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ADVISORY #2018-3

To: All suppliers¹ and distributors² of liquor and wine

Subject: Sealed, pre-wrapped packages

The purpose of this advisory is to provide guidance to the industry regarding the ability of suppliers and distributors to sell to retailers sealed pre-wrapped packages containing: (1) several types of scheduled alcoholic beverages; and (2) individual bottles of a scheduled alcoholic beverage and other merchandise. This advisory replaces and rescinds Advisory 2016.³ To the extent that any provision of this Advisory conflicts with a provision of the Consent Orders, suppliers, distributors and retailers should be guided by the provisions of this Advisory.

Discussion

Alcoholic Beverage Control Law (“ABCL”) §101-b requires that liquor and wine sold in New York State be "price posted". There are two required price postings. The "wholesale schedule"⁴ lists the price at which licensed wholesalers may buy the product. The "retail schedule"⁵ lists the price at which licensed retailers may buy the product. Each of these schedules must contain the bottle and case price that the buyer must pay for the "item." In each instance, the price posted must “be individual for each item and not in “combination” with any other item.” The term “item” is not defined in this statute or in the Act.

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 or a licensed manufacturer distributing product to licensed retailers.

³ Advisory #2016-9 replaced and rescinded Advisory #2013-1, which replaced and rescinded Bulletin No. 583.

⁴ ABCL §101-b(3)(a)

⁵ ABCL §101-b(3)(b)

The Authority interprets an "item" to be a bottle or case of a specific liquor or wine. Pursuant to ABCL §101-b(3)(a), an item can also be a bottle of liquor or wine combined with certain non-alcoholic products in a pre-wrapped package. In addition, the Authority, under Bulletin 583, has allowed a licensed distiller, winery or wholesaler that owns more than one brand to combine two or more of those brands of a single brand owner into a pre-wrapped package (otherwise referred to as a "combo pack"). The combo pack then became an "item" that could be price posted.

As noted above, in the time since Bulletin No. 583 was issued, industry members have sought guidance from the Authority regarding whether certain conduct is permissible under ABCL §101-b and that directive. To provide such guidance, the Authority hereby adopts the following policy with respect to the sale of sealed pre-wrapped packages:

With respect to sealed, pre-wrapped packages containing an individual bottle of a scheduled alcoholic beverage and other merchandise:

- 1) As set forth in ABCL §101-b(3)(a), an "item" includes "a sealed, pre-wrapped package consisting of a sealed container of liquor, wine or wine product and other merchandise reasonably used in connection with the preparation, storage or service of liquor, wine or wine products provided that such other merchandise shall not be potable or edible." For purposes of this advisory, this shall be referred to as a "value added pack".
- 2) The value-added pack must contain only one container of a brand of liquor or wine which has been registered or authorized in accordance with the provisions of ABCL §107-a. Where a label has been issued a brand label registration number, the number must be set forth in the price schedule listing pertaining to such value-added pack.
- 3) The value-added pack must contain only one bottle of liquor or wine in combination with the non-potable and non-edible merchandise.
- 4) The scheduled item price for the value-added pack may be different than the scheduled price for the single bottle of liquor or wine.
- 5) The value-added pack must be posted as an item on both the schedule of prices to licensed wholesalers and the schedule of prices to licensed retailers.
- 6) If the value-added package is limited in availability, it shall be reported to the Authority in the same manner as other limited availability items, by email to the Wholesale Bureau (limited.availability@sla.ny.gov) setting forth the method of allocation.

With respect to sealed, pre-wrapped packages containing different scheduled alcoholic beverages:

- 7) In addition to the sealed, pre-wrapped packages provided for in ABCL §101-b(3)(a), the Authority, subject to the provisions of this advisory, will allow the following sealed, pre-wrapped packages containing two or more bottles of liquor and/or wine to be sold to licensed retailers: (a) those assembled and packaged by the supplier (or a third party on

behalf of the supplier) and not by its distributor; and intended to be disassembled by the licensed retailer for resale; (b) those assembled and packaged by the supplier (or a third party on behalf of the supplier) and not by its distributor; and clearly intended to be sold to the end consumer by the licensed retailer as a complete package and not to be disassembled by the licensed retailer prior to sale to the consumer; (c) those assembled and packaged by the distributor of the supplier with the approval of the supplier.

