

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
NEWARK INTERNATIONAL PLAZA
U.S. Routes 1-9 (Southbound) Newark, N. J. 07114

BULLETIN 2381

December 12, 1980

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1. COMMENTS BY DIRECTOR - TEXT OF ADVERTISING and PROHIBITED PROMOTIONS REGULATIONS. N.J.A.C. 13:2-24.10 and 23.16.

1. COMMENTS BY DIRECTOR - TEXT OF ADVERTISING AND PROHIBITED PROMOTIONS REGULATIONS; N.J.A.C. 13:2-24.10 and 23.16

On March 11, 1980 major changes in Division Regulations became effective. This first phase of "deregulation" did not address all of the initiatives contemplated by the Division, specifically with respect to retail promotions. Several regulations then under review continued in force and effect until July 3, 1980. Since that date, I have responded to several inquiries concerning retail advertising and promotions pursuant to N.J.A.C. 13:2-36.1. This Bulletin presents a collection of relevant Opinion Letters and the text of the Divisions advertising and promotion Regulations as amended July 3, 1980. Any previous Bulletins or Opinion Letters, to the extent they are inconsistent are repealed by implication.

* * * * *

N.J.A.C. 13:2-24.10 ADVERTISING AND CONSUMER PROTECTION

(a) No manufacturer, importer, registrant, wholesaler, distributor or retailer shall include in any advertising material or in any advertisement, directly or indirectly, any statement, illustration, design, device, name, symbol, sign or representation that:

- (1) is false or misleading;
- (2) is obscene;
- (3) contains the name of or depiction of any biblical character or religious character or symbol;
- (4) portrays a minor or child or items or symbols which are generally associated with children or which tends to induce minors to purchase alcoholic beverages;
- (5) tends to create or give the impression that the use of an alcoholic beverage has curative or therapeutic effects or enhances athletic prowess;
- (6) offers an alcoholic beverage product for sale to consumers which is not immediately available in reasonable supply at the price, size and age specified, unless advertised at a stated limited quantity;
- (7) offers alcoholic beverage pricing information in affiliation with other non-identically owned licensees in a communication which fails to truthfully disclose and prominently indicate (a) the identity of the individual licensee who established the pricing information, and (b) that the specific prices and products featured may not be available at all businesses represented or indicated as being affiliated.

* * * * *

N.J.A.C. 13:2-23.16 PROHIBITED PROMOTIONS

No licensee or registrant privileged to sell or solicit the sale of alcoholic beverages within this State shall, directly or indirectly, allow, permit or suffer any practice or promotion that:

(a) offers to the public at large unlimited availability of any alcoholic beverage for a set price; or

(b) offers to a patron or consumer a free drink, gift, prize or anything of value, conditioned upon the purchase of an alcoholic beverage or product, except branded or unique glassware or souvenirs in connection with a single purchase, or

(c) requires or allows a consumer to prepurchase more than one drink or product at a time via tickets, tokens, admission fees, two for one, or the like, as a condition for entry onto a licensed premises or as a requirement for service or entertainment thereon.

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2. OPINION LETTER - WOODEN NICKELS AND TOKENS - LIMITED USEFULNESS - "TWO-FOR-ONE" DRINK PROMOTIONS - PROHIBITED - "HALF PRICE" DRINK PROMOTIONS - PERMITTED - DISCUSSION.

October 16, 1980

Frank A. Palmieri, Esq.
Orange, N. J.

RE: Wooden Nickels - Tokens - "Two-for-One" - "Half-Price"
N.J.A.C. 13:2-23.16.

Dear Mr. Palmieri:

In a series of recent letters you have inquired on behalf of your client, Theodore's, Inc., t/a Ann's Clam Bar, as to the propriety of the use of wooden nickels or other tokens in connection with the sale or service of alcoholic beverages. N.J.A.C. 13:2-23.16, effective July 3, 1980, prohibits any practice or promotion that:

"...requires or allows a consumer to pre-purchase more than one drink or product at a time via tickets, tokens, admission fees, two-for-one, or the like, as a condition for entry into a licensed premises or as a requirement for service or entertainment thereon." (Emphasis added)

The regulation does not prohibit per se the use of tokens or tickets, etc. It prohibits their use when they reflect a consumer pre-purchase of more than one alcoholic beverage drink mandated by the licensee as a condition of service, entertainment or entry. In short, a licensee may not "build" into a minimum cover-charge, entry, entertainment or other service fee more than one drink per person. The regulation does not prohibit the use of wooden nickels or other tokens when they indicate a voluntary purchase or pre-purchase of a single drink by one patron for him or herself or for another patron.

