
**TITLE 4 ALCOHOLIC BEVERAGES AND MARIJUANA
DELAWARE ADMINISTRATIVE CODE**

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**DEPARTMENT OF STATE
OFFICE OF THE ALCOHOLIC BEVERAGE CONTROL COMMISSIONER
900 Trade Practices for Suppliers, Wholesales, and Retailers**

**Rule 901 (Formerly Rule 46) A Rule Governing the Contractual Relationships Between
Suppliers and Wholesalers for the Distribution of Alcoholic Beverages**

1.0 Preamble

Historically, in Delaware the distribution of particular brands of alcoholic beverages has been accomplished through dealings between an out-of-state supplier (i.e., distiller, vintner, brewer, manufacturer, rectifier or other business entity) licensed to supply alcoholic beverages into Delaware and one Delaware wholesaler (also sometimes referred to as an importer or distributor) licensed to sell and distribute alcoholic beverages to Delaware retailers. These exclusive relationships between suppliers and wholesalers have, through the years, proven to be an efficient and economical means of distribution in Delaware. Until recently such exclusive relationships had been utilized to the virtual exclusion of other methods of distribution. Today, exclusivity still remains the preferred method of distribution for the vast majority of brands being sold in Delaware.

Over the years, in reliance on the suppliers' custom and practice of establishing and maintaining exclusive distribution relationships, Delaware wholesalers have made substantial investments of time and money in efforts to promote and sell the suppliers' brands. As early as 1959, the Commissioner realized that some safeguards were necessary to protect wholesalers from arbitrary, discriminatory or otherwise unfair termination of the supplier/wholesaler relationship by national or international suppliers wielding far greater economic power than the local wholesalers. The Commissioner realized then, as the Commissioner does today, that should such abusive practices be permitted to occur, the adverse impact could be felt well beyond the affected wholesaler. As a result of the Commissioner's concerns, the Commissioner promulgated the original version of Rule 46 in 1959. The Rule was substantially revised in 1981 in an effort to provide more detailed criteria to govern the supplier/wholesaler relationship.

It is the Commissioner's view that the Rule has effectively regulated the relationships between out-of-state suppliers and Delaware wholesalers during much of this decade. Nevertheless, because of changes which have been occurring within the industry itself, and because the Commissioner has had several recent opportunities to review the Rule in intricate detail in differing contexts, the Commissioner has become convinced that certain issues must be addressed by means of the promulgation of a new Rule 46.

Specifically, over the last several years the supplier tier of the beverage alcohol industry has experienced widespread consolidation on a national and international scale. In several instances, this phenomenon has had a significant effect on supplier/wholesaler relationships in Delaware. Therefore, Rule 46 is being revised to recognize and address equitably the interests of both parties in such situations.

Another recent change affecting supplier/wholesaler relationships in Delaware has been the interest expressed by several suppliers in implementing systems of "dual distribution" (i.e., distribution of a particular brand or brands of alcoholic beverages by more than one wholesaler in the same geographic area). As a result, Rule 46 is being revised specifically to address issues related to this method of distribution.

Experience has also convinced the Commissioner that Rule 46 should provide suppliers with the ability to terminate an unwanted distribution relationship even in circumstances where the "good cause" requirements of the Rule cannot be satisfied. Providing this flexibility is necessary in order to allow suppliers to adapt their systems of distribution to changing market conditions or otherwise to respond to legitimate business considerations. Therefore, the Rule is also being revised to allow for the termination or transfer of distribution rights even in those instances where "good cause" does not exist provided that the terminated wholesaler receives reasonable compensation from the supplier in recognition of its efforts to promote and sell the supplier's brands.

Finally, this new Rule attempts to define more clearly the "good cause" criteria which must be satisfied in order to permit the uncompensated termination or transfer of distribution rights from one wholesaler to another.

For the reasons stated and pursuant to the Commissioner's statutory authority, the Commissioner promulgates new Rule 46 in an effort to strike an equitable balance between the sometimes conflicting interests of out-of-state suppliers and Delaware wholesalers, as well as to allow, to the extent practicable, business parties to determine the nature and the extent of their contractual relationships free from governmental intervention. In so doing, the Commissioner intends to further the interests of the State and its people in maintaining a healthy, efficient and competitive alcoholic beverage industry - one in which consumers are assured a wide range of products at reasonable prices.

