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ADVISORY #2021-x

To: All licensees

Subject: Contracts That Compensate A Third Party Provider (“TPP”) Of Goods Or Services With A Percentage Of The Licensee’s Sales, Profits, Or Revenues

The New York State Liquor Authority (the “Authority”) is charged with ensuring compliance with the Alcoholic Beverage Control Law (“ABCL”) § 110, which requires applicants for licenses, and existing license holders, to state or provide:

- “the name of any other person interested as a partner, joint venture, investor or lender either in the premises or in the business to be licensed” (§110(1)(b));
- “a financial statement adequate to show all persons who, directly or indirectly have an economic interest in the establishment or acquisition of the business for which the license or permit application is being made. . . .” (§110(1)(h)).¹

The Authority uses these disclosures, among other things, to ensure that licenses are not held or controlled by persons the ABCL prohibits from holding a license: felons, manufacturers/wholesalers on a retail license, police officers, persons who had a license revoked, etc. The Authority has jurisdiction over businesses that hold a license to sell or manufacture alcoholic beverages (a “Licensed Business”). Persons that are receiving *any* portion, or *any* percentage, of a Licensed Business’ revenues are being paid in part for alcoholic beverage sales. As such, under the ABCL, they must not only be disclosed to the Authority, but must also be included as a principal on the license (made a “Co-Licensee”) and, thereby, become subject to the Authority’s jurisdiction.

The ABCL does not define the nature or extent of interests “in the business to be licensed” that require disclosure and co-licensing. Accordingly, the Authority assesses such matters on a case by case basis and will continue to do so. Such assessments include analysis of contracts, agreements, or other financial arrangements (“Agreements”) with third party providers to licensed businesses (“TPPs”) who are compensated for the goods or services they provide in many ways.

¹ Existing license holders have an ongoing duty to provide notice and present a “supplemental statement” to the Authority if “there be any change . . . in any of the facts required to be set forth” in the application. ABCL § 110(4).

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TPPs traditionally have been compensated through “Flat Fee” Agreements -- where the third party is paid a pre-determined amount that is not dependent in any way on the licensee’s sales, profits, or revenues. In recent years, it has become increasingly common for TPPs to be compensated with a percentage of the Licensed Business’ sales, profits, or revenues. Some TPPs are compensated with a percentage of the Licensed Business’ total revenues, and some with a percentage of particular sales or revenues. When an applicant or licensee enters into such a revenue-sharing Agreement, *it is the applicant or licensee’s obligation* to provide notice to the Authority of all revenue-sharing TPPs and to address with the Authority whether such TPPs need to be Co-Licensees on the license. To the extent that applicants or licensees fail to do so, they risk violating the ABCL for availing their licenses to such TPPs, as well as for making false material statements/concealments in applications (§53.1(b) of the Rules of the SLA) and/or for failing to notify the Authority of a change in fact (ABCL § 110(4)).

The Authority has recognized in the past that Flat Fee Agreements with licensed entities generally have not required notice to the Authority (unless otherwise required by the application process) or co-licensing.

In addition, the Authority has interpreted the ABCL to allow landlords to obtain a limited percentage of the licensee’s sales, profits, or revenues without the need for Co-Licensing, as long as the percentage is considered to be a *de minimis* amount, *i.e.*, an amount unlikely to give the landlord significant control over the Licensed Business. The Authority generally finds that a lease entitling the landlord to a percentage of the tenant’s Licensed Business does not require co-licensing if the percentage does not exceed 10% of the business’ revenues and the lease does not otherwise give the landlord other financial interests 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 generally has increased the permissible threshold to 20% when the landlord is a not-for-profit corporation, governmental agency or public authority.

The purpose of this Advisory is to provide guidance to applicants and licensees who are, or may become, involved in Agreements with TPPs that involve compensation through a percentage of the Licensed Business, in whole or in part, and to create a procedure for licensees to ensure they comply with all legal requirements. Such TPPs include, but are not limited to:

- landlords;
- managers of, or consultants on, the licensee’s business;
- delivery services;
- e-commerce/internet platforms that provide advertising or accept or forward food and beverage orders 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;
- attorneys, accountants, or other representatives of the licensee; and
- fulfillment centers that store, pack, ship and/or otherwise arrange for the delivery of a licensee’s products to consumers.

