STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
RICHARD J. HUGHES JUSTICE COMPLEX, CN-087
TRENTON, NJ 08625

BULLETIN 2433 DECEMBER 14, 1983

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1. RECENT LEGISLATION - CLUB LICENSES ISSUABLE TO CONSTITUENT CHAPTER OR MEMBER CLUB OF A NATIONAL OR STATE ORDER, ORGANIZATION OR ASSOCIATION NOTWITHSTANDING MUNICIPALITY IS "DRY" BY REFERENDUM. (N.J.S.A. 33:1-46.1, 46.2 & 46.3).

Chapter 365 of the Laws of 1983 (approved October 13, 1983) amended N.J.S.A. 33:1-46.1 through 46.3 to expand the exception to the prohibition on the issuance of retail licenses in "dry" municipalities, (which are "dry" by reason of negative referenda held pursuant to N.J.S.A. 33:1-45 or 33:1-46), to also permit club licenses to be issued "to any constituent unit, chartered or otherwise duly enfranchised chapter or member club of a national or state order, organization or association ... which is in possession of a suitable premises." Prior to the amendment, the exception permitted a club license to be issued only to a bona fide golf and country club, incorporated not for pecuniary gain.

The statute, as amended, now reads as follows:

N.J.S.A. 33:1-46.1

It shall be lawful for the governing board or body of any municipality in which a referendum has been held pursuant to the provisions of R.S. 33:1-45 or R.S. 33:1-46, wherein a majority of the legal voters of said municipality voted "No," to issue a club license as defined in and regulated by subsection 5 of R.S. 33:1-12, to any constituent unit, chartered or otherwise duly enfranchised chapter or member club of a national or state order, organization or association, or to a bona fide golf and country club in said municipality, incorporated not for pecuniary gain, and which is in possession of a suitable premises and to adopt an enabling ordinance therefor.

N.J.S.A. 33:1-46.2

The director may, subject to rules and regulations, issue special permits to a constituent unit, chartered or otherwise duly enfranchised chapter or member club of a national or state order, organization or association, or to a bona fide golf and country club in the event that the said municipality has failed or neglected to adopt an enabling ordinance as aforesaid, or has failed or neglected to properly act upon an application by such a constituent unit, chartered or otherwise duly enfranchised chapter or member club or a bona fide golf and country club for a club license, as aforesaid; the fee for the same shall be determined in each case by the director and shall not be less nor more than the fee provided for by subsection 5 of R.S. 33:1:-12.

N.J.S.A. 33:1-46.3

Nothing in this act shall be deemed to limit or modify any powers otherwise granted by law to the director.

2. AMENDMENTS TO REGULATIONS - REGULATION OF WHOLESALER CREDIT [N.J.A.C. 13:2-7.10(b)4 AND N.J.A.C. 13:2-24.4] - PROHIBITED PROMOTIONS (N.J.A.C. 13:2-23.16) - TEXTS OF AMENDED REGULATIONS

a) N.J.A.C. 13:2-24.4. Regulation of wholesaler credit, has been amended to permit mail service of a Notice of Obligation and to provide for a transfer of delinquency status of a license to a transferee of that license. At the same time N.J.A.C. 13:2-7.10 was amended to delete subsection (a)4, which had required a written statement, under oath, be furnished by the transferor and transferee in a person-to-person transfer, regarding obligations out of the proceeds of the transfer. Such statement is no longer required. The amendments' proposal appeared in the September 19, 1983 New Jersey Register [15 N.J.R. 1557(a)]. Following the requisite comment period, the amendments were adopted, with minor changes from the proposal, and became effective November 21, 1983, upon publication in the New Jersey Register [15 N.J.R. 1945(b)].

The full texts of N.J.A.C. 13:2-7.10 and 13:2-24.4, as amended, are as follows:

N.J.A.C. 13:2-7.10 Hearing not required; reasons

(a) No hearing need be held if no written objection shall be lodged and the issuing authority determines to approve the application, but this in no way relieves the issuing authority from the duty of making a thorough investigation on its own initiative.

(b) No application shall be approved unless the issuing authority affirmatively finds and reduces to resolution that:

1. The submitted application form is complete in all respects; and

2. The applicant is qualified to be licensed according to all standards established by Title 33 of the New Jersey statutes, regulations promulgated thereunder as well as pertinent local ordinances and conditions consistent with Title 33; and

3. The applicant has disclosed and the authority reviewed the source of all funds used in the purchase of the license and the licensed business and all additional financing obtained in connection with the licensed business.

(c) The issuing authority shall not disapprove the application without first affording the applicant an opportunity to be heard, and providing the applicant with at least five days notice thereof. The hearing need not be of the evidentiary or trial type and the burden of establishing that the application should be approved shall rest with the applicant. In every action adverse to any applicant or objector, the issuing authority shall state the reasons therefore.

(d) In the event no action is taken on an application for transfer of a license within 60 days of the date of filing of the application, the applicant may file an appeal with the director as if the application had been denied.

As amended, R. 1983 d. 545, eff. Nov. 21,1983
See 15 N.J.R. 1557(a), 15 N.J.R. 1945(b)

N.J.A.C. 13:2-24.4 Regulation of wholesaler credit

(a) Credit terms established by an individual wholesaler shall be offered equally to the entire retail trade unless dif-ferent terms to individual retail accounts are justified by the financial or credit history or risk of the particular accounts.

1. The maximum period for which credit may be extended in sales made to retailers is 30 days from the date of delivery in the case of all sales of any type of alcoholic beverage.

(b) In the event that a wholesaler has not received payment in accordance with the terms of sale as set forth upon an individual delivery invoice pursuant to N.J.A.C. 13:2-39.1, such wholesaler shall, personally or by first class mail, serve a "Notice of Obligation" upon any such defaulting retailer or its employee within three business days after the obligation is due. Service shall be deemed complete on the second business day following the date of mailing or when personal service is made.

1. A "Notice of Obligation" shall inform the retailer in writing of amount due, the date delinquency occurred, the consequences of non-payment and that, in the event that the claim is disputed, immediate written notice shall be given to the Division of Alcoholic Beverage Control by the retailer which will initiate a review pursuant to (f) below.

(c) A wholesaler which has complied with the provisions of (b) above shall, on the third business day thereafter, cause a written electronic "Notice of Delinquency" to be transmitted to all wholesalers of alcoholic beverages who sell to retailers in this State and to the retailer which is the subject of the Notice. The "Notice of De-linquency" shall contain the State license number of the delinquent licensee, the amount due and the date past due.

1. A "Notice of Delinquency" shall not be transmitted by any wholesaler which has received notice that the retailer disputes the existence of an obligation.

2. Any wholesaler which has received a "Notice of Delinquency" with respect to a retail account shall not sell alcoholic beverages to that account on credit terms until it has received a "Notice of Satisfaction" thereof.

(d) A wholesaler which caused a "Notice of Delinquency" to be transmitted with respect to a retail account shall promptly upon satisfaction of the terms of sale relating to the original transaction (and in no event later than three business days) cause all persons to whom a "Notice of Delinquency" was transmitted to receive a "Notice of Satisfaction". The "Notice of Satisfaction" shall include State license, number of the retailer, the date of satisfaction, and the date originally due.

(e) Any wholesaler which disseminates credit obligation, delinquency, or satisfaction information directly, or through a credit information agency, shall be responsible for the accuracy of the information transmitted to any person and shall:

1. Cause to be maintained all information transmittals and other credit records for a period of two years; and

2. Cause to be submitted to the Division monthly reports of all delinquent retail accounts by license number, license name, the amount due, and the date due; and

3. Cause to be submitted to the Division annually, evidence in the form of a report outlining what it or its agent has done and will do to insure compliance with ABC credit regulations.

(f) Upon receipt of a written claim by a retailer that it disputes the existence of a debt as set forth in a "Notice of Obligation", the Director or his designee will, upon a showing that either the merchandise was not delivered or that payment has been made, direct that the matter be set down for informal conference with notice to the parties and subject to appropriate interim orders to preserve the rights of the retailer. In the event that the dispute has not been resolved by the date of the hearing, the Director or his designee shall take proofs as to whether or not the merchandise which is the subject of the "Notice of Obligation" was delivered, and/or whether or not payment was made, and if so, upon what date. Should the Director or his designee determine that the "Notice of Obligation" was accurate, a special ruling shall be entered directing that a "Notice of Delinquency" be issued with respect to the licensee for such period of time as that which would have transpired between the original "Notice of Obligation" and "satisfaction". Should it be determined that the original "Notice

of Obligation" was inaccurate, a special ruling shall be entered prohibiting the issuance of a "Notice of Delinquency." The party for whom the determination was adverse shall promptly remit to the Division such costs as may be determined, which shall in no event be less than $25.00.

