

NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF 10/26/2022
REFERRED FROM: COUNSEL'S OFFICE

2022- 01601

REASON FOR REFERRAL
REQUEST FOR DIRECTION

PROPOSED ADVISORY-
GROCERY STORE INVENTORY

(PROPOSED ADVISORY)

The Members of the Authority at their regular meeting held at the Zone I New York City Office on 10/26/2022 determined:



State Liquor Authority

KATHY HOCHUL
Governor

VINCENT G. BRADLEY
Chairman

LILY M. FAN
Commissioner

GREELEY FORD
Commissioner

ADVISORY #2022-xx

SUBJECT: Minimum inventory standards for grocery stores

The purpose of this Advisory is to provide guidance with respect to maintaining a bona fide grocery store within the meaning of the Alcoholic Beverage Control Law ("ABCL"). Grocery stores and drug stores are eligible for licenses to sell beer (ABCL §54) or beer and wine products (ABCL §54-a) at retail for consumption off the licensed premises. "Grocery store" is defined in ABCL §3(13) as "any retail establishment where foodstuffs are regularly and customarily sold in a bona fide manner for consumption off the premises." This advisory replaces Advisory 2014-2.

In prior directives¹ the Members of the Authority provided their interpretation as to the inventory that must be maintained to meet the statutory definition of "grocery store" and operate a bona fide business within the contemplation of the "grocery store beer" license. After consultation with representatives of the grocery store industry, the Members of the Authority issued Advisory 2014-2, setting forth a new inventory standard that must be maintained by a business in order that it shall be considered a "grocery store" within the meaning of the ABCL. The new standard took into consideration that businesses seek to offer multiple services and goods to patrons. The Authority's prior standard would, in some instances, prohibit a bona fide grocery store from obtaining an off-premises beer, or beer and wine, license either because of the items that were, or were not, available for sale or because of the volume of products that were available for sale.

Accordingly, in Advisory 2014-2, the Members of the Authority interpreted the definition of "grocery store" to mean a business that devotes at least 50% of its public floor space exclusively to the display of "consumer commodities", however packaged or contained. The advisory created three categories of consumer commodities. However, it did not expressly require grocery stores to offer any specific item from any of the categories.

To continue to allow businesses the ability to offer goods and services not typically associated with a "grocery store", but to also have available the items that the public would expect at a "grocery store," the Authority's definition of "grocery store" shall continue to mean a business that is open to the public and devotes at least 50% of its public floor space exclusively to the display of "consumer commodities." In addition, at least one-half of the floor space devoted to the display of consumer commodities must be devoted to the display of "food."

For purposes of the Advisory:

¹ Divisional Order 780 and Divisional Order 826, which rescinded and replaced Divisional Order 780.

"Food" shall mean all items used or intended for consumption by human beings or household pets. Food does not include alcoholic beverages or carbonated beverages. At least ten different food items must be eligible for purchase using Supplemental Nutrition Assistance Program ("SNAP") benefits.

"Consumer Commodities" shall mean:

- (a) Food;
- (b) Household items, which means napkins, facial tissues, toilet tissues, foil wrapping, plastic wrapping, paper towels and disposable plates and utensils; and
- (c) Personal health/hygiene items, which means non-prescription drugs, hygiene products and toiletries.

Compliance with this standard shall be determined as follows: The number of square feet of public floor space devoted to consumer commodities shall be divided by the total number of square feet of public floor space in the licensed premises. The resulting quotient must be no less than 0.5 for the business to be considered a bona fide grocery store. In calculating the total number of square feet of floor space occupied by the licensed premises, businesses occupying less than 5,000 square feet may exclude up to 10% of their floor space for area used for food preparation, bottle redemption and automated teller machines. Businesses occupying 5,000 or more square feet may not exclude any space used for such purposes.

All existing grocery store beer licensees must maintain the inventory standards set forth above to be considered a operating a bona fide business within the contemplation of the grocery store beer license. Failure to comply with these standards may result in disciplinary action against the licensee. All applicants for a grocery store beer license shall be required to sign a stipulation prior to the approval of the application in which the applicant agrees to abide by these standards.

This matter was heard and determined by the Members of the Authority at a Full Board meeting held on _____, 2022 before Chairman Vincent Bradley, Commissioner Lily Fan, and Commissioner Greeley Ford. The above written advisory was approved by the Members of the Authority on _____, 2022.