Your inquiry also raises questions with respect to tokens and "one-half price" or "two-for-one" promotions. N.J.A.C. 13:2-23.16 also prohibits any practice or promotion that:

"...offers to a patron or consumer a free drink, gift, prize or anything of value, conditioned upon the purchase of an alcoholic beverage or product, except branded or unique galssware or souvenirs in connection with a single purchase..." (Emphasis added)

A "two-for-one" promotion represents a mandated pre-purchase of more than one drink as a condition of service at that reduced (half) price. Such a promotion violates N.J.A.C. 13:2-23.16. A "half price" or other price discount promotion available when a consumer purchases any drink is not violative of the regulation. It is not "tied" to future or multiple purchases. The rationale is that drinks of alcoholic beverages intended for actual immediate consumption shall not be available at reduced prices only when purchased in quantities of two or more. It is intended that both the licensee and the consumer reflect upon the merits of each additional sale and contemplated further consumption. If some conversation, observation and exchange of currency is required between the patron and bartender, this goal is assisted and the public interest served. See, N.J.A.C. 13:2-23.1.

Finally, following this posture, any announced or routine policy which provides a patron with a discounted drink or drink "on-the-house" after the purchase of several drinks is prohibited. I am not suggesting that it is a violation to offer a patron a drink as a gesture of good will "on-the-house". What is prohibited is an actual or implied promotion as a result of which the patron is led to believe that if he or she buys several drinks, automatically one will be provided free.

As you may have surmised, within this framework, the usefulness of tokens is limited. I trust this communication has been responsive.

JOSEPH H. LERNER
DIRECTOR

3. OPINION LETTER - PACKAGED GOOD SALES - MANUFACTURERS COUPONS - PROHIBITED; RETAILER "DISCOUNT" COUPONS - PERMITTED; RETAILER COUPONS FOR NON-ALCOHOLIC BEVERAGE PRODUCTS - PERMITTED; "TIED" SALES and EXCEPTION DISCUSSED.

October 24, 1980

Re: Coupon Merchandising of Packaged
Alcoholic Beverages N.J.A.C. 13:2-23.16

In response to your individual letters of suggestion, comment or inquiry, the following represents current Division policy applicable to coupon merchandising and sales of alcoholic beverages in original containers for off-premises consumption.

N.J.A.C. 13:2-23.16 prohibits, with a limited exception, the offering to a consumer of "...anything of value conditioned upon the purchase of an alcoholic beverage or product..." I do not view a coupon which presents to consumers a bona fide discount or special price as being violative of the regulation. A discount coupon does not offer something else of value conditioned upon a purchase. Rather it is an offering of price reduction on alcoholic beverage products. Therefore, a coupon program initiated by a retailer, independent of suppliers, wholesalers and other non-identically owned retail licensees, which offers a fixed percentage, dollar amount discount or special price on alcoholic beverage products upon presentation, is permissible, so long as the ultimate sales price does not fall below the cost of the products to the retailer. N.J.A.C. 13:2-24.8.

Now, most retail licensees have the privilege of selling products other than alcoholic beverages from their licensed premises. Whether it be snack foods, soda, ice or whatever, they may be discounted, specialied, or offered free with coupons, provided no purchase of alcoholic beverages is required. If a purchase of alcoholic beverages is required, I would consider the coupon offer something else of value conditioned upon or "tied" to such a purchase, and violative of N.J.A.C. 13:2-23.16.

The exclusive exception to the foregoing rule is that "...branded or unique glassware or souvenirs... 'may be offered'... in connection with a single purchase..." This exception was originally drafted to permit on-premises consumption retail licensees to include in the price of a single drink a unique glass or mug, etc. Therefore, coupons would normally not have been involved. Unless future factual analysis necessitates intervention by the Division, I see no reason why the exception should not extend to package goods sales. Certain further comments are, however, required. First, it is possible that local governing bodies may, by ordinance or special condition, have limited or prohibited the sale of certain non-alcoholic beverage products from licensed premises. This must be examined by each individual retailer. N.J.S.A. 33:1-40. cf. N.J.S.A. 33:1-12. Secondly, Division Regulation N.J.A.C. 13:2-24.9 prohibits the offering of an alcoholic beverage product in combination with any other product (even if offered "free") at a unit price below their combined cost to the retailer, and further requires that the normal or regular price of each component of the unit be provided in advertising and shelf pricing. Thus, it will be necessary for retailers to state in advertising and in unit shelf pricing, the regular price of both the glassware or souvenir, etc. and the single

alcoholic beverage product in connection with which the item is offered. (eg with this coupon and the purchase of Old Deregulator Whiskey, 750 ml, normally \$X.XX, one free souvenir shot glass, regularly \$X.XX). Again I point out that this exception is limited to branded or unique glassware or souvenirs. I view the latter as being of nominal value and related to consumer use in connection with alcoholic beverages, eg openers, cork screws, recipe books, preferably containing a product or retailer logo. I will not engage in a practice of prior approval of such items, but reserve the discretion, as noted above, to react if promotions become a problem.

