

STATE OF NEW YORK
LIQUOR AUTHORITY

To: All suppliers¹, distributors² and licensed on-premises retailers

Subject: Gifts and Services Law: Guidance on “buy-back,” “bar spend,” private and promotional events conducted at retail establishments

The Alcoholic Beverage Control Law (“ABCL”) contains various provisions governing the relationship between the “three tiers” (suppliers, distributors and retailers) of the alcoholic beverage industry. Among those provisions is the Gifts and Services Law, ABCL §101(1)(c). That statute prohibits suppliers and distributors from making any gift or rendering any service to a retailer which “in the judgment of the liquor authority may tend to influence such licensee to purchase the product” of the supplier or distributor.

There are both statutory and regulatory exceptions to the prohibition contained in §101(1)(c). For example, Part 86 of the Rules of the Authority contains a list of items and services that a supplier or distributor may provide to a retailer. Apart from the exceptions specifically set forth in either the law or the regulations, the Authority generally considers anything given by a supplier or a distributor to a retailer as an improper attempt to influence the retailer to buy the supplier’s or distributor’s products.

Given allegations of widespread abuse of the Gifts and Services Law, as well as other violations of the provisions governing the relationship between the three tiers, the Attorney General’s Office, together with the Authority, conducted an investigation into the trade practices of certain suppliers, distributors and retailers. The result of that investigation was a series of court orders imposing penalties on those entities. Those orders (commonly referred to as the “Consent Orders”) also set forth activities that the Authority considers to be violations of the Gifts and Services Law. In addition, the Consent Orders contain examples of permissible dealings between suppliers and distributors on one hand, and retailers on the other.

¹ For purposes of this advisory, “supplier” means entities licensed in this state to manufacture alcoholic beverages, as well as: other domestic and foreign manufacturers of alcoholic beverages, importers, and other entities that sell alcoholic beverages, directly or indirectly, to licensed wholesalers for distribution in this state.

² For purposes of this advisory, “distributor” means a licensed wholesaler.

It should be noted that, while only certain entities were named in the Consent Orders, the Authority considers the orders to be a statement of permissible and impermissible trade practices. Accordingly, the Authority expects all suppliers, distributors and licensed retailers to abide by the terms of the Consent Orders. Licensees that engage in conduct that is prohibited by the Consent Orders are subject to disciplinary action by the Authority. This includes not only suppliers and distributors who improperly provide gifts and services to retailers, but retailers who accept, or solicit, such gifts or services.

Among the topics addressed in the Consent Orders is the ability of suppliers and distributors to purchase alcoholic beverages for consumers from a retailer. The Consent Orders contain a general prohibition against such activity. However, the orders contain three exceptions to that general prohibition. The exceptions apply only to purchases made from a licensed on-premises retailer. First, a supplier or distributor may purchase an alcoholic beverage for a consumer or consumers on an individual or incidental basis.³

Second, a supplier or distributor may purchase alcoholic beverages for its employees, private guests, or employees of other suppliers, distributors or retailers during certain events conducted by the supplier or distributor. Those events are: bona fide business meetings or business entertainment; or private invitation-only events closed to the general public. The events must take place at either a licensed on-premises retailer's establishment or a location for which a caterer's permit has been issued.

Third, a supplier or distributor may purchase alcoholic beverages at a promotional event that is open to the general public. The Consent Orders provide that the supplier or distributor may spend no more than \$500 (plus a 20% wait staff gratuity) at each event. In addition, a supplier or distributor may not conduct more than six events annually at any particular licensed establishment. All three exceptions prohibit the supplier or distributor from paying more than the retailer's regular price for the alcoholic beverages.

The Consent Orders were issued in late 2006 and early 2007. Since that time the Authority has received inquiries regarding the interpretation of certain provisions of the Consent Order. In particular, a number of questions and issues have been raised regarding the application of the three exceptions discussed above.

³ For example, a salesperson for a supplier or distributor may purchase a drink for an individual patron of a licensed retailer while such salesperson is in the premises taking an order.

