



**KATHY HOCHUL**  
Governor

**LILY M. FAN**  
Commissioner

**VINCENT G. BRADLEY**  
Chairman

**GREELEY FORD**  
Commissioner

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**DECLARATORY RULING**  
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E-Platform

Agenda # 2021-01601

**Introduction**

The applicant asks if its proposed business model as an internet/app-based platform (“Platform”) is permitted under the NYS Alcoholic Beverage Control Law. Platform allows licensed on-premises and off-premises retailers to create free accounts on the Platform to advertise their products and promotions. Consumers also sign up for free and enter their personal information, including product preferences. The Platform then provides a personalized listing of products and promotions to the consumer offered by licensed retailers in their geographic area.

A consumer can then purchase a “credit” for a product and redeem it at the retailer that is offering it. The Platform holds the consumer’s funds in a segregated custodial account until after the consumer redeems; upon redemption, Platform releases the money to the retailer, less the Platform’s fee, not to exceed 10% per transaction. Following redemption of the credit, the consumer’s credit card statement will reflect the charge and the name of the retailer.

**Statutes Involved**

Section 111 of the Alcoholic Beverage Control Law provides that a liquor license issued to a particular person shall not be made available to any other person.

Section 105(10)(a) of the Alcoholic Beverage Control Law provides that a liquor store must display the prices for its products and sell them at only the displayed price.

**Questions**

Is Platform in the business of selling alcoholic beverages such that they would be required to be licensed?

Are the participating licensees making their licenses available to Platform in violation of ABCL Section 111 by permitting Platform to take 10% of each transaction?

Should Platform be considered to be trafficking in alcoholic beverages because it will have custody over funds related to retail sales; for example, if the consumer makes payments to

Platform, but never redeems their “credit” for alcoholic beverages purchased, will that result in a violation of ABCL Section 111?

Does allowing web-based promotions on wine and liquor by liquor stores made available on the Platform violate such retailers’ legal requirement to sell only at prices posted in the store at the time of the sale in accordance with ABCL Section 105(10)(a)?

Will Platform’s method of operation require it to pay sales taxes under the 2019 New York Marketplace Facilitator Law?

### **Analysis/Determination**

On the licensing and availing issues, Platform is a third-party internet provider that provides an advertising service for retailers in exchange for compensation. Platform will not be exercising any license privileges. Platform does not perform any activities that involve it in the day to day operations of any licensee. Platform states that it will not select products or pricing. It will simply facilitate the ordering of alcoholic beverages from licensed retailers by consumers. Accordingly, availing issues associated with control over the operations of licensees do not appear to be a concern here.

Platform would be receiving a 10% fee per order, a percentage of the revenues on alcoholic beverage sales. A third-party provider compensated by a percentage of a licensed entity’s revenues or profits raises issues under ABCL Section 111 -- unless the recipient of the percentage is on the license as a principal. The Members of the Authority have treated certain third-party provider arrangements in which the provider receives 10% or less of the overall licensed business’ revenues as *de minimis* and, thus, not a violation of ABCL 111, for example, in lease agreements with landlords.

The Members considered a similar Declaratory Ruling request in Thirst for Night (“Thirst”) 2015-01717F, in which a phone app allowed users to place orders and pay for food and drinks while inside the licensed premises. The Members permitted payment through a percentage of such sales because the percentage charged would not be more than 10 percent of the sales made via the app, a *de minimis* amount. While Thirst involved the purchase of food and drink together, and Platform involves only alcoholic beverage sales, the Members of the Authority have approved flat fee arrangements in the past for alcoholic beverage only third-party provider agreements, such as Swill 2015-01557D, Bottle Rush 2014-02578 and Drizly 2013-02526.

This appears to be the first percentage-based arrangement we have considered in a Declaratory Ruling context that involves just alcoholic beverages, something that arguably appears to involve an unlicensed entity more directly taking a cut of a licensee’s alcoholic beverage sales than in the past. But the SLA has generally applied this 10% or less rule in many contexts and has now memorialized its interpretation of these issues in its Third-Party Provider Advisory -- #2021-23. That Advisory extended the 10% or less standard generally to third-party providers, subject to the restrictions and qualifications therein, and provided procedures for licensees who enter into agreements with third-party providers that involve percentage revenue deals in excess of 10%. As noted in that Advisory, the concern with revenue sharing is the

potential for operational control of a licensed business, where the percentage is 10% or less, there is little (if any) risk of control.

Consistent with the Advisory, the Members do not find the arrangement and compensation structure proposed by Platform to be unlawful, provided that Platform would not end up with more than 10% of a retailer's total revenues. By taking no more than 10% of each transaction as its maximum compensation, more than 10% of a retailer's total business revenues would not be possible.

On Platform's holding of payments earmarked for alcoholic beverage purchases, Platform collects the funds and holds them in a separate custodial account until they are used. As to the issue of unused credit, Platform initially stated that the credits remain in a consumer's account (held by Platform) and remain available to the consumer for future use at the designated retailer's store. In response to questions about this procedure, Platform has since clarified by further representing that there will be three options. The first will be the default option, in which the funds remain in the segregated custodial account for a period of one year, after which they will be automatically refunded to the user via the user's purchasing method. The second option allows a user to request that the uncommitted funds from an incomplete transaction are immediately refunded to user, prior to the expiration of the one-year period, via the user's original purchasing method. Option three allows a user to instruct Platform to earmark the uncommitted funds to remain indefinitely in the segregated custodial account but exist as a digital credit for user to put towards another offer displayed on the Platform. A refund to a user is a 100% refund without any service fees or charges retained by the intended retailer or Platform. Under any of these options, the Members do not find Platform's control or access to funds creates a significant enough risk of availing to find the method unlawful.

As to price-posting requirements, Platform states that the promotional price offered by a liquor store on the Platform site would match the price available to all customers shopping at the liquor store, and that licensees are cautioned to abide by this statutory responsibility. Assuming those facts as true, there would be no violation of ABCL § 105(10)(a)

Retailers will remain obligated to ensure, under the ABC law, that they are only selling to persons 21 years of age or older.

Finally, since the last time the Members were asked to consider a third-party provider platform in which sales for alcoholic beverages were first paid to the provider (and not the licensee), New York passed the Marketplace Facilitator Law. Under this new law, parties deemed to be "marketplace providers" are responsible for collecting and paying sales tax directly to New York State for the sales they are facilitating. It is our understanding, for example, that Drizly – a web-based service provider that connects customers to retail liquor stores -- learned that it was being deemed a marketplace provider and, as a result, would need to change its method of operation (and systems) to withhold and deliver sales tax from customer funds before delivering the remainder to retail licensees.

Platform describes its method, in pertinent part, as follows: "The funds from a consumer that purchased credits are held by Provider (separate from Provider's operating account) and

released to retailers regularly (either weekly or monthly) after the redemption by a user.” To the extent that Platform is deemed a marketplace facilitator, it will be obliged to follow the law on paying sales taxes.

Based upon and limited by the foregoing, the Members find that the proposed business model of Platform to provide an electronic ordering platform for licensed retailers to advertise their products and for consumers to order and pay for those products does not violate the NYS Alcoholic Beverage Control Law.

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This matter was heard and determined by the Members of the Authority at a Full Board meeting held on May 26, 2021 before Chairman Vincent Bradley, Commissioner Lily Fan and Commissioner Greeley Ford. The above written ruling was approved by Chairman Bradley on behalf of the Members on July 6, 2022.

Dated: 07/06/22

A handwritten signature in black ink, appearing to read "Donald Roper", written in a cursive style.

Donald Roper  
Secretary to the Authority