



STATE OF ARKANSAS
ALCOHOLIC BEVERAGE CONTROL DIVISION

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MEMORANDUM

TO: All Arkansas Beer Wholesalers & Suppliers

Date: September 12, 2012

FROM: Michael W. Langley, Director *WML*
ABC Administration

RE: Rebate/Reimbursement Practices

REBATE/REIMBURSEMENT PRACTICES BULLETIN

The Director of the Arkansas Alcoholic Beverage Control Division (ABC) issues this Bulletin to address the use of certain rebates and reimbursement practices by beer manufacturers licensed in Arkansas. Specifically, there is one particular rebate method that has been used in the market that runs contrary to ACT 783 of 2009 (ACA § 3-5-107) and also constitutes reach back pricing, which is prohibited by ABC regulation 2.28(11). The purpose of this bulletin is to describe that rebate method and explain how it is prohibited by Arkansas law.

Like other rebate programs used in Arkansas, the rebate method in question provides for a rebate from a manufacturer to a wholesaler if the wholesaler discounts its price on a particular product to its retailers. However, under the rebate method in question in order to receive the rebate on a product, the wholesaler must adhere to a recommended price to retailer (RPTR) that is set by the manufacturer. More precisely, in order to obtain a rebate, the wholesaler's discounted price to the retailer must be less than the recommended price to retailer (RPTR). If the wholesaler's discounted price exceeds the RPTR less the manufacturer's suggested discount, the rebate decreases and is actually eliminated if the wholesaler's discounted price exceeds the RPTR. The following are some examples of this rebate method:

Example 1:

- RPTR for a 30 pack of beer is \$20.00
- If the wholesaler utilizes the RPTR , and discounts the cost to the retailer by \$1.00 it will receive a rebate of 50% of the discount up to a maximum \$1.00 discount, for maximum potential rebate of \$.50
- Wholesaler frontline price to retailer is \$21.50
- Discounted price to retailer is \$20.50
- Since the discounted price to the retailer exceeds the RPTR there is no rebate in this particular case

Example 2:

- RPTR for a 30 pack of beer is \$20.00
- If the wholesaler utilizes the RPTR and discounts the cost to the retailer by \$1.00, it will receive a rate of 50% of the discount (50 cents)
- Wholesaler frontline price to retailer is \$20.50
- Discounted price to retailer is \$19.50
- The discounted price is lower than the RPTR, but only .50 cents lower as opposed to \$1.00 lower as desired by the manufacturer; as a result, the wholesaler only gets a rebate of 50% of .50 cents, for a rebate of .25 cents per 30 pack

Example 3:

- RPTR for a 30 pack of beer is \$20.00
- If the wholesaler utilizes the RPTR and discounts the cost to the retailer by \$1.00, it will receive a rebate of 50% of the discount (50 cents)
- The wholesaler adopts the RPTR of \$20.00
- Discounted price to retailer is \$19.00
- Given that the wholesaler adopted the RPTR of \$20.00, and discounted it to \$19.00, it will receive the maximum rebate of 50% of \$1.00, for a total rebate of .50 cents per 30 pack

In summary, if a wholesaler's discounted price to a retailer exceeds the RPTR, there is no rebate. If the wholesaler's discounted price comes in below the RPTR, it will get a rebate, but the amount will vary depending on its relation to the RPTR.

Act 783 of 2009, titled "Unlawful pricing by brewers and manufacturers," makes it unlawful for beer manufacturers to "discriminate in price, allowance, rebate, refund, commission, or discount between distributors or wholesalers licensed in Arkansas. ACA § 3-5-107(b)(1). The Act defines "discriminate" as the "granting of a more favorable price, allowance, rebate, refund, commission or discount to one (1) Arkansas distributor or wholesaler than to another Arkansas distributor or wholesaler." ACA § 3-5-107(a).

The rebate method described in this Bulletin results in varying rebates among wholesalers, which is prohibited by ACA § 3-5-107(a).

ABC regulation 2.28(11) prohibits the industry practice known as “reach-back pricing.” In 2010, the Texas Alcoholic Beverage Commission (“TABC”) issued a “Marketing Practices Bulletin” speaking to the issue of “reach back pricing.” As stated in the TABC Bulletin, a manufacturer is free to set its own prices, but the price changes must be based on factors other than a wholesaler’s increase in the price they charge to a retailer. Likewise, the Director finds that a manufacturer is free to set its own rebates, but changes in the rebate amount must be based on factors other than a wholesaler’s increase in the price they charge to a retailer. This particular rebate method is dependent on the price the wholesaler charges its retailers. Such a method is prohibited by Arkansas law.

The Director finds the Texas Bulletin persuasive and hereby adopts it for the purpose of interpreting the Arkansas prohibition on “reach-back pricing.” The Director finds that the rebate method addressed in this Bulletin constitutes prohibited reach-back pricing. In using this method, a manufacturer calculates its rebate based upon discounts provided below the RPTR. If the wholesaler’s price to the retailer higher than wholesaler receives a reduced rebate, or it is eliminated entirely.

That this rebate method constitutes reach-back pricing is further bolstered by the fact that, when the maximum discount is not provided below the RPTR, the amount of the rebate held back by the manufacturer is identical to the additional amount realized by the wholesaler as a result of its mark-up in price to the retailer.

Arkansas has adopted and follows the three-tier system of distribution for alcoholic beverages in part to protect a wholesaler’s right to independently set its prices. The purpose of this Bulletin is to emphasize that the ABC will strictly enforce the prohibitions of ACA § 3-5-107 and ABC regulation 2.28(11) regarding reach-back pricing. The Director finds that the rebate method described herein runs afoul of both those provisions and is prohibited in Arkansas.

Other rebate and reimbursement methods utilized by beer manufacturers have not been challenged. Therefore, these other methods appear to be acceptable as standard industry practice. This conclusion is made without a formal review of any other method and is subject to a formal decision by the ABC should any other method be challenged.