

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

IN THE MATTER OF APPLICATION FOR)
CLOSEOUT PERMITS AUTHORIZING THE)
SALE OF ALCOHOLIC BEVERAGES)
BELOW COST)

SR 2021-10
SPECIAL RULING AUTHORIZING THE
CLOSEOUT OF BRAND-REGISTERED
(CURRENT AND HISTORIC) PRODUCTS

BY THE DIRECTOR:

The Division of Alcoholic Beverage Control (“Division”) is introducing through the POSSE licensing system an online application for a closeout permit, which allows wholesale licensees to sell brand-registered alcoholic beverages below cost during a bona fide closeout sale. See N.J.A.C. 13:2-24.8. In conjunction with this new online application procedure, the Director is authorizing a separate closeout permit to allow wholesalers to close out alcoholic beverage products with expired brand registrations—commonly referred to as inactive or “historic” products—in order to facilitate the timely liquidation and clearance of these products from inventory.¹ The Director is also extending the expiration of both closeout permits to 180 days.

I. Background

Pursuant to N.J.S.A. 33:1-2(c) of the Alcoholic Beverage Control Act (“ABC Act”), N.J.S.A. 33:1-1 to -4-1, all alcoholic beverage products sold in New Jersey must be brand-registered on an annual basis. The fee for registering and annually renewing a brand is \$23. N.J.S.A. 33:1-2(d). A brand registration filing must include, among other things, the full and

¹ As described in Section II below, inactive or “historic” products refer to products that were once brand-registered; however, due to a variety of circumstances, the brand registrations of those products have lapsed or are no longer current.

correct brand name, its nature and type, vintages, and the name and license number of each wholesaler authorized to sell a supplier's brand product. N.J.A.C. 13:2-33.1(a)(1)-(4), (6).² If there is a change in the brand registration (including the addition or deletion of an authorized wholesaler or the addition of a vintage), the brand owner or registrant (manufacturer, importer, wholesaler or authorized agent of the brand owner) must amend the brand registration within 10 days. N.J.A.C. 13:2-33.1(c).³ The brand owner or registrant is ultimately responsible for ensuring that the brand registration is complete and updated in a timely manner.

Wholesale licensees are prohibited from selling alcoholic beverages at prices below "cost" except for authorized samples and donations or upon petition and approval of a closeout permit to conduct a bona fide closeout sale. N.J.A.C. 13:2-24.8(a).⁴ In general, a closeout permit is appropriate when a brand-registered product: (1) is not selling in sufficient quantities; (2) is going "out of date" (e.g., expiring soon); (3) is being liquidated to make space for a new vintage or product; (4) is undergoing a change in brand labelling by the manufacturer; or (5) is being discontinued in some form or manner (e.g., change in size). All closeout products must be offered on the same terms to *all* retailers throughout the State on a non-discriminatory basis. In addition,

² A brand registration number is assigned to a single brand. However, if the brand is a wine, each vintage must be listed as part of the brand registration. If necessary, a brand registration of a wine must be amended to include each vintage of the wine before it may be sold. There is no fee associated with amending a brand registration to add a new vintage.

³ With the exception of adding a new vintage, the fee for amending a brand registration is \$10 per brand. N.J.A.C. 13:2-33.2(a).

⁴ "Cost" is defined by regulation as the actual proportionate invoice price and freight charge to a distributor or wholesaler and the actual proportionate invoice price to a retailer, as the case may be, of any given container of an alcoholic beverage product, plus applicable State and Federal taxes. The actual invoice price shall be determined by the "last-in-first-out" method applying generally accepted accounting principles. N.J.A.C. 13:2-24.8(b).

closeout products may not be re-introduced into the marketplace until at least one year after the expiration of the closeout permit and only upon petition to and approval by the Director.⁵ A closeout sale cannot take place unless the wholesaler receives a closeout permit and posts each product to be closed out (with the corresponding price) in its Current Price List (CPL). *See* N.J.A.C. 13:2-24.6(a)(6).

