (“44s” or “32s” operating as liquor stores), which have been determined to be “essential retail stores,” are maintaining steady, if not increased, sales, therefore, no relief from the credit regulation is being granted to them under this Special Ruling.

While it is the Division’s intention to strike an appropriate balance between the economic needs of both the retail and wholesale tiers of the industry, the Director recognizes that additional relief may be needed under certain circumstances not covered by this Special Ruling. Therefore, if additional relief is warranted, a licensee may apply to the Division for further relaxation pursuant to N.J.A.C. 13:2-9.1.

4. **Notices of Obligation.** Pursuant to N.J.A.C. 13:2-24.4(b), wholesalers that have not received payment in accordance with the credit terms set forth in a delivery invoice shall send a Notice of Obligation (“NOO”) to the defaulting retailer. Under the current regulation, NOOs shall be delivered “personally or by first class mail.” In light of the public health emergency, the Division has been informed that many employees of the wholesalers are working remotely and do not have the ability to send the NOOs by mail

or by personal delivery. Accordingly, given this hardship, the Division is relaxing this regulation and is allowing NOOs to be sent to defaulting retailers by electronic mail for the duration of the public emergency, or until restrictions are otherwise lifted, whichever is earlier. All other provisions in N.J.A.C. 13:2-24.4 shall continue to apply unless circumstances arise warranting further relaxation.

5. **Bill and Hold.** Pursuant to Section C of a Special Ruling, dated June 12, 2015, the Division authorized a practice known as “bill and hold.” Under this practice, wholesalers sell product to retailers at perceived better prices and store the products, for a charge, at the wholesalers’ warehouse (subject to a public warehouse license) for no more than 75 days. On the 76th day, a retailer must accept delivery of the products stored, or it is in violation of several trade practice regulations. A retailer that does not accept delivery on the 76th day is placed on C.O.D. status.

In light of the public health emergency, the Division has been requested to extend the permissible number of days a retailer’s products may be stored at the wholesaler’s warehouse from 75 days to 105 days. Based on the current market conditions, I FIND that requiring retailers to accept merchandise on the 76th day may create a hardship for both retailers and wholesalers, that extending the number of days for storage will not unduly burden any affected parties, and that this extension, applied on a non-discriminatory basis, is not inconsistent with the ABC Act. As such, the Division is relaxing Section C of the June 2015 Special Ruling and is authorizing wholesalers to store products already in “bill and hold” for an additional 30 days, under its existing contractual arrangements, which will commence on the date EO No. 103 is lifted or other restrictions are relaxed, whichever is earlier. The Division may consider additional requests for relief of the “bill and hold” guidelines, as may be warranted by the facts and circumstances.

The relief provided herein is based on information provided by licensees in the wholesale and retail tiers of the industry, and represents a balancing of those interests. Should the underlying facts and/or the general State of Emergency change, the Director reserves the right to make modifications to this Special Ruling in the exercise of his discretion.


JAMES B. GRAZIANO
ACTING DIRECTOR

Dated: April 7, 2020

JBG/JNM/PTU/APW