

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

AN 2021-04 AMENDED ADVISORY NOTICE TO THE INDUSTRY REGARDING BACK-ORDERED PRODUCTS AND THEIR IMPACT ON RIPS, CREDIT AND DELIVERY

1. Introduction.

On November 24, 2020, the Division of Alcoholic Beverage Control (the “Division”) issued AN 2020-11, which addressed disparate industry practices involving the handling of back-ordered goods. These are products that are ordered by retailers, but due to shortages and other supply chain issues at the manufacturer/supplier level, cannot be timely delivered to retailers by wholesalers and included in a single invoice. AN 2020-11 outlined uniform practices to temporarily address the back-order issue, especially its impact on credit and retailer incentive programs (“RIPs”). The Division determined that AN 2020-11 was appropriate and necessary to restore market stability and create an even playing field for all participants, while it continued to evaluate whether rulemaking or other relief was needed to address these issues.

In order for the Division to assess the scope of the back-order problem and to determine whether further relief was warranted, the Division required wholesalers to submit reports containing information on back-ordered goods with associated RIPs. In particular, the reports contained data on invoices, the number of days it took to fulfill back orders, whether RIPs were associated with those orders/invoices, and how many orders still could not be completed. The Division analyzed this data to determine whether the 30-day relief granted in AN 2020-11 to wholesalers to fulfill a backorder and to honor the RIP was an appropriate time period, and if it was not, what permissible options should be put in place if the back-ordered goods could not be delivered within 30 days.

Based on the Division’s review of the data submitted by Allied Beverage Group and Fedway Associates, New Jersey’s two largest wholesalers, and comments received by the New Jersey Wine and Spirits Wholesaler’s Association (“NJWSWA”), 60 days appear to be a more appropriate period for

wholesalers to complete orders and delivery of back-ordered goods and to honor the RIPs offered to retailers, as described in more detail below. In addition, the Division has determined that, if delivery of the back-ordered goods cannot be completed within 60 days, a wholesaler will be permitted, with retailer approval, to replace or substitute the back-ordered products with a different type or variety of the back-ordered product, provided that the replaced or substituted products are within the same brand family, the same size and the same price as the back-ordered products, and was eligible for a RIP in the originally-filed Current Price List (“CPL”). *See* No. 6(a) below. Retailers will also be permitted to return the goods if delivery of the back-ordered goods cannot be completed within 60 days, provided they have not sold any of the initial inventory received. *See* No. 6(b) below.

Additionally, if delivery of the back-ordered goods cannot be completed within 60 days, the wholesaler, with retailer approval, may honor the small quantity RIP that was posted in the originally-filed CPL, under the following limited circumstances. For example, if a retailer has already purchased and received some quantity of product from the initial order that would qualify for a small quantity rebate pursuant to N.J.A.C. 13:2-24.1(e)(2), and either there are no products that can be substituted as outlined in No. 6(a), or the retailer does not accept a substitution of products as described in No. 6(a), the wholesaler may honor the small quantity RIP for the quantity of product that the retailer has received. If this latter option is chosen, the initial order is deemed complete. *See* No. 6(c) below. In other words, if the retailer agrees to accept the small quantity RIP, the order is deemed complete and the wholesaler shall not deliver any of the remaining back-ordered goods. Please note that if a wholesaler provides any of the relief authorized by this amended Advisory Notice, it must be provided to all retailers on a non-discriminatory basis.

Although the Division is temporarily allowing wholesalers additional time to complete their orders and deliveries of back-ordered products and will permit them to honor the RIPs offered to retailers if the delivery is completed within this additional time frame, all wholesalers are expected to implement procedures and undertake efforts to minimize the acceptance and promotion of orders of products that are

on back order. Wholesalers are discouraged from selling or offering for sale products with associated RIPS if those products are on back order or are not available for sale.

The additional relief provided herein recognizes the current economic climate caused by product shortages and supply chain issues, and is within the Director's broad authority to make such rulings and findings that are necessary for the proper regulation and control of the manufacture, sale and distribution of alcoholic beverages. *See* N.J.S.A. 33:1-39. This relief is also consistent with the Division's legislative purposes of providing a framework for the alcoholic beverage industry that recognizes and encourages beneficial aspects of competition and that maintains a trade stability within the industry. *See* N.J.S.A 33:1-3.1(b)(6) and (7).

