

NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF 08/20/2019
REFERRED FROM: SECRETARY'S OFFICE

2019-01699B

REASON FOR REFERRAL
REQUEST FOR DIRECTION

PROPOSED ADVISORY REGARDING
LEASES, MANAGEMENT AGREEMENTS
AND OTHER ARRANGEMENTS BETWEEN
LICENSEES AND THIRD PARTIES
PROVIDING SERVICES TO LICENSEES
REGARDING THE SALE OF ALCOHOLIC
BEVERAGES

The Members of the Authority at their regular meeting held at the Zone 2 Albany Office
on 08/20/2019 determined:



State Liquor Authority


ANDREW M. CUOMO
Governor

VINCENT G. BRADLEY
Chairman

LILY M. FAN
Commissioner

GREELEY FORD
Commissioner

To: Members of the Authority

From: Thomas J. Donohue, Secretary to the Authority 

Subject: Proposed Advisory regarding third party agreements

Date: August 12, 2019

Attached for your review is a proposed Advisory intended to provide guidance to the industry in situations where a third party is sharing in a licensee's profits.

It is respectfully suggested that the Members of the Authority defer any action on this proposal and hold the matter over to a future Full Board meeting to allow sufficient time for the submission of comments from the public and the industry.



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ADVISORY #2019-x

To: All licensees

Subject: Leases, management agreements and other arrangements between licensees and third parties providing services to licensees regarding the sale of alcoholic beverages

The purpose of this advisory is to provide guidance to applicants and licensees who are, or may become, involved in arrangements with third parties that provide services to the licensee related to the licensed business. These third parties include, but are not limited to:

- the licensee's landlord;
- managers of the licensee's business;
- delivery services;
- e-commerce/internet platforms that provide advertising or accept or forward orders for alcoholic beverages for the licensee;
- promotion companies that offer coupons, discounts, etc. for the licensee's products;
- companies that host, support or otherwise maintain a licensee's internet website, smartphone application, social media or other electronic platform; and
- fulfillment centers that store, pack, ship and/or otherwise arrange for the delivery of a licensee's products to consumers.

In general, any person who is sharing in the profits from a business holding a license to sell or manufacture alcoholic beverages must be disclosed to the Authority and included as a principal on the license. The Authority does make a distinction between "flat fee" arrangements (where the third party is paid a pre-determined amount that is not dependent in any way on the licensee's sales) and "percentage" arrangements where the third party's compensation is a percentage of the profits and is therefore dependent on the profits generated by the licensee.

In addition, the Authority has allowed certain third parties to obtain a limited percentage of the licensee's profits without the need for the third party to be included as a principal of the licensed entity. For example, a lease entitling the landlord to a percentage of the profits from the

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tenant's licensed business will not require the landlord to be added as a principal of the licensed entity if the percentage does not exceed 10% of gross profits and the lease gives the landlord no other financial interest in, or control over, the licensed business. The lease may, of course, give the landlord traditional rights as the property owner over the real property where the licensed business is located.

The Authority has also allowed leases with a percentage exceeding 10% but no more than 20% when the landlord is a not-for-profit corporation, governmental agency or public authority provided the lease gives the landlord no other financial interest in, or control over, the licensed business. The Licensing Board may act on such matters without the need for review by the Members of the Authority.

Prior to 2011, applicants were required to demonstrate control over the licensed premises by way of either a lease or a deed. Since 2011 applicants can satisfy this provision with a management or other agreement that gives the applicant control over the food and beverage operations at the licensed premises. The Authority's policy set forth above regarding leases is applicable to such agreements.

In the view of the Members of the Authority, the same analysis should be applied to other arrangements between licensees and other third parties who provide services to the licensed business. Accordingly, the Authority adopts the following policy regarding all such relationships between licensees and those third parties:

- For purposes of this Advisory, a "flat fee" shall mean that the third party is compensated at a pre-determined fee that is not dependent on the monetary value of sales made by the licensee or the number of sales made by the licensee.
- For purposes of this Advisory, an "agreement that entitles the third party to a percentage" shall mean any agreement where the third party's compensation for services to the licensee is based on the monetary value of sales made by the licensee or the number of sales made by the licensee. This includes any agreement related to a percentage or number of sales, whether it is limited to sales of alcoholic beverages or excludes sales of alcoholic beverages.
- Any agreement that entitles the third party to a "flat fee" for its services is permissible and will not require the third party to be included as a principal on the license, provided that "flat fee" is commercially reasonable in the view of the Authority. In making a determination of commercial reasonableness, the Authority will look to among other things the market rate for the service being offered and whether the amount of the flat fee would tend to give significant control to the third party over the licensed business.
- Any agreement that entitles a third party to a percentage not exceeding 10% of the licensee's profits is permissible and will not require the third party to be included as a principal on the license.

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- Any agreement that entitles a not-for-profit organization, government entity or public authority to a percentage not exceeding 20% of the licensee's profits is permissible and will not require the third party to be included as a principal on the license.

Except as provided above, the Licensing Board will deny any application that includes an agreement entitling a third party a percentage of the profits from the licensed business. Provided, however, that the applicant may request that the application be forwarded to the Members of the Authority for their review. In such matters, the applicant must demonstrate good cause why the third party should not have to be included as a principal of the licensed entity. For purposes of this advisory, good cause shall not include a situation where the third party is legally prohibited from holding the license in question.

Except as provided above, a licensee with an agreement entitling a third party a percentage of the profits from the licensed business will be considered to be availing its license and subject to disciplinary action by the Authority. Provided, however, that a licensee or third party may submit a request for a declaratory ruling to the Members of the Authority for their review. In such matters, the applicant must demonstrate good cause why the third party should not have to be included as a principal of the licensed entity. For purposes of this advisory, good cause shall not include a situation where the third party is legally prohibited from holding the license in question.

Please note that this advisory only addresses the financial compensation paid by the licensee to the third-party provider. Any agreement between a licensee and third-party provider shall be subject to review to determine whether the agreement affords the third-party provider significant control over the licensee's business that would require the third-party provider to be included as a principal on the license.

To the extent that this Advisory conflicts with any prior declaratory ruling issued by the Members of the Authority, applicants and licensees are instructed that the policy set forth herein shall pre-empt such rulings as of that date of this Advisory and shall apply to ant agreements that have not been previously approved by the Authority.

This matter was heard and determined by the Members of the Authority at a Full Board meeting held on _____, 2019 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 _____, 2019.

Dated:

Thomas J. Donohue
Secretary to the Authority

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