(g) The provisions of this regulation may be relaxed in the discretion of the Director, upon written petition by a retail licensee with notice to all creditor-wholesalers, in such instances where a formal debt liquidation plan has been entered into by such a licensee. In proceedings pursuant to (f) above, the Director will decline to entertain claims predicated upon set-offs or other defenses more appropriately resolved by the parties in a court of competent jurisdiction.

(h) Whenever the license of any retail licensee that is subject to an outstanding "Notice of Delinquency" is transferred or extended to another person or is subject to a change in corporate stockholders, the name and address of the transferee or the person to whom the license has been extended or the same corporate entity that has its State assigned license number modified because of a stockholder change shall be placed on the "Notice of Delinquency" in the place and stead of the transferor or license subject to extension or stockholder change.

As amended, R. 1983 d. 545, eff. Nov. 21, 1983
See 15 N.J.R. 1557(a),15 N.J.R. 1945(b)

b) N.J.A.C. 13:2-23.16, Prohibited Promotions, has been amended to eliminate a conflict with the recently adopted N.J.A.C. 13:2-24.11, regulating the use of manufactuers' rebates and coupons. The amendment was proposed in the September 19, 1983, New Jersey Register [15 N.J.R. 1558(a)], and adopted upon publication of the November 21, 1983 New Jersey Register [15 N.J.R. 1946(a)].

The full text of N.J.A.C. 13:2-23.16, as amended is as follows:

N.J.A.C. 13:2-23.16 Prohibited Promotions

(a) 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:

1. Offers to the public at large unlimited availability of any alcoholic beverage for a set price; or

2. 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 consumer mail-in rebates offered by alcoholic beverage producers or importers in accordance with N.J.A.C. 12:2-24.11; or

3. 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 into a licensed premises or as a requirement for service or entertainment thereon.

As amended, R. 1983 d. 527, eff. Nov.21, 1983
See 15 N.J.R. 1558(a), 15 N.J.R. 1946(a)

3. DECLARATORY RULING: DIRECTOR'S DETERMINATION IN THE MATTER OF PETITIONS OF TODD SEIFERT, ET AL - CONFIRMATION OF VALIDITY OF DIVISION'S PRIMARY SOURCE - WHOLESALER DESIGNATION REGULATIONS, N.J.A.C. 13:2-25.2(a), N.J.A.C. 13:2-25.3(b) and N.J.A.C. 13:2-33.1.

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

In the Matters of:	
TODD SEIFERT, t/a SEIFERT DISTRIBUTING COMPANY, and ANTHONY ESPOSITO, t/a LONGWOOD DISTRIBUTORS,	FINDINGS AND CONCLUSIONS CONFIRMING VALIDITY OF REGULATIONS, N.J.A.C. 13:2-25.2(a), 13:2-25.3(b) and 13:2-33.1
and	
CLAUDIO IODICE, t/a INTERNATIONAL BEVERAGE DISTRIBUTOR,	
FOR A REVIEW AND HEARING CONCERNING N.J.A.C. 13:2-25.2(a), 13:2-25.3(b), and 13:2-33.1.	

Christine H. Steinberg, Deputy Attorney General on behalf of the Division of Alcoholic Beverage Control (Michael R. Cole, Acting Attorney General, attorney).

John J. Byrne, III, on behalf of Todd Seifert, t/a Seifert Distributing Company, and Anthony Esposito, t/a Longwood Distributors (Cole, Geaney, Yamner & Byrne, attorneys)

John A. Herfort, on behalf of Claudio Iodice, t/a International Beverage Distributor. (Gelberg & Abrams, of New York, N.Y., attorneys).

Edward G. D'Alessandro and Brian E. Mahoney, on behalf of the Beer Wholesalers' Association of New Jersey (D'Alessandro, Sussman, Jacovino & Mahoney, attorneys).

David Samson and Douglas P. Black, on behalf of the New Jersey Wine and Spirit Wholesalers Association (Wolff & Samson, attorneys).

Gary M. Nateman, on behalf of the United Brewers Association, Inc. (Gary M. Nateman, of Washington, D.C., general counsel).

Russell W. Shannon, on behalf of the Distilled Spirits Council of the United States, Inc. (Russell W. Shannon, of Washington, D.C., general counsel).

Peter E. Moll and John Conkle, on behalf of Anheuser-Busch Companies (Howrey & Simon, of Washington, D.C., attorneys; David C. Welsch, of St. Louis, Mo., of counsel).

Bruce L. Montgomery, Thomas H. Milch, and Edward L. Wolf, on behalf of Miller Brewing Company (Arnold & Porter, of Washington, D.C., attorneys).

Ralph J. Savarese, Ray A. Jacobsen, Jr., and Paul A. Koches, on behalf of Heublein, Inc., (Howrey & Simon, of Washington, D.C., attorneys).

Barry R. Temkin, on behalf of Wine and Spirit Retailers of New Jersey (Hellring, Lindeman, Goldstein & Siegal, attorneys).

William B. Schreiber and Michael T. Kelly, on behalf of Joseph E. Seagram & Sons, Inc., (Schreiber & MacKnight, of New York, N.Y., attorneys).

BY THE DIRECTOR:

On June 1, 1983, and July 6, 7, 8, 11, 12, 13, 14, 1983, extensive informational hearings[1] were held by the Director as to N.J.A.C. 13:2-25.2(a), 13:2-25.3(b) and 13:2-33.1, which were adopted in 1979, and which provide:

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[1] Notice of the hearings was given by the Director to all parties known or thought to have an interest, and it was published in its entirety in the May 23, 1983, Beverage Retailer Weekly, a New Jersey alcoholic beverage industry trade publication. The Director also discussed the hearings with a reporter of the Newark Star Ledger, which carried articles about the hearings and thereby gave further notice of them. There was ample opportunity for any interested party to be heard, and in fact twenty-nine witnesses testified and 63 exhibits were submitted for the record. Parties were permitted to submit clarifying questions through the Director, and to directly question the expert witnesses.

"Subchapter 25. Diversion, Transshipment and Registered Distribution

* * *

13:2-25.2 Registered Distribution

(a) No plenary wholesale, wine wholesale or limited wholesale licensee shall sell, deliver, or include in its Current Price List any brand of alcoholic beverages not acquired from the owner of the brand or its registered supplier pursuant to N.J.A.C. 13:2-33, or for which that wholesaler or distributor is not a registered wholesaler or distributor pursuant to N.J.A.C. 13:2-33, except pursuant to waiver provisions of N.J.A.C. 13:2-33.1(b)3, when granted permission by the Director upon petition setting forth the brand name, the quantity to be acquired, the source of supply, and such other information as the Director may deem necessary.

* * *

13:2-25.3 State Beverage Distributors

* * *

(b) No State Beverage Distributor shall sell, deliver, acquire, or purchase or include in its Current Price List malt alcoholic beverages not acquired or purchased from the owner of the brand or its registered distributors pursuant to N.J.A.C. 13:2-33, except pursuant to waiver provisions of N.J.A.C. 13:2-33.1(b)3, when granted permission by the Director upon petition setting forth the brand name, the quantity to be acquired, the source of supply, and such other information as the Director may deem necessary.

"Subchapter 33. Product Information Filing: Brand Registration

13:2-33.1 Schedule of product filing

(a) No licensee shall sell or offer for sale or deliver, or receive or purchase at wholesale or retail, any alcoholic beverage, including private label brands owned by a retailer and exclusive brands owned by a manufacturer or wholesaler and offered for sale or sold by such manufacturer or wholesaler exclusively to one New Jersey retailer, unless there is first filed with the Director of the Division of Alcoholic Beverage Control for each calendar year a schedule listing the following:

1. Its correct brand or trade name;
2. Its nature and type;
3. Its age and proof of alcoholic content when stated on the label;
4. The standard number of unit containers per standard case;

5. The capacity of each unit container; and
6. The names of all New Jersey licensees acknowledged by the filer to be an authorized distributor of the product at wholesale.

(b) The schedule shall be filed by:
1. The manufacturer or wholesaler who owns such brand; or
2. A wholesaler selling such brand who is appointed as exclusive agent by the brand owner for the purpose of filing such schedule; or
3. Any wholesaler with the approval of the director in the event that the owner of such brand does not file or is unable to file a schedule or designate an agent for such purposes; or
4. In the case of private label brands, by the manufacturer or wholesaler supplying such private label brand to the retailer or by any wholesaler having authority, in writing, from the retailer owning such private label brand, except where the alcoholic beverages are imported by the retailer under a special permit issued by the director, in which case the retailer shall file the schedule and the labels."

