

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

BULLETIN 2421

November 24, 1981

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BULLETIN 2421

November 24, 1981

1. NOTICE TO WHOLESALERS - SUGGESTED RETAIL PRICES - AUGUST 18, 1980.

NOTICE TO ALL WHOLESALERS AND  
DISTRIBUTORS SELLING TO RETAILERS

It has come to my attention that some wholesalers or distributors are including "suggested retail prices" or "wrap-up prices at traditional mark-up" in their Current Price Lists filed with the Division pursuant to N.J.A.C. 13:2-24.6. I am further advised that similar pricing information is being independently provided to retailers by wholesalers in documents that represent or imply that the information is that which is filed or required to be filed with this Division.

This Division does not require that "suggested retail or prices at traditional mark-ups" be included in Current Price Lists. Effective immediately, any future Current Price List containing such information will be rejected by the Division. Further, any wholesaler or distributor which disseminates such information in a format or document which implies or represents that the communication has governmental sanction or is required by Division regulation will be subject to disciplinary action for violation of N.J.A.C. 13:2-24.10.

JOSEPH H. LERNER  
DIRECTOR

Dated: August 18, 1980

2. NOTICE TO WHOLESALERS - AMENDMENTS TO CURRENT PRICE LISTS - JULY 22, 1981.

NOTICE TO ALL WHOLESALE LICENSEES

N.J.A.C. 13:2-24.6 (4) directs that every licensee or registrant intending to sell alcoholic beverages to retailers in this State shall file with the Division of Alcoholic Beverage Control, no later than the 15th day of each calendar month the prices which will become effective the first day of the following calendar month and remain effective for that month.

Additionally, N.J.A.C. 13:2-24.6 (5) stipulates that there shall be no amendments or changes to these prices (except upon approval of the Director to correct bona fide clerical errors.)

However, a review of our records indicates that the filing of affidavits to correct "clerical errors" of prices has occurred as late as ten days after the required filing date (the 15th of each month.)

While some indulgence had been shown in the past, due to the lack of familiarity of licensees with the new regulation, sufficient time has now passed for all price filers to routinely abide by the regulation in the proper manner.

Therefore, effective immediately, no approval will be given for the correction of clerical errors unless a proper affidavit is filed with this Division within 48 hours of the original filing deadline.

Dated: July 22, 1981

JOSEPH H. LERNER  
DIRECTOR

3. NOTICE TO WHOLESALERS - AMENDMENTS TO CURRENT PRICE LISTS, NEW CREDIT REGULATIONS, TERMS OF SALE - "PAYMENT" and "SATISFACTION" - OCTOBER 30, 1981.

NOTICE TO ALL WHOLESALE LICENSEES

- RE: A) CURRENT PRICE LISTS AND AMENDMENTS TO CURRENT PRICE LISTS  
B) NEW CREDIT REGULATION  
C) TERMS OF SALE - "PAYMENT" AND "SATISFACTION"

I - CURRENT PRICE LISTS AND AMENDMENTS THERETO

I have recently asked my Staff to review practices relating to amendments to Current Price Lists pursuant to N.J.A.C. 13:2-24.5(5). Preliminary analysis indicates that some wholesalers may have sought, and perhaps obtained, approval to amend prices after original filing, for reasons other than a bona fide clerical error. Clearly, in certain instances, amendments have been sought which conform what would otherwise be clearly competitive prices or discounts to those prices or discounts of all other competitors carrying the same product, or which would change prices or discounts to obtain a distinct competitive advantage.

To eliminate even the suggestion that the amendment process is being used for other than the correction of bona fide clerical errors, it is appropriate, at this time, to restate and elaborate upon the Division policy concerning requests to amend filed prices. All wholesalers are entitled to certainty and independence in their pricing evaluations.

In any request for consideration to amend an entry in the Current Price List the following requirements apply:

- (1) The sole basis to amend is to correct a bona fide clerical error;
- (2) The request is supported by an affidavit of the person who, in fact, made the error;
- (3) an affidavit is submitted by an executive officer of the company seeking the amendment averring that the amendment sought is submitted in good faith, solely to rectify a clerical error; is not submitted for any competitive or other business reason; and sets forth the number of amendments which have been sought by the company within the

last year; and

- (4) all of this documentation is in the custody of the Division within forty-eight (48) hours after Current Price Lists are filed pursuant to N.J.A.C. 13:2-24.6(4).

