

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

**AN 2020-11 -- ADVISORY NOTICE TO THE INDUSTRY REGARDING BACK-ORDERED
PRODUCTS AND THEIR IMPACT ON RIPS, CREDIT AND DELIVERY**

1. Introduction.

Pursuant to its broad authority under N.J.S.A. 33:1-39 to make such findings that are “necessary for the proper regulation and control of the manufacture, sale and distribution of alcoholic beverages[,]” the Division of Alcoholic Beverage Control (the “Division”) is implementing temporary provisions through February 28, 2021, that address back-orders of alcoholic beverages and their impact on retail incentive programs (“RIPS”), credit and delivery. The Division is issuing this Advisory Notice in response to concerns raised by the New Jersey Wine and Spirits Wholesalers Association (“NJWSWA”) in a letter to the Director, dated October 29, 2020. Issues related to back-ordered products are not addressed in Title 33 or its implementing regulations and have not been previously addressed by the Division. The Division is providing this notice to assist the industry on a temporary basis while it evaluates the issues raised herein and determines whether future rulemaking is needed.

Industry members have asserted that disruption of supply chains and product movement in the current economic environment, especially during the holiday season, have led to an increase in the number of products without inventory or with insufficient inventory to satisfy retailer demand. These inventory shortages have been documented in the news media.¹ Further, there is uncertainty in the marketplace about how to manage RIPS, credit and delivery of these back-ordered products. Consequently, wholesalers are handling back-ordered products differently from one another and inconsistently with the RIP regulation, as set forth in N.J.A.C. 13:2-24.1(b)(3) and (e). Additionally,

¹ For an example of supply chain issues, see ‘Liquor stores struggling to keep top-selling products on shelves,’ <https://www.wkyc.com/article/news/nation-world/liquor-stores-struggling-top-selling-products/91-2c9603c3-54df-4a2f-9055-a699c72fa80d>

retailers are being afforded different terms from other retailers. These varying practices have the potential to create an uneven playing field and are likely to result in instability in the marketplace.

The alcoholic beverage industry is comprised of a three-tier system, consisting of suppliers, wholesalers and retailers. The Division is responsible for regulating this industry in a manner that promotes and 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 Director has ample authority to issue this Advisory Notice and implement a short-term resolution to the disparate approach being undertaken by different wholesalers, while it considers promulgating regulations specifically addressed to back-ordered goods, RIPs, credit and delivery. This approach is consistent with the Director's almost "limitless" powers to regulate the sale of alcoholic beverages. *See R&R Marketing, LLC v. Brown-Forman Company*, 158 N.J. 170, 176 (1999), citing *Joseph H. Reinfeld, Inc. Schieffelin & Co.*, 94 N.J. 400, 412 (1983). (As the Supreme Court stated, "[W]e would hesitate to substitute our judgment for the agency's own policy determinations concerning regulation of the alcoholic beverage industry.") Moreover, the Supreme Court has upheld the Director's implied authority to craft appropriate remedies to address unique situations and to deal fairly with holders of alcoholic beverage licenses. *Circus Liquors, Inc. v. Governing Body of Middletown Township*, 199 N.J. 1, 19-23 (2009).

2. Temporary Provisions for Back-Ordered Products.

After reviewing the October 29, 2020 letter from the NJSWA and assertions made by industry members, the Division has become aware of the disparate industry practices concerning the handling of back-ordered goods and has determined that it is appropriate and necessary to implement uniform practices that are intended to restore market stability and create an even playing field for all participants during the industry's busiest time of year. Accordingly, the following practices may be implemented by wholesale licensees through February 28, 2021, provided they are made available to all retail licensees on

a non-discriminatory basis. After review of a post-holiday report, as described below, the Division will reevaluate the practices permitted herein, and will determine whether to continue to allow them, modify them, or terminate them. The Division will also continue to collect additional information from licensees in order to determine whether regulations specifically crafted to address RIPs, credit and delivery related to back-ordered goods should be promulgated as part of its overall review of the trade practice regulations codified at N.J.A.C. 13:2-24.1 through -24.12.