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2.0 Requirements for Importing Alcoholic Beverages Into Delaware

- 2.1 No out-of-state supplier of alcoholic beverages shall ship or caused to be shipped into Delaware any alcoholic beverages unless all of the following requirements have been satisfied:
 - 2.1.1 It shall have obtained from the Commissioner an Out-of-State Supplier's license as required by 4 Del.C. §501;
 - 2.1.2 It shall submit the following information to the Commissioner and to each affected wholesaler in writing:
 - 2.1.2.1 the name and address of each licensed wholesaler in Delaware with which it has contracted;
 - 2.1.2.2 the brand or brands of alcoholic beverages which it intends to distribute in Delaware;
 - 2.1.2.3 a statement as to whether the distribution rights being conferred on each wholesaler are exclusive; and
 - 2.1.2.4 if in writing, a copy of the distribution contract, between it and the licensed wholesaler(s);
 - 2.1.3 It shall ship such alcoholic beverages only to a wholesaler or wholesalers licensed by the Commissioner; and
 - 2.1.4 It shall agree to comply with all applicable requirements of this Rule. (Noncompliance with the requirements of subsection 2.1 prior to shipping alcoholic beverages into the State shall subject the supplier to the imposition of such administrative sanctions as the Commissioner deems warranted.)
- 2.2 No wholesaler licensed by the Commissioner shall order or receive any alcoholic beverages from an out-of-state supplier which has not complied with the requirements contained in subsection 2.1 of this Rule.

3.0 General Principles

- 3.1 A licensed supplier having a contract (this term is also intended to include all agreements, understandings or other arrangements, whether written or oral) with a licensed wholesaler for the distribution in Delaware of a brand or brands of alcoholic beverages, which brand or brands have been recorded with the Commissioner as required by subsection 2.1.2 of this Rule, may terminate the distribution rights and transfer such rights to another licensed wholesaler upon the voluntary agreement of both wholesalers (i.e., a voluntary termination and transfer). In the event of such a voluntary termination and transfer, the supplier shall provide written notice of that fact to the Commissioner indicating that the affected wholesalers have both agreed to the termination and transfer. A copy of the supplier's notification letter to the Commissioner shall be provided to both wholesalers.
- 3.2 In the event that a licensed wholesaler does not agree to the termination or transfer of its distribution rights (i.e., an involuntary termination or transfer), the supplier may terminate or transfer said rights only in accordance with the applicable provisions of this Rule.
- 3.3 A licensed supplier already supplying a brand or brands of alcoholic beverages in Delaware by means of a single wholesaler may commence the "dual distribution" of such product(s) only after compliance with the applicable provisions of this Rule.
- 3.4 A licensed supplier which seeks to introduce a new brand or brands of alcoholic beverages into Delaware may distribute such products through more than one licensed wholesaler provided that by so doing it does not violate any provision of an applicable distribution contract between it and any licensed wholesaler, and that it satisfies the requirements contained in subsection 2.1 of this Rule.

4.0 Contracts

- 4.1 Contracts involving the distribution of alcoholic beverages in Delaware between a licensed out-of-state supplier and a licensed wholesaler may be written or oral.
- 4.2 No contract for the distribution of alcoholic beverages shall be supported by the exchange of \$100 or more.
- 4.3 All contracts subject to this Rule shall continue in effect until voluntarily terminated or until any involuntary termination, transfer or substantial modification of the distribution rights granted by such contracts has been approved by the Commissioner.
- 4.4 Every contract for the distribution of alcoholic beverages in Delaware between a licensed out-of-state supplier and a licensed wholesaler shall contain, or be deemed to contain, all of the provisions of this Rule.