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It is the view of the Members of the Authority that the same analysis the Authority has applied to landlords and leases should be applied to other Agreements between licensees and TPPs who provide goods or services to the Licensed Business. Certain TPP percentage shares are also *de minimis* and unlikely to lead to significant control over a Licensed Business. Accordingly, the Authority offers the following interpretation of the ABCL as it applies to the Notice and Co-Licensing obligations of licensees and TPPs:

- For purposes of this Advisory, a “TPP Agreement” is any contract, agreement, or other arrangement with a Licensed Business, or with a business applying for a license, through which a TPP provides goods or services.
- For purposes of this Advisory, a “Flat Fee” shall mean compensation under a TPP Agreement, at a pre-determined fee that is not dependent on the sales, profits, or revenues made by the licensee.
- For purposes of this Advisory, a “TPP Percentage Agreement” shall mean any TPP Agreement where the TPP’s compensation is based on a percentage or share of the monetary value of sales or revenues that would otherwise belong to the licensee, whether such percentage applies to some or all of Licensed Business’s sales or revenues. This includes a percentage of *any* sales or revenue to the Licensed Business, whether such sales or revenue are for alcoholic beverages or not.
- For purposes of this Advisory, “Notice” shall mean the notice and disclosures required under ABCL §110, including providing the TPP Agreement itself to the Authority.
- For purposes of this Advisory, “Co-Licensing” shall mean that the applicant or licensee is required to include the TPP on the license for the business at issue.
- For purposes of this Advisory, “10% Of Total Revenue Statement” shall mean a sworn statement from an applicant’s or licensee’s principal stating that the percentage compensation to be paid to a TPP pursuant to a TPP Percentage Agreement is not reasonably expected to constitute more than 10% of the licensed business’s total revenues, including a sworn statement (with supporting documentation) in the form attached to this Advisory as Exhibit A..
- For purposes of this Advisory, “20% Of Total Revenue Statement” shall mean a sworn statement from an applicant’s or licensee’s principal stating that the percentage compensation to be paid to a TPP pursuant to a TPP Percentage Agreement is not reasonably expected to constitute more than 20% of the licensed business’s total revenues, including a sworn statement (with supporting documentation) in the form attached to this Advisory as Exhibit A.
- Any TPP Agreement that entitles the TPP to a Flat Fee will not require Notice or Co-Licensing of the TPP, provided that the Flat Fee is commercially reasonable in the view of the Authority. In making a commercial reasonableness determination,

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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 TPP over the licensed business.

- Any TPP Percentage Agreement that entitles the TPP to a percentage of *any* sales or revenue, but where that percentage does not exceed 10%, will not require Notice or Co-Licensing of the TPP. If the applicant or licensee in such TPP Percentage Agreement is a not-for-profit organization, government entity or public authority, but the percentage does not exceed 20% of *any* sales or revenue, it will not require Notice or Co-Licensing.
- All other TPP Percentage Agreements require the applicant or licensee to provide Notice of the TPP to the Authority. In other words, if a TPP Percentage Agreement calls for the TPP to be compensated by more than 10% of even a portion of the licensee's revenues (or for not-for-profit organizations, government entities, or public authorities, more than 20%), Notice is required.
- All other TPP Percentage Agreements also require the applicant or licensee to address the Co-Licensing of the TPP, either through ensuring that the TPP is Co-Licensed or through the submission of a 10% Of Total Revenue Statement (or a 20% Of Total Revenue Statement) as follows:
- **APPLICATIONS:** At the time of application, any applicant who is a party to a TPP Percentage Agreement must (a) include with its application Notice of the TPP Percentage Agreement, and (b) address TPP Co-Licensing. TPP Co-Licensing can be addressed by either (i) ensuring that such TPP is Co-Licensed through presenting the required application documentation, or (ii) providing a 10% Of Total Revenue Statement (or for not-for-profit organizations, government entities, or public authorities, a 20% of Total Revenue Statement). Any such Revenue Statement must be based on reasonable projections of the proposed Licensed Business's expected revenues and expected obligations under the TPP Percentage Agreement. Upon receipt of an applicable sworn Total Revenue Statement, absent other potential issues suggesting control, the Authority will treat the TPP as not requiring Co-Licensing.
- **POST-APPLICATION:** At all other times, an applicant or licensee that enters into a TPP Percentage Agreement for which it has not already provided Notice to the Authority and addressed TPP Co-Licensing must, within thirty (30) days of entering into such TPP Percentage Agreement, provide Notice and address TPP Co-Licensing by either (i) ensuring that an application with all required application documentation be presented to add such TPP as a Co-Licensee, or (ii) providing a 10% Of Total Revenue Statement (or for not-for-profit organizations, government entities, or public authorities, a 20% of Total Revenue Statement). Any such Revenue Statement must be based on a reasonable assessment of the Licensed Business's historical revenues and expected obligations under the TPP Percentage Agreement, or where the Licensed Business is a new business without historical revenues, reasonable projections of expected revenues and expected

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obligations under the TPP Percentage Agreement. Upon receipt of a sworn Total Revenue Statement, absent other potential issues suggesting control, the Authority will treat the TPP as not requiring Co-Licensing.