With the exception of the new additions and amendments described above, all other provisions in AN 2020-11 will continue to apply. However, for clarity and convenience, the temporary provisions that address back orders, RIPS, delivery and associated credit are found below in their entirety.

2. Temporary Provisions for Back-Ordered Products.

The provisions set forth herein may be implemented by wholesalers until September 30, 2021, or until the Division modifies, rescinds or promulgates regulations, whichever is earlier. If a wholesaler implements these practices, a wholesaler must identify them in their Marketing Manual and/or CPL and must make them available to all retailers on a non-discriminatory basis.

- 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. If some of the goods are on back-order, there may be two periods of credit based on a single order. For example, for a 10-case order of a product, if 8 cases are delivered on March 1, 2021, credit for those 8 cases begins on March 1, 2021. If the additional 2 cases are delivered on March 15, 2021, credit for the additional 2 cases begins on March 15, 2021;
- 5) Back-ordered goods shall be delivered to the retailer within 60 days of an initial invoice, unless a wholesaler, with retailer approval, honors a small quantity RIP, as described in No. 6(c) below.
 - 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 CPL attached to the product. However, if a wholesaler honors a small quantity RIP, the RIP shall be payable to the retailer *no less than 30 days and no more than 90 days after the order is completed and paid (as described in No. 6(c) below)*;
 - 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 60 days, even if delivery of the back-ordered product occurs in a different month from the initial invoice.
- 6) However, if delivery of the back-ordered goods cannot be completed within 60 days of an initial invoice through no fault of the wholesaler, the following options are permissible:
 - a. The wholesaler may, with retailer approval, replace or substitute the back-ordered products with a different type or variety of the back-ordered product, provided that the replaced or substituted products must be within the same brand family, must be

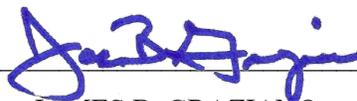
the same size and the same price as the back-ordered products, and must have been eligible for a RIP in the originally-filed CPL. For example, with retailer approval, it would be permissible for the wholesaler to substitute a 1.5 L of Brand X Chardonnay for the back-ordered 1.5 L Brand X Pinot Grigio, if the 1.5 L of Brand X Chardonnay was the same price and was eligible for a RIP in the originally filed CPL; or

- b. The retailer may choose to cancel the entire transaction if the retailer has not sold any of the previously delivered product. In this scenario, the wholesaler would pick up the previously delivered product from the retailer; or
- c. The wholesaler, with retailer approval, may honor the small quantity RIP if a retailer has already purchased and received some quantity of product from the initial order that would qualify for a small quantity rebate pursuant to N.J.A.C. 13:2-24.1(e)(2), and either there are no products that can be substituted as outlined in No. 6(a), or the retailer does not accept a substitution of products as described above. For example, if a retailer receives only 5 out of 10 cases that the retailer purchased in the initial order, and if a small quantity RIP rebate was available for the purchase of 5 cases as identified in the originally-filed CPL, a retailer would qualify for the 5 case RIP. If this option is chosen, the initial order is deemed complete and the wholesaler shall not deliver any of the remaining back-ordered goods; or
- d. The wholesaler may petition the Director for relief granting an additional period of time during which to satisfy the delivery of the back-ordered product. Such petition must include, at a minimum, an explanation of the extraordinary circumstances surrounding the extended delivery delay of the back-ordered product, the specific efforts the wholesaler made to timely fulfill the order, and an expected delivery date. The Director will make a determination on the petition based on whether the wholesaler has demonstrated good cause to justify additional relief.

- 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. 5(a) above, even if all of the goods are not part of a single delivery;
- 8) All wholesalers who sell goods on backorder must state in their Marketing Manual and/or on the 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 Amended 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 backorder for 60 days or more, shall submit a report in searchable spreadsheet format such as Excel to the Division by August 31, 2021, that explains all such activity. The report shall include, at a minimum, the information itemized in AN 2020-11, page 5, adjusted to reflect the revised dates and time frames set forth in this amended Advisory Notice.

Please note that the provisions being implemented in this amended 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 amended Advisory Notice, and take appropriate enforcement action.



JAMES B. GRAZIANO
DIRECTOR

Dated: February 28, 2021
JBG/ABC