The second major area of inquiry set forth in your letters involves "manufacturers' coupons". For the reasons expressed in the immediately preceding paragraphs, most of the proposed programs are prohibited, (i.e., because upon "proof of purchase" (condition) together with a manufacturer's coupon, a consumer will receive something else of value, eg, other items or another coupon good for free or discounted non-alcoholic beverage products), although the "unique glassware exception" would be available to manufacturers.

Manufacturers' "cash refund" or "cents-off" coupons, however, create more complex issues. First, a question of sales "below cost" (N.J.A.C. 13:2-24.8) arises if a retailer is to redeem the consumer coupon and its pricing does not lawfully allow for the absorption of the offered discount. Second, where retailer redemption is contemplated, "tied-house" prohibitions become a concern. N.J.S.A. 33:1-43. Third, whether manufacturer or retailer redeemed, the impact (both vertically upon retail pricing and upon competition, in general, among suppliers to licensees within this State) is unknown. N.J.A.C. 13:2-24.3. Finally, and perhaps more critical, is the issue whether this Division can sanction direct solicitation of consumers through "cash refund" coupons by manufacturers who hold no licenses to engage in retail sales in New Jersey. N.J.S.A. 33:1-2, 12 & 43.

I have not found it necessary to resolve these broad issues. As a matter of policy, pursuant to N.J.S.A. 33:1-39, I have determined that manufacturers' "cash refund" or "cents-off" coupons, whether initially redeemable at either the retail or manufacturer level, are incompatible with the existing regulatory scheme of alcoholic beverage control of this State. New Jersey is undergoing a significant change to a more pro-competitive market. Under our previous regulations suppliers, in effect, vertically established retail package goods minimum pricing. Retailers are now learning to individually develop pricing structures in response to intra-state competitive forces. To permit suppliers to indirectly re-introduce themselves into retail pricing decisions through discount coupons would not be wise at this time. I cannot forecast a point in time at which further consideration would be appropriate, but until such a re-examination is completed, manufacturers' "cash refund" or "cents-off" coupons are not permitted.

JOSEPH H. LERNER
DIRECTOR

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4. OPINION LETTER - RESTAURANT AND TAVERN PROMOTIONS - COMPLIMENTARY DRINKS WITH MEAL - PERMITTED; FREE OR DISCOUNT DRINK COUPONS - PERMITTED; COUPON DIRECT MAIL SOLICITATION - PROHIBITED - SUBJECT TO INDIVIDUAL REVIEW; FREE DRINKS PERMITTED - WARNING INTOXICATED PATRONS; "ALL YOU CAN DRINK FOR A SET PRICE" - PROHIBITED - EXCEPTION DISCUSSED; FREE PROMOTIONAL ITEMS - PERMITTED, ADVERTISING IN ANY MEDIUM - PERMITTED - PROHIBITION AGAINST BROADCAST ADVERTISING REJECTED; CONTESTS - PERMITTED; RAFFLES, BINGO GAMBLING - DISCUSSED; SALE OF GLASS WITH DRINK - PERMITTED - DISCUSSION.

November 20, 1980

Steak and Ale Restaurants of America, Inc.

Re: Restaurant Promotions - Complimentary Drinks - Drink Coupons -
Free Drinks - Free Promotional Items

In a letter of November 12, 1980 you raise a series of questions concerning permissible activities by licensees which function essentially as restaurants. In answering the same I have rephrased some of the questions to assist in articulation of Division policy.

1. May a restaurant advertise a free mixed drink, beer or wine with a meal order?

In 1974 a previous Director in interpreting former Regulation N.J.A.C. 13:2-23.16 (which prohibited practices unduly designed to increase consumption), concluded, for pro-competitive reasons, that restaurant licensees should be permitted to include a "complimentary" drink in the price of meals. Bulletin 2127, Item 3 (1974). While the text of that Regulation was amended July 3, 1980, the Regulation continues to address, via Prohibited Promotions, Division concerns relating to practices which may adversely impact on immediate personal consumption. Upon review, I find that I agree with the spirit of the previous policy articulation. Therefore, a licensee may include in the price of meals a complimentary alcoholic (or non-alcoholic) beverage. The size of the drink or container is not limited. It may be a glass, carafe or pitcher, etc. and may be any type of alcoholic beverage as long as the container is a single unit. ("All you can drink" is prohibited; N.J.A.C. 13:2-23.16). While the promotion may be advertised, it may not be advertised as "free". In fact, it is not "free", but rather included in the cost of the meal. It may be advertised as "included" or promoted as "complimentary". See N.J.A.C. 13:2-24.10(a)(1).

