

Regulatory Impact Statement

Statutory authority:

These proposed regulations modernize existing regulations relating to the anti-discrimination provisions in the Alcoholic Beverage Control Law (“ABCL”) which prevent licensed wholesalers from giving preferential treatment to certain licensed retailers through price discrimination. Specifically, these regulations concern the maximum “split case fee” wholesalers can charge to retailers who order liquor or wine by the bottle, instead of by the case, a regulatory measure that has been in place since 1969, but has not been amended to account for inflation since 1980. The regulations would be issued by the State Liquor Authority (“Authority”) pursuant to ABCL § 101-b, as well as State Administrative Procedure Act (“SAPA”) §§ 201, and would appear as amended Sections 65.4(d) and 65.4(e) of Title 9, Subtitle B, of the New York Codes, Rules and Regulations (N.Y.C.R.R.).

These regulations are issued pursuant to the following:

ABCL §101-b(d), which authorizes the Authority to promulgate rules and regulations appropriate to carry out the purpose of prohibiting unlawful discrimination by wholesalers against retailers; and

SAPA §201, which authorizes all agencies to adopt by rule additional procedures not inconsistent with statute.

Legislative Objectives:

To ensure that smaller retailers (restaurants, taverns, and small liquor stores), who are not in a financial position to purchase all of the liquor and wine they sell to consumers by the case, are not unlawfully discriminated against through the charging of exorbitant split case fees.

To ensure that wholesalers are permitted to charge split case fees, but capped at a level that has been adjusted upward to reflect inflation since 1980, when the cap on split case fees was last adjusted.

Needs and benefits:

Wholesalers generally make liquor and wine available for sale to retailers by the case, usually in packages containing 6, 12, 24, or 48 bottles/containers of a particular product. Wholesalers traditionally have sold liquor and wine by the bottle, or in some quantity less than a full case, but doing so brings with it a marginally increased cost: the additional labor of splitting cases and additional warehouse space needed to facilitate the process. Wholesalers have, historically, passed along these marginal costs to the retailers who purchase by the bottle through a “split case fee,” an added charge per bottle that a retailer must pay. Smaller retailers, generally, are more likely to purchase by the bottle because they lack the physical space or financial resources to stock a full bar, or have a wide array of product, with each item purchased by the case. The charging of split case fees, thus, puts smaller retailers at a competitive disadvantage in the marketplace, as their cost per bottle will be higher than those retailers who purchase the same product by the case. Excessive split case fee charges have thus been considered discriminatory for over 50 years, as reflected in Rule 65.4(e), enacted in 1969.

Rule 65.4(e) was originally enacted in 1969 in furtherance of the legislative objectives, expressed in §101-b of the ABCL, of preventing price discrimination by mandating that any split case charges be imposed in a uniform, nondiscriminatory manner. A cap of \$1.00 per case was set in 1969, an amount that would then be apportioned amongst the bottles in the split case. For example, for a 12-bottle case, no more than 8 cents (\$1.00 divided by 12) could be added to a bottle as a split case fee. When Rule 65.4(e) was amended in 1980, the cap was raised from \$1.00 to \$1.98. In recent years, the Authority has not enforced the split case fee cap

set forth in Rule 65.4(e), leaving wholesalers free to charge substantially more than \$1.98 per case. As a result, the Authority has not amended Rule 65.4(e) since 1980. The unenforced cap remains at \$1.98.

Under the existing Rule 65.4(e) cap of \$1.98, the highest split case fee charge per bottle for a 12-bottle case would be just \$0.16 (\$1.98 divided by 12). The Authority has learned that the two largest wholesalers in New York, which account for the majority of the wholesale sales in New York and tend to set the market, routinely charge as much as \$36 per case as a split case fee. For a 12-bottle case, that's a \$3 charge, far more than the 16 cents the existing Rule, if enforced, would permit. Indeed, the split case fee for a 6-bottle case is \$6, an amount that exceeds the price of a bottle for many products.

The Authority has found that this increase is too great to be capable of being explained, rationally, by the increase in marginal costs to wholesalers to split cases since 1980. The two largest wholesalers have advised the Authority, generally, that the \$36 per case charge reflect a "pass through" of their purported marginal expenses for splitting cases, but they have refused to provide evidence to the Authority supporting this claim. The Authority can only conclude that the practice of charging split case fees at that level violates the price discrimination provisions of the ABCL. This is an especially troubling market development given the impact the Covid 19 pandemic has had on restaurants and taverns, the very businesses most unfairly impacted by excessive split case fees. The Authority seeks to stop this practice from continuing, but acknowledges that enforcing the cap at the 1980 level – 16 cents per bottle -- would be unfair to wholesalers, who are entitled to have the cap raised to account for increases in costs over the last 40 plus years.