## II - NEW CREDIT REGULATIONS

The new credit regulations, proposed in the September 10, 1981 New Jersey Register (13 N.J.R. 604(b)) have been adopted, with some changes, effective November 2, 1981. The changes will be published in the N.J. Register of that date, along with the Notice of Adoption.

## III - TERMS OF SALE - "PAYMENT" AND SATISFACTION"

The new credit regulations almost mandate that individual wholesalers give more careful attention to what each wholesaler will consider as payment or satisfaction of a debt (whether before or after a delinquency). While each wholesaler will be required to define these terms of sale in its Current Price List (the next filing being for December), I urge, that on an individual basis, each wholesaler undertake to provide a copy of such terms to every retailer it serves, as soon as possible.

JOSEPH H. LERNER  
DIRECTOR

Dated: October 30, 1981

## 4. OPINION LETTER - STANDARD CASE SIZES.

Maidstone Wine & Spirits, Inc.  
Los Angeles, CA

Re: Standard Case Sizes

In a letter of July 23, 1981, you have inquired about the shipment into this State of products in other than traditional case sizes. Your request is apparently related to the relaxation of certain regulatory requirements by the Bureau of Alcohol, Tobacco and Firearms.

This Division adopts the Federal requirements for labeling and standards of fill; N.J.A.C. 13:2-27.1. The Division has no affirmative regulations with respect to standard case sizes. Therefore, you may sell alcoholic beverages to wholesalers in this State in any case size which you deem appropriate and which is otherwise consistent with Federal requirements.

If you choose to entertain alternative case sizes, please give careful attention to the record keeping requirements of N.J.A.C. 13:2-24.5 (price quotations) and 13:2-39.1 (invoicing).

Dated: August 4, 1981

JOSEPH H. LERNER  
DIRECTOR

## 5. OPINION LETTER - BRAND REGISTRATION - UNIFORM PRODUCT CODE.

E & J Gallo Winery  
Modesto, Ca.

RE: Brand Registration N.J.A.C. 13:2-33.1 et seq.

Dear Mr. Thorpe:

In your letter of June 6, 1980 you have inquired as to whether or not the addition of a Uniform Product Code (U.P.C.) symbol to the labels of your company's products, in and of itself, would require a resubmission of the label under this Division's "brand registration" regulations. N.J.A.C. 13:2-33.1 et seq. Bulletin 2354, Item 4. Simply stated, the answer is that no resubmission would be necessary.

Dated: June 27, 1980

JOSEPH H. LERNER  
DIRECTOR

6. OPINION LETTER - TRADE ADVERTISING - COMPLIANCE WITH N.J.A.C. 13:2-24.10.

Beverage Retailer Weekly  
Wayne, N. J.

Re: Trade Advertising

This will acknowledge receipt of your letter of May 11, 1981 concerning the above. Division Regulation N.J.A.C. 13:2-24.10, as amended and effective July 3, 1980, provides in part:

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:...

...Offers alcoholic beverage pricing information in affiliation with other non-identically owned licensees in a communication which fails to truthfully disclose and prominently indicate the identity of the individual licensee who established the pricing information, and that the specific prices and products featured may not be available at all businesses represented or indicated as being affiliated.

The regulation is not limited in scope to consumer advertising. Thus, when a supplier engages in trade advertising which includes pricing information and references distributors (i.e., non-identically owned licensees), the regulation is applicable. Such advertising must prominently disclose the identity of the "person" who established the pricing information and that the specific prices may not be available through all distributors carrying the product(s). Further, a clear indication should be given with respect to who placed and paid for the advertisement.

Dated: May 19, 1981

JOSEPH H. LERNER  
DIRECTOR

## 7. OPINION LETTER - SERVICING RETAIL ACCOUNTS.

Wine Institute  
Harper Woods, Michigan

Re: Servicing Retail Accounts

In a letter earlier this year, you presented questions with respect to the scope of permissible servicing that may be engaged in by wholesalers at retail premises. The general perimeters are as follows: No manufacturer's representative or wholesaler's salesman may solicit sales from or provide services to a retailer unless he or she possesses a valid Solicitor's Permit. N.J.S.A. 33:1-67. A solicitor may not engage in conduct prohibited to his employer or provide services to retailers that are not contained in his employer's "Marketing Manual". N.J.A.C. 13:2-37.3. Both manufacturers and wholesalers must maintain "Marketing Manuals" documenting, among other items, all services to be provided to trade buyers in this State. N.J.A.C. 13:2-24.5 and 24.6. Services must be available on proportionally equal terms to all customers, and may not be "tied" to future purchase of product. N.J.A.C. 13:2-24.2. Within this framework, the latitude for permissible activities is great.