Given the passage of time, as well as input from the industry subsequent to the issuance of the orders, the Authority is also of the view that certain modifications to the terms of the orders would be appropriate. This advisory is issued to provide guidance to industry members and agency staff specifically with respect to the provisions of the Consent Orders addressing the ability of suppliers and distributors to buy alcoholic beverages from licensed on-premises retailers.⁴

Purchases for consumers on an individual or incidental basis

The provisions of the Consent Orders allowing for such purchases remain unchanged. Suppliers, distributors and retailers are reminded that these provisions are not intended to be used for promotional type events, such as discussed below. The purpose of the provisions is to allow for the occasional purchase of alcoholic beverages by employees of the supplier or distributor at the retail establishment for their own consumption, or (as described in footnote #3) for sales staff to make occasional purchases for individual patrons of a retailer.

Business meeting and private events

As noted above, “business meetings or business entertainment” and “private invitation-only events closed to the general public” are exceptions to the general prohibition against a supplier or distributor purchasing alcoholic beverages from a retailer. The question of what constitutes “business meetings or business entertainment” and “private invitation-only events closed to the general public” has been the focus of much of the discussion regarding the ability of suppliers and distributors to buy alcoholic beverages from licensed on-premises retailers.

- Business meetings or business entertainment

The Authority interprets “business meetings or business entertainment” to mean a gathering of the supplier’s or distributor’s employees, and/or representatives from entities that conduct business with the supplier or distributor. This includes other suppliers, distributors and licensed retailers. The purpose of the gathering must be for a legitimate business purpose. For example, a discussion concerning product sales, the introduction of a new product, etc. Holiday parties and other events to commemorate special occasions are not considered business meetings or business entertainment. There are no restrictions regarding the amount

⁴ A copy of the Consent Order issued with respect to suppliers is attached hereto. The provisions regarding the ability of suppliers and distributors to buy alcoholic beverages from licensed on-premises retailers are the same in each of the three orders.

that a supplier or distributor may spend for such an event, or the number of times a supplier or distributor may use a particular retailer's establishment for such events. However, these gatherings must be conducted under the following guidelines:

1. Such events shall be held in an area that is reserved for invitees. Said area may consist of as little as one reserved table if such an arrangement is commensurate with the number of invitees.
 2. An employee of the supplier or distributor must be present during the entire event.
 3. Retail licensees and their employees may be invited. The supplier or distributor may send a general invitation for the event to all employees of a retail licensee.
 4. The presence of media representatives and/or the circulation of generic media advisories shall not affect the determination of whether or not an event is being conducted for a business purpose.
- Private invitation-only events closed to the general public

A "private invitation-only event closed to the general public" is not conducted for a business purpose. However, these events are not meant to be used for promotional purposes by a supplier or distributor, or to otherwise circumvent the provisions of the Consent Orders. Accordingly, to provide clarification as to what constitutes a bona fide "private invitation-only event," the Authority adopts the following guidelines:

1. A "private invitation-only event closed to the general public" is a gathering of invitees who have an identifiable affiliation or relationship with the supplier or distributor (e.g., a party for employees, vendors or business associates), or a common affiliation or relationship with one another (e.g., an event for journalists, sports teams or non-profit organizations). A large gathering of a group of consumers or potential consumers, without meaningful commonality other than the supplier's or distributor's attempt to market or target a demographic, shall not be considered a "private invitation-only event closed to the general public."
2. Invitees to a "private invitation-only event closed to the general public" shall be solicited by a communication from the supplier or distributor sent directly

to specific individuals of legal drinking age, by individual name. The supplier or distributor may elect to allow each such named individual to bring one guest.⁵ The solicitation may be made by a variety of means, such as letter, email, or other digital communication, phone call, delivery service or in person. The following may not be used to solicit attendees: invitations contained in any form of media advertisements; generic communications advising anyone wishing to attend the event to register as an invitee; or “mailing lists” of consumers either obtained or created by the supplier or distributor.

3. A “private invitation-only event closed to the general public” shall be held in an area that is reserved for invitees. Said area may consist of as little as one reserved table if such an arrangement is commensurate with the number of invitees.
4. An employee of the supplier or distributor must be present during the entire event.
5. Retail licensees and their employees may be invited. However, the supplier or distributor may not send a general invitation for the event to all employees of a retail licensee or to a chain of retail licensees with the exception of invitations to retailer education seminars held pursuant to §86.8 of the Rules of the Authority.
6. The presence of media representatives and/or the circulation of generic media advisories shall not affect the determination of whether or not an event is a *bona fide* “private invitation-only event closed to the general public.”

Promotional events open to the general public

As noted above, the Consent Orders allow a supplier or distributor to purchase alcoholic beverages at a promotional event that is open to the general public. The Consent Orders provide that the supplier or distributor may spend no more than \$500 (plus a 20% wait staff gratuity) at each event. In addition, a supplier or distributor may not conduct more than six events at any particular licensed establishment.