2. May a licensee mail a coupon or facsimile thereof, redeemable for a mixed drink, beer or wine, or for a discount off the regular price.

A licensee may issue and honor coupons for a free drink or a drink discount price so long as the coupon relates only to a single unit (glass or pitcher, etc.) and no other purchase of any product, service or drink is required as a condition for redemption ("tied" via the coupon). Only one coupon may be redeemable per consumer on any given date. Additionally, such coupons may be issued and redeemed only by single licensees or groups of identically owned licensees. They may not be issued by a franchisor or by a third party, pursuant to rights under a Trademark or Service Mark agreement, although such a Mark may be affixed to the coupon. The latter pro-

scription is necessary to insure that the individual licensee is the only person to exercise control over the licensed business as it relates to sales of alcoholic beverages.

Further, it is asked if such coupons may be mailed, presumably to potential patrons. N.J.A.C. 13:2-24.4 provides that: "No licensee shall solicit house-to-house, personally or by telephone, the purchase of alcoholic beverages..." By way of interpretation and also as a matter of policy, direct mail retail solicitation throughout the State is offensive to the intent of the regulation. By this, I am not suggesting that the circulation of coupons must be limited exclusively to the use of newspapers as a vehicle, but rather that it will be necessary for licensees to articulate alternative proposals for future Division review.

3. May a licensee provide free drinks without advertising through local media (i.e., only through on-premises signs)?

The Division has never established or regulated the price of a drink. A licensee may provide free drinks to patrons, with or without advertising, in any form. Attendant to the decision to entertain such conduct, however, is the responsibility imposed that a licensee may not serve or allow the service of alcoholic beverages to any person actually or apparently intoxicated. N.J.A.C. 13:2-23.1. Further, if there were an admission cover charge, or any other fee required of patrons as a condition of entry or service during a period in which all or certain drinks were provided free, I would consider the program a violation of N.J.A.C. 13:2-23.16. Specifically prohibited by that Regulation is the offering of "unlimited availability of any alcoholic beverage product for a set price". Under those circumstances, I would view the admission fee as the set price. The term "public at large" in the Regulation is not intended to limit the prohibition exclusively to those such promotions as are advertised to the public through media. Rather, the phrase has been historically construed by the Division as an exception so as to permit "dinner and beverage packages" by licensees via catering contract or special events for which reservations are required, (eg, New Year's Eve, Weddings, Bar Mitzvahs, where unlimited beverages and a meal are offered as a package at a stated price per person or couple).

4. May a licensee give away any promotional items with or without advertising through local media (i.e., t-shirts, mugs, key rings, etc.)?

A retail consumption licensee may provide patrons with promotional items so long as no purchase of alcoholic beverages is required in order to obtain the item. N.J.A.C. 13:2-23.16. There is no requirement that the promotion be advertised in local media. It is noted, however, that retailers most probably would be prohibited from actually selling many of such items by local ordinance or statute, i.e., engaging in another mercantile business contrary to N.J.S.A. 33:1-12.

5. Are there any restrictions on the type of media a licensee may use in advertising?

Recently revised Division Regulations (effective July 3, 1980) do not prohibit the use of any specific type of advertising medium.

Basic advertising restrictions are contained in N.J.A.C. 13:2-24.10. Division Bulletin 2015, Item 1 (1971), which had placed limitations on broadcast advertising (including a prohibition with respect to distilled spirit products) is, therefore, considered to be nullity.

6. Are "sweepstakes" (drawings) legal on licensed premises?

Generally speaking, a licensee may conduct "contests" (dance, singing, costume, etc.) so long as no purchase of alcoholic beverages is required as a condition of entry and the prize or award, if any, is not alcoholic beverages or certificates redeemable therefor. If what is contemplated by the term "sweepstakes" is, in fact, a "raffle", then I doubt that most, if any, retail licensees operating for a profit could qualify for the license required, pursuant to the "Raffles Licensing Law, N.J.S.A. 5:8-50 et seq." Licenses authorized pursuant to that Act are supervised by the Legalized Games of Chance Control Commission. See, N.J.S.A. 5:8-1. Further, any lawful lottery activity must be conducted under the auspices of the State Lottery Commission (See, N.J.S.A. 5:9-1 et seq.) and gambling, to the extent that is State sanctioned falls within the jurisdiction of the Casino Control Commission. See, N.J.S.A. 5:12-1 et seq. cf 2C:37-1 et seq., N.J.A.C. 13:2-23.5(c) and 23.7. Bingo licensed pursuant to the "Bingo Licensing Law" (N.J.S.A. 5:8-24 et seq.) may be conducted on licensed premises. However, no alcoholic beverages may be sold or consumed during any period of time in which the game is being conducted. See, N.J.A.C. 13:2-23.7(b). In short, any raffle, lottery, bingo or other form of gaming or chance must be licensed by State agencies other than this Division. Engaging in conduct prohibited under those licensing Acts, with or without a license, would expose any licensee of this Division to disciplinary action. N.J.S.A. 33:1-31, N.J.A.C. 13:2-23.5(c).