In response to your specific questions, shelf stocking, brand rotation and dusting and cleaning of shelves are permitted. There is no prohibition against touching a competitor's product during permitted activities nor against moving merchandise from storerooms to display or shelf areas. As a matter of policy, however, price marking by solicitors, even under the affirmative direction of the retailer, is prohibited.

JOSEPH H. LERNER  
DIRECTOR

Dated: October 30, 1980

## 8. OPINION LETTER - SALESMEN SERVICING OF RETAIL ACCOUNTS.

Lawrence Rubenstein  
Edison, N. J.

Re: Salesmen Servicing of Retail Accounts

Your letter of May 29, 1981 raises questions with respect to the parameters of "servicing" that may be permissibly engaged in by licensed solicitors (N.J.S.A. 33:1-67) as part of their efforts to secure retail sales.

N.J.A.C. 13:2-24.2(a)(1) provides that no wholesaler, in connection with the distribution or marketing of alcoholic beverages shall pay any commission or other compensation "except for the reasonable value of services rendered". Implicit in this statement is the understanding that if a salesperson does nothing to secure an order, then no value or services have been rendered justifying compensation.

N.J.A.C. 13:2-37.3 provides that a solicitor may not sell products or engage in promotional efforts or any sales contests unless the sales terms or the marketing policies are consistent with those set forth in his or her employer's "Current Price List" and "Marketing Manual". Therefore, a solicitor may only service accounts within the boundaries of servicing policies established and recorded by his or her employer.

A wholesaler may provide services to retailers only if they are available on proportionally equal terms to all retailers competing in the sale of the product or products involved; and the provision of such services may not be contingent upon a requirement or agreement to make further purchases. N.J.A.C. 13:2-24.2(a)(2).

The term "proportionally equal terms" obviously indicates that there can exist different "service" treatments among retailers based on previous or potential sales. It is not required that a salesperson expend the same amount of time servicing a retail account which has and will not purchase more than a minimal amount of products when logistics would dictate that he or she otherwise ignore a good account.

By servicing an account, the Division envisions such conduct as developing product promotion, working with advertising and display materials, educational programs concerning marketing and products and stocking and product rotation, etc. This brief list is not intended to be all-inclusive. There are, however, several areas which require specific comment.

First, a solicitor may discuss competitive wholesale prices with a retailer, but they may not involve themselves in retailer-to-consumer pricing; nor may a solicitor physically shelf price or label products at prices even if they are established by the retailer.

Second, the delivery of product to a retailer by a solicitor is an area that demands close consideration. In an "emergent" situation, a solicitor may service an account by what is known as a "salesmen's pick-up". However, any pattern or regular practice of delivering products between retailer members of a Cooperative Purchasing Group (N.J.A.C. 13:2-26.1), most likely involves not the "servicing" of an account, but price discrimination, contrary to N.J.A.C. 13:2-24.1. This is so because delivery terms are part of wholesaler "terms of sale" and a solicitor may not alter such terms in a fashion so as to discriminate in favor of cooperatives against single retailers. N.J.A.C. 13:2-37.3. See, also, Division Bulletin 2381, Item 9 (1980).

Within the framework of the discussion above, the basic response is that a solicitor should look to his or her employer for guidelines relating to the types and extent of account servicing that is to be made available to retailers.

Dated: June 17, 1981

JOSEPH H. LERNER  
DIRECTOR

## 9. OPINION LETTER - DISTRIBUTION AND SALE BY WHOLESALE LICENSEES OF SNACK FOODS.

Anheuser-Busch Companies, Inc.  
St. Louis, Mo

Beer Wholesalers Association of N. J.  
Trenton, N. J.