- 8) For purposes of this advisory, the three types of sealed pre-wrapped packages referred to in #7 above shall be referred to as a “combo packs”.
- 9) All such combo packs must be posted as an item on both the schedule of prices to licensed wholesalers and the schedule of prices to licensed retailers. Those assembled and packaged by the supplier’s distributor shall be identified as such on the price schedules using a designation determined by the Authority. Such designation shall be accompanied by a notation that such items are not sold as a package to the wholesaler but are assembled by the wholesaler from its own inventory.
- 10) A combo pack must contain only brands of liquor and/or wine from a single brand owner⁶ which have been registered or authorized in accordance with the provisions of ABCL §107-a. Where a label has been issued a brand label registration number, the number must be set forth in the price schedule listing pertaining to such combo pack.
- 11) Each bottle contained in such combo pack must be separately available to licensed retailers in accordance with the bottle and case prices posted in the schedule.
- 12) The scheduled item price for any such combo pack must be: no greater than the sum of the individual bottle prices for each bottle contained in the package; and no lower than the sum of the lowest volume discount prices for each bottle contained in the package. No quantity discounts can be posted for the item.
- 13) No combo pack may contain more than the equivalent of 12 liters. The combo pack shall constitute an item for purposes of price posting.
- 14) Where one or more bottles of liquor are packaged with one or more bottles of wine in a combo pack, the item price for the combo pack must be listed on both the schedules of liquor prices and the schedules of wine prices.
- 15) The inclusion of each combo pack on the schedule of prices to wholesalers shall signify the brand owner and/or brand owner agent’s approval of such item.

⁶ For the purposes of this advisory, “brand owner” shall mean the person who would be authorized to appoint an agent to file: (a) an application for brand label approval under ABCL §107-a(4)(b); or (b) a schedule of prices to licensed wholesalers under ABCL §101-b(3)(a). A brand owner who is not licensed by the Authority must designate an appropriately licensed wholesaler to act as its exclusive brand agent for the purpose of filing the required schedules. The licensed wholesaler thus designated as brand agent must be a true agent of the brand owner. Where the brand owner or the brand owner’s exclusive agent does not register the brand, the brand must be registered, and schedules must be filed, by one of the persons listed in ABCL §107-a(4)(b).

- 16) For those combo packs assembled and packaged by the supplier and not by its distributor and intended to be disassembled by the licensed retailer for resale, all such combo pack shall be price posted as limited in availability and reported to the Authority in the same manner as other limited availability items, by email to the Wholesale Bureau (limited.availability@sla.ny.gov) setting forth the method of allocation.
- 17) For those combo pack assembled and packaged by the supplier and not by its distributor and intended to be disassembled by the licensed retailer for resale, if the distributor's inventory of such combo pack has been depleted, the distributor shall, at the request of any licensed retailer seeking to purchase such combo pack, assemble and package up to two of such combo pack for such retailer. Any such licensed retailer must meet the criteria set forth in the distributor's method of allocation submitted to the Authority and the distributor may not refuse to sell the combo pack to any such licensed retailer who agrees to pay for in cash or credit upon terms which conform to the statute and are satisfactory to the distributor.
- 18) For those items assembled and packaged by the supplier's distributor pursuant to paragraph 7(c) above, no more than two of each combo pack may be offered to any licensed retailer in any month, and the distributor may not refuse to sell such combo packs to any licensed retailer who agrees to pay for it in cash or credit upon terms which conform to the statute and are satisfactory to the distributor.
- 19) For those combo packs items assembled and packaged by the supplier's distributor, a commercially reasonable charge shall be assessed by the distributor and paid by the supplier for the work performed by the distributor on assembling the combo pack. The distributor may assemble the item by either wrapping the bottles (up to 12 liters) into one pre-packaged unit or placing the loose bottles that comprise the combo pack into a single carton and sealing same prior to delivery to the retailer. However, in the instance of a combo pack consisting of loose bottles which are sealed into a box with other retailer-ordered product before delivery to the retailer, there will be no charge to the supplier by the distributor for the assembly of the item.
- 20) For purposes of complying with the requirement of ABCL §101-b(3)(a) and this Advisory that all liquor and wine "items" be sold to retailers as sealed, pre-wrapped packages, the complete combo pack including any loose bottles ordered by a retailer as a price posted combination package "item" pursuant to paragraph 18 above must be delivered to the retailer in a single delivery. However, if there is room in the package, bottles which are not part of the combo pack may be included therein. While price-posted split case charges may be applied against other loose bottles, no split case charge shall be applied against the bottles that comprise the combo pack. In addition, each such combo pack must be price posted and invoiced to the retailer as an "item."
- 21) For those combo packs assembled and packaged by the supplier and clearly intended to be sold to the end consumer by the licensed retailer as a complete package and not to be disassembled by the licensed retailer prior to sale to the consumer, any such combo pack may be, but does not have to be, posted as limited in availability. If such combo pack is posted as such, it must be reported to the Authority in the same manner as other limited

availability items, by email to the Wholesale Bureau (limited.availability@sla.ny.gov) setting forth the method of allocation.

- 22) Nothing in this Advisory should be read as to require that distributors or suppliers must offer combo packs for sale to retailers. However, the provisions of this Advisory shall apply to any combo packs that are offered for sale. In those situations where a supplier must (see paragraph 17 above) or may (see paragraph 18 above) offer up to two of the combo packs to retailers, the same number of combo packs must be made available to each retailer.

This matter was heard and determined by the Members of the Authority at a Full Board meeting held on July 11, 2018 before Chairman Vincent Bradley, Commissioner Lily Fan, and Commissioner Greeley Ford. The above written advisory was approved by Chairman Bradley on behalf of the Members of the Authority on July 19, 2018.

Dated: 7/20/18



Thomas J. Donohue
Secretary to the Authority