If a business obtains a license under one of those Acts and wishes to ascertain if the conduct is permitted on a licensed premises, this Division will review the merits of each proposal in light of our Alcoholic Beverage Law on an ad hoc basis.

7. May a licensee give away a drink container and not the alcoholic beverage drink? Under the circumstances, would the licensee have to charge a fee for the container or include the cost in the price of the beverage to the consumer?

A licensee may not offer anything of value to a patron conditioned upon the purchase of an alcoholic beverage. N.J.A.C. 13:2-23.16. The exception to the rule is "branded or unique glassware or souvenirs in connection with a single purchase" Id. This exception implies that the container (glass) is sold with the drink. Since the Division does not regulate drink prices, the issue of inclusive costs need not be resolved. However, under the circumstances, a licensee may not suggest that the glassware is "free" because a purchase of a beverage is required. If the glassware (container) is unique or branded, it may be a promotional item. In that regard, you are referred to the answer to question four (4) above. Notwithstanding the above, under no circumstances may a licensee promote the giving or sale of empty original containers (liquor, wine or beer bottles). I am not suggesting that a licensee must refuse a patron who desires to take home an empty bottle that is, in fact, unique or personally desired for collection purposes. The initiative must, however, come from the consumer.

JOSEPH H. LERNER, DIRECTOR

5. OPINION LETTER - CONSUMER CONTEST PRIZES MAY NOT BE ALCOHOLIC BEVERAGES OR CERTIFICATES REDEEMABLE THEREFORE - DISCUSSION; PROOF OF PURCHASE - PROHIBITED - DISCUSSION.

November 6, 1980

Jos. Schlitz Brewing Co.

Re: Consumer Contests - Prizes - Proof of Purchase

In recent communications with this Division, your company has inquired as to the propriety of a consumer contest which offers prizes based on accumulated points. The points are to be awarded to various organizations (eg college fraternities, sororities, etc.) in relation to the number of empty packages and/or bottle caps of your company's products which are turned-in to participating distributors. The prizes will range in value from \$200 to \$1,000 and will be selected by the winning participants from "prize groupings" established in relation to the total points achieved. The prizes may be such items as pool tables, televisions, pinball machines, gas grills and refrigerators, etc.

First, whether conducted by a manufacturer or retailer, a consumer contest permitted under Division regulations may award any type of prize of any value, except a prize of alcoholic beverages, drinks, coupons, or certificates exchangeable therefor. Cash prizes are permitted as long as it is not required or implicitly understood that alcoholic beverages will be purchased with the award.

Second, Division regulations, with limited exception, prohibit the offering of anything of value conditioned upon the purchase of an alcoholic beverage or product. N.J.A.C. 13:2-23.16. Therefore, a contest that requires a proof of purchase as a condition to entry or eligibility is prohibited. In this instance, a contest which awards "points" upon presentation of your company's product packaging, is viewed as requiring proof of purchase and, therefore, offensive to the regulation.

I have, however, permitted one exception to the "proof of purchase" concept to date. Specifically, if a contest was based upon presentation of aluminum containers intended for recycling and acceptable containers included those used by your competitors and those of other industries (eg soft drinks), I would not view the program as offensive to the purpose of the regulation.

JOSEPH H. LERNER
DIRECTOR

6. OPINION LETTER - SALE OF GIFT CERTIFICATES - PERMITTED - DISCUSSION.

October 15, 1980

Anthony J. Napodano, Esq.

Re: Advisory Opinion - Gift Certificates

In a letter of September 19, 1980 you have inquired on behalf of your clients, (various retailers participating in Shop Rite Liquor Stores Purchasing Cooperatives pursuant to N.J.A.C. 13:2-26.1), as to the propriety of the use of gift certificates.

Notwithstanding any previous Division reply to the contrary, under recently amended Division Regulations, gift certificates, issued and redeemable only at face value and valid only towards the purchase of alcoholic beverages in original containers for off-premises consumption, are a permissible business promotion for individual licensees. However, since your inquiry involves groups of non-identically owned licensees and the participation of a non-licensee "clearing house", further commentary is in order.