Re: Distribution and Sale by Wholesale Licensees of  
Snack Foods - N.J.S.A. 33:1-11

In recent separate letters, you have inquired as to whether or not Plenary Wholesale and State Beverage Distributor Licensees ("S.B.D.") may engage in the distribution and sale of snack foods. Anheuser-Busch Companies, Inc. has become involved in the manufacture and sale of a line of such foods, i.e., pretzels, peanuts, potato sticks, corn chips, and the like. It is desirous of utilizing its existing New Jersey beer distribution network for these products. Pursuant to a Plenary Brewery license (N.J.S.A. 33:1-10), Anheuser-Busch presently distributes malt alcoholic beverages to both wholesalers and retailers from within this State. Additionally, in some portions of the State, Anheuser-Busch malt beverage products are distributed to retailers by independent wholesalers licensed as either Limited Wholesalers or State Beverage Distributors. N.J.S.A. 33:1-11.

I find nothing in Title 33 that would prohibit the holder of either a Plenary Brewery, Plenary Wholesale, Wine Wholesale or Limited Wholesale licensee from engaging in the distribution of snack foods to retailers. However, a State Beverage Distributor's license "shall not be issued for premises in or upon which any retail business, except the sale of malt alcoholic beverages and non-alcoholic beverages, is carried on." N.J.S.A. 33:1-11(2)(c) (Emphasis added). This amendment to the Act was intended to permit the issuance of such licenses to persons engaged in or interested in other retail businesses, provided that such other retail businesses are not conducted on the licensed premises of the State Beverage Distributor. Bulletin 123, Item 3 (June 12, 1936). Thus, a State Beverage Distributor may wholesale snack foods to retailers and may own an interest in another retail business which sells snack foods from other than its "S.B.D." licensed premises, but it may not engage in the sale to consumers from any portion of its "S.B.D." licensed premises of products other than malt alcoholic and non-alcoholic beverages. N.J.S.A. 33:1-11(2)(c).

Finally, should the venture be undertaken in this State, to preserve the enforcement integrity of our Alcoholic Beverage Laws, all business records and invoicing at both the supplier-to-wholesale and wholesale-to-retail levels must be maintained separately from those relating to the sale and distribution of alcoholic beverages and must be available for inspection by the Division at the premises of participating licensees.

Dated: October 21, 1980

JOSEPH H. LERNER  
DIRECTOR

10. OPINION LETTER - MALT BEVERAGES - SALES IN COMBINATION WITH NON-ALCOHOLIC BEVERAGE PRODUCTS - PROHIBITED.

Beer Wholesalers Association of N. J.  
Trenton, N. J.

Re: N.J.A.C. 13:2-24.9(b)

In a recent letter to the Division you have asked for an amplification with respect to the above regulation as it relates to an exception for sales to retailers of malt alcoholic beverages.

State Beverage Distributor and Limited Wholesale licensees may sell to retailers any type of malt alcoholic beverages in combination with any other type or brand of malt alcoholic beverages so as long as the offer is contained in Current Price Lists filed with this Division. This permissive application is distinguished from spirit and wine sales, where combinations may only be offered with respect to different sizes of identical product. The "exception" with respect to malt beverages recognizes historical business practices relating to mix - and - match sales and discounts predicated upon gross case purchases, regardless of brand. The "exception" does not contemplate or otherwise sanction the combination sale of malt alcoholic beverages together with non-alcoholic beverage products such as soda or snack foods; although such items may be wholesaled to retailers under an entirely separate terms of sale.

In that regard, while State Beverage Distributors may wholesale non-alcoholic beverage products, no retail business may be conducted from a licensed premises, except the sale of malt alcoholic beverages and non-alcoholic beverages. N.J.S.A. 33:1-11(2)(c)

Dated: September 16, 1981

JOSEPH H. LERNER  
DIRECTOR

11. OPINION LETTER - SOMMELIER INSTITUTE OF NEW JERSEY, INC. - QUALIFIED INDUSTRY TRADE ORGANIZATION - N.J.A.C. 13:2-24.7.

Sommelier Institute of New Jersey, Inc.  
New Milford, N. J.

Re: Qualified Industry Trade Organizations -  
N.J.A.C. 13:2-24.7

Your letter of September 3, 1980 inquires whether the Sommelier Institute of New Jersey, Inc. ("Institute") is a qualified industry trade organization pursuant to N.J.A.C. 13:2-24.7, so as to be able to receive donations of alcoholic beverages from the trade.

