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ADVISORY #2021-11

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Subject: Brand Label Registration guidance

This Advisory provides guidance to licensees with respect to the brand label requirements under Alcoholic Beverage Control Law (“ABCL”) §107-a. This Advisory supersedes and replaces Advisory 2016-3.

All alcoholic beverages sold in this state must have an approved brand label affixed or imprinted upon the container. The only exceptions to this requirement are privately held wines and liquors being sold pursuant to ABCL §85 or ABCL §99-g. Manufacturers, wholesalers and retailers may be subject to disciplinary action for advertising or offering for sale any alcoholic beverage that does not have an approved brand label. While the changes discussed in this Advisory eliminate or reduce filing requirements, brand labels must still comply with the requirements set forth in this Advisory. Failure to comply with these requirements may subject licensees to disciplinary action.

**Compliance with Part 84 of the Rules of the Authority**

ABCL §107-a and Part 84 of the Rules of the Authority govern the registration and approval of brand labels. Chapter 354 of the Laws of 2013 amended §107-a. As a result of the amendments, certain provisions of the regulations in Part 84 are now inconsistent with the statutory provisions. To avoid confusion until such time as the Authority issues new regulations consistent with the amended ABCL §107-a, brand owners and licensees should be guided by the information contained in this Advisory instead of the regulations in Part 84. Licensees who comply with the provisions of this Advisory will not be subject to disciplinary action if their conduct would otherwise be considered a violation of Part 84.

**Required Information on Brand Labels**

Effective March 26, 2014, ABCL §107-a requires that brand labels contain:

- The brand or trade name (see “Brand or Trade Names” section in this Advisory);
- The class and type of alcoholic beverage (see “Class and Type of Alcoholic Beverage” section in this Advisory);
- The net contents of the container (see “Net Contents” section in this Advisory); and
- All other labeling information required by TTB (see “Information Required by TTB” section in this Advisory).

Except as explained in this Advisory (see “When is a separate brand label approval required?” section), a separate brand label registration is required when there is any difference in either: the brand or trade name; or the class and type of alcoholic beverage.

### **Brand Names**

The “brand or trade name” is the name under which the product is marketed. It is usually the most prominent information on the label and the name used by consumers to identify the product. The Authority considers the brand name to include any statement regarding: flavor description; vintage; age; and geographic designation or appellation. Generally speaking, any difference in the brand name is considered a separate brand label.

In most cases, the Authority considers the brand name to be unique and licensees should presume that any variation in that brand name will require a separate brand label registration and approval will be required. For example, the addition of designations such as “kosher” or “organic” would be a different brand name from a brand label that was otherwise the same except for that designation. With respect to beer, the designations “IPA,” “ale” and “pale ale,” for example, would all be considered separate brand names. A whiskey that is marketed with different ages is considered to have a separate brand name for each age.

However, as discussed later in this Advisory under the “When is a separate brand label approval required?” section, certain differences in the brand name are not considered separate brand labels and, therefore, a separate approval is not required. Please note that these are long standing exceptions to the general rule that any difference in the brand name requires a separate brand label approval.

### **Class and Type of Alcoholic Beverage**

Brand labels must use TTB’s categories for the class and type of the alcoholic beverage.

#### **For cider and mead**

As a result of changes made to the ABCL, the permissible alcohol content of cider has been increased from 7% to 8.5%. If the product meets the ABCL definition of wine and cider, the manufacturer will have the choice of marketing the product either as wine or cider. However, if the alcohol content exceeds 7%, TTB will require that the product be brand label approved as a wine even if the manufacturer intends to market the product in this state as cider. TTB will allow the brand label to identify the product as cider. In the event the brand owner intends to market the product in New York State as a wine, the TTB label approval will be sufficient and no state registration is required.

If the product will be marketed as a cider in New York State, it must be brand label registered with the Authority as a cider. The designation of the pomme fruit used is considered to be part of the class and type information and must be set forth on the label.