5.0 Procedure for Involuntary Termination or Transfer

- 5.1 Any licensed supplier which desires to terminate involuntarily the distribution rights of a licensed wholesaler or to transfer such rights from one licensed wholesaler to another shall submit a written request to the Commissioner at least sixty days prior to the proposed termination or transfer date.
 - 5.1.1 Upon written request, a copy of which shall be provided to the affected wholesaler, the sixty-day notice provision may be waived by the Commissioner if the reason for the requested termination or transfer is the insolvency of the wholesaler, the occurrence of an assignment for the benefit of the wholesaler's creditors, the bankruptcy of the wholesaler, the dissolution or liquidation of the wholesaler, the cancellation, revocation, nonrenewal or suspension for more than thirty consecutive days of the wholesaler's license, or, if the supplier can otherwise establish to the satisfaction of the Commissioner that compliance with the sixty day notice requirement would cause it to suffer irreparable harm.
 - 5.1.2 The requirement of this section that the supplier provide the Commissioner with a written request to terminate or transfer distribution rights is applicable to, and includes, those circumstances whereby the supplier has obtained the rights to supply such alcoholic beverages in Delaware by means of a merger, purchase of stock, purchase of assets, or other acquisition, or by otherwise becoming a new regional or national supplier of such products. Any supplier obtaining such rights to supply alcoholic beverages in Delaware does so subject to the existing distribution arrangement and rights existing in Delaware with respect to such beverages.
- 5.2 The written request to terminate or transfer distribution rights required by subsection 5.1 shall include all of the following information:
 - 5.2.1 The name and address of the existing wholesaler from which the supplier seeks to withdraw the distribution rights, and the name(s) and address(es) of the wholesaler(s) upon which the distribution rights are sought to be conferred;
 - 5.2.2 The reason and basis for the request; and,
 - 5.2.2.1 In the event that good cause is relied upon for such termination or transfer, a summary of the facts giving rise to the assertion of good cause; or
 - 5.2.2.2 In the event that good cause is not the basis for the request, the agreement to pay compensation and to abide by arbitration, if necessary, as provided by this Rule, together with a representation that the request does not violate any of the terms of the distribution agreement with the existing wholesaler.
- 5.3 If good cause is the basis for the request to terminate or transfer distribution rights, the supplier shall provide a copy of the notice required by subsection 5.2 by certified mail, return receipt requested, to any wholesaler affected by its request. Any adversely affected wholesaler may oppose the request by sending written notice of its opposition to the Commissioner by certified mail, return receipt requested, within twenty days after receipt of its copy of the supplier's request. A copy of the notice of opposition shall also be sent to the supplier and any other affected wholesaler(s). The failure to file a timely notice of opposition with the Commissioner shall waive the wholesaler's right to oppose the request to terminate or transfer distribution rights. If the Commissioner receives timely notice of opposition to a request to terminate or transfer distribution rights for good cause, the Commissioner shall hold a hearing to consider the request and the opposition thereto.
- 5.4 If good cause is not the basis for the request to terminate or transfer distribution rights, the supplier shall provide a copy of the notice required by subsection 5.2 by certified mail, return receipt requested, to any wholesaler affected by its request. Following the issuance and receipt of such notice, the parties shall comply with the provisions contained in Section 6.0 of this Rule.

6.0 Reasonable Compensation

- 6.1 Procedure for determining compensation
 - 6.1.1 A supplier may terminate or transfer distribution rights from an existing wholesaler without good cause upon the payment to the existing wholesaler of reasonable compensation for the value of the wholesaler's business related to the terminated or transferred brand or brands. For purposes of determining reasonable compensation under this Rule, the value of the wholesaler's business shall be deemed to be the inventory at laid-in cost of the terminated or transferred brand or brands and its associated good will. "Associated good will" is defined as 1.0 times the wholesaler's average annual gross profits on the terminated or transferred brand or brands for the last three fiscal years or such lesser period during which the brand or brands have been distributed by the terminated wholesaler. For purposes of this Rule "gross profits" shall mean selling price less F.O.B., taxes and freight.

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6.1.2 If the contract between a supplier and the existing wholesaler from which the supplier seeks to withdraw the distribution rights provides for an amount of compensation greater than that provided for by this Rule, the supplier shall be required to compensate the existing wholesaler in that greater amount prior to terminating or transferring such rights.