Briefly, you represent that the "Institute" is a non-profit New Jersey corporation engaged in the education of persons employed in the alcoholic beverage industry of this State to enhance their awareness and knowledge with respect to the acquisition, merchandising and service of fine wine and spirits. Since 1974, over 565 students have graduated from the "Institutes" Academy Seminars or Advanced Courses. The faculty is comprised of industry members who lecture on a voluntary basis. The Board of Governors of the "Institute" requires industry member participation, according to the By-Laws.

I am satisfied that the "Institute" is a qualified industry trade organization within the intendment of N.J.A.C. 13:2-24.7, and, therefore, wholesalers may, pursuant to a Donation Special Permit, donate alcoholic beverages intended to be consumed during courses or seminars conducted by the "Institute". I note, however, that because the "Institute" charges a fee as one of the prerequisites to attendance of its courses, and alcoholic beverages will be "tasted" during these seminars, that the "Institute" will be required to continue to obtain a Special Permit pursuant to N.J.A.C. 13:2-5.1(g).

JOSEPH H. LERNER  
DIRECTOR

Dated: November 21, 1980

12. OPINION LETTER - CONSUMER RETURNS OF ALCOHOLIC BEVERAGES.

New Jersey Food Council  
Trenton, N. J.

Re: Consumer Returns of Alcoholic Beverages

In a letter of April 21, 1981 you have inquired:

- (1) May the store accept an unopened bottle of liquor?
- (2) May the store accept an opened bottle that for some reason has not met the needs of the consumer?

A retail licensee may accept for refund or exchange an unopened original container of alcoholic beverages upon presentation of proof of original purchase from that individual licensee.

A retail licensee may accept for refund or exchange an opened original container of alcoholic beverages upon presentation of proof of original purchase from that individual licensee and consumer representation that the content is damaged or distressed in some fashion. This statement does not contemplate the sale of alcoholic beverages under terms similar to "satisfaction guaranteed", but simply recognizes a business justification for accepting returns of opened "package goods" which are distressed merchandise.

Dated: May 6, 1981

JOSEPH H. LERNER  
DIRECTOR

## 13. OPINION LETTER - ALCOHOLIC BEVERAGE "DOGGY BAG".

Marlboro Marketing, Inc.  
New York, N. Y.

Re: Alcoholic Beverage "Doggy Bag"

In a letter to the Division of July 1, 1981, you have inquired: Is it legal for a diner to take with him or her from a restaurant an unfinished portion of a bottle of wine in an alcoholic beverage version of a "doggy bag"?

I recognize that many wines can feasibly be sold only by the bottle to dining consumers and that most consumers would rather imbibe to the extent that the bottle is empty than leave the wine, i.e., "waste" their money.

It is the policy of this State to encourage moderation in consumption of alcoholic beverages. To permit a consumer to take with him or herself the unfinished portion of a bottle of wine under these circumstances is consistent with that policy. The answer to your question is yes.

JOSEPH H. LERNER  
DIRECTOR

Dated: July 23, 1981

## 14. OPINION LETTER - RETAIL ADVERTISING "AT WHOLESALE PRICES".

David S. Piltzer, Esq.  
Cranford, N. J.

Re: Retail Advertising "At Wholesale Prices"

In your letter to the Division of March 11, 1981, you inquire if retail licensees conducting business under the name "Buy-Rite" may advertise products "at wholesale prices" when the products are, in fact, being sold at the wholesale "cost" to the retailer.

An individual retailer may advertise that products are offered "at wholesale prices" if they are sold at "cost" inclusive of taxes. This letter is not to be construed to sanction an agreement among retailers to sell at any given price, including "wholesale prices". Of course, any joint advertising by retailers must comply with the provisions of N.J.A.C. 13:2-24.10(a)(7).

JOSEPH H. LERNER  
DIRECTOR

Dated: March 12, 1981

## 15. OPINION LETTER - RETAILERS - CABLE T. V. - MOVIE CONTENT.

Borrus, Goldin & Foley, Esqs.  
North Brunswick, N. J.

Re: Cable T.V. - Movie Content

Your letter of May 4, 1981 inquires on behalf of a licensee engaged in the motel business as to the propriety of the provision of cable TV in guest rooms and the appropriateness of the presentation of "R" rated movies.

A plenary or seasonal retail consumption licensee, whether functioning as a hotel, motel, tavern or restaurant, etc. may utilize cable television services. Any restrictions with respect to the availability of "movie channels" derive not from Division regulations, but rather from either the Federal Communication Commission or the cable television companies themselves. A previous Division policy prohibiting the projection of motion pictures on licensed premises was lifted in 1973 (Division Bulletin 2094, Item 6), therefore, film and video presentations are permitted.