⁵ For events held solely for employees of the supplier or distributor, invitees may also include the employee’s immediate family members.

The Authority finds that it is appropriate, based on the passage of time and after hearing the concerns of the industry, to ease the restrictions imposed by the Consent Orders. Therefore, notwithstanding the provisions of the Consent Order, the Authority will allow suppliers and distributors to conduct such events under the following conditions:

1. The supplier or distributor may spend no more than \$700.00 (excluding a wait staff gratuity of not more than 20%) for the purchase of alcoholic beverages.
2. The supplier or distributor may not purchase food, non-alcoholic beverages or any other items from the retailer.
3. The supplier or distributor may conduct no more than ten events per calendar year at each licensed premises.
4. Suppliers and distributors may advertise such events, identifying the date, time and location. They may also send invitations to members of the general public for such events. However, attendance may not be restricted only to members of the general public who have received invitations.

Suppliers and distributors will no longer be required to submit statements after each such event to the Authority. Instead, each supplier and distributor shall be required to maintain, for a period of two years from the date of each event, a record of the event that includes: the date, time, location, and duration of the event; the brand(s) that were purchased; and the name(s) of the persons or agents who conducted the event on behalf of the supplier or distributor.

Promotional invitational events open to the general public

Based on input from industry members, the Authority is aware that promotional events on a scale much larger than those envisioned in the Consent Orders are sometimes appropriate to successfully market alcoholic beverages. To allow for such events to be conducted in compliance with the Gifts and Services Law, the Authority hereby adopts a fourth exception to the general prohibition against suppliers and distributors purchasing alcoholic beverages for consumers from a retailer. Such events, often referred to as a “brand experience,” shall be subject to the following conditions:

1. The supplier or distributor may spend no more than \$10,000.00 (excluding a wait staff gratuity of not more than 20%) for the purchase of alcoholic beverages, non-alcoholic beverages and food from the retailer. A supplier or distributor may seek, in advance, permission from the Authority to conduct an event at which it would spend more than \$10,000.
2. The supplier or distributor may not use the same licensed retailer (either the retailer's licensed premises or the retailer's services under a caterer's permit) for more than six events per calendar year.
3. Attendees to such events must be invited. The supplier or distributor may solicit invitees by a communication from the supplier or distributor sent directly to specific individuals of legal drinking age, by individual name. The solicitation may be made by a variety of means, such as letter, email, or other digital communication, phone call, delivery service or in person. The following may be used to solicit attendees: invitations contained in any form of media advertisements; generic communications advising anyone wishing to attend the event to register as an invitee; and "mailing lists" of consumers either obtained or created by the supplier or distributor.
4. The supplier or distributor may advertise such events, identifying the date, time and location.
5. The supplier or distributor may elect to allow each such named individual to bring one guest.
6. The supplier and distributor shall be required to maintain, for a period of two years from the date of each event, a record of the event that includes: the date, time, location, and duration of the event; the brand(s) that were purchased; and the name(s) of the persons or agents who conducted the event on behalf of the supplier or distributor.
7. Consistent with other limitations imposed on their involvement in marketing events, beer distributors may not conduct these "brand experience" events.

Events where the supplier or distributor provides the alcoholic beverages

As noted above, this Advisory addresses situations where the supplier or the distributor is purchasing alcoholic beverages from a retailer. If the supplier or distributor is donating alcoholic beverages for an event being conducted by a not-

for-profit organization, the restrictions set forth in this Advisory are not applicable. It does not matter whether the event is being held at a licensed premises, or at a non-licensed venue with the appropriate permit issued by the Authority. It also does not matter whether the supplier or distributor receives any promotional benefits in exchange for the donation to the organization. However, the supplier or distributor cannot select the retail license catering the event.

In addition, if a supplier or distributor is conducting a private invitation-only event closed to the general public, or a “brand experience” event at a non-licensed venue, the restrictions set forth in this Advisory are not applicable if the supplier or distributor is providing the alcoholic beverages. The supplier or distributor may hire a retail license to serve the alcoholic beverages and provide food to attendees.

In either of the examples provided above, the supplier or distributor must insure that the appropriate permit or license is in effect for the venue and any unused alcoholic beverages provided by the supplier or distributor must be removed after the event.