6.2 Neutral arbitrator

6.2.1 In the event that a supplier and its existing wholesaler are unable to agree on the amount of reasonable compensation to be paid by the supplier in accordance with subsection 6.1 within twenty days after the wholesaler receives a copy of the supplier's request to terminate or transfer distribution rights, as required by subsection 5.4, the dispute shall be submitted to a neutral arbitrator selected by the parties. If they cannot agree on an arbitrator within an additional twenty days, upon the request of either party, the arbitrator shall be appointed by the Commissioner.

6.2.2 By becoming a party to any distribution contract governed by this Rule, such party agrees in advance to proceed to arbitration in accordance with the provisions of this Rule and to recognize the arbitrator as a subordinate designated by the Commissioner to conduct a hearing on the issue of reasonable compensation in accordance with the applicable provisions of the Administrative Procedures Act, 29 **Del.C.** Ch. 101.

6.2.2.1 Upon agreement of the parties, the arbitrator may conduct an informal conference in lieu of a formal hearing in accordance with 29 **Del.C.** §10123.

6.2.2.2 In the case of an informal hearing, as in the case of a formal hearing, a record from which a verbatim transcript can be prepared shall be made.

6.2.3 The written decision of the arbitrator shall be submitted to the Commissioner which shall issue a final order in accordance with the applicable provisions of the Administrative Procedures Act.

6.2.4 The costs of arbitration shall be borne equally by the parties.

6.3 Effective date of termination or transfer

6.3.1 Any termination or transfer of distribution rights for which compensation is required under this Rule shall not be effective and shall not be permitted until the supplier has paid the required compensation to the wholesaler which is having its rights terminated or transferred, unless the supplier posts a bond in the amount of the required compensation, as determined by the final order of the Commissioner.

6.3.2 A supplier may post a bond in the amount of the required compensation during the pendency of an appeal taken by any party affected by the compensation decision. Upon posting of the bond, the termination or transfer of distribution rights may take place.

7.0 Good Cause for Involuntary Termination or Transfer

7.1 Notwithstanding the provisions of the distribution contract between the parties, when, for good cause, a licensed supplier seeks to withdraw involuntarily distribution rights for alcoholic beverages already being sold in this State from a licensed wholesaler by termination of the relationship, transfer of brands or otherwise, and to confer those distribution rights on another licensed wholesaler, the Commissioner shall not approve the request unless the supplier establishes that "good cause", as defined in this Rule, exists to permit such termination or transfer as a result of the acts or omissions of the existing wholesaler.

7.2 Because good cause can only be established based upon the acts or omissions of the existing wholesaler, it is not a sufficient basis that a supplier has obtained the rights to supply such alcoholic beverages in Delaware by means of a merger, purchase of stock, purchase of assets, or other acquisition, or by otherwise becoming the new regional or national supplier of such products. Any supplier obtaining such rights does so subject to the existing distribution relationship in Delaware for such alcoholic beverages.

7.3 The term "good cause" as used in this Rule shall include:

7.3.1 The failure or refusal of the wholesaler to comply substantially with a material provision of the distribution contract (including any provision establishing standards of performance), which provision is essential, fair and reasonable, after having received written notice of such failure from the supplier and having failed within sixty days thereafter to correct substantially such deficiency; provided, however, that such notice and opportunity to correct the deficiency is not required when the deficiency results from a licensed wholesaler's (i) felony conviction, (ii) fraudulent conduct, (iii) sales of the supplier's brands outside of its agreed upon sales territory, or (iv) failure to pay and continued failure to make payment to the supplier after receipt of written notice of the delinquency and demand for payment within the period of time agreed upon by the parties or ten business days, whichever is greater.