- **TPP AGREEMENTS ALREADY IN-FORCE:** Applicants or licensees that are already subject to, or operating under, TPP Percentage Agreements on the date the Authority issues this Advisory for which Notice has not been provided and TPP Co-Licensing has not been addressed shall have ninety (90) days from the date the Advisory is issued to comply with these requirements.
- **CHANGES IN REVENUE PERCENTAGE:** If a TPP is not Co-Licensed due to expected or projected revenue-sharing levels referenced in an applicant's or licensee's submission of a Total Revenue Statement, but the TPP's percentage of a licensee's revenue that exceeds 10% (or for not-for-profit organizations, government entities, or public authorities, exceeds 20%) for any three consecutive months and/or for any annual period based on the Licensed Business's fiscal year, the licensee shall (a) notify the TPP and the Authority and (b) re-address TPP Co-Licensing by either (i) ensuring that an application with all required application documentation be presented to add such TPP as a Co-Licensee, or (ii) end or modify the TPP Percentage Agreement and submit it along with a new 10% Of Total Revenue Statement (or for not-for-profit organizations, government entities, or public authorities, a 20% of Total Revenue Statement) explaining why Co-Licensing is not required.
- **LICENSEE'S ONGOING OBLIGATION:** It is the Licensed Business's obligation to review and determine whether a TPP's entitlement to a percentage of the licensee's revenue exceeds 10% (or for not-for-profit organizations, government entities, or public authorities, exceeds 20%) for any three consecutive months and/or for any annual period based on the Licensed Business's fiscal year through a quarterly reconciliation of its revenues from a TPP Agreement as compared to total revenues, and shall maintain such reconciliation as part of the books and records of the Licensed Business and make such reconciliation available to the Authority upon request.
- Total Revenue Statements shall be delivered to licensing.information@sla.ny.gov and may be submitted using the form attached to this Advisory as Exhibit A, or in an alternative form that complies with the requirements set forth herein.

The Licensing Board will deny any application that includes a TPP Percentage Agreement unless the applicant addresses TPP Co-Licensing as described above. However, 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 an exception to the interpretation offered in this Advisory should be made. For purposes of this Advisory, good cause shall not include a situation where the TPP is legally prohibited from holding the license in question.

A licensee with a TPP Percentage Agreement that fails to address TPP Co-Licensing as provided above will be considered to be availing its license and subject to disciplinary action by

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the Authority. Such licensee may also be subject to disciplinary action for making a false material statements/concealment in an application and/or for failure to notify the Authority of a change in fact. Provided, however, that a licensee or TPP may submit a request for a declaratory ruling to the Members of the Authority for their review. In such matters, the licensee must demonstrate good cause why the TPP should not have to be a Co-Licensee. For purposes of this Advisory, good cause shall not include a situation where the TPP is legally prohibited from holding the license in question.

Please note that this Advisory only addresses certain financial compensation Agreements. It should not be interpreted as permitting other financial arrangements that result in third parties obtaining significant control of a Licensed Business, and all such arrangements are subject to review to determine whether the potential for significant control over the Licensed Business requires Notice and/or Co-Licensing.

Please note as well that the 10% and 20% exceptions to the Co-Licensing requirements under the ABCL discussed in this Advisory refer only to Agreements with TPPs that are not otherwise restricted from being a licensee under other sections of the ABCL. The Authority does not interpret the ABCL as permitting TPP Agreements that grant *any* percentage interest in a Licensed Business to persons, for example, who are restricted from holding a license by the "Tied House" provisions of the ABCL (§§ 101(1)(a) and 106(13)), who are felons, who are police officers, etc.

To the extent that this Advisory conflicts with any assumptions or presumptions that applicants or licensees have made from the review of prior declaratory rulings relating to TPPs issued by the Members of the Authority, applicants and licensees are instructed that the interpretation set forth herein shall pre-empt any such assumptions or presumptions derived from such rulings. Any persons who are parties to prior declaratory rulings relating to TPP issues shall be governed by the terms of those rulings *and* should expect to be governed by this Advisory as well, subject to the rights set forth herein, including the right to request a further declaratory ruling from the Members of the Authority.

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

Dated:

Thomas J. Donohue
Secretary to the Authority

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