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ADVISORY #2021-6

Subject: Guidance regarding wholesalers' price-posting of, and waiver of, late fee charges

The following guidance is provided to wholesale licensees who include in their price postings and/or terms of sale, or otherwise charge, a service fee, late fee, or other charge to alcoholic beverage retailers or wholesalers ("Purchasers") for balances that are unpaid by their due date (hereinafter, "Late Fee Charges").

It has come to our attention that some liquor and wine wholesalers who include Late Fee Charges in their price postings and/or terms of sale – for example, a service charge of 1% per month for a past due balance – have a practice of forgiving or waiving some or all of these charges. We are informed that they may either do so in connection with the payment of the late unpaid balance, or that they otherwise negotiate the waiver of these fees, in a manner that may not be applied uniformly to all Purchasers.

Such waivers raise questions about preferential treatment amongst retailers that would violate the anti-discrimination and gifts and services provisions of the Alcoholic Beverage Control Law ("ABCL"). There is also a more fundamental question about whether Late Fee Charges are part of the "price" that is posted: if so, there are additional statutory provisions that would make it unlawful to waive such charges. Guidance as to the legality of the waiver of Late Fee Charges is necessary not only for clarity, but also to ensure fair competition amongst wholesalers who include such charges, as some routinely provide such waivers to Purchasers and others, believing waivers to be unlawful, do not and lose customers as a result.

No section of the ABCL expressly references or discusses Late Fee Charges. Plausible arguments can be advanced on both sides of this "right to waive" issue based on the language of provisions of law, rules, and guidance that address arguably related issues. For example, if one assumes that a Late Fee Charge is part of the "price" for alcoholic beverages, the following provisions would appear to make waiver illegal.

ABCL § 101-b provides, in pertinent part:

2. It shall be unlawful for any person who sells liquors or wines to wholesalers or retailers

- (a) to discriminate, directly or indirectly, in price, in discounts for time of payment or in discount on quantity of merchandise sold....
- (b) to grant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement of any kind whatsoever, except a discount or discounts for quantity of liquor or for quantity of wine and a discount not in excess of one per centum for payment on or before ten days from date of shipment.

Section 65.1 of the Rules of the State Liquor Authority provides, in pertinent part:

- (a) Except with the written permission of the Liquor Authority first obtained...:
 - (2) No manufacturer or wholesaler shall sell any brand of liquor or wine to a retailer nor . . . unless a schedule of prices to retailers has been filed with the Liquor Authority by the seller and is then in effect and the sale and purchase is made in conformance with the terms and conditions of such schedule.

Divisional Order 719, which concerns "Removal From Delinquent List," contains language that could be read broadly to prohibit the acceptance of a sum lesser than the amount due in any context other than a bankruptcy proceeding in which a "Plan of Arrangement" has been confirmed by a court:

Compromise of Retailer's Indebtedness: A manufacturer or wholesaler may not accept a lesser sum than the amount due from a retailer in full payment of such indebtedness except under a confirmed Plan of Arrangement. Such acceptance of a lesser amount constitutes a violation of the provisions of Section 101-1(c) of the law.

On the other hand, no ABCL statutory language definitively deems Late Fee Charges to be part of the "price." Those who argue waivers are legal contend that they are merely a term of sale, and not part of the price. As such, they contend, Late Fee Charges can be lawfully waived in connection with the collection of past due payments pursuant to subsection 8 of ABCL § 101-aa, which governs "Terms of Sale":

Nothing herein contained shall be construed to require any manufacturer or wholesaler to extend credit to any retail licensee nor to restrain any . . . wholesaler from seeking to enforce by legal action or otherwise, payment of any sum or sums of money due or alleged to be due to any such . . . wholesaler for alcoholic beverages sold or delivered to any such retail licensee.