- 7.3.2 In the absence of any express provision in the distribution contract establishing standards of performance, the failure of the wholesaler to meet reasonable and fair standards of performance based upon the custom and practice of the industry, after having received written notice of such failure from the supplier and having failed within sixty days thereafter to correct substantially such deficiency; provided, however, that such notice and opportunity to correct the deficiency is not required when the deficiency results from a licensed wholesaler's (i) felony conviction, (ii) fraudulent conduct, (iii) sales of the supplier's brands outside of its agreed upon sales territory, or (iv) failure to pay and continued failure to make payment to the supplier after receipt of written notice of the delinquency and demand for payment within the period of time agreed upon by the parties or ten business days, whichever is greater.
- 7.3.3 The insolvency or bankruptcy of the wholesaler;
- 7.3.4 The dissolution or liquidation of the wholesaler's business;
- 7.3.5 The loss for more than thirty consecutive days by the wholesaler of any federal or state license necessary to carry out the provisions of the distribution contract between the parties whether by revocation, cancellation, failure to renew, suspension, or otherwise;
- 7.3.6 The assignment, transfer or sale of the ownership or substantial assets of the wholesale licensee's business whenever the wholesaler to be substituted is financially unable to assume the obligations under the distribution contract, or lacks the business experience or qualifications necessary to protect the legitimate interests of the supplier. The burden of establishing such inability shall be upon the supplier.

8.0 Dual Distribution

- 8.1 The terms "dual" and "dualing" as used in this Rule mean the distribution of the same brand or brands of alcoholic beverages in Delaware by more than one wholesaler. The term "dualized wholesalers" identifies those wholesalers handling the brand or brands being dualized.
- 8.2 A supplier may supply a new brand or brands of alcoholic beverages in Delaware by dualing such brand or brands provided that no provision of any applicable distribution contract prohibits dualing the product(s), and further provided that the supplier complies with the requirements of subsection 2.1 of this Rule.
- 8.3 A supplier which is already supplying a brand or brands of alcoholic beverages in Delaware as a result of a distribution relationship with one wholesaler may confer dual distribution rights to the product(s) upon one or more additional wholesalers provided that no provision of the original distribution contract prohibits dualing, and further provided that the supplier complies with the requirements contained in subsection 8.4 of this Rule.
- 8.4 If any supplier which is already supplying a brand or brands of alcoholic beverages in Delaware as a result of a distribution relationship with one wholesaler desires to dual such product(s), such supplier shall provide written notice to the Commissioner and all affected wholesalers at least sixty days prior to the proposed start of the dualing. Such written notice shall contain all of the following:
 - 8.4.1 The name of the brand or brands which it seeks to dual and the name and address of the wholesaler selling the product(s) at the time of the request;
 - 8.4.2 The names and addresses of those wholesalers through which it seeks to dual the brand or brands;
 - 8.4.3 A representation that the request to dual is based upon a valid bona fide business reason or reasons of the supplier, and a description of the business reason or reasons giving rise to the request;
 - 8.4.3.1 Reasons that do not constitute "valid bona fide business reasons" include, but are not limited to, the desire to avoid the requirement of establishing good cause for a termination or transfer of distribution rights; the desire to avoid paying compensation for a termination or transfer of distribution rights; any other circumstances that cause it to appear to the Commissioner that the request to dual is merely an attempt to circumvent any of the provisions of this Rule.
 - 8.4.4 A representation that the distribution contract with the existing wholesaler of the brand or brands sought to be dualized permits it to dual such products; and
 - 8.4.5 A representation that it will offer the dualized product(s) upon the same terms and conditions to every dualized wholesaler. No special terms, discounts or conditions shall be afforded to one wholesaler which are not afforded to all dualized wholesalers.
- 8.5 Any existing wholesaler which is affected by a supplier's request to begin dual distribution of a brand or brands may oppose the request by sending written notice of its opposition to the Commissioner by certified mail, return receipt requested, within twenty days after its receipt of a copy of the supplier's request. A copy of the notice of opposition shall also be sent to the supplier and every other affected wholesaler. The failure to file a timely

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notice of opposition with the Commissioner shall waive the wholesaler's right to oppose the supplier's request to dual its product(s).

- 8.6 If the Commissioner receives a timely notice of opposition to a supplier's request to begin the dual distribution of a brand or brands, the Commissioner shall hold a hearing to consider the request and the opposition thereto. The supplier shall not be permitted to begin the dual distribution of its product(s) until such time, following the hearing, as the Commissioner determines that it has complied with the requirements of this Rule and approves the request.