With respect to the content of movie or video communications, the Division's policy is not to engage in prior censorship. While Division Regulation N.J.A.C. 13:2-23.14 continues to prohibit the display of obscene or other indecent matter, each case is reviewed on an individual basis. Thus, any film "rating", in and of itself, is not determinative of the ultimate question regarding content.

Dated: May 15, 1981

JOSEPH H. LERNER  
DIRECTOR

## 16. OPINION LETTER - PARTICIPATION BY SUPPLIERS IN OUT-OF-STATE RETAIL TRADE ASSOCIATION CONVENTIONS.

Miller Brewing Company  
Milwaukee, Wisconsin

Re: Participation by Suppliers in Out-of-State  
Retail Trade Association Conventions

In your letter of October 13, 1980 it is disclosed that Miller Brewing Company intends to participate in the National Licensed Beverage Association's Annual Convention to be held in Hollywood, Florida. It is anticipated that retailers from this State will be in attendance. Miller Brewing Company plans to host a dinner to which all attendees of the convention will be invited. Miller products will be available, but not on an exclusive or preferential basis. It is possible that promotional or novelty items of nominal value will be made available to attendees at the Miller Convention Information Booth. In short, Miller wishes to enhance its "good will" at a trade convention which involves participation by other suppliers and retailers from all over the Nation.

Where a supplier wishes to participate in a trade convention outside the physical boundaries of this State and the attendees are not licensees exclusively of this State, there is little need for governmental intrusion by this Division. If the program is in accordance with the laws of the State in which it is conducted and each supplier's participation documented in its "Marketing Manual" (N.J.A.C. 13:2-24.5), New Jersey's basic requirements have been met.

JOSEPH H. LERNER  
DIRECTOR

Dated: October 28, 1980

17. OPINION LETTER - RETAIL PROMOTION WITH NON-LICENSEE - BANK CREDIT CARD PROGRAM.

New Jersey National Bank  
Trenton, N. J.

Re: Credit Card "Supper Club" Program

In a series of recent communications with this Division, you have inquired about the propriety of a discount program involving the New Jersey National Bank ("Bank"), restaurants most of whom are licensees of this Division ("Merchants") and holders of credit cards issued by your Bank ("Consumers"). Figures and dollar amounts submitted are appropriate, but representative, so as to preserve the confidentiality of the specific program being formulated. The program envisions the issuance of "Discount Certificates" to consumers which are redeemable at participating restaurants for a reduction of 30% of a total dinner bill, including alcoholic beverages. The mechanics of the program are as follows:

(1) As part of the "Bank's" credit card program, it has contracted with several thousand "Merchants" who have agreed to accept Visa and/or MasterCard bank cards for purchases made at their establishments. Merchants pay a fee of approximately 5% of the face value of these sales for the "Bank's" services. Included in this "Merchant Base" are a significant number of restaurants, i.e., licensees.

(2) Four geographically regionalized groups of restaurants are in the "Bank" card plan. Each regional group consists of twelve restaurants that have agreed to participate during a particular month.

(3) A brochure, listing the 48 restaurants and describing the Supper Club Program, is sent to each cardholder-consumer. Included with the promotional material is an order form offering the consumer a choice of one or more regional club programs. The consumer purchase price for each club is approximately \$20.00.

(4) When the order forms are received by the bank, consumers are sent a package of twelve "Certificates". Each certificate is valid on specified days during a particular month and entitles the cardholder to the 30% discount whenever two meals are purchased.

(5) Restaurants participate in the program for several reasons:

(a) Their name and advertising copy are brought to the attention of the Bank's 400,000 customers in New Jersey.

(b) They will acquire new customers which, hopefully, they will be able to impress with their food and service so that repeat business will be generated.

(c) The "Merchant's Fee" for the month that the restaurant participates in the Supper Club is waived by the Bank. Since all the bank card business generated that month is not a result of the Supper Club program, this benefit partially offsets the cost of the consumer discount.

(6) Consumers participate because:

(a) They are able to recoup their membership fee if they use as few as two certificates. Depending upon their participation on a regular basis, they can save several hundred dollars on meals during the one year program.