Dated:

Donald Roper
Secretary to the Authority

STATE OF NEW YORK
LIQUOR AUTHORITY

TO: "Grocery store beer" licensees and agency staff

SUBJECT: Minimum inventory standards for grocery stores

The purpose of this Advisory is to provide guidance with respect to maintaining a bona fide grocery store within the meaning of the Alcoholic Beverage Control Law ("ABCL"). Grocery stores and drug stores are eligible for licenses to sell beer (ABCL §54) or beer and wine products (ABCL §54-a) at retail for consumption off the licensed premises. "Grocery store" is defined in ABCL §3(13) as "any retail establishment where foodstuffs are regularly and customarily sold in a bona fide manner for consumption off the premises."

In prior directives¹ the Members of the Authority have provided their interpretation as to the inventory that must be maintained in order to meet the statutory definition of "grocery store" and operate a bona fide business within the contemplation of the "grocery store beer" license. After consultation with representatives of the grocery store industry, the Members of the Authority hereby set forth a new inventory standard that must be maintained by a business in order that it shall be considered a "grocery store" within the meaning of the ABCL. This new standard takes into consideration that businesses seek to offer multiple services and goods to patrons. The Authority's existing standard would, in some instances, prohibit a bona fide grocery store from obtaining an off-premises beer, or beer and wine product, license.

Accordingly, the Members of the Authority interpret the definition of "grocery store" to mean a business that devotes at least 50% of its public floor space exclusively to the display of "consumer commodities", however packaged or contained. For purposes of the Advisory, "consumer commodities" shall mean:

- (a) Food, which means all items used or intended for consumption by human beings or household pets. Food does not include alcoholic beverages or carbonated beverages. At least ten different food items must be eligible

¹ Divisional Order 780 and Divisional Order 826, which rescinded and replaced Divisional Order 780.

for purchase using Supplemental Nutrition Assistance Program (“SNAP”) benefits.

- (b) Household items, which means napkins, facial tissues, toilet tissues, foil wrapping, plastic wrapping, paper towels and disposable plates and utensils.
- (c) Personal health/hygiene items, which means non-prescription drugs, hygiene products and toiletries.

Compliance with this standard shall be determined as follows: The number of square feet of floor space devoted to consumer commodities shall be divided by the total number of square feet of floor space occupied by the entire licensed premises. The resulting quotient must be at no less than 0.5 for the business to be considered a bona fide grocery store. In calculating the total number of square feet of floor space occupied by the licensed premises, businesses occupying less than 5,000 square feet may exclude up to 10% of their floor space for area used for food preparation, bottle redemption and automated teller machines. Businesses occupying 5,000 or more square feet may not exclude any space used for such purposes.

All existing grocery store beer licensees must maintain the inventory standards set forth above to be considered to be operating a bona fide business within the contemplation of the grocery store beer license. Failure to comply with these standards may result in disciplinary action against the licensee. All applicants for a grocery store beer license shall be required to sign a stipulation prior to the approval of the application in which the applicant agrees to abide by these standards.

NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF 10/26/2022
REFERRED FROM: COUNSEL'S OFFICE

2022- 1607A

REASON FOR REFERRAL
REQUEST FOR DIRECTION

NOTICE OF ADOPTION FOR
RULE PROMULGATION
SPLIT CASE FEES

(NOTICE OF ADOPTION)

The Members of the Authority at their regular meeting held at the Zone 1 New York City Office on 10/26/2022 determined:

Notice of Adoption

Liquor Authority, State
(SUBMITTING AGENCY)

- This adoption will amend the NYCRR.
 This adoption will not amend the NYCRR.

NOTE: Typing and submission instructions are at the end of this form. Please be sure to COMPLETE ALL ITEMS. Incomplete forms will be cause for rejection of this notice. change in text

1. Action taken:

Amendment of Sections 65.4(d), and 65.4(e) of Title 9(b) of the N.Y.C.R.R.

"X" box if the rule was originally proposed as a consensus rule making.

2. Effective date of rule:

Date this notice is published in the *State Register*.

This is a "rate making" as defined in SAPA §102(2)(a)(ii), and, is effective as follows:

Date of filing.

Other date (specify): _____

Other date (specify): _____

_____ days after filing.

3. Statutory authority under which the rule was adopted:

ABCL Secs. 101-b(4), and 101-b(5)(d), as well as SAPA Sec. 201.