#### **For wine specialties**

The designation “wine specialty” is considered to be part of the class and type

information and must be set forth on the label. For purposes of this Advisory, a “wine specialty” shall mean wine containing less than 7% alcohol by volume that includes ingredients not permitted in “wine” as defined in ABCL §3(36); and does not meet the definition of “wine product” set forth in ABCL §3(36-a).

### **Net Contents**

The Authority does not require that the net contents statement be included on the actual label. The information may be imprinted or otherwise set forth on the bottle/container. If the information is not included on the brand label, the application must include a photograph of the bottle/container clearly showing where the information will be displayed. For refillable kegs, in lieu of photographs, stickers featuring net contents may be added to the actual label for purposes of compliance with this section.

### **Information Required by TTB**

As noted above, in addition to the brand or trade name, the class and type of alcoholic beverage, and the net contents, a brand label must contain any other labeling information required by TTB. If the label sets forth this information in accordance with TTB regulations, the label will be considered in compliance with this state’s brand label registration laws. Following is a list of the information currently required by TTB regulations. Please note that this information is provided only for guidance, and reference should be made to TTB regulations to assure compliance.

#### **For liquor:**

- The alcohol content;
- The name and address of the bottler and/or the manufacturer or importer;
- The country of origin (for imported alcoholic beverages);
- A statement with respect to the presence of coloring materials (if applicable);
- A statement with respect to treatment with wood (if applicable);
- A statement with respect to FD&C Yellow #5 (if applicable);
- A statement regarding the presence of sulfur dioxide (if applicable);
- A statement regarding the percentage of neutral spirits (if applicable);
- A statement of age (if applicable);
- The state of distillation for whiskeys produced in the United States; and
- A health warning statement.

#### **For beer and braggot:**

- The alcohol content;
- The name and address of the bottler and/or the manufacturer or importer;
- A statement with respect to FD&C Yellow #5 (if applicable);
- A statement regarding the presence of saccharin (if applicable);
- A statement regarding the presence of sulfur dioxide (if applicable);
- A statement regarding the presence of aspartame (if applicable);
- The country of origin (for imported alcoholic beverages); and

- A health warning statement.

For wine:

- The alcohol content;
- The name and address of the bottler and/or the manufacturer or importer;
- A statement regarding the presence of sulfur dioxide (if applicable);
- The appellation of origin (when required);
- The country of origin (for imported alcoholic beverages); and
- A health warning statement.

**Items Prohibited on Brand Labels**

Effective March 26, 2014, ABCL §107-a brand label may not contain any of the following:

- Any false or untrue statement;
- Any statement disparaging of a competitor's product;
- Any statement, design, device or representation that may mislead a consumer; or
- Any statement or claim that the product has any health benefits.

Applications for approval of brand label registration will be reviewed to determine whether any prohibited statements are contained in a brand label. In addition, if a change is made to any approved brand label, the inclusion of any prohibited statement will subject the brand owner (if in-state), or the licensee filing the application on behalf of the out-of-state brand owner, to disciplinary action.

**The Application Process**

An application for registration of a brand label shall include:

- A completed brand label application form submitted electronically (or submitted via paper application by mail);
- In the event the applicant is not the brand owner (i.e, the applicant is a licensed wholesaler acting as agent for an out of state supplier), a letter from the out of state brand owner appointing the applicant as its exclusive agent for purposes of submitting the application;
- A legible photocopy or photograph of the brand label that is being registered with each required item clearly identified. If the net contents are not set forth on the brand label, the application must include a photograph of the bottle/container clearly showing where the information will be displayed;
- In the case of wine products, cider, mead, kombucha and non-malt beverages, an analysis by a laboratory accredited by either the ANSI-ASQ National Accreditation Board ("ANAB") or the American Association for Laboratory Accreditation ("A2LA") or signed by a TTB certified chemist stating the alcohol content and ingredients of the alcoholic beverage; and
- A check or money order for the required fee.

