

Opinion No. 58-153

July 23, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr.,
Assistant Attorney General

TO: Representative Arsenio J. Martinez, P. O. Box 871, Espanola, New Mexico

QUESTION

QUESTIONS

1. "Does the Liquor Control Act or any regulation promulgated under said Act absolutely prohibit the extension of credit by a wholesaler to a retailer, dispenser or club for a period of in excess of thirty days from date of delivery of any item of merchandise without regard to whether a so-called 'tied-house' results?"
2. "Does the Act or the regulations prohibit in all instances the extension of credit for a greater period than thirty days?"
3. "Does the Act or the regulations prohibit a wholesaler from continuing to sell alcoholic beverages to a retailer, dispenser or club who has not paid his bills within thirty days, or to deal with such retailer, dispenser or club licensee upon a cash or c.o.d. basis?"
4. "Does the Act or the regulations require retailers, dispensers or clubs to pay their bills to wholesalers within thirty days from date of delivery?"
5. "If a retailer, dispenser or club licensee did not pay his bills to a wholesaler within thirty days from date of delivery, would he be liable for suspension or revocation of his license?"

CONCLUSIONS

1. No.
2. No.
3. No.
4. No.
5. No.

OPINION

ANALYSIS

The statutory foundation upon which Regulation 5 has been promulgated is found as § 46-9-8 (b) (3), N.M.S.A., 1953 Compilation, which provides, as is important to this opinion, as follows:

"It shall be unlawful for any importer, distiller, brewer, rectifier, winer, nonresident licensee, or any kind or class of wholesale licensee, directly or indirectly, or through an affiliate:

. . . .

(b) Tied house: To induce through any of the following means, any wholesale liquor dealer, retail liquor dealer, dispenser or club engaged in the sale of any kind or class of alcoholic liquors to purchase any such products from such person to the exclusion in whole or in part of alcoholic liquors sold or offered for sale by other persons:

. . . .

(3) By furnishing, giving, renting, lending or selling to any wholesale liquor dealer, retail liquor dealer, dispenser or club any equipment, fixtures, signs, supplies, money, **services or other thing of value**, subject to such exceptions as the chief of division of liquor control shall by regulation prescribe, having due regard for public health and welfare, the quantity and value of the articles involved and established trade customs not contrary to the public interest and the purposes of this subsection; . . ." (Emphasis supplied)

And Regulation 5, as we understand, being the basis for the existing credit policy of the Division of Liquor Control, provides in part the following:

"Section 1. Definitions -- As used in this regulation:

. . . .

(d) The term 'services' and the term 'other thing of value' mean and include:

(1) The extension of credit for a period of [in] excess of thirty (30) days from the date any item of merchandise is delivered.

(2) Delivering any merchandise to any retailer without receiving full cash payment therefor if such retailer has not paid to the wholesaler delivering the same the full purchase price in money of [for] all merchandise purchased from, and delivered by, such wholesaler to such retailer more than thirty (30) days prior to such delivery to such retailer of such merchandise.

. . . .

Section 2. Application. -- Except as provided in these regulations, it shall be unlawful and a violation of these regulations, for any industry member, directly or indirectly, or through an affiliate, to induce any retailer engaged in the sale of any kind or class of alcoholic liquors to purchase any such products from such person to the exclusion in whole or in part of alcoholic liquors sold or offered for sale by other persons by furnishing, renting, lending, giving or selling to any retailer any equipment, fixtures, signs, supplies, money, services or other thing of value."

Considering your first question stated, it is necessary to examine the statutory basis for the prohibition, § 46-9-8, supra, and thereupon it is readily discovered that this statute in prohibiting unfair competition among importers, distillers, brewers and wholesalers is specifically concerned with the existence or creation of exclusive outlets and tied house relationships between the aforesaid classes of licensees and the club, retail and dispensary licensees as provided for by the liquor code.