The hearings were the result of a remand order issued by Part B of the Appellate Division on October 18, 1982, in Todd Seifert, t/a Seifert Distributing Company[2] and Anthony Esposito, t/a Longwood Distributing Company[3] and Anthony Esposito, t/a Longwood Distributors vs. John F. Vassallo, Jr., Director of the Division of Alcoholic Beverage Control of the State of New Jersey, Docket No. A-345-82T3, wherein the Court said:

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[2]Todd Seifert, t/a Seifert Distributing Company, who holds a State Beverage Distributor license, (which type license permits sales to be made to consumers at retail, with some exception, as well as wholesale sales), has been a designated distributor of Ballantine and Utica Club since 1933. In 1978, Todd Seifert began transshipping other brands, for which he is not a registered distributor. The transshipped brands now constitute about 85% of his business.

[3]Anthony Esposito, t/a Longwood Distributors, is also a State Beverage Distributor licensee and has been in business for about 27 years.

"Appellants' motion for a stay of the application of N.J.A.C. 13:2-25.3(b) as to Seifert Distributing Co. and Longwood Distributors pending appeal is granted.

"We have serious doubt that the regulation in question serves any valid public purpose, and it may be unreasonable. The regulation had been stayed by the Director, Division of Alcoholic Beverage Control, from June 2, 1980 until August 10, 1982, when the decision in this matter was rendered based upon evidence presented at a hearing held on July 10, 1980. In these circumstances, we sua sponte order the matter remanded to the Director, Division of Alcoholic Beverage Control, for a hearing to determine whether the regulation serves a valid public purpose or is unreasonable. On such remand evidence may be offered of the impact, if any, of the stay of the regulation beginning on June 2, 1980 upon the goals purportedly served by the regulation. Such other evidence of the impact of the regulation may be considered as parties may present.

"The proceedings on this appeal shall be suspended pending completion of the proceedings on remand. Following completion of the remand, appellants may file an amended notice of appeal or may withdraw their appeal in the event the determination on the remand is favorable to their position. Should the appeal be continued, the schedule for filing appellants' brief and appendix shall be determined in relation to the time of filing an amended notice of appeal."

A second Appellate Division matter, Claudio Iodice t/a International Beverage Distributor[4] vs. John F. Vassallo, Jr.,

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(Footnote 3 continued)
About 1974 he was subcontracted by Warren Distributors, an authorized Genesee distributor, to distribute the brand in Morris and Sussex Counties. He did this until 1977, when Warren took over those two counties itself. Esposito then turned to transshipping. In 1979, he sold the business to John Roe, but took it back in 1980 after default by Mr. Roe. Longwood is an authorized distributor of a number of small, primarily imported brands.

[4]Claudio Iodice, t/a International Beverage Distributor, first applied for and was issued a limited wholesale license in May of 1982. He is a designated distributor for Pearl Beer and transships the balance of the alcoholic beverages he has been distributing.

Director of the Division of Alcoholic Beverage Control of the State of New Jersey, Docket No. A-5420-81 T3, was consolidated for the purposes of the hearings as the result of a May 6, 1983, order by Part F of the Appellate Division, wherein the Court granted Claudio Iodice t/a International Beverage Distributor's "motion for temporary remand and stay of the application of N.J.A.C. 13:2-25.3(b) (sic) pending appeal ... pursuant to the same conditions incorporated in the order of Judge Botter dated October 18, 1982, in the matter of Seifert Distributing Company and Longwood Distributors," supra. That order referred to N.J.A.C. 13:2-25.3(b) but should have referred to N.J.A.C. 13:2-25.2(a) as Claudio Iodice holds a limited wholesale license rather than the state beverage distributor license held by both Todd Seifert and Anthony Esposito. The effect of both sections, which will be dealt with in detail, is substantially similar, and both can be collectively considered New Jersey's "Primary Source" regulations.

Although the Appellate Division's orders did not mention it, N.J.A.C. 13:2-25.2(a) and 13:2-25.3(b) cannot be considered without also considering the "Brand Designation" or "Brand Registration" regulation, N.J.A.C. 13:2-33.1. Consequently, the Director gave notice, on May 9, 1983, that the hearings to commence on June 1, 1983, would encompass all of the aforementioned regulations. The Director additionally announced that the hearings would also serve the purpose of evaluating the said regulations pursuant to Executive Order 66 (1978), which would cause them to expire on April 12, 1984, unless re-adopted.

This was not the first hearing concerning the brand registration and primary source regulations in question. Prior to their adoption in April, 1979 hearings were held by former Attorney General John J. Degnan and former Director Joseph H. Lerner and their staffs on February 8 and 9, 1979. Those hearings were to consider the adoption of the "deregulation" package of regulations, of which the brand registration and primary source regulations were a part. Following those hearings and the adoption of the regulations, Todd Seifert t/a Todd Seifert Distributors Co. and Longwood Distributors, Inc. petitioned the Division for a review of the primary source regulations and to have them stayed as to them. Former Director Lerner held hearings on July 10, 1980, but no decision was rendered by him, apparently due to the pendency before the United States Supreme Court of an appeal from a California Court of Appeal decision, Norman Williams Company v. Baxter Rice, 108 Cal. App. 3d 348, 166 Cal. Rptr. 563 (1980), which had ruled that a California statute,[5] identical in effect to the New Jersey primary source regulations, was unlawful under the Sherman Antitrust Act and thus preempted under the Supremacy Clause of the Constitution of the United States.

It was after the reversal of that California decision by the United States Supreme Court in July, 1982, [see, Rice v. Norman Williams Co., ____U.S.____, 102 S. Ct. 3294, 73 L Ed 2d 1042, 50 U.S. L.W. 5052 (6-29-82) (1982)] that I, following a review of the record

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[5]California Business and Professions Code Section 23672 provides that a "licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent."

and transcripts of the prior hearings, upheld the validity of the brand designation and primary source regulations and vacated the stays of enforcement as to the petitioners in those proceedings. In the Matter of the Petitions of Todd Seifert, t/a Seifert Distributing Co. and Longwood Distributors, Inc. for a Review and Hearing Concerning N.J.A.C. 13:2-25.3(b), A.B.C. Bulletin 2428, Item 3 (August 10, 1982). In that Order Vacating Stay of Enforcement, entered on August 10, 1982, the public purposes served by these regulations were noted:

> "After reviewing the transcripts and written summations of counsel, the Supreme Court's decision in Rice v. Williams, supra, and my responsibilities as Director under Title 33, it is my determination that the public interest is and will continue to be best served by the brand registration regulations.
>
> "An important responsibility of any Director of the ABC is to ensure that all taxes on sales of alcoholic beverages are properly paid, and that all licensees responsible for the payment of those taxes are easily identified. N.J.S.A. 33:1-39 specifically empowers the Director to make regulations regarding taxes and their enforcement. The two regulations under consideration substantially aid in identifying licensees subject to taxation through the filing of reliable and verifiable documentation. The State Supreme Court recognized the validity of this in Heir v. Degnan, 89 N.J. 109, 125 (1980), when it upheld a challenge to N.J.A.C. 13:2-25.1.
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> "The regulations under consideration also serve at least two other purposes. First, they provide a certain degree of stability within the market and in the economic structure of the industry within the State. Brewers can rely upon distributors selected by and answerable to them. Designated distributors can provide a higher level of service to retailers, including point of sale marketing aids. Designated distributors need not fear attempts by undesignated distributors to take a free-ride on their marketing efforts. Retailers are benefitted by reliable service from designated distributors and are able to

complain directly to the brewer if service is lacking. A retailer which deals with undesignated distributors may not have an effective source to which to make complaints because the brewer has no control over undesignated wholesalers. Consumers of this State are protected as to availability of product, proper channels for complaints and assured (sic) collecting tax revenues. Coupled with these benefits to the various segments of the industry and to consumers are the stability and security which the regulations provide to the economic investments of the designated wholesalers and their employees in this State. Undesignated wholesalers can wreck havoc on distribution and supply planning and on the quantum of employment and man-hours required to make such distribution and provide such service, thereby creating job insecurity and unemployment. Trade stability has always been recognized as important in the regulation of alcoholic beverages in this State. Heir v. Degnan, supra, at 114 and Grand Union Co. v. Sills, 43 N.J. 390 (1964). It continues to be important today, and is a very important consideration herein.

"A second purpose served by the regulations is quality control. The testimony by Mr. Garrity, Mr. Tripuka and Mr. Lonergan indicates that the 'life' of beer is fairly short and that it must be properly warehoused and checked before sale. The consumers of the State have a right to expect beer being purchased to be at its peak in flavor and quality. Both petitioners testified that there is no problem with the quality of the beer which they sell. But neither petitioner is supervised by the brewers whose beers are sold, and neither has any contractual responsibilities to those brewers. Under these circumstances, it is not unreasonable to expect that beer, which has been purchased outside the brewers' established distribution network, may be less fresh and/or less well cared for than beer sold by designated distributors.

"Although I do not consider the quality control issue to be the primary reason for enforcing the regulations, it does merit consideration. Enforcement of the regulations should insure that outdated or stale beer is not offered to the consuming public."