Currently, wholesalers who need to conduct a closeout sale to sell brand-registered products below cost must file a petition for a closeout permit, available for download on the Division's website. The petition requires wholesalers to identify: (1) the brand name and registration number of each closeout product; (2) number of cases; (3) price per case; (4) size, if applicable; and (5), vintage, if applicable. The fee for the permit is \$1 per case with a minimum fee of \$20. *See* N.J.A.C. 13:2-5.4(e). A closeout permit expires after 90 days, with further extensions considered for good cause.⁶

Beginning on **October 15, 2021**, as discussed below, this permit for brand-registered products will be available to wholesalers exclusively on POSSE. In addition, a separate closeout permit for historic products will also be available to wholesalers on POSSE. These new permits for brand-registered products and historic products will expire after 180 days, but wholesalers will be able to apply for an extension on POSSE if there is good cause. Wholesalers will also be able to apply for an extension of an existing closeout permit (which will retain its current expiration date) on POSSE if there is good cause.

⁵ The Division notes that, although different vintages of wines may have the same brand registration number, it is possible to close out a particular vintage (or size) without closing out the entire brand.

⁶ *See* [AN 2020-05 \(Advisory Notice Regarding Close-Out Permits\)](#), April 22, 2020.

II. Historic Product

Thanks in part to an increasing number of alcoholic beverage products and stock keeping units (SKUs) in the marketplace, wholesalers face new challenges managing their warehouse inventory and movement of products while complying with the regulations. Problems arise when wholesalers are in possession of brand-registered products that are selling poorly. In addition, if a wholesaler is no longer authorized by a supplier or brand owner to sell a product, that wholesaler is not authorized to renew the brand registration itself and may end up with excess inventory of products (i.e., products with expired brand registrations) through no fault of its own. Since brand registrations must be renewed at the end of each year, it may be economically infeasible for some to renew the remaining poorly selling products, or it may even be impossible to renew if the supplier/wholesaler relationship has been terminated. These remaining products are deemed “historic products.” Some wholesalers may elect to destroy potable historic products if they cannot return these products to the supplier and need to make room for new products. Such waste serves no purpose.

The Director has broad authority to regulate the alcoholic beverage industry, facilitate orderly transitions, and deal fairly with parties. Circus Liquors, Inc. v. Middletown, 199 N.J. 1, 12-13 (2009). Through this Special Ruling, and in conjunction with the POSSE online application process for a closeout permit to sell brand-registered products below cost, the Director is authorizing wholesalers to close out historic products with a brand registration that expired within the last two years. For example, a wholesaler will be allowed to apply for a closeout permit in calendar year 2021 for a historic product with a brand registration that expired in calendar year 2019.

As a one-time solution to the specific problem presented by historic products, and for 30

days only (from **October 15th to November 15th, 2021**), wholesalers will be allowed to apply for a closeout permit to sell historic products with a brand registration that expired within the last five years. After November 15, 2021, only historic products with a brand registration that expired within the last two years will be eligible for a historic-product closeout permit.

Every application for a historic-product closeout permit will be reviewed carefully by staff on a case-by-case basis. The Division reserves the right to deny a historic-product closeout permit if the applicant has failed to comply with the regulations (or prior Special Rulings) or the permit is not justified by the facts and circumstances. Under no circumstances will the Division issue a closeout permit for product that has never been brand-registered.

The Director strongly encourages wholesalers to identify potential closeout products, apply for a permit to conduct a closeout sale *before* the brand registration expires, and sell at an appropriate price point to encourage prompt liquidation, thereby avoiding the problem of historic products. Historic-product closeout permits are not a means to evade payment of brand-registration fees or for any other improper purpose.

III. Closeout Permit Application Process

Beginning on **October 15, 2021**, all licensees in need of a closeout permit for current brand-registered products must complete an online application on POSSE. The application requires the following:

1. Select license number;
2. Select the brand name, number of cases, price per case, and (if applicable) size and vintage of the closeout product;
3. Identify the individual responsible for the permit application and provide contact information;
4. Explain the reason(s) why the applicant is seeking a closeout permit (e.g., product has been discontinued, product is selling poorly, etc.).

Also beginning on **October 15, 2021**, all licensees in need of a closeout permit for historic

products must complete an online application on POSSE. The application requires the following:

1. Select license number;
2. Select the brand name, number of cases, price per case, and (if applicable) size and vintage of the closeout product;
3. Identify the individual responsible for the permit application and provide contact information;
4. Explain the reason(s) why the applicant is seeking a closeout permit (e.g., product has been discontinued, product is selling poorly, etc.).
5. Explain the reason(s) why the product no longer has a current brand registration number.