Referring to the language of § 46-9-8, supra, we find that it shall be unlawful for a wholesaler, as well as the other designated type licensees, to induce any retail class of liquor dealer to purchase products from a wholesaler to the exclusion of all other wholesalers, by furnishing and giving "services or other thing of value". It is this last stated phrase, as found in the statute, which is obviously relied upon in the promulgation of Regulation 5. In view of the specific situation or commercial status, as is defined by the terms "exclusive outlet" or "tied house", it becomes apparent that only when these conditions do exist or are created by the giving or extension of credit beyond thirty days may such giving or extension of credit be considered as prohibited and such acts held as unfair competition.

It is pointed out that the unfair competition statute herein considered is in form an adoption of the Federal law, Title 27, § 205, with regard to which numerous opinions and interpretations have been handed down. Generally, the Federal regulations regarding the extension of credit for periods longer than thirty days have held consistently that there is no violation of the Federal regulations unless it be determined as a matter of fact that such extension has effectuated a tied house or exclusive outlet situation. Official interpretations of credit to retailers regulations, C.C.H. Fed., Credit to Retail Regulations, 1956.

Accordingly, it is our opinion that the Liquor Control Act and Regulation 5, duly promulgated under said Act, do not absolutely prohibit the extension of credit by a wholesaler to any retail class of liquor licensee, and further, that the statute and regulation aforesaid become operative only in those determined situations wherein the giving or extension of credit actually produces a tied house situation.

Likewise, it is our opinion, based upon a search of the provisions of the Alcoholic Beverage Code as well as the regulations provided, that no prohibition exists against the extension of credit for a greater period than thirty days, except as hereinbefore pointed out, in those instances where it may be shown that the competitive nature of

supplying retailers, dispensers and clubs is defeated by an extension of credit creating a tied house relationship.

While in nowise controlling under the laws of this state, it might be pointed out that Regulation 8, as promulgated in keeping with the Federal Alcohol Administration Act, provides in part as follows:

" Circumstances in which extension is prohibited.

The extension of credit to a retailer, by any person engaged in business as a distiller, brewer, rectifier, blender, or other producers, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouse man and bottler of distilled spirits, for a period of time in excess of thirty days from date of delivery, is prohibited **when** the extension of such credit induces any retailer engaged in the sale of distilled spirits, wine, or malt beverages to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the cause of interstate or foreign commerce, or if such person engages in the practice of using such means to such an extent as to substantially restrict or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such enducement is to prevent, deter, hinder or restrict other persons from selling or offering for sale any such products of such retailer in interstate or foreign commerce." (Emphasis supplied)

It is interesting to note, particularly in view of the fact that the New Mexico regulation has been obviously copied from the Federal, that the afore-quoted language has been interpreted to mean that there is no prohibition of credit except in those instances where a tied house effect is occasioned by such credit extension.

In answer to questions 3 and 4, our search of the Alcoholic Beverage Code and regulations do not reveal any provision which requires the payment of bills within a thirty day period except again in those cases contemplated by § 46-9-8 and Regulation 5 where it may be shown that competition is eliminated by the inducement of extended credit. Also, we find no requirement for retail payment of liquor bills owed to wholesalers within a thirty day period so long as there is no tendency to encourage purchases by retailers from any one wholesaler to the exclusion of other wholesalers who hold themselves out on a competitive basis and solicit business within the same trade area.

Finally, and in response to your fifth question, it is our opinion that no retailer, dispenser or club licensee subjects himself to a suspension or revocation of his license by failing to pay his bills to a licensed wholesaler within thirty days from the date of delivery. It is true that the grounds provided for the suspension or revocation of licenses as are found in § 46-6-2 and of importance to this opinion, (c) of the aforesaid section provides for suspension or revocation whenever the Chief of Division shall find that any liquor licensee has "refused to comply with any valid rule or regulation adopted and promulgated under the provisions of this act by the chief of division or commissioner

(Bureau of Revenue)." However, in view of the afore-stated conclusions, it must be held as our opinion that only in instances where a tied house situation has been created or exists by reason of the extension or giving of credit that regulation 5 may be looked to as being applicable. Even in such situation, the provisions of Regulation 5, as defined under (d) (1) and (2), apply against the wholesaler rather than against the retailer, dispenser or club licensee.