Accordingly, with the intention of enforcing the cap on split case fees going forward to prevent unlawful price discrimination, the Authority hereby seeks to update Rule 65.4(e) to account for the rise in wholesaler costs since 1980. While the Authority would prefer to set a new cap based on the actual, marginal expenses that wholesalers incur through splitting cases, that approach is not practical or possible. The Authority's request to

the two largest wholesalers for such information – hourly labor costs, warehouse space costs, etc. -- was summarily rejected under claims of confidentiality. Indeed, the act of collecting and presenting information on the actual expenses particular wholesalers are paying arguably interferes with their proprietary business rights, as wholesalers are all in competition with each other. The best means available to the Authority to set a new cap is to take the 1980 cap and adjust it to 2022 dollars by using a well-recognized and accepted inflation metric. This appears to be the way the Authority adjusted the cap from \$1.00 (in 1969) to \$1.98 (in 1980), using the Consumer Price Index (CPI). While the actual reason for selecting \$1.98 cannot be found in the record, that is the exact number one reaches by adjusting for the increase in the CPI from 1969 (36.7) to 1979 (72.6): it is 1.9782 times higher.

While the CPI reflects changes in consumer prices, and not business expenses, such price changes are likely the basis on which employment negotiations over wages (union and non-union) are based. The CPI is thus the most-well known and used metric for determining cost of living increase. It is also the only metric that is currently in use that dates back to 1969 and 1979. The average annual CPI for 1979, the last available annual index when the rule was last amended, was 72.6. The average annual Consumer Price Index for 2021 was 271.0. Based on that increase, the cap would rise from \$1.98 to \$7.39. That would make the maximum split case fee for a bottle in a 12-bottle case 62 cents; for a 24-bottle case, it would be 31 cents.

In addition to raising the cap, the Authority is also modifying the language of Rule 65.4(e) to address associated issues that will facilitate the application of the cap. The existing language of Rule 65.4(e) is confusing on its face and may be the reason why the Authority stopped enforcing the cap. Accordingly, the Authority is revising the language to clarify the way in which the cap is to be calculated. The revisions also include eliminating a distinction made in the existing rule for cases of 48 bottles or more, which currently limits the split case fee to just 1 cent. Having a uniform rule for all case sizes will simplify application and calculation of the new cap.

The revisions also include clarifying the way in which the price of a bottle is to be posted, making it clear that a listing of a per bottle price must include the split case fee for purchasing by the bottle. The Authority makes that clarification because wholesalers do not currently include the split case fee into the posted per-bottle price. Currently posted per-bottle prices merely divide the case price by the number of bottles; wholesalers purport to satisfy “notice” obligations by mentioning the additional split case fee charges in footnotes or preliminary, general language in their postings. As a result, currently listed per-bottle prices routinely indicate a price that is deceptive -- lower than a retailer is actually paying in every case. The revisions require the split case fee to be included in the posted per-bottle price.

Finally, the revisions also include minor additions of language to Rule 65.4(d). The existing rule fails to reference that price posting requirements apply to both liquor and wine (it currently indicates liquor only). This revision merely clarifies the way in which the rule is already interpreted by the Authority and the industry.

Costs:

There will be no anticipated costs to the agency as a result of these amendments.

There will be no increased costs to local municipal governments as a result of these proposals, as local municipalities play no role in wholesaler pricing and price posting.

How costs are to be interpreted as applied to the major industry tiers – wholesaler and retailers – depends on whether the rule revisions are viewed in isolation, or in combination with the Authority’s decision to re-commence enforcing the split case fee cap. Since the Authority does not intend to enforce the existing cap, the best mode of assessing costs is to view the raise in the cap, and the enforcement of that cap, in combination. Enforcing the revisions will result in a reduction in costs to retailers who purchase their liquor and wine by the bottle, with the cost savings generally going to retailers who purchase in smaller quantities (restaurants, taverns, and smaller liquor and wine stores). The impact on wholesalers, initially, would be the

reverse: their costs will increase, as they will be unable to collect as much in split case fees as they are currently collecting. Wholesalers are expected, however, to recoup the revenue lost in split case fee charges by raising liquor and wine prices across the board. This expected adjustment would result in the costs associated with splitting cases being passed on to retailers (and thus not incurred by wholesalers at all), but since the costs would be incorporate into pricing for all retailers, those costs would not be borne disproportionately by smaller retailers, as they have been for the last several years.

Local government mandates:

None. Local governments play no role in wholesaler pricing and price posting.

Paperwork:

Wholesalers will be required to adjust their monthly price postings to ensure that (a) split case fees do not exceed the newly established cap, and (b) to include the split case fee in the per bottle price. The proposed rule amendments impose no additional paperwork requirements on industry members or Authority staff.

Duplication:

There is no federal or local municipal duplication as neither plays any role in wholesaler pricing or price posting.

Alternatives/ federal standards:

There are no applicable or relevant standards. There are two alternatives, neither of which strike an appropriate balance for the interests involved. Since the existing cap is dated and no longer economically relevant, the Authority could choose to eliminate the Rule altogether. This would essentially endorse the status quo, as the Authority has not been enforcing the cap for several years. For the reasons stated above, that would allow price discrimination to continue and is, thus, not acceptable. The other alternative would be to issue a

rule that restricts wholesalers from charging any split case fees at all. The Authority finds this option to be unfair to wholesalers and to retailers who do not purchase split cases. There is indeed a marginal cost to wholesalers to make individual bottles available to retailers who want to purchase them. A fair share of that cost is appropriate to be charged to such retailers; if it was not, all retailers would unfairly bear this marginal expense.

Compliance schedule:

The period of time the industry will require to enable compliance is likely to be negligible. Wholesalers will be able to adjust their pricing to comply with the revisions immediately, or at least within a month or two. The Authority expects to be compliant immediately upon adoption of this regulatory package.