The failure of an applicant to submit any of the above items will result in disapproval of the application. Applicants are urged to read the instructions provided to ensure that all required information is included in the application. If items, such as the net contents, are not on the brand label but appear elsewhere on the container, a photograph showing the location of that item on the container must also be submitted.

All applications for registration and approval of brand labels must be submitted by: electronic filing; certified mail, return receipt requested; registered mail, return receipt requested; or overnight delivery service with proof of mailing. If a brand label is approved by the TTB and submitted to the Authority, it will be deemed approved seven business days after receipt unless the Authority issues a decision disapproving the application before that time. In light of changes at the TTB, a copy of the actual TTB approval will not have to be submitted with the application. The TTB identification number will be sufficient.

### **When is a Separate Brand Label Approval Required?**

A separate brand label registration is required when there is a difference in: the brand or trade name; or the class or type of alcoholic beverage. A separate brand label registration is also required when a “private brand label” is being placed on the container. A “separate brand label registration” requires a separate application and fee (unless the fee is otherwise waived by ABCL §107-a).

As noted in the “Brand Name” section of this Advisory, a brand name includes any statement regarding: flavor description; vintage; age; and geographic designation or appellation. Therefore, except as set forth below, any difference in any of those items creates a separate brand label requiring separate registration and approval. The following are not considered by the Authority to constitute separate brand names:

- Cordial and liqueur brand names that differ only with respect to flavor description;
- Wine brand names that differ only with respect to vintage year;
- Gin brand names that differ only with respect to the addition of the designation “dry”; and
- Rum brand names that differ only with respect to the addition of the designation “white,” “light,” “dark,” “gold” or “silver.”

In Advisory 2016-4, the Authority stated that the placement of stickers bearing the words “Direct,” “Reserve” or similar permutations thereof on bottles or cases does not create a separate brand or trade name. This Advisory does not, in any way, change the guidance provided in Advisory 2016-4.

As noted above, each brand label must include the class and type of alcoholic beverage. With one exception, any difference in the class or type of alcoholic beverage constitutes a separate brand label. Beer brand names that differ only with respect to the use of the designation “beer,” “lager beer” or “lager” do not constitute separate brand names.

### **Vintage Year and Age of an Alcoholic Beverage**

As noted above in the “Brand Name” section, the vintage year or age of an alcoholic

beverage is considered to be part of the brand name. However, under Part 84 of the Rules of the Authority, a change in the vintage year did not require a separate brand label registration. Liquor labels that differed with respect to the age of the product did require separate brand label registrations. This treatment of vintage years and age of the product remains in effect.

### **Duration of Approval**

An approval of a registration shall be valid for three years. Current brand label registration approvals shall remain in effect until they expire. New applications and renewals of existing applications will be issued for three years on the following schedule:

- Liquor- October 1<sup>st</sup> through September 30<sup>th</sup>.
- Beer- July 1<sup>st</sup> through June 30<sup>th</sup>.
- Wine products- March 1<sup>st</sup> through February 28<sup>th</sup>/29<sup>th</sup>.
- Cider- March 1<sup>st</sup> through February 28<sup>th</sup>/29<sup>th</sup>.
- Wine requiring state approval, including wine specialties- March 1<sup>st</sup> through February 28<sup>th</sup>/29<sup>th</sup>.

In the cases where new registration approval takes effect before the applicable date above, the initial approval will be prorated for the appropriate date. Any renewal thereafter will be issued for a period of three years requiring the full three-year fee.

### **Changes in Brand Label Agent**

In the event that an out of state brand owner changes the licensee designated as the exclusive agent for a particular item, the new exclusive agent shall file an application for approval of the brand label. The registration approved under the former brand agent shall be deemed surrendered and no refund shall be due for any of the unused portion of the three year registration fee.

### **Refund of Registration Fee**

There is no provision in the ABCL for the refund of the unused portion of an approved brand label registration fee. If a registration is surrendered, such as in the case of a change in the brand label agent or for any other reason, or otherwise cancelled or revoked, there will be no refund due for any of the unused portion of the three year registration fee.