Notwithstanding the conclusions of the Director, upon appeal of the Order Vacating Stay of Enforcement, supra, by

petitioners Seifert and Esposito, the Appellate Division remanded for further hearings as discussed above. In compliance with the remand order, I held the June and July, 1983, hearings.

Upon consideration of the entire record of the June and July, 1983, hearings, which were very extensive, as well as the records and transcripts of the prior proceedings and hearings of February 8 and 9, 1979, and July 10, 1980, supra, and substantial portions of the record of proceedings on the Malt Beverage Interbrand Competition Act (S. 1215 and H.R. 3269) before the Committee on the Judiciary of the United States Senate and the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary of the House of Representatives, held in the Second Session (1982) of the Ninety-Seventh Congress, and having also carefully considered the arguments advanced by a number of counsel in very well written and extensively documented briefs and memoranda, I cannot but continue to conclude, as I did in the order of August 10, 1982, supra, that the Brand Designation and Primary Source Regulations, N.J.A.C. 13:2-33.1, and 13:2-25.2(a) and 25.3(b), are valid, reasonable and necessary to protect the goals of alcoholic beverage control and that the public interest is and will continue to be best served by the continuation of these regulations; and they should be re-adopted upon expiration pursuant to executive Order 66, (1978) in April, 1984. The interests of the State of New Jersey and its residents in a stable alcoholic beverage industry, capable of being controlled and monitored, significantly outweigh any particular limited interests of the petitioners. Those findings and conclusions as

enunciated by me in the prior Order were confirmed and strengthened by the evidence produced at the July, 1983 hearings. If I had any previous doubt as to the wisdom of my predecessor in adopting the Brand Registration and Primary Source Regulations, I do not now. There is no doubt whatsoever that these regulations are valid and reasonable and serve a valid public purpose, as will be explained in greater detail.

Although the petitioners have suggested that, because of the remand, the primary source regulations do not carry the usual presumption of validity, I do not agree. I see the remand as a question raised by the Appellate Division without benefit of a full record and based on a question as to whether there could be any validity to a regulation that has had its effectiveness stayed for a period of three years. The Court was merely questioning the necessity for the regulations if a long period could pass without the enforcement of the regulations. In that limited context of the stay granted to the petitioners, it is a fair question.

To answer that question raised by the Appellate Division as to "the impact, if any, of the stay of the regulation beginning on June 2, 1980 upon the goals purportedly served by the regulation," it is necessary to note that the primary source regulations were only stayed as to the petitioners, Seifert and Longwood, since 1980. A third distributor, Jaybee Supply Corporation, which has since ceased active operation of its limited wholesale license, was granted a stay in June, 1981.[6] Finally, as noted above, Claudio Iodice

[6]Appellate Division Docket No. 4348-80T3.

was granted a stay in May of 1983. None of the approximately 270 other distributors or wholesalers, other than those four, had or even requested a stay of the enforcement of the primary source regulations. Therefore, the impact of the stay on the goals and objectives of the primary source regulations was minimal, although there was ample evidence produced at the hearings that there has been some, even if not significant, adverse effect on the stability of the industry, as a result of the stays granted to the petitioners. The primary source regulations have been in effect as to all other wholesalers and distributors, and they have generally accomplished their purposes. To eliminate the regulations would literally open a Pandora's box and would unquestionably create a chaotic and unstable distribution system, complete with the problems the primary source regulations are designed to prevent.

Thus the fact of the remand or the fact of the stay of the primary source regulations as to two, or even as to the four distributors, can in no way be suggestive that the regulations are not valid. As the Supreme Court noted in Heir v. Degnan, 82 N.J. 109 (1980), at 122:

> "...Deference must be given to the Director's expertise in this field and regulations duly adopted by him are to be accorded a presumption of validity. New Jersey Guild of Hearing Aid Dispensers v. Long [75 N.J. 544 (1978)], 75 N.J. at 560-562. That presumption is overcome only when it is shown that the regulation is clearly unreasonable and has no rational relationship to the purpose intended. Consolidated Coal Co. v. Kandle, [105 N.J. Super. 104 (App. Div. 1969), aff'd o.b. 54 N.J. 11 (1969)], 105 N.J. Super. at 117."

No question has been raised that the Director lacked the statutory authority to adopt the brand designation and primary source regulations nor that they were not lawfully adopted in accordance with proper administrative procedure. It is not necessary to go into those matters, especially since, as will be seen later, there is a very broad power delegated to the Director by legislative fiat and the regulations were certainly proper exercises of that power. Also, the issue was disposed of in Heir v. Degnan, supra., at 82 N.J. 118-119.

It is therefore clear that the sole question regarding the regulations can be whether the regulations have a rational relationship to the purpose intended. It is not whether, as petitioners have suggested, there might be another way to accomplish those same goals. The administrative action, as taken, has a presumption of reasonableness. "As was said in Pacific States [Box and Basket Co. v. White, 296 U.S. 176, 56 S.Ct. 159, 80 L.Ed. 138, 101 A.L.R. 853 (1935)], quoting from Borden's Farm Products Co., Inc. v. Baldwin, 293 U.S. 194, 209, 55 S.Ct. 187, 79 L.Ed. 281 (1934), when legislative action taken by an administrative agency is called into question, 'if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts***.' Those who oppose it 'must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.'" Consolidated Coal Co., et al. v. Kandle, et al., supra., 105 N.J. Super. at 118-119. In

dealing with the primary source and brand designation regulations, the evidence shows not just "any state of facts" that can reasonably be conceived to sustain it, but several. Any one is enough for a valid regulation. The validity of a regulation, however, also depends on its being consistent with the policy of the underlying legislation. In the Matter of the Schedule of Rates for Barnert Memorial Hospital, 92 N.J. 31, 39 (1983); New Jersey Guild of Hearing Aid Dispensers v. Long, supra, at 75 N.J. 562. Therefore, to see that the brand registration and primary source regulations are consistent with the policy of the legislative enactments and are within the authority given to the Director, a review of the legislative and administrative history of alcoholic beverage control in general and of these regulations in particular is helpful.

Grand Union v. Sills, 43 N.J. 390, 398-402 (1964), sets out a very good and succinct outline of the regulation of the sale of alcoholic beverages and it is worth repeating here:

> "Because of its inherent evils, liquor has always been dealt with as a subject apart. (Citations omitted). Its sale may be prohibited entirely or permitted under severe restrictions. (Citations omitted.) In colonial days there were laws licensing and restricting the sale of liquor, and, after the revolution, there were comparable enactments which, though revised from time to time, always gave clear recognition to the dangers and the need for controls. (Citations omitted).
>
> "Despite the licensing restrictions, abuses in the liquor industry prevailed during the nineteenth century and early twentieth century, and gave rise to much public concern. The tied house system (citation omitted) contributed to sales stimulations

which ran counter to the goal of temperance, and relations between liquor and legislative interests were oftentimes unholy in nature. In 1844 the territorial legislature of Oregon adopted a prohibition law and its action was followed by similar enactments in many states, not, however, including New Jersey. In 1919 a national policy of prohibition became effective through the adoption of the eighteenth amendment and sales of alcoholic beverages became unlawful in our State as well as elsewhere. The unfortunate experiences of the prohibition era need not be recounted here; suffice it to note that in 1933 the national policy was terminated through the adoption of the twenty-first amendment. Control was returned to the states which immediately set about to establish their own systems. Seventeen states adopted some form of public monopoly. (Citation omitted). This had the high virtue of eliminating sales stimulations but it involved the displacement of private operation by public operation. The New Jersey Legislature chose to retain private operation while surrounding it with comprehensive safeguards designed to promote temperance and to eliminate the racketeer and bootlegger and other abusive incidents of the liquor traffic. L. 1933, c. 436; N.J.S.A. 33:1-1 et seq.; N.J.S.A. 33:1-3; N.J.S.A. 33:1-39.

"New Jersey's Control Act ... broadly authorized the Commissioner to adopt regulations dealing with practices unduly designed to increase consumption and with such other matters as might become necessary in the stringent administration of the law. N.J.S.A. 33:1-39. In Franklin Stores Co. v. Burnett, 120 N.J.L. 596, 598 (Sup. Ct. 1938), this regulatory power was upheld in an opinion which reaffirmed the State's 'practically limitless' power to regulate the liquor industry. See Blanck v. Mayor and Borough Council of Magnolia, 38 N.J. 484, 490-491 (1962)....