The proposal submitted contemplates the following:

- (1) Shop-Rite Beverages, Inc., a wholly owned subsidiary of Wakefern Food Corp., contemplates issuing gift certificates in specific dollar amounts, redeemable at participating Shop Rite Liquor stores.
- (2) The gift certificates will be issued in denominations of \$10.00, \$20.00 and \$25.00, or multiples thereof.
- (3) Participating Shop Rite Liquor stores will purchase the gift certificates from Shop Rite Beverages, Inc., paying the face value.
- (4) Shop Rite Liquor stores will sell the certificates to customers for redemption in any Shop Rite Liquor store.
- (5) Shop Rite Liquor stores will redeem the certificates for merchandise, charging the customer the redeeming store's individually established retail price for the item or items at the time of redemption.
- (6) Certificates will be redeemed by Shop Rite Beverages, Inc. at face value, upon presentment by the stores.
- (7) Shop Rite Beverages, Inc. will not in any way participate in either the management or operation of any of the licensed stores, and all certificates will be sold and redeemed at face value.

I would not find the proposal offensive to this State's Regulatory scheme, if in addition to the terms submitted above, the following conditions were incorporated:

- (a) The "clearing house" (Shop Rite Beverages, Inc.) shall make no profit from the sale of alcoholic beverages, inasmuch as it is not a licensee. N.J.S.A. 33:1-2. Any fee established by the "clearing house" in providing gift certificates or other business services attendant to the licensing or use of a service or trade mark must be fixed and not on a percentage basis. Any such agreements must be reduced to writing and available for Division inspection at the premises of all participating licensees. See, Attorney General, Formal Opinion 1964-No. 3 (May 6, 1964).
- (b) Upon purchase of a gift certificate from the "clearing house", a licensee must endorse its face with its license name and number. Upon redemption from a consumer, a licensee must endorse the certificate face with its license name and number. Such endorsements shall include the signature of each licensee or employee actually present and participating in the transaction. See, N.J.A.C. 13:2-23.32.
- (c) Finally, I have had the opportunity to observe joint advertising on the part of retailers for several months now following "deregulation". Even absent pricing considerations, I have had some reservations about joint advertising or other communication formats. Accordingly, each gift certificate must prominently state that participating licensees are individually owned and prices and product availability at each store may vary. N.J.A.C. 13:2-24.10.

JOSEPH H. LERNER
DIRECTOR

7. OPINION LETTER - MANUFACTURERS "CONSUMER CONTESTS" - PERMITTED - DISCUSSION.

May 7, 1980

Schreiber, Tunich & MacKnight, Esqs.

Re: Somerset Importers, Ltd - Johnnie Walker Black Label
Father's Day Scholarship Contest

I have reviewed your client's proposed promotional program which may be characterized as a "consumer sweepstakes" as submitted under your letter of May 2, 1980. I note that:

1. No purchase of alcoholic beverages is necessary to enter,
2. All entrants must be of legal drinking age,
3. The answers to entry qualification questions may be found on the product label or the proposed retail display and the manufacturer will supply a label to prospective entrants upon requests,
4. No skill or special knowledge is necessary to ascertain the correct answers,

5. Winners will be determined by random drawings of an independent judging agency,
6. The prizes are not alcoholic beverages, and
7. Employees and families of wholesalers, distributors and retailers are not eligible to win.

Based on the foregoing conditions, I do not find the program offensive to Division Regulations. To the extent that it is implemented through New Jersey wholesalers via the provision of displays and promotional materials to retailers, the "Marketing Manual" and "Antidiscrimination" sections of Division Regulations (N.J.A.C. 13:2-24.6 and 24.2) must be complied with.

JOSEPH H. LERNER
DIRECTOR

8. OPINION LETTER - "ALCOHOLIC BEVERAGES BY WIRE" - PERMITTED - REVIEW RESERVED.

September 17, 1980

Piltzer and Piltzer, Esqs.

Greenbaum, Greenbaum, Rowe & Smith, Esqs.

Re: Tele-Wine, Inc., "Wines-by-Wire"

Under separate communications beginning February 22, 1980, you have inquired on behalf of your above non-licensee clients as to the propriety of a marketing service initiative which may be characterized as "alcoholic beverages-by-wire". The concept is presented as being similar to the F.T.D. florists network.