4. Subject of the rule:

Ensuring smaller retailers are not unlawfully discriminated against through the charging of exorbitant split case fees.

5. Purpose of the rule:

To ensure smaller retailers are not unlawfully discriminated against through the charging of exorbitant split case fees.

6. Terms and identification of rule:

A. I.D. No. of original notice of proposed or emergency/proposed rule making: LQR-26-22-00001 - P

B. Comparison of the proposed rule to the adopted rule (CHECK ALL THAT APPLY):

No changes were made to the proposed rule.

• *Text/Summary does not need to be republished in the State Register. If the last previously published RIS, RFA, RAFA or JIS remain adequate and do not require correction, SKIP ITEMS 9-12 and do NOT attach any such statements. If any of the most recently published statements were deemed inadequate or required correction, complete Item 9, 10, 11, or 12 as applicable, do NOT attach previously published statements. Be sure to complete C (if applicable), and D, as well as remaining Items 7-8 and 13-14.*

Nonsubstantive changes were made in [Parts, sections, subdivisions or paragraphs]:

• *Text/Summary is required to be republished in the State Register. Attach the original of the text as adopted (if proposed as full text, submit full text; if proposed as a summary, submit a summary) typed in scannable format. Do not skip Items 9-12; revised statements or explanatory statements are required.*

Text attached.

Summary attached.

This is a "rate making" as defined in SAPA §102(2)(a)(ii) and, pursuant to SAPA §202(7)(b), the agency elected to submit an original copy of a description of the substance. Substantial revisions were made in the following Parts, sections, subdivisions or paragraphs:

C. List the publication date and I.D. No. of any previously published notice(s) of revised rule making:

Publication date: _____, I.D. No. _____

Publication date: _____, I.D. No. _____

D. Signed certification of adoption and full text of the rule are attached:

Signed certification of adoption (scanned pdf).

Full text of the rule (MS Word).

7. The text of the final rule and any required statements and analyses may be obtained from:

Agency contact Paul Karamanol, Senior Attorney

Agency name New York State Liquor Authority

Office address 80 South Swan Street, Suite 900

Albany, New York 12210

Telephone (518) 486-6743 E-mail: paul.karamanol@sla.ny.gov

8. Additional matter required by statute:

Yes (include below material required by statute).

No additional material required by statute.

9. Revised Regulatory Impact Statement (RIS)

(SELECT AND COMPLETE ONE; ALL ATTACHMENTS MUST BE 2,000 WORDS OR LESS)

A. The attached Revised RIS contains:

The full text of the Revised RIS.

A summary of the Revised RIS.

B. A statement is attached explaining why a revised RIS is not required (check one box):

Changes made to the last published rule do not necessitate revision to the previously published RIS.

This is a technical amendment exempt from SAPA §202-a.

- C. A revised RIS is **not** attached because this rule is a "rate making" as defined in SAPA §102(2)(a)(ii).
- A revised RIS is **not** attached because this rule was proposed as a consensus rule as defined in SAPA

10. Revised Regulatory Flexibility Analysis (RFA) for small businesses and local governments

(SELECT AND COMPLETE ONE; ALL ATTACHMENTS MUST BE 2,000 WORDS OR LESS)

- A. The attached Revised RFA contains:
 - The full text of the Revised RFA.
 - A summary of the Revised RFA.
- B. A **statement is attached** explaining why a revised RFA is not required (check one box):
 - Changes made to the last published rule do not necessitate revision to the previously published RFA.
 - The changes will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments. The attached statement sets forth this agency's findings and the reason(s) upon which the findings were made, including what measures were used to determine those findings.
- C. A revised RFA is **not** attached because this rule is a "rate making" as defined in SAPA §102(2)(a)(ii).
- A revised RFA is **not** attached because this rule was proposed as a consensus rule as defined in SAPA §102(11).

11. Revised Rural Area Flexibility Analysis (RAFA)

(SELECT AND COMPLETE ONE; ALL ATTACHMENTS MUST BE 2,000 WORDS OR LESS)

- A. The attached Revised RAFA contains:
 - The full text of the Revised RAFA.
 - A summary of the Revised RAFA.
- B. A **statement is attached** explaining why a revised RAFA is not required (check one box):
 - Changes made to the last published rule do not necessitate revision to the previously published RAFA.
 - The changes will not impose any adverse impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. The attached statement sets forth this agency's findings and the reason(s) upon which the findings were made, including what measures were used to determine those findings.
- C. A revised RAFA is **not** attached because this rule is a "rate making" as defined in SAPA §102(2)(a)(ii).
- A revised RAFA is **not** attached because this rule was proposed as a consensus rule as defined in SAPA §102(11).