"In the years following New Jersey's adoption of its Control Act there were many amendments which had a common thread. They were designed to aid in the stabilization of the industry and in the promotion of temperance through the curbing of competitive practices which tended to stimulate sales. In 1938 the Legislature authorized the Commissioner to prohibit or regulate the sale of alcoholic beverages in violation of fair trade contracts (L. 1938, c. 208; N.J.S.A. 33:1-23.1); the preamble to the statute noted that indiscriminate price cutting and excessive advertising of cut prices were 'detrimental to the proper operation

> of the liquor industry and contrary to the interests of temperance.' In Gaine v. Burnett, 122 N.J.L. 39 (Sup. Ct.), aff'd. 123 N.J.L. 317 (E. & A. 1939), the court held that even without this specific legislation the Commissioner had power to fix liquor prices and promulgate price regulations; in the course of its opinion it pointed out that the fixing of liquor prices was 'an ancient method to prevent abuse in the use of a commodity of much social disadvantage.' 122 N.J.L. at p. 43. (Citation omitted).
>
> "In 1939 the Legislature prohibited discriminatory grants of discounts to liquor retailers and authorized the Commissioner to adopt regulations dealing with maximum discounts and related matters; the statutory preamble set forth that grants of discounts to selected retailers had contributed to destructive price wars which had unduly increased the consumption of alcoholic beverages and were 'detrimental to the proper operation of the liquor industry and contrary to the interests of temperance.' L. 1939, c. 87; N.J.S.A. 33:1-89; Duff v. Trenton Beverage Co., 4 N.J. 595, 602-604 (1950). In 1942 the Legislature prohibited discrimination in liquor sales to wholesalers by distillers, importers and rectifiers. L. 1942, c. 264; N.J.S.A. 33:1-93.1...."

Grand Union Co. v. Sills, supra, specifically dealt with the statute limiting beneficial interest in retail liquor licenses to two (N.J.S.A. 33:1-12.31, et seq.), but the reasoning of the Court is equally applicable here. In speaking of that statute, the Court went on to say, at 43 N.J. 403-404:

> "In any event, we do not sit here as a superlegislature nor do we concern ourselves with the wisdom of Chapter 152. Our function is to determine whether the Legislature has gone beyond the outer limits of its constitutional power. Even when dealing with an essential commodity, the Legislature is said to have broad power to adopt trade prohibitions and regulations deemed necessary for the protection of the public health, safety, morals or general welfare (citations omitted); and as has already been pointed out, when dealing with a nonessential and inherently dangerous commodity such as liquor, its power is said to be almost without limit. (Citations omitted)."

Consonant with the broad authority spoken of in Grand Union Co. v. Sills, supra, about 1950 a primary source regulation was promulgated as to alcoholic beverages other than malt alcoholic beverages. Under that regulation (former A.B.C. Regulation 34), wholesalers were permitted to purchase only from the owner of the brand or its authorized supplier, or from another wholesaler authorized by the supplier to distribute that brand. That regulation continued in effect since its promulgation and has now been continued in the current brand registration and primary source regulations under consideration in this matter.

The current brand designation and primary source regulations have their more immediate origin in the investigation of the alcoholic beverage industry commenced by the Office of the Attorney General in November, 1976. The purpose of that investigation was:

> "(1) to determine whether there are violations of existing rules and regulations that require the administrative attention of the Division of Alcoholic Beverage Control; and
>
> "(2) to determine whether existing statutes and regulations should be amended or supplemented in any respect to improve control over trade practice of the industry...." (Report of Division of Criminal Justice Antitrust Task Force to Study the Alcoholic Beverage Industry, Page 1).

Alfred J. Luciani, who headed that Task Force for the Office of the Attorney General, indicated in his testimony at the July, 1983 hearings that a major problem encountered in the investigation was the lack of information that existed in 1977 and 1978 at the Division of Alcoholic Beverage Control, especially as to who was actually engaged in the alcoholic beverage industry. Because of that, the Task Force judged it necessary to create a mechanism whereby brand

owners and their channels of distribution could be identified. (See also, Task Force Report, page 6). Among the specific recommendations of the Task Force was "the introduction of formal brand and distributorship registration by suppliers to replace the present practice of merely adopting Federal label filings." (Task Force Report, page 70).

It must be noted that although the Task Force spoke only of "brand and distributorship registration," that term of necessity includes the primary source regulations for without them brand registration alone is meaningless.

Following release of the Task Force report, the informational public hearings referred to earlier were held on February 8 and 9, 1979. Thereafter, proposed amendments, which included the brand registration and primary source regulations under consideration, were prepared and the notice of intention to adopt was published on June 7, 1979 at 11 N.J.R. 285 following the applicable provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-4. Following the comment period and a modification of the proposal to permit non-registered distributors to sell products acquired from designated or registered wholesalers, the regulations were so adopted and ultimately became effective February 11, 1980. The brand registration and primary source regulations were codified as N.J.A.C. 13:2-33.1 et seq., 13:2-25.2(a) and 13:2-25.3(b) respectively, and they are still in effect today. Of course, they are the subject of these proceedings.

Although the regulations[7] promulgated as a result of the Task Force recommendations, of which regulations the brand registration and primary source regulations are a part, were to be effective earlier, the effective date was delayed due to two suits filed by liquor retailers and wholesale solicitors to challenge the package of regulations. See Heir v. Degnan, supra. When the Supreme Court entered its decisions on February 11, 1980, affirming most of the regulations, including the brand registration and primary source regulations as being properly adopted (Heir v. Degnan, supra, at 82 N.J. 118-119) and within the statutory and inherent power of the Director to adopt, the regulations became effective.

In specifically speaking of N.J.A.C. 13:2-25.1, the Court, in Heir v. Degnan, supra, at 82 N.J. 125, said:

> "The regulation implements the statute and serves the valid purpose of preventing the diversion of alcoholic beverages and assuring the proper collection of taxes under the Alcoholic Beverage Tax Law, N.J.S.A. 54:43.1. The argument that both the new and the old regulations are anti-competitive and therefore invalid fails to consider the purpose for the statute and regulations, supra, and the benefit to the State resulting therefrom."

This same language can aptly be applied to the primary source regulations, which are companion to and part of the ones addressed by the Supreme Court.

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[7] "These regulations eliminate retail price maintenance in the alcoholic beverage industry except for sales below cost and otherwise modify significantly the previous policy of the ABC regarding price controls and competition." Heir v. Degnan, supra, at 82 N.J. 113.

As I said in the August 10, 1982, Order Vacating Stay of Enforcement, supra, and as was confirmed by the testimony of Division of Taxation Director John R. Baldwin, in the June-July, 1983, hearings, the regulations under consideration substantially aid in identifying licensees subject to taxation through the filing of reliable and verifiable documentation. The "audit trail" which the brand registration and primary source regulations establish is an indispensable element in the tax collection and tax enforcement of the very substantial taxes ($136 million in 1982) paid by the New Jersey alcoholic beverage industry. The regulations afford the means for a higher level of tax enforcement than in other industries, and with a minimum of collection problems, because of the enhanced audit capability. Where transshipping occurs, there is a greater likelihood of tax evasion since the only means of verifying sources of supply to a wholesaler (the basis for the excise or gallonage tax-see N.J.S.A. 54:41-1 et seq.) is what is reported by the transhipping distributor. If such distributor does not wish to pay all taxes, or engages in cash or invoiceless purchases to avoid records and to be able to minimize prices by excluding taxes, he would simply not report those purchases, and tax auditors would have no means of verifying them, except for the off-hand, slim chance of catching such a recordless shipment in progress. The regulations have protected the tax collections and provided an orderliness which is virtually without precedent. To do otherwise than maintain this effective tax tool would not be in the best interests of the State of New Jersey.

Similarly, the very tax base generated by the alcoholic beverage industry must also be considered. The orderliness created by the regulations also serves to protect those revenues. Without the regulations, the sources of the substantial funds can be undermined to the detriment of the State. We would be remiss to let this happen, and in fact it would constitute a dereliction of the duties of the Director which require him to "make, or cause to be made, such investigations as he...shall deem proper in the administration of this chapter and of any and all other laws now or which may hereafter be in force and effect concerning alcoholic beverages, or the manufacture, distribution or sale thereof, or the collection of taxes thereon...." N.J.S.A. 33:1-35. The brand designation and primary source regulations enhance these "investigations."

Based on the language of the Court in Consolidated Coal Co., et al. v. Kandle, et al., supra, the tax enhancement goal of the regulations is sufficient to sustain them. There are, however, several other positive results of the regulations, many of which are also worthy of consideration or at least mention. Several of them would also each be sufficient rationale on which to base the regulations. Taken in totality, they unquestionably support their validity.

A second major effect or impact of the brand registration and primary source regulations is providing a strong degree of stability within the marketplace and also in the structure of the alcoholic beverage industry within New Jersey. This not only is in

keeping with the fundamental purpose of alcoholic beverage control in this State, which is to insure a stable industry (Heir v. Degnan supra, 82 N.J. at 128; Affiliated Distillers Brands Corp. v. Sills, 56 N.J. 251, 260 (1970); Grand Union Co. v. Sills, 43 N.J. at 404), but is also in the best interests of the consuming public, protecting both availability and price, while at the same time assuring consistency with the sensitive social aspect surrounding alcoholic beverages.