The Division has previously approved such programs, Bulletins No. 155, Item 1 (1936); 230, Item 9 (1938) and 768, Item 3 (1947). As was the situation in the past, there exists limited information with respect to the actual operation of such programs in this or other States. There has been a significant change, however, in this State's policy with regard to pricing since the previous Bulletins. Effective March 11, 1980, this Division no longer sanctions retail price maintenance. Therefore, any agreements with respect to pricing among the participants (other than a standard non-percentage service fee) may expose the licensees and non-licensees alike to price-fixing liability.

Consistent with the previous Bulletins and the above, your clients may proceed with the proposed enterprises. While I perceive nothing improper in the proposals as presently outlined, full right is reserved to the Department to modify or revoke this letter should experience or the Administration of proper control require the same.

JOSEPH H. LERNER
DIRECTOR

9. OPINION LETTER - SALES OR LOANS OF ALCOHOLIC BEVERAGES AMONG RETAILERS - PROHIBITED - IDENTICALLY OWNED RETAILERS AND COOPERATIVES - DISTINGUISHED; QUANTITY DISCOUNTS - DISCUSSED.

November 6, 1980

Wine 'N Stuff, Inc.

Re: Sales Among Retailers - Quantity Discounts -
Cooperative Purchasing

In your recent letter, an inquiry was presented concerning the perimeters of transactions between different retail licensed premises. Specifically, Wine 'N Stuff, Inc. is the holder of two retail distribution licenses within the City of Wildwood, New Jersey. It wishes to know if it is permissible to secure quantity discounts from wholesalers for purchases divided between the two licenses or billed to one license, but delivered separately to the two premises. In answering, I shall first review Division policy relating to sales among and to retailers.

New Jersey's regulatory scheme invisions a three tiered distribution system, i.e., supplier, wholesaler and retailer. Within that framework, retailers are authorized to sell alcoholic beverages to only consumers. N.J.S.A. 33:1-12. Therefore, Division regulation N.J.A.C. 13:2-23.12 states, in part, "...purchase of alcoholic beverages by one retailer from another and sale of alcoholic beverages by one retailer to another are prohibited;..." Nor is it permissible for a retailer to "loan" alcoholic beverages to another retailer which has depleted its stock in an item, even in an emergency. See, Bulletin 13, Item 2 (1934), Bulletin 45, Item 16 (1934). In the past, however, the Division has recognized a distinction between sales of alcoholic beverages among retailers, in general, and transfers of alcoholic beverages between identically owned licenses. See, Bulletin 24, Item 10 (1934), Bulletin 119, Item 2 (1936). Thus, where retail licenses are held by identical owners in an identical fashion (eg the same corporation, not just similar shareholders), alcoholic beverages intended for resale to consumers may be transferred between licensed premises, subject to two conditions. First, the alcoholic beverages must be transported in a Division licensed vehicle. N.J.A.C. 13:2-20.1 et seq. Second, the alcoholic beverages must be accompanied by, and the receiving licensed premises must maintain, a document reflecting the source and "cost" of the products as defined in N.J.A.C. 13:2-24.8. Therefore, a group of identically owned licenses may take advantage of wholesale quantity discounts by ordering in the name of a single license and transferring the products consistent with the above.

Your letter also inquires if it is permissible for products ordered by one licensee to be delivered by a wholesaler to all or several of the identically owned licenses. This question must be answered from the wholesaler rather than the retailer perspective.

What has been stated in the first portion of this letter, in effect, is that groups of identically owned retailers need not form Cooperative Purchasing Groups pursuant to N.J.A.C. 13:2-26.1 in order

to take advantage of wholesaler quantity discounts. The wholesaler, however, has an obligation not to discriminate among retailers in terms of sale. N.J.A.C. 13:2-24.1. In that regard, Cooperative Purchasing Groups and quantity orders from groups of identically owned retailers are viewed similarly. In short, the terms offered to them may not be different from those offered to individual retail establishments. Therefore, quantity or other discounts need not be given to groups if no corresponding justification for the differential exists. cf N.J.A.C. 13:2-26.1(a)(11). The most obvious cost justification for a differential in group sales is the sale of a quantity of products for delivery to one location. Stated otherwise, there is a presumptive cost saving to the wholesaler if it delivers orders of several retail licensees to one location. Such a saving would place a group on the same footing as a single retailer which ordered merchandise on identical terms of sale. Therefore, it is unlikely that a wholesaler could cost justify, (i.e., establish the absence of discrimination) selling to a group of licensees on terms including multiple-deliveries, without violating Division regulations. This statement is not intended to limit creative competitive efforts on the part of wholesalers seeking cost justifications, but merely to advise you of the realities of the impact of the antidiscrimination provisions of the regulatory scheme. cf N.J.S.A. 33:1-89 and 90.