Applicants will be able to close out a particular vintage or size, or they can choose to close out the entire brand. Errors in selecting the closeout product, completing the permit application or amending and updating the brand registration may result in delay or denial of the permit.

At the end of the POSSE application process, permit applicants will be prompted to pay the corresponding fees (\$1 per case with a minimum fee of \$20). If the permit is approved, it will be assigned a number and the permit certificate can be downloaded or printed through POSSE.

Once a wholesaler receives a closeout permit for brand-registered products or for historic products, it may conduct a bona fide sale of approved closeout products. However, each closeout product must be individually posted on the wholesaler's CPL before the sale takes place.⁷ The practice of bundling or "palletizing" a combination of closeout products for sale to retailers will be allowed, provided that the pallet and its contents are listed on the Combo tab of the CPL and each closeout product in the bundle or pallet is identified with a frontline bottle price and a price for the entire pallet.⁸ This practice will be subject to further review, and may be discontinued at the discretion of the Director.

⁷ The closeout permit number must be included in Column L of the CPL. See "CPL Template Instructions" in POSSE.

⁸ See "CPL Template Instructions" in POSSE. If closeout products are sold in a pallet or bundle, each product in the pallet or bundle does not have to be individually listed on the CPL tab if the product is not available for sale as a single unit. This is an exception to N.J.A.C. 13:2-24.9(a).

For all closeout sales, the licensee shall file with the Director a signed inventory report identifying the type and quantity of all alcoholic beverages sold, the name and address and license number of the retail purchaser(s), and invoices accompanying each sale. This filing must be made no later than 30 days after expiration of the closeout permit.

IV. Request For Extension

As stated above, the Director is extending the expiration date for new closeout permits from 90 days to 180 days, giving wholesale licensees a total of six months to conduct a bona fide closeout sale. If a wholesaler seeks to extend the closeout permit beyond 180 days due to hardship or other good cause, it must complete an application for an extension on POSSE. There is no fee associated with applying for an extension. The application requires the following:

1. Select Permit Application – Extension Closeout Permit;
2. Select current closeout permit;
3. State the reason(s) why an extension of the current closeout permit is necessary and justified;
4. Provide copies of invoices of closeout product(s) sold to retailers from the date the permit was first issued to the present time.

The individual submitting the application will be required to acknowledge that (a) the extension must be approved by the Division; (b) the closeout product will continue to be sold to all retailers on a non-discriminatory basis; and (c) when the existing inventory of closeout product is finally sold, the product may not be re-introduced into the marketplace until at least one year after the expiration of the closeout permit and only upon petition to and approval by the Director.

An application for a closeout permit extension should be submitted at least two weeks (14 days) before the closeout permit expires and will be reviewed carefully by staff on a case-by-case basis. If the extension request is approved, the closeout permit will be extended for an additional 180 days. Any further request for an extension beyond 180 days may be considered for hardship or other good cause, but will require further justification and documentation.

V. Conditions

The current conditions on closeout permits will remain in effect. Specifically, all closeout products must be offered on the same terms to all retailers throughout the State on a non-discriminatory basis; the discriminatory trade practice of “steering” (i.e., offering discounted product to favored retailers) is strictly prohibited.⁹ Closeout products may not be re-introduced into the marketplace until one year from the expiration of the closeout permit and only upon petition to and approval by the Director. If the closeout product is a specific vintage or size and not the entire brand line of products, the remaining non-closeout products may be sold in the normal course.

A closeout permit is a limited and temporary exception to N.J.A.C. 13:2-24.8, which generally prohibits wholesalers (and retailers) from selling alcoholic beverages below cost.¹⁰ As the regulation makes clear, a closeout sale must be bona fide, i.e., a legitimate sale in good faith to clear out a product efficiently and expeditiously. Licensees who violate the regulation will be referred to the Division’s Enforcement Bureau for appropriate action.

Closeout permits are subject to all rules and regulations of the Division and may be cancelled by the Director in his sound discretion at any time without notice, reason or cause. This Special Ruling is subject to review and modification should the factual circumstances warrant.



ALYSSA P. WOLFE
ACTING DIRECTOR

Dated: October 14, 2021
APW/GS/RL

⁹ See Special Ruling, In Re Anti-Competitive And/Or Potentially Discriminatory Practices In Wholesale Alcoholic Beverage Industry, June 12, 2015.

¹⁰ Nothing in this Special Ruling shall affect the authority of a licensed retailer to apply for a closeout permit.