

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

**AN 2022-01 -- ADVISORY NOTICE TO THE INDUSTRY REGARDING BRANDED
REUSABLE CARRYOUT BAGS FOR ADVERTISING PURPOSES.**

On November 4, 2020, Governor Murphy signed into law P.L. 2020, c. 117 (Assembly Bill No. 1978) prohibiting the use of single-use plastic carryout bags in all New Jersey stores¹ and food service businesses. Effective May 4, 2022, New Jersey businesses shall not provide or sell single-use plastic carryout bags to customers, and grocery stores (over 2,500 square feet) shall not provide or sell single-use paper carryout bags to customers. N.J.S.A. 13:1E-99.128.² In addition, no person or food service business shall provide or sell a polystyrene foam food service product or food in a polystyrene foam food service product to customers. N.J.S.A. 13:1E-99.129.³ As a result of this law, the Division has received inquiries from interested industry members about whether manufacturers, suppliers, importers or wholesalers may provide retailers with branded reusable carryout bags since retailers will no longer be allowed to provide single-use plastic carryout bags to their customers.

¹ “Store” is defined to include a liquor store. See N.J.S.A. 13:1E-127.

² This is phase 2 of P.L. 2020, c.117. Phase 1 was implemented on November 4, 2021 and required that food service businesses provide single-use plastic straws to customers upon request.

³ AN 2020-06—Advisory notice to the industry regarding new law on cocktails-to-go during state of emergency defined “closed and sealed container.” The Advisory Notice specifically stated that Styrofoam cups were not permitted to be used for cocktails-to-go. Consistent with P.L. 2020, c.117 and AN 2020-06, polystyrene foam cups are not permitted to be used for cocktails-to-go. The prohibition against the use of polystyrene foam cups will continue in effect should cocktails-to-go be permitted by the Legislature beyond the current expiration date in P.L. 2020, c. 117 (which is seven months following the termination of the current State of Emergency due to COVID-19).

The Alcoholic Beverage Control Act (“ABC Act”) prohibits manufacturers, suppliers or importers from having an interest in a retail license in New Jersey or from being interested, directly or indirectly, in the retailing of any alcoholic beverages. N.J.S.A. 33:1-43. For brand promotion and advertising purposes, however, manufacturers, suppliers, wholesalers or third parties at their direction, may supply retailers with point of sale consumer novelty items provided that (1) the items supplied shall be nominal in value; (2) provision of such items may not be conditioned upon any purchase by the retailer; and, (3) the items shall be brand identified for advertising purposes and intended for use by the retailer and/or distribution to consumers to advertise product or promote brand recognition. N.J.A.C. 13:2-24.7(b). The Division has determined that the foregoing marketing initiatives do not violate the tied-house principles in N.J.S.A. 33:1-43, provided they are offered to retailers on a non-discriminatory basis. N.J.A.C. 13:24-2(a)(2).

According to information supplied to the Division, reusable carryout bags can be produced for as little as five-cents to thirty-cents a bag. In the Division’s view, this is of nominal value and is comparable to the items listed in N.J.A.C. 13:2-24.7 -- napkins, coasters, T-shirts, golf balls and similar items. While an individual bag is certainly of nominal value, the Division has considered whether upper tier industry members cross the threshold from nominal to substantial if they were to distribute large (or even unlimited) quantities of branded bags to retailers. The wholesale segment of the industry argues that the regular and frequent distribution of reusable bags to retailers exceeds “nominal” value, and improperly passes a thing of value from wholesalers to retailers. The Division has carefully considered this position.

Considering the salutary purpose behind P.L. 2020, c. 117 of eliminating plastic bags from the environment, the fact that wholesalers are not required to give retailers brand identified

reusable carry out bags, and the Division's current view that the value of these bags is nominal, even in the aggregate, the Division will permit manufacturers, suppliers, wholesalers, or third parties at their direction, to voluntarily provide these bags to retailers for ninety day, subject to the limitations below.⁴ During that time, retailers shall not request and wholesalers should not supply more than a reasonable number of bags considering the temporary nature of this advisory.

Although the Division is not convinced that allowing upper tier industry members to provide branded reusable bags to retailers constitutes an impermissible interest in the retailing of alcohol, the Division notes that it is currently reviewing its trade practice regulations at N.J.A.C. 13:2-24.1 to -24.12. As such, until the Division definitively decides this issue, it will allow this practice on a temporary basis. Retailers are therefore advised to procure their own compliant reusable bags should they wish to continue to provide them to their customers after August 29, 2022.

For the duration of this Advisory Notice, in order to be compliant with the N.J.A.C. 13:2-24.7, manufacturers, suppliers, wholesalers, or third parties at their direction, choosing to provide branded reusable bags cannot condition the provision of the bags upon any purchase by the retailer. The branded reusable carryout bags shall be brand identified for advertising purposes and intended for use by the retailer and/or distribution to consumers to advertise or promote brand recognition; individual store names shall not be on the supplier-logoed reusable bags. The branded reusable carryout bags are to be given to consumers and may not be resold by a retailer. The branded reusable carryout bags must be offered to retailers on a non-discriminatory basis. Lastly, within

⁴ Although not binding, the Division notes that this conclusion is consistent with the Alcohol and Tobacco Tax and Trade Bureau's ("TTB") view that an industry member giving certain "consumer advertising specialties," such as shopping bags, does not constitute a tied-house violation. See 27 C.F.R. §6.84.

thirty days following the expiration date of this advisory (August 29, 2022), upper tier industry members providing branded reusable bags to retailers shall provide a report to the Division , which shall include the name and address of the retailer receiving the branded reusable carryout bags, the date(s) furnished, and the industry member’s cost to furnish the items. These records shall be maintained for a one-year period from the date of this advisory.

To be complaint with P.L. 2020, c. 117, a “reusable carryout bag” is a carryout bag that: (1) is made of polypropylene, PET nonwoven fabric, nylon, cloth, hemp product, or other machine washable fabric; (2) has stitched handles; and (3) is designed and manufactured for multiple reuse. Under the law, the bags must be capable of withstanding 125 washes, either by hand or machine, while maintaining usefulness and integrity.⁵ Finally, in light of the law’s prohibition against distribution of paper bags by grocery stores (2,500 feet or greater), the Division will not be permitting supplier brand-labeled paper bags or boxes.

This Advisory Notice is based on the Division’s understanding of the facts as presented, and is subject to revision or modification should the facts or circumstances change. This Advisory Notice shall expire in ninety days from issuance (August 29, 2022), unless extended by the Director. Questions concerning this Advisory Notice should be directed to DAG Mary Stevens at (609)376-9819.



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DIRECTOR

⁵ <https://www.nj.gov/dep/get-past-plastic/>