12. Revised Job Impact Statement (JIS)

(SELECT AND COMPLETE ONE; ALL ATTACHMENTS MUST BE 2,000 WORDS OR LESS)

- A. The attached Revised JIS contains:
 - The full text of the Revised JIS.
 - A summary of the Revised JIS.
- B. A **statement is attached** explaining why a revised JIS is not required (check one box):
 - Changes made to the last published rule do not necessitate revision to the previously published JIS.
 - The changes will not impose a substantial impact on jobs and employment opportunities. The attached statement sets forth this agency's findings that the rule will have a positive impact or no impact on jobs and employment opportunities; except when it is evident from the subject matter of the rule that it could only have a positive impact or no impact on jobs and employment opportunities, the statement shall include a summary of the information and methodology underlying that determination.
- C. A revised JIS is **not** attached because:
 - This rule is a "rate making" as defined in SAPA §102(2)(a)(ii).
 - This rule was proposed by the State Comptroller or Attorney General.

13. Assessment of Public Comment (includes legislative comments)

(COMPLETE ONE; ALL ATTACHMENTS MUST BE 2,000 WORDS OR LESS):

- Attached is an assessment of public comment.

No particular form is required, and it need only include comments not addressed in any previously published assessment for this rule. However, the assessment must be based on any written comments received by the agency or any comments presented at any public hearing held by the agency about this rule (include legislative comment). It must contain a summary and an analysis of the issues raised and significant alternatives suggested, a statement of the reason(s) why any significant alternatives were not incorporated, and a description of any changes made as a result of such comments.

- An assessment is not attached because no comments were received.

- An assessment is not required because this action is for a "rate making" as defined in SAPA §102(2)(a)(ii).

14. Referenced material (check one box):

- No information is being incorporated by reference in this rule.

- This rule contains referenced material in the following Parts, sections, subdivisions or paragraphs:

15. Initial Review of Rule (SAPA §207)

(SELECT AND COMPLETE ONE)

- A. As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2025, which is no later than the 3rd year after the year in which this rule is being adopted.

- B. As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year which is the 4th or 5th year after the year in which this rule is being adopted. This review period, justification for proposing same, and invitation for public comment thereon, were contained in a RFA, RAFA or JIS:

Attached is an assessment of public comment on the issue of the 4 or 5-year initial review period; or

An assessment of public comment on the 4 or 5-year initial review period is not attached because no comments were received on the issue.

- C. As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year which is no later than the 5th year after the year in which this rule is being adopted.

- D. Not Applicable. This is a "rate making" or a "consensus rule," or a repeal of a rule.

AGENCY CERTIFICATION (To be completed by the person who PREPARED the notice)

I have reviewed this form and the information submitted with it. The information contained in this notice is correct to the best of my knowledge.

I have reviewed Article 2 of SAPA and Parts 260 through 263 of 19 NYCRR, and I hereby certify that this notice complies with all applicable provisions.

Name Paul Karamanol, Senior Attorney Signature _____
Address 80 South Swan Street, Suite 900, Albany, New York 12210
Telephone (518) 486-6743 E-mail paul.karamanol@sla.ny.gov
Date 10/17/2022

Please read before submitting this notice:

1. Except for this form itself, all text must be typed in the prescribed format as described in the Department of State's *Register* procedures manual, *Rule Making in New York*.
2. Rule making notices, with any necessary attachments (in MS Word unless otherwise specified), should be e-filed via the Department of State website.

Sections 65.4(d) and 65.4(e) of Title 9, Subtitle B, of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR), are hereby amended to read as follows:

65.4 Prices to retailers (Alcoholic Beverage Control Law, § 101-b)

(d) The bottle or case price of an item of liquor or wine listed in a schedule of liquor or wine prices to retailers shall not be changed from the price theretofore listed in the prior schedule of liquor or wine prices to retailers except insofar as such change may be required or permitted pursuant to the provisions of 3(b) of section 101-b [Alcoholic Beverage Control Law], or after prior permission of the authority for good cause shown and for reasons not inconsistent with the purpose of section 101-b.