(b) Cardholders are given an incentive to try new and different restaurants on a regular basis.

(7) The Bank operates the program:

(a) As an incentive to attract and maintain relationships with quality restaurants.

(b) As an incentive to attract and maintain quality cardholders for the bank card program.

(c) For the reasonable profit generated by the sale of club memberships. The promotional mailing to the cardholders, the waiver of merchant fees during the month of participation, and the establishment and maintenance of a membership fee are significant expenses.

When this program was initially presented to the Division via telephone, concern was that it might result in the Bank exercising privileges of a licensee contrary to N.J.S.A. 33:1-26 or be a promotion contrary to N.J.A.C. 13:2-23.16. I have concluded otherwise.

Participation by a licensee is voluntary and for a specific period of limited duration, i.e., a month. While the licensee is to discount the cost of food and beverage to the consumer, the Bank also waives its "Merchant's Fee" for all cardholder charges for the month. Therefore, notwithstanding the \$20.00 club fee, only under a strained construction could it be said that profits from the sale of alcoholic beverages will enure to the benefit of the Bank. Although the program requires the consumer purchase of two dinners in order to be eligible for the 30% discount, it does not require the purchase of alcoholic beverages at all.

Accordingly, I find that the program is not offensive to N.J.A.C. 13:2-23.16 or N.J.S.A. 33:1-26.

Dated: March 10, 1981

JOSEPH H. LERNER  
DIRECTOR

18. OPINION LETTER - RETAIL PROMOTION WITH NON-LICENSEE - PINBALL TOURNAMENT.

Petrin Vending Co.  
West Orange, N. J.

Re: Pinball Tournament

I have reviewed your letter of July 22, 1981 concerning your company's proposal to conduct pinball tournaments at licensed premises which are the locations of Petrin vending machines.

First, while I might be misreading your letter, I wish to make it clear that any promotional activity upon a licensed premises must be conducted with the participation of the licensee. Therefore, your company alone may not conduct any pinball tournaments, but it may with the joint participation of the licensees.

Second, no betting of any kind may be permitted and no entry or admission fee, in any form, may be charged as a condition to participation in such a tournament or as a condition to entry onto the licensed premises during any portion of the period of time during which such a tournament is being conducted. See, Attorney General Formal Opinion No. 1-1980 (January 10, 1980).

Third, the participation of any casino hotel in such a promotion is a question which should be initially directed to the Casino Control Commission.

Subject to the foregoing, licensees may participate in pinball tournaments. I have enclosed, for your information, a copy of the above referenced Attorney General's Opinion.

Dated: August 3, 1981

JOSEPH H. LERNER  
Director

Casino Control Commission  
Trenton, New Jersey

Formal Opinion No. 1 - 1980

You have inquired with regard to the legality of a backgammon tournament which a casino hotel operator proposes to sponsor at its business premises. The hotel operator is currently undecided as to whether or not to charge a nominal admission fee to the tournament or to permit free participation by the contestants. We have concluded that the proposed backgammon tournament would not violate the criminal laws of New Jersey provided that no admission fee is charged, either directly or indirectly, for participation in the tournament.

The backgammon tournament format at issue is fairly standard and has been utilized at casinos throughout the world, including Las Vegas, Monte Carlo and Paradise Island in the Bahamas. Backgammon is a game in which a series of counters are moved over a board with the object of placing all the counters in a prescribed position. The movement of the counters is governed by the roll of dice. The results of a throw of the dice are applicable only to the contestant on behalf of whom the dice are thrown. Certain positioning of the counters in the course of the game will increase the probability of victory. A player who is adept at manipulating his or her counters to attain favorable positions has an advantage. Nonetheless, no matter how skilled a player is, she or he can only manipulate the counters in conformity to the roll of the dice. Hence, an unskilled player who attains a series of favorable throws of the dice can defeat a more skilled player whose throws of the dice preclude advantageous movement of her or his counters.

The sponsor of the proposed tournament intends to conduct the contest on a limited participation basis. The number of entries will be finite. Each player will engage in a single game of backgammon with another player. The loser is eliminated from that competition, while the winner goes on to play another round against another player. The single elimination process is repeated in a series of rounds until only one player remains undefeated. He or she is the winner of the competition. The tournament itself consists of a number of such single elimination contests so that each player has more than one opportunity to win. The winners of these various competitions are rewarded with valuable prizes, including substantial quantities of cash.