Based on the foregoing, the following provisions shall be implemented immediately by wholesalers affected by inventory shortfalls through February 28, 2021:

- 1) If a retailer purchases a product with a RIP attached that is on back-order, the wholesaler shall state on the initial invoice: the entire quantity of product ordered; how much of the product is being delivered; how much of the product is on back-order; and the RIP amount on the product;
- 2) Credit shall begin to run from the date of the delivery of the available (delivered) product, not the entire order;
- 3) Delivery of back-ordered products shall be accompanied by a separate invoice, which shall specifically reference the initial invoice number and date;
- 4) Credit shall begin to run from the date of delivery of the back-ordered products. There may be two periods of credit based on a single order, if some of the goods are on back-order. For example, for a 10-case order of a product, if 8 cases are delivered on December 1, 2020, credit for those 8 cases begins on December 1, 2020. If the additional 2 cases are delivered on December 15, 2020, credit for the additional 2 cases begins on December 15, 2020;
- 5) Back-ordered goods shall be delivered within 30 days of an initial invoice. If delivery of the back-ordered goods cannot be completed within 30 days of an initial invoice, the initial invoice for the entire order shall be voided (the Division leaves to the wholesalers' discretion how to account for already-delivered product), and the RIP shall not be paid, unless the

wholesaler can demonstrate to the Director extraordinary circumstances. However, payment shall be due on the product that was delivered pursuant to the initial invoice in accordance with the credit regulations at N.J.A.C. 13:2-24.4;

- 6) If the back-ordered product as outlined in section 5 above is delivered to the retailer within 30 days of the initial invoice:
 - a. The RIP shall be payable to the retailer *no less than 30 days and no more than 90 days after the entire order is delivered and paid*, even if the back-ordered product is delivered in a different month or a month in which there is no current RIP posted in the Current Price List (“CPL”) attached to the product;
 - b. Similarly, regarding price, if the delivery date of the back-ordered product falls within a different month in which the initial order was placed, the price of the back-ordered product shall be the same as the prior month’s CPL-posted price;
 - c. In other words, the retailer shall get the benefit of the RIP and price posted in the CPL during the month the purchase is made if the product is delivered within 30 days, even if delivery of the back-ordered product occurs in a different month from the initial invoice;
- 7) No single RIP rebate shall exceed \$1,000. A RIP rebate may be paid to a retailer on back-ordered goods in the time frames specified in No. 6(a) above, even if all of the goods are not part of a single delivery;
- 8) All wholesalers who sell goods on back-order must state in their Terms and Conditions tab filed with their CPL that RIPs, credit and delivery of back-ordered goods shall be handled in the manner set forth in this Advisory Notice and that the terms described herein shall be made available on proportionally equal terms to all retailers in a non-discriminatory manner.

N.J.A.C. 13:2-24.2(a)(2).

Every wholesaler who engages in fulfilling RIP-eligible orders in which some of the product is on back-order, shall submit a report in searchable spreadsheet format such as Excel to the Division by January 31, 2021, that explains all such activity. The report shall include, at a minimum, the following information:

- 1) Total number of invoices issued for all sales and total number of invoices issued with back-ordered products from the date of this Notice to January 31, 2021;
- 2) Summary of all invoices by invoice number issued for back-ordered products on which a RIP is attached (initial and subsequent), including retailer name and address, product, price, quantity of cases ordered, organized by date;
- 3) Delivery dates of the available product and the back-ordered product, identified by invoice number;
- 4) Description of what RIPs were posted in the CPL when the product was ordered, but were not posted in the CPL during the month when the back-ordered product was delivered;
- 5) Summary of all invoices for orders that were not completely fulfilled within 30 days; and
- 6) What RIPs were paid to retailers, including the amount and date paid.

By requiring the foregoing information in this report, the Division hopes to gain a better understanding of the scope and pervasiveness of the back-order issue to determine whether a regulatory solution is needed.

The Division shall review the reports submitted and revisit the issues posed by the industry. After review, the Division will evaluate the relief provided in this Advisory Notice and will determine whether it is necessary and appropriate to address the issues raised herein. This Advisory Notice shall be in effect until February 28, 2021, or until such time as the Division modifies or rescinds it, or promulgates regulations implementing it.

Please note that the provisions being implemented in this Advisory Notice are based on representations made by members of the alcoholic beverage industry. Should any of these representations

be found to be false or inaccurate, the Division reserves its rights to modify or rescind this Advisory Notice.

A handwritten signature in black ink, appearing to read "J.B. Graziano", is written over a horizontal line.

JAMES B. GRAZIANO
ACTING DIRECTOR

Dated: November 24, 2020
JBG/ABC