### **Designation of Brand Agents and Licensing Requirements for Brand Owners**

If the brand owner is licensed under the ABCL, it must file the application for brand label registration approval (as well as the price schedule required by ABCL §101-b(3)(a), except in the case of a private label). A brand owner located outside of this state and not licensed under the ABCL must designate a wholesaler licensed in this state as its exclusive agent for purposes of filing the application for brand label registration approval as well as the price schedule required by ABCL §101-b(3)(a).

In the case of an alcoholic beverage produced by and for a manufacturer in this state,

the brand owner (except in the case of a private label) shall be a manufacturer licensed in this state. However, if the licensed manufacturer intends to distribute the product in this state exclusively through one licensed wholesaler (with no sales being made by the manufacturer to any other licensed wholesaler or any licensed retailer in this state), the manufacturer may designate such exclusivewholesaler as the brand owner of the label.

In the case of an alcoholic beverage produced by or for a brand owner outside of this state, such brand owner must designate a wholesaler licensed in this state as its exclusive agent for purposes of filing the application for brand label registration approval as well as the price schedule required by ABCL §101-b(3)(a).

In the case of a brand owner not licensed in this state, an “appointment letter” must be submitted by the brand owner identifying the licensed wholesaler who is designated as the exclusive agent to file the application for brand label approval. Please note that a separate appointment letter from the brand owner is not required for each brand name. One letter may be used to list all the brand names for which the licensed wholesaler has been appointed as exclusive agent.

### **"Ornamental," "Enhanced," or "Special" Containers**

The marketing of alcoholic beverages in “ornamental,” “enhanced” or “special” containers is addressed in Advisory 2014-23.

### **“Supplemental” Brand Labels**

As a result of the amendments made to ABCL §107-a, it is no longer necessary to file separate, or “supplemental,” brand label registrations. As noted above, a separate brand label registration will only be required when there is a change in: 1) the brand or trade name; or 2) the class or type of the alcoholic beverage.

Although the brand label must set forth the net contents and the labeling information required by TTB, if a change is made to those items it is not necessary to file an application to amend or supplement the existing approved label or obtain approval for a separate label. In addition, a second label that differs from the approved label does not require a separate registration as long as the brand or trade name and the class or type of the alcoholic beverage remains the same.

However, even if an amended, supplemented or separate brand label registration is not required, any brand label being used must comply with the provisions of ABCL §107-a and this Advisory. In particular, any brand labels changed after approval of the Authority must contain the information required by ABCL §107-a and must not include the items prohibited by ABCL §107-a. Violations will result in disciplinary action by the Authority.

### **Private Labels**

A “private brand label” is a brand label owned by a licensed retailer. It does not have to contain the retailer’s name. An alcoholic beverage with a private brand label can only be

sold by the licensed retailer who owns the brand label. The licensed retailer must own the brand name or otherwise have the legal right to use a brand or trade name belonging to another entity. However, in no case can the brand name be owned by a manufacturer or wholesaler. Manufacturers and wholesalers may not allow retailers to use their brand or trade name on a retailer's private brand label, except to identify the manufacturer, importer or bottler as may be required under TTB regulations. The use of phrases such as "exclusively bottled for" or "exclusive to" the retailer on a brand label owned by the manufacturer or another party does not constitute a private brand label. Such practices constitute an illegal gift or service in violation of ABCL §101(1)(c). Hotels, which operate under a common trademark, may sell beer or cider under a private brand label where a hotel chain or a hotel management company, which owns or otherwise has the legal right to use the brand or trade name, is listed on the license and the beer or cider is only sold in hotels owned in part or managed by the owner of the brand, or an affiliate of such owner.

Applications for approval of private brand labels must include proof that the retailer owns, or has the legal right to use, the brand or trade name set forth on the label. If the brand label is otherwise in compliance with ABCL §107-a and this Advisory, a retailer does not have to obtain a separate brand label registration approval when there is a difference in the manufacturer, importer or bottler.

### **Wine**

For wine brand labels that have been approved by TTB, an application for registration approval does not have to be submitted. A wine brand label without TTB approval must be registered and approved by the Authority.