The purpose of the tournament is to promote commercial activity at the hotel and casino in which the tournament is being conducted. Additional spinoff benefits may accrue to other enterprises doing business in the general area. The tournament's sponsors hope to schedule it at a period when lessened commercial activity is anticipated at the hotel-casino.

New Jersey's Constitution establishes an anti-gambling policy. N. J. Const. (1947), Art. IV, 57, par. 2; see F.O. No. 9 (1978).

<sup>1</sup> The Legislature has effectuated this policy through a series of statutory enactments. Those enactments applicable in the criminal context are embodied in the provisions of N.J.S.A. 2C:37-1 et seq. which superseded on September 1, 1979, N.J.S.A. 2A:112-1 et seq. and N.J.S.A. 2A:121-1 et seq. See N.J.S.A. 2C:98-2.

Pursuant to N.J.S.A. 2C:17-2 promoting gambling is a criminal offense punishable by a scale of sanctions which range from a third degree crime to a disorderly persons offense. Criminal liability for maintaining a place where gambling activity is taking place is created by N.J.S.A. 2C:37-4.

N.J.S.A. 2C:37-1(b) provides:

"Gambling" means staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the actor's control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

This definition requires that a participant must risk "something of value" before any gambling can occur. "Something of value" is separately defined in N.J.S.A. 2C:37-1(d) as such items as money or tokens or such intangible forms of consideration as extensions of credit or free entries into

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<sup>1</sup> The constitutional prohibition on legislatively authorized gambling provides:

No gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof have been heretofore submitted to, and authorized by a majority of the votes cast by, the people at a special election or shall hereafter be submitted to, and authorized by a majority of the votes cast thereon by, the legally qualified voters of the State voting at a general election ... N.J.. Const. (1947), Art. IV, 57, par. 2.

Casino gambling, state lotteries to aid education and any raffles and bingo games sponsored by charitable organizations have been exempted from this anti-gambling proscription. N.J. Const. (1947), Art. IV, 57, par. 2(A) and (C).

games for which a charge is generally exacted.<sup>2</sup> If the participants in the backgammon tournament were required to pay any admission fee directly or indirectly, then they would be "risking" something of value on their chances of success in the tournament. However, the absence of any admission fee would preclude a finding that any gambling activity could occur because the backgammon players would not be risking "something of value." This same analysis would apply to the question of whether the backgammon tournament was a "lottery," within the meaning of N.J.S.A. 2C:37-1 et seq. Lotteries are defined as a specialized form of gambling scheme in which "something of value" is tendered as a consideration for participation. N.J.S.A. 2C:37-1(h). Once again, the absence of an admission fee establishes that nothing of value, as defined in the Code of Criminal Justice, will be transferred by the participants to the promoters or sponsors of the backgammon tournament. It seems clear that the definition of "something of value" in N.J.S.A. 2C:37-1(d) means that mere participation, or presence, by a contestant will not constitute "consideration" sufficient to support the existence of a lottery in violation of the criminal law. This is consistent with recent views on the scope of the concept of "consideration" in the gambling and lottery context. See, e.g., F.O. No. 9 (1978).

Finally, the promoters of the backgammon tournament have asserted that, "no betting of any kind on the players or the outcome will be permitted or sanctioned. sanctioned." This essential because any betting, including the formation of pools or "auctions" in which monies are divided based upon the results of the tournament, would constitute "gambling" within the meaning of N.J.S.A. 2C:37-1(b). The promoters or facilitators of any such pools or auctions would be criminally liable for promoting gambling in violation of N.J.S.A. 2C:37-2. If the hotel-casino operators know that such gambling activity is taking place on portions of their premises open to the general public, then they and the hotel-casino will be criminally liable under N.J.S.A. 2C:37-4 for maintaining a gambling resort. See N.J.S.A. 2C:37-1(j). Provided that no such activity is permitted and that no admission fee is assessed either directly or indirectly such as by conditioning participation on the purchase of any pools or services, the proposed backgammon tournament will not contravene the criminal laws of New Jersey.

JOHN J. DEGNAN  
ATTORNEY GENERAL


By: Edwin H. Stier,  
Assistant Attorney General

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<sup>2</sup>N.J.S.A. 2C:37-1(d) provides:

"Something of value" means any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.

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Joseph H. LERNER  
Director