The decision to waive a Late Fee Charge can be read under this provision to be a collection measure – part of the "or otherwise" in this section – and thus carved out of price posting requirements and restrictions, as long as such charges are merely terms of sale and not part of the price.

The question of whether it is lawful for a wholesaler to waive a Late Fee Charge, thus, turns in large part on whether such charges are considered a term of sale or part of the price. As financial charges that are included in price posting, one could conclude that they must be price terms. On the other hand, they are usually set forth in a "terms of sale" section of that posting and, as a matter of practice, non-payment of a late fees does not result in a Purchaser being placed on the COD list, perhaps an indication that the industry and SLA have not to date considered Late Fee Charges to be part of the price.

We find that Late Fee Charges do not fit neatly into either category. While arguments can be fashioned on both sides of this issue, we see nothing in the text of the ABCL, the Rules of the SLA, or prior guidance that dictates an answer. This is not surprising. Late Fee Charges apparently were not contemplated by the drafters of the laws, rules, and guidance at issue.

We do know, however, that there is a clear legislative intent in the ABCL to ensure that wholesalers do not discriminate amongst retailers or give preferential treatment to particular customers. The entire price posting structure exists to eliminate a wholesaler's ability to favor some businesses over others financially. If a wholesaler is free to determine, for its own business reasons, whether to waive Late Fee Charges or not, retailers will not be treated equally, and the risk of discrimination is obvious. Preferential treatment of Purchasers through the waiver of fees otherwise owed, but not uniformly offered to all Purchasers, would be the equivalent of giving some, but not all, rebates and financial concessions or even an interest-free inventory loan, any and all of which would violate the gifts and services restrictions of ABCL 101(1)(c) and Part 86 of the Rules of the SLA.

We could determine that Late Fee Charges not be allowed at all, as they are not contemplated by the ABCL at all. But we recognize that such a rule would substantially interfere with the current business market and is perhaps unnecessary to prevent against the risk of unfair discrimination. Accordingly, unless and until the legislature clarifies how Late Fee Charges should be treated, we interpret the law as follows:

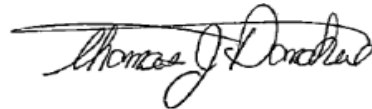
- Wholesalers can choose to impose Late Fee Charges on *all* Purchasers, or on *no* Purchasers.
- Late Fee Charges must be included in a wholesaler's monthly price postings if they are to be charged to any Purchasers, for example, as part of the "terms of sale" on the wholesaler's or manufacturer's Price Posting Profile page.
- Wholesalers who include Late Fee Charges in their terms of sale, or otherwise require them, cannot waive them; if they are part of the posting and to be imposed, they must be imposed equally as to all Purchasers.
- Waivers of Late Fee Charges will be considered a violation of the ABCL; the SLA will enforce the law as interpreted in this Advisory and will charge wholesalers found to have committed such violations.
- The interpretations and requirements set forth in this Advisory cannot be evaded by simply electing to not include Late Fee Charges in a wholesaler's price

posting; the interpretation will be enforced whether the Late Fee Charge terms are actually included in the price posting or not, although as stated above, if such charges are to be imposed, they must be included in the price posting.

We recognize that some wholesalers may believe that they could present a standard set of Late Fee Charge terms that would include waivers to be applied in a way that would minimize or eliminate some or all of the discrimination and gifts and services concerns we've set forth herein. Perhaps, but there could still be gifts and services issues with respect to any particular set of terms and we cannot attempt to predict such scenarios and address them in advance. If a wholesaler wishes to bring a set of terms to the Board for consideration, the proper means to do so would be through a request for a Declaratory Ruling.

This matter was heard and determined by the Members of the Authority at a Full Board meeting held on March 3, 2021 before Chairman Vincent Bradley, Commissioner Lily Fan and Commissioner Greeley Ford. The above written advisory was approved by the Members of the Authority on March 3, 2021.

Dated: 3/4/21



Thomas J. Donohue
Secretary to the Authority