A three-tier (manufacturer, wholesaler, retailer) distribution system is essential to maintenance of the restrictive control scheme established in this State. One of the prime features of it is its assuring widespread distribution and availability of product. Small distillers, vintners and brewers, as well as larger ones, can depend on designated wholesalers to service their products in accordance with their requirements and to distribute them to large and small, profitable and not-so-profitable retail accounts as well, without fear of other unauthorized distributors utilizing their efforts and usurping the more profitable accounts, which is exactly what the evidence points to as happening with transshipping. Without this protection afforded by the brand registration and primary source regulations, there is no incentive for new suppliers to enter the market, thereby depriving consumers of new products or as large a selection as is now available. Similarly, there is also an adverse effect on the marketing efforts and effectiveness of smaller suppliers, thereby further diminishing the widespread availability of brands. Transshippers' interests lie in selling primarily to the larger, more lucrative retail accounts

and at the same time selling only the more popular products and packages, rather than a full line of products, so that the economic viability of designated wholesalers who must by contract service all accounts large and small, and do so with a full and complete product line, is frustrated by their actions.

It is noteworthy that all the petitioners in these proceedings are designated distributors for one or more smaller brands. Yet a review of their filed Current Price Lists, as well as the testimony at the hearings, shows a pattern of their placing emphasis on the transshipping and sale of major brands and popular packages for which they are not authorized. This must of necessity also be detrimental to their authorized brands.

Manufacturers of alcoholic beverages, and particularly brewers, rely substantially on their designated distributors to promote and advertise their products and to primarily maintain the products' quality and integrity. Malt alcoholic beverages, wines and some liqueurs are essentially food products and require proper handling for maximum quality. Manufacturers are understandably insistent in requiring rigid standards for handling, storing and marketing their products. Climate controlled warehouses, refrigeration, proper and suitable delivery equipment and appropriate training of personnel are among the primary requirements. Although protection of the quality and freshness of the product is primarily for the economic benefit of the brand owner, it is not without benefit to the consumer. Better for him to have the assurance of a quality product as a result of the regulatory system permitting

it than to acquire a product that has not been handled to standards. In such a situation, which can occur through transshipping, to where can the consumer go to complain?

Because of the quality and integrity requirements placed on the distributors, as well as the expectations that the designated wholesalers will assist in the advertising and development of the product line, the designated distributors must and have made large capital investments, and maintenance of these investments provides employment security and economic benefit to the State, as well as to the tax structure previously considered. The brand registration and primary source regulations protect this. Transshippers and undesignated wholesalers raise havoc with it by taking unfair advantage of, or a "free-ride" on, the expenditures made by the designated distributors of a product. If such is permitted to occur, there will be no incentive for such expenditures and capital investment to be made. The number of wholesalers will diminish, and the entire structure of a now-stable industry will suffer. At the same time, there is little evidence, other than speculation, that prices would even be more favorable at the consumer level. The evidence, when carefully analyzed, even suggests the contrary.

Another benefit accruing to the State as a result of the brand registration and primary source regulations is that they solved the problem of knowing who the alcoholic beverage industry members are. The importance of this becomes apparent when the statutory

mandates of Title 33, Intoxicating Liquors, of the Revised Statutes[8] are considered. Those mandates which are of necessity carried over into regulations, cannot even begin to be accomplished without a satisfactory and certain method of identifying the participants in the industry. The brand designation and primary source regulations accomplish it in a very effective way.

In rejecting a recent challenge to N.J.S.A. 33:1-93.6, et seq., which prohibits discrimination in the sale of nationally advertised brands of alcoholic beverages, other than malt alcoholic beverages, by suppliers to wholesalers, the Supreme Court spoke of N.J.A.C. 13:2-33.1, the brand registration regulation we are considering. In dismissing an argument that the brand registration regulation was promulgated to allow a party to side-step the provisions of N.J.S.A. 33:1-93.6, et seq., the Court said, "...the true purpose of the registration requirement was expressed by the Director:

> 'The regulations of the Division of Alcoholic Beverage Control are an extension of the exercise of the full plenary powers of the State of New Jersey to regulate the sale and distribution of alcoholic beverages within its boundaries pursuant to the Twenty-first Amendment. In that regard Sub-chapters 25 and 33 of the regulations are designed to assist the State in identifying the distribution network of alcoholic beverages to insure tax integrity (See, N.J.A.C. 13:2-24.1, 14.6, 24.8, 25.1, et seq., 33.1 et seq., 39.1 and 39.2). The State simply wishes to know what products are being distributed within the State and by whom. The information is of

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[8] N.J.S.A. 33:1-3 summarizes the statutes and regulations: "It shall be the duty of the commissioner (now 'director') to supervise the manufacture, distribution and sale of alcoholic beverages in such a manner as to promote temperance and eliminate the racketeer and bootlegger."

> great significance under circumstances such as are now present here, where a State has recently repealed a system of industry price maintenance and permitted a more pro-competitive market.'
>
> [In the Matter of the Brand Registration of Certain 'Western' Malt Beverages, A.B.C. Bulletin 2391, item 4, March 4, 1981.]"

Joseph H. Reinfeld, et al. v. Schieffelin & Co., etc., et al, _____ N.J. _____(1983).

The last major positive effect of the brand registration and primary source regulations is the promotion and enhancement of interbrand competition. The petitioners' primary argument has been that the regulations are anti-competitive and violative of antitrust laws. On the basis of all the evidence at the hearings, I can do nothing short of totally rejecting that argument, even though these proceedings were not intended as an antitrust proceeding. Since there are other valid reasons for the regulations, it is not necessary to even go into the antitrust or competition arguments (see, In the Matter of the Schedule of Rates for Barnert Memorial Hospital, supra), but the quantity of argument and evidence compels me to do so.

Petitioners have dwelt at length on territorial exclusivity of the distributorship designations by the brewers. I first note that the brand registration and primary source regulations do not compel any territorial arrangements; they merely require a registration of authorized wholesalers and, to give such registration meaning, prohibit sales by a non-registered wholesaler, unless such non-registered wholesaler has acquired the product from an authorized wholesaler. What the supplier (brewer, vintner or

distiller) does by way of vertical restraints, and the reasonableness and legality of its practices, must still be examined under the "rule of reason" test, i.e., by judging its net competitive effect after a careful weighing and balancing process. Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). If those vertical restrictions are non-price restrictions and they promote interbrand competition, which is a primary goal of antitrust laws, by permitting a producer to achieve certain efficiencies in product distribution, they will not be disturbed, even if intrabrand competition is not enhanced or is even curtailed. The bottom-line question is whether the consumer is worse-off. If not, a distribution arrangement should not be found to unreasonably restrain trade. See, Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982).

In these proceedings there has been nothing to demonstrate any adverse effect on the consumer. Although petitioners' economist made an attempt to compare retail prices and to show that prices in areas where transshipping is presumed to take place is lower, there are so many other factors to be considered, and so many unknowns in the comparisons, that the figures are meaningless. Direct evidence tended to show that savings that might be realized from purchasing from a transshipper are not passed on to the consumer. On the other hand, the distribution system utilized in New Jersey under the brand registration regulations shows definite benefits to the consumer. Beer prices have kept below the inflationary average increase of other consumer goods. New products and a full-range of

current products are readily available at fair prices. Products are properly warehoused in temperature-controlled settings to assure maximum quality and freshness. See also Del Rio Distributing, Inc. v. Adolph Coors Co., 589 F.2d 176 (5th Cir.), cert. den. 444 U.S. 840 (1979), which upheld a verdict that Coors' exclusive territorial restrictions were reasonable and there was ample evidence showing that the territories "were essential to maintaining quality control and service in the retail market" and resulted in "a long-term effect of making each distributorship stronger, better able to compete with other brands and provide better service." 589 F.2d at 179. Without the brand designation and primary source regulations, there would likewise be no incentive for suppliers to enter the New Jersey marketing area and risk capital investments. That would adversely affect the labor market. From the evidence produced, the benefits clearly outweigh any anti-competitive effects and demand the maintenance of the regulations.

The real antitrust test of the validity of the brand designation and primary source regulations is spelled out in Rice v. Norman Williams Co, supra, where the Court said, at 73 L.Ed. 2d 1049-1050:

> "A state regulatory scheme is not preempted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anti-competitive effect. (Citations omitted).

"A party may successfully enjoin enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy....";

and where the Court said further, at 1051-1052:

"California's designation statute merely enforces the distiller's decision to restrain intrabrand competition. It permits the distiller to designate which wholesalers may import the distiller's products into the State. It prevents an unauthorized wholesaler from obtaining the distiller's products from outside the distiller's established distribution chain. The designation statute does not require the distiller to impose vertical restraints of any kind; that is a matter for it to determine. The number of importers which may be designated by the distiller is not limited; the designated importer is not required to sell the imported brand to retailers within a specified area or from a specified location within the State."

