

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.

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 different 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 manufacturers' 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 hearings¹ 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:

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 Company² and Anthony Esposito, t/a Longwood Distributing Company³ 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:

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 Distributor⁴ vs. John F. Vassallo, Jr.,

(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.

⁴Claudio 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

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.

"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 Inter-brand 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. 4343-80T3.

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