JOSEPH H. LERNER
DIRECTOR

10. OPINION LETTER - HOLIDAY AND GIFT COMBINATION PREPACKAGED UNITS - PERMITTED - DISCUSSION OF LOCAL LIMITATIONS ON RETAIL SALES.

September 10, 1980

Joseph E. Seagram & Sons, Inc.

Buchman, Buchman & O'Brien, Esqs.

Re: Advisory Opinion: Holiday and Gift
Combination Unites - N.J.A.C. 13 2-24.9(b)

Earlier this year on behalf of your respective employer and client, Joseph E. Seagram & Sons, Inc. and E & J Gallo Winery, you had separately inquired as to the propriety of specific proposed combination holiday or gift set concepts. At that time, the Division was reassessing its position with respect to the merits of allocating resources to engage in "prior review" of merchandising, promotional and advertising initiatives contemplated by industry members. The present policy, articulated through N.J.A.C. 13:2-36.1 (effective July 3, 1980), is that such requests normally will not result in the issuance of a Division opinion or response. Your inquiries, however, have had the catalytic effect of drawing attention to the apparent prohibitive implications of N.J.A.C. 13:2-24.9(b) upon the general concept of pre-packaged combination units involving both alcoholic beverage and non-alcoholic beverage products. In that regard, a substantial question of general applicability, warranting response has been presented.

Specifically, N.J.A.C. 13:2-24.9(b) provides in part: "except for sales to retailers of malt alcoholic beverages; no wholesale

licensee shall offer to sell or sell any alcoholic beverage product in combination with another product...". Obviously, if wholesalers were prohibited from selling to retailers combination gift and holiday units, it would be of little value for me to confirm your understanding that suppliers may sell such units to wholesalers. Extensive articulation of the underlying reasoning for the quoted regulation is not necessary in this opinion. I shall simply state that the regulation was not intended, nor will it be construed, to prohibit, in general, the sale by suppliers to wholesalers, wholesalers to retailers, or retailers to consumers of pre-packaged combination gift or holiday sets.

Notwithstanding the previous statement, some further comment is necessary. In enacting New Jersey's Alcoholic Beverage Laws, the Legislature vested primary jurisdiction and discretion over retail licensees in local municipal issuing authorities. N.J.S.A. 33:1-24. Among the broad powers of local authorities is that to "regulate the conduct of any business licensed to sell alcoholic beverages at retail and the nature and condition of the premises upon which any such business is to be conducted". N.J.S.A. 33:1-40. The exercise of such municipal discretion is to be articulated exclusively through local Ordinance. N.J.S.A. 33:1-94. It is possible, therefore, that one or more of the municipalities of this State may have enacted an Ordinance which could prohibit some of the types of holiday or gift combination sets contemplated. Further, pursuant to N.J.S.A. 33:1-12, the classes of retail licenses are strictly limited with respect to the other types of items they may sell or mercantile businesses they may engage in. In short, via affirmative legislative statement, the only class of non-alcoholic beverage combination items of which it can be said there exists clear authority for retail sale is "distillers and vintners packaged holiday merchandise pre-packaged as a unit with suitable glassware as gift items to be sold only as a unit". N.J.S.A. 33:1-12.

While the foregoing may resolve the question of what non-alcoholic beverage products may permissibly be combined in merchandising sets by wholesalers, it does not address the question of a combination with other alcoholic beverages in relation to N.J.A.C. 13:2-24.9(b). Here again, the regulation was not intended, nor will it be construed, to prevent the combination in special holiday or gift pre-packaged sets of distilled spirit or vintners products with products of the same classification, i.e., wine with wine, spirit with spirit. Clearly, it was contemplated that such packages would be available to consumers. cf N.J.A.C. 13:2-24.9(c).

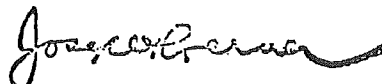
Whether the special packaging or glassware, etc. intended for unit combination is provided to trade-buyers as non-discriminatory free promotional items, or at a cost, or included in the unit pricing for the combined item, is a decision to be made on an individual basis by the trade. The option chosen dictates the applicable Division Regulations. What is critical is that the parties maintain or file the appropriate documentation and the merchandising program is non-discriminatory in all aspects. See N.J.A.C. 13:2-24.1 et seq.

JOSEPH H. LERNER
DIRECTOR

11. STATE LICENSES - NEW APPLICATION FILED.

Trentacoste Bros. Inc.
304 Connecticut Drive
Burlington, New Jersey

Application filed December 11, 1980
for place-to-place transfer of limited
wholesale license from 100 Lakewood
Avenue, cor. Maine Avenue, Hainesport,
New Jersey.



Joseph H. Lerner
Director