* * *

"The manner in which a distiller utilizes the designation statute and the arrangements a distiller makes with its wholesalers will be subject to Sherman Act analysis under the rule of reason. There is no basis, however, for condemning the statute itself by force of the Sherman Act."

Thus, N.J.A.C. 13:2-33.1, 13:2-25.2(a) and 13:2-25.3(b) can also not be condemned as being per se violative of antitrust laws. The regulations themselves are valid. The conduct of parties utilizing the regulations can be questioned, but, as I have previously said, from the evidence at the June-July, 1983 hearings, there does not appear to be any violative conduct by suppliers or wholesalers either.

Petitioners have also argued that the brand registration and primary source regulations are discriminatory and violative of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Paragraphs 1 and 5, of the New Jersey Constitution.

I do not agree. The Twenty-first Amendment to the United States Constitution is very broad and permits states to prescribe conditions which are not unreasonable and which subserve the policy of confining the liquor traffic in order to minimize its evils. Ziffrin v. Reeves, 308 U.S. 132, 60 S. Ct. 163 (1939). See also California Retail Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980), which says the Twenty-first Amendment gives the states "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." Similarly, the New Jersey Supreme Court has said, in Affiliated Distillers Brands Corp. v. Sills, supra, at 56 N.J. 256:

> "...It must be remembered that because of its inherent evils liquor has always been dealt with as a subject apart. Borough of Fanwood v. Rocco, 33 N.J. 404 (1960), Paul v. Gloucester County, 50 N.J.L. 585, 595 (E. & A. 1888). Its sale may be prohibited entirely or severely curtailed. Borough of Fanwood v. Rocco, supra 33 N.J. at 411. While the constitutional protections of equal protection and due process are applicable to actions arising in this area, these protections must be viewed in the light of the broad power of the Legislature to regulate the sale of intoxicating beverages. Indeed, that power has been called "practically limitless." Blanck v. Mayor and Council of Magnolia, 38 N.J. 484, 490 (1962); Meehan v. Excise Commissioners, 73 N.J.L. 382, 386 (Sup. Ct. 1906), aff'd 75 N.J.L. 557 (E. & A. 1908)."

In light of the broad-ranging power conferred by the Twenty-first Amendment, economic regulations promulgated in furtherance of a state's authority under it "merit only the mildest review under the Fourteenth Amendment." Craig v. Boren, 429 U.S. 190, 207 (1976). Only if there was proof that the State acted arbitrarily

and irrationally in promulgating the brand registration and primary source regulations could they be held violative of the Constitution. See, Vance v. Bradley, 440 U.S. 93 (1979); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). There is no such proof.

Petitioners Seifert and Longwood also argue that the primary source regulation applicable to them, N.J.A.C. 13:2-25.3, should only be applied prospectively because a retroactive application would be unduly harsh and oppressive since those distributors had been transshipping prior to the promulgation of this regulation.[9] In asserting this position, the petitioners have correctly recognized that there is no presumption of prospective application of a regulation, but the law to be applied is that which is in effect at the time of rendering a decision, "unless doing so would result in manifest injustice...." Bradley v. Richmond School Board, 416 U.S. 696, 711 (1974).

Based on the evidence presented in the hearings, I do not find that there would be a manifest injustice to these petitioners. Although there is some evidence that they were transshipping prior to the effective date of the regulations in 1980, it must also be noted that both of these petitioners hold state beverage distributors' licenses, which confer a retail as well as a wholesale privilege. They are also both registered distributors for at least two brands of beer. Therefore, they are not rendered unable to distribute malt

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[9]Petitioner Iodice did not obtain his license until May 1982, well after the effective date of the brand registration and primary source regulation: Therefore, this same argument would not apply to him.

alcoholic beverages by the brand registration and primary source regulations. They can devote their efforts to developing the product lines which they are authorized to distribute rather than continuing, as the evidence indicates they have been doing, to attempt to selectively handle the larger and more popular brands to the detriment of the brands authorized to them.

It should also be noted that the privilege to sell the alcoholic beverages which is accorded to the petitioners by their licenses is exactly that - a privilege - and not something to which they have a vested right. That privilege must be exercised within the limitations imposed by the state, whether by statute or regulation, in order to achieve the goals of promotion of temperance and the stability of the industry. (See, Heir v. Degnan, supra).

Before concluding, I cannot fail to note that the existence of primary source regulations in the State of New Jersey is certainly not an arbitrary or uncommon happening. In fact, the action of New Jersey in this area is consonant with the actions of approximately 80% of the states in which the sale of alcoholic beverages on the wholesale level is licensed to be carried on by private parties. Twenty-five other states, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Missouri, Nebraska, New Mexico, New York, Nevada, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Texas and Wisconsin, as well as the District of Columbia, have a primary source statute or regulation

at least akin to New Jersey's. The California statute, which is quite similar in effect, has previously been treated in the discussion of Rice v. Norman Williams Co., supra. The fact of the promulgation of such a statute regulation by the overwhelming majority of the "license states" is certainly an indication of the necessity and validity of such a regulation for the purposes previously discussed, and for the effective accomplishments of the goals of alcoholic beverage control.

In conclusion, I find N.J.A.C. 13:2-25.2(a), 13:2-25.3(b) and 13:2-33.1 are proper and reasonable regulations which serve several valid public purposes. I further find that the goals served by the regulations are necessary to the proper and effective regulation of the alcoholic beverage industry, and they should be retained and readopted upon expiration [pursuant to Executive Order 66 (1978)] in April, 1984. Additionally, I find that continuation of the stays of enforcement of the regulations as to the petitioners creates a situation which adversely affects the regulatory interests of the State and the stability of the alcoholic beverage industry, and creates the potential for tax violations and destructive trade practices which are not in the public interest. Both for these reasons, and in fairness to approximately 270 wholesalers and distributors complying with the regulations, the stays should be vacated. Since they were granted by the Appellate Division, however, the vacating of them must come from that Court.

Accordingly, on this 5th day of December, 1983, I confirm

N.J.A.C. 13:2-33.1, 13:2-25.2(a), and 13:2-25.3(b), and I determine them to be in full force and effect. I further request that the Appellate Division vacate the stays of the enforcement of these regulations previously granted to the petitioners.

JOHN F. VASSALLO, JR.
DIRECTOR

4. NOTICE TO WHOLESALERS, DISTILLERS, BREWERS, VINTNERS, IMPORTERS AND SUPPLIERS: REVISED PROCEDURE FOR 1984 PRODUCT INFORMATION - BRAND REGISTRATION FILING (N.J.A.C. 13:2-33.1 & .2)

N.J.A.C. 13:2-33.1 et seq. provides, in essence, that no alcoholic beverage product, including private label brands, can be sold or offered for sale unless that product is "registered" with the Division and the authorized distributors are "designated" by the brand owner or agent. The appropriate forms and fees to be charged shall be established by the Director.