### **Cider**

Effective January 15, 2014, the definition of cider contained in the ABCL was amended. Among other changes, the maximum alcohol content by volume was increased from 7% to 8.5%. In addition, an alcoholic beverage that meets the definition of cider and wine may be marketed either as a cider, or as a wine. If the brand owner decides to market the product as a cider, it must be brand label registered as a cider. That product may be offered for sale by any licensed retailer. If the brand owner decides to market the product as a wine, the brand label must be approved (as a wine) by TTB or the Authority. The product must also be price posted and sold only by retailers who are licensed to sell wine.

### **Non-Malt Beverages**

Non- Malt beverages are products such as hard seltzers and hard kombucha where the ingredients do not include a malted product. As non-malt products typically do not require TTB approved COLAs, the items listed below are required by the state to be submitted along with the application:

- If you applied for a COLA from the TTB, a TTB rejection letter

Lab Analysis from a laboratory accredited by either the ANSI-ASQ National Accreditation

Board (“ANAB”) or the American Association for Laboratory Accreditation (“A2LA”) stating the alcohol content and ingredients of the alcoholic beverage or signed by a TTB certified chemist.

### **Deviations or Changes in Alcohol Content**

Except for cider and wine products, the Authority will allow a deviation of no more than 1.5% between the alcohol content stated on the label and the actual alcohol content of the product as shown in the laboratory analysis. In the case of cider and wine products: the Authority will allow a deviation of no more than 0.5%; and the actual alcohol content cannot exceed the statutory limit set forth in the ABCL. Should the alcohol content exceed the amounts noted above, a new brand label registration must be submitted.

If the alcohol content stated on the label or container is changed after the brand label has been approved, a new, amended or supplemental registration is not required. As long as the brand label otherwise conforms to the requirements set forth in this Advisory, the change will be deemed part of the approved label. Please note that this applies if the alcohol content is being changed. If two products have brand labels that are identical in all other ways, with the only difference being the alcohol content, each product will require its own brand label approval.

### **“Small Batch” Fee Exemptions**

ABCL §107-a provides for exemptions from the fee for brand label registration for liquor, beer and cider produced in “small batches.” For liquor, “small batches” means 1,000 gallons or less. For beer and cider, “small batches” means 1,500 barrels or less. While there is a fee exemption, an application for registration of the brand label must still be filed and approved.

In determining whether the product has been manufactured in a “small batch,” please note that:

- The fee exemption applies to product under the same state brand label registration number. If the total annual amount manufactured for a product, or products, under one brand label registration number exceeds (or is anticipated to exceed) the limitations stated above, a fee will be required to register the label.
- The total amount manufactured includes not only the amount of product manufactured for sale in this state, but the entire annual amount of the product that is manufactured, regardless of where it will be sold.

### **Beer and Wine Products Sold in “Soft Pouches”**

As noted above, brand labels cannot contain any statement, design, device or representation that is likely to mislead the consumer. In the view of the Authority, beer and wine products sold in “soft pouches” (whether or not intended to be frozen prior to consumption) can be mistaken for non-alcoholic products sold by off-premises beer retailers. Therefore, to avoid consumer deception and confusion, as well as to assist in preventing sales of these products to underage persons, the Authority requires that the front label of any such container, as well as the case or pack for such containers, include the following

statement: "CONTAINS ALCOHOL – NO SALES UNDER 21."

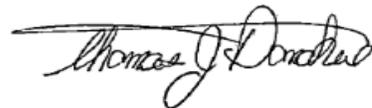
**Personalized Bottles and Containers**

The addition of personalized engraving, stamping, writing, etc., to a bottle or other container in compliance with the Authority's "Containers, packaging and personalization of bottles" Advisory does not require a separate brand label registration approval.

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This matter was heard and determined by the Members of the Authority at a Full Board meeting held on March 31, 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 31, 2021.

Dated: 4/1/21



Thomas J. Donohue  
Secretary to the Authority