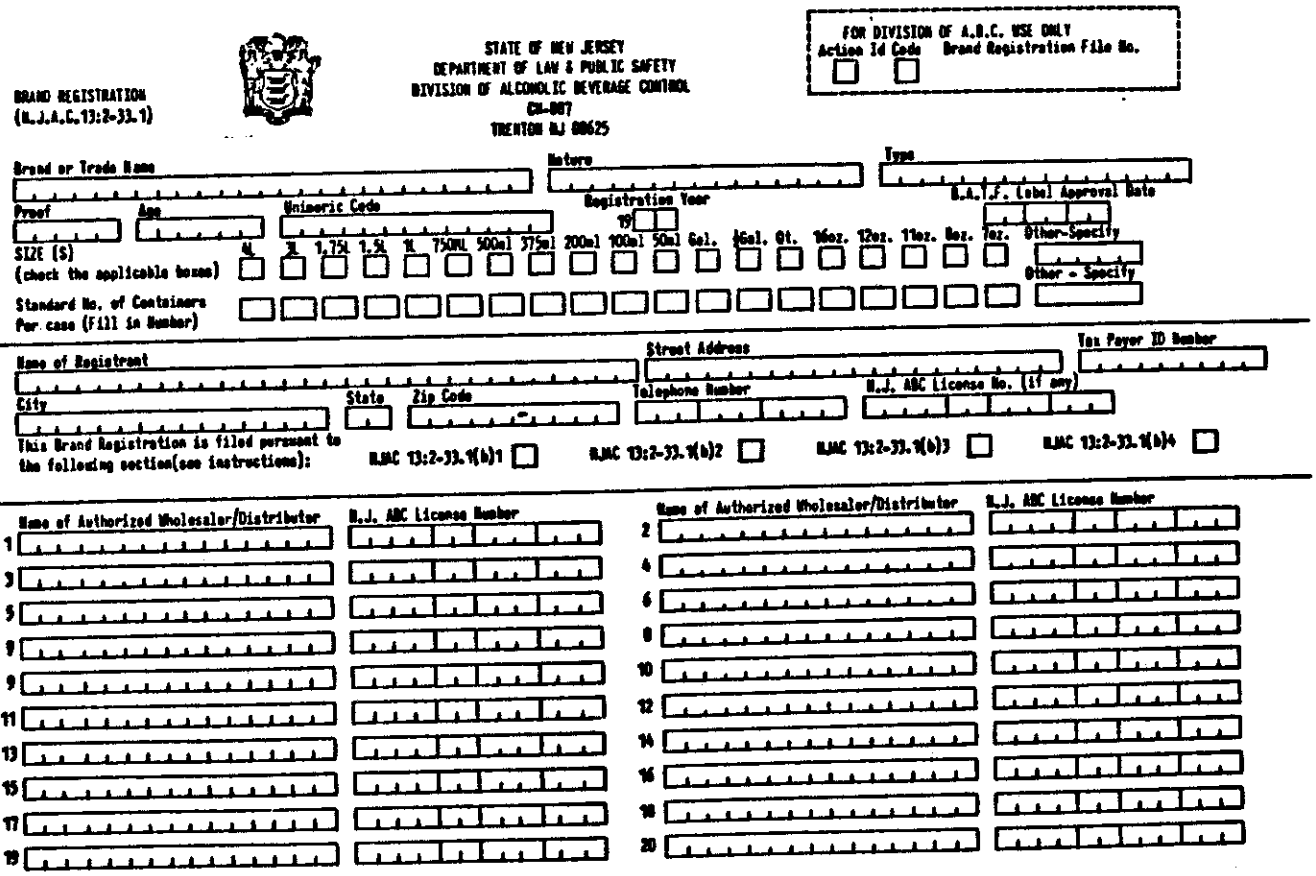
Significant Division activity in the past year concerning the filings under this regulation have indicated an immediate need to enhance retrieval of information capabilities and to permit the Division to undertake coordinative and comparative evaluations. Such requirements can best be achieved through data processing of these filings and, to that end, a revised Product Information - Brand Registration Filing Form has been developed which must be used for the 1984 calendar year. A replica of the revised form and instructions is noted herein. The actual 8" X 11½" form to be utilized can be obtained from the Bureau of Trade Practices, Division of Alcoholic Beverage Control, CN 087, Trenton, New Jersey 08625 - Telephone number (609) 984-2795. Persons filing under this regulation can xerox copies of the full size form for submission of numerous filings. Enclosing a postage paid self-addressed, stamped envelope will permit the Division to return a copy of the filing with a Division notation of receipt.

The Product Information - Brand Registration Form must be filed in duplicate by February 1, 1984. A copy of the BATF Label Approval Form is no longer required.

The fee to be paid the Division is $10.00 per registration. Existing expenses and anticipated additional expenses in consequence of the data processing of this information have made it impossible to continue the prior practice of limiting the total registration fee for any single registrant to $1,000.00. That dollar ceiling is eliminated and that policy as well as other inconsistent provisions in former Bulletin 2354, Items 4 & 6 and Bulletin 2429, Item 2, are repealed.

The Division intends to closely monitor compliance under this regulation and will vigorously discipline any violator who sells or offers for sale a product that has not been properly registered by the February 1, 1984 filing deadline date.

Facsimiles of the form and of the instructions follow:



BRAND REGISTRATION
(N.J.A.C.13:2-33.1)

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
CN-087
TRENTON NJ 08625

FOR DIVISION OF A.B.C. USE ONLY
Action Id Code Brand Registration File No.

Brand or Trade Name
Nature
Type
Proof
Age
Uniocric Code
Registration Year 19
B.A.T.F. Label Approval Date
SIZE (S) (check the applicable boxes)
4L 3L 1.75L 1.5L 1L 750ML 500ml 375ml 200ml 100ml 50ml Gal. ½Gal. Qt. 16oz. 12oz. 11oz. 8oz. 7oz. Other-Specify
Standard No. of Containers Per case (Fill in Number)
Other - Specify

Name of Registrant
Street Address
Tax Payer ID Number
City
State
Zip Code
Telephone Number
N.J. ABC License No. (if any)
This Brand Registration is filed pursuant to the following section(see instructions): N.J.A.C 13:2-33.1(b)1 N.J.A.C 13:2-33.1(b)2 N.J.A.C 13:2-33.1(b)3 N.J.A.C 13:2-33.1(b)4

Name of Authorized Wholesaler/Distributor	N.J. ABC License Number	Name of Authorized Wholesaler/Distributor	N.J. ABC License Number
1		2	
3		4	
5		6	
7		8	
9		10	
11		12	
13		14	
15		16	
17		18	
19		20	

IF OVER 20 WHOLESALERS/DISTRIBUTORS CHECK HERE (use 2nd sheet for the rest)

I CERTIFY THE ABOVE INFORMATION IS COMPLETE,TRUE AND CORRECT.

SIGNATURE:_____ TITLE:_____ DATE:_____

BRF BD-1 ABC 12/83-1

INSTRUCTIONS - BRAND REGISTRATION FORM, BRF 80-1 12/83-1

N.J.A.C. 13:2 SUBCHAPTER 33 provides:

13:2-33.1 - Schedule of Product Filing

(a) No licensee shall sell or offer for sale or deliver, or receive or purchase at wholesale or retail, any alcoholic beverage, including private label brands owned by a retailer and exclusive brands owned by a manufacturer or wholesaler and offered for sale or sold by such manufacturer or wholesaler exclusively to one New Jersey retailer, unless there is first filed with the Director of the Division of Alcoholic Beverage Control for each calendar year a schedule listing the following:

1. Its correct brand or trade name;
2. Its nature and type;
3. Its age and proof of alcoholic content when stated on the label;
4. The standard number of unit containers per standard case;
5. The capacity of each unit container; and
6. The names of all New Jersey licensees acknowledged by the filer to be an authorized distributor of the product at wholesale.

(b) The schedule shall be filed by:

1. The manufacturer or wholesaler who owns such brand; or
2. A wholesaler selling such brand who is appointed as exclusive agent by the brand owner for the purpose of filing such schedule; or
3. Any wholesaler with the approval of the director in the event that the owner of such brand does not file or is unable to file a schedule or designate an agent for such purposes; or
4. In the case of private label brands, by the manufacturer or wholesaler supplying such private label brand to the retailer or by any wholesaler having authority, in writing, from the retailer owning such private label brand, except where the alcoholic beverages are imported by the retailer under a special permit issued by the director, in which case the retailer shall file the schedule and the labels.

13:2-33.2 Schedule filing dates

(a) The schedule of product filings shall be filed in such form and on such dates and upon payment of such fees as shall be prescribed by the director.

SPECIFIC INSTRUCTIONS FOR COMPLETING THE FORM

1. This Brand Registration Form has been designed as a means to computerize records. The spacing is dictated by the computer, which requires that all information, whether numeric or alphabet, be provided by the use of a single space for a single character. The sole exception is with regard to "Standard No. of Containers Per Case" wherein the entire number must be entered in the space provided.
2. If the required information consists of more letters than space allows, print as many as will fit in the spaces provided, and eliminate the rest.
3. Nature - e.g. Whiskey; Gin; Vodka; Rum; Brandy; Tequila; Cordial; Liqueur; Wine; Malt; etc.
4. Type - e.g. Blended; Straight; Bordeaux; Rose; Table White; Brut Champagne; Schnapps; Cream Sherry; Whiskey Sour; Margarita; Napoleon (Brandy); Lager; Dark; etc.
5. Proof - Indicate proof (Distilled Spirits) or percentage of alcohol content (wines and malt alcoholic beverages).
6. Age - Enter age as stated on bottle or vintage year. Each vintage year requires a separate Brand Registration if there will be a different pricing for different vintage years. If age is not stated, indicate "NA" (not applicable).
7. N.J. ABC License No. - make certain license number is accurate.
8. "Brand Registration is filed pursuant to" - check only one of the four boxes, NJAC 13:2-33.1(b)1 to (b)4. If NJAC 13:2-33.1(b)2 is checked, Registrant must present proof of appointment by Brand Owner, on a separate sheet, accompanying this Form.
9. Brand Registration Form must be filed in duplicate.
10. Facsimilies of signatures will be accepted, and forms or completed portions may be photocopied.
11. Brand Registrations must be filed by February 1st of the registration year.
12. Annual fee of $10.00 per Brand Registration is to accompany Registration Form(s). Do not submit cash.
13. Failure to provide all information may be cause for rejection of Brand Registration.

PUBLICATION OF BULLETIN 2433 IS HEREBY DIRECTED THIS 14th DAY OF DECEMBER, 1983.

John F. Vassallo, Jr.

JOHN F. VASSALLO, JR.
DIRECTOR