(e) Split Case Fees: In accordance with the anti-discrimination provisions of section 101-b(2) (Alcoholic Beverage Control Law), for each item of liquor or wine listed in the schedule of prices to retailers, prices shall be posted for (i) the price of a case and (ii) the price of a bottle. For purchases involving less than a case, a split case fee may be added to the price of each bottle, but in an amount that would total no more than \$7.39 per case. For example, where a case with 12 bottles has a price of \$120 (\$10 per bottle), the maximum price for each bottle, rounding to the nearest cent, would be \$10.62: \$127.39 divided by 12. For a 24 bottle case with a price of \$240, the maximum price for each bottle would be \$10.31: \$247.39 divided by 24. In the schedule of prices to retailers posted pursuant to the provision of 3(b) of section 101-b (Alcoholic Beverage Control Law), the listing for the price of a bottle shall include the split case fee for each bottle. In the examples above, the posted price of a bottle would be \$10.62 or \$10.31 respectively, not \$10. [For each item of liquor listed in the schedule of liquor prices to retailers there shall be posted a bottle and a case price. The bottle price multiplied by number of containers in the case must exceed the case price by approximately \$1.92 for any case of 48 or fewer containers. The figure is to be reached by adding \$1.92 to the case price, dividing by the number of containers in the case, and rounding to the nearest cent. Where more than 48 containers are packed

in a case, bottle price shall be computed by dividing the case price by the number of containers in the case, rounding to the nearest cent, and adding one cent. Variations will not be permitted without approval of the authority.]

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the June 29, 2022 State Register, sixty-three written public comments were received from sixty three individuals regarding the Split Case Fee Rules Reform Package (the “Package”). Fifty-three of the public comments were identical electronic mail letters in support of the Package. There were also three public comments made in-person at the Authority’s public hearing on September 14, 2022 from persons who had already submitted written public comments.

PUBLIC COMMENTERS ONE THROUGH FIFTY-THREE: The fifty-three persons submitting the same electronic mail support letter are all restaurant owners in New York and expressed support for the Package as part of an effort to support restaurants and small businesses generally in light of today’s economic environment featuring inflation and heightened costs across the board for small businesses in the wake of the COVID-19 pandemic.

AUTHORITY RESPONSE: The Authority agrees that the Package should be adopted as a price anti-discrimination measure, one that is meant to allow wholesalers to recover the (inflation adjusted) cost of the additional effort to splitting cases, while protecting smaller retailers (those that more often utilize split cases), still recovering from the economic effects of the COVID-19 pandemic, from the discrimination of exorbitant and unjustified split case fees.

PUBLIC COMMENTER FIFTY-FOUR: The fifty-fourth person submitting public comments expressed support for the Package as part of an effort to support restaurants and small businesses in light of today’s economic environment. This commenter also argues that wholesalers in New York have established legal statewide monopolies over the brands they sell in contravention of the original intent of the statute, so that currently retailers are forced to purchase products from each brand’s sole in-state wholesaler who uses this market power to place significant economic pressure on small retailers. This commenter also notes that while

the Authority has not actually changed the split case fee in SLA Rule 65.4(e) since 1980 (increasing from \$0.96 to \$1.92 maximum per case), that today the two largest wholesalers in the state are charging \$30.00 to \$36.00 per case, or between 15 to 20 times the legally authorized limit for this service. As a result, New York's small retail and restaurant licensees (the ones that do not have the ability to store cases of multiple brands of liquor or wine) are forced to pay thousands of dollars per year in split case fees to these two statewide wholesaler monopolies each year.

This commenter argues that SLA Rule 65.4(e) is rooted statutorily in the anti-discrimination provisions of Alcoholic Beverage Control Law ("ABCL") Sec. 101-b, contrary to the wholesalers' erroneous claims that the rule at the heart of this regulatory reform package lacks statutory authorization in light of the Supreme Court's striking down of the price control portions of the ABCL (specifically ABCL Sections 101-bb and 101-bbb which were subsequently repealed by the Legislature). This commenter concludes that SLA Rule 65.4 is not a comprehensive price control regulation – as erroneously claimed by the wholesalers - since wholesalers are free to charge whatever price they wish for the brands of liquor and wine they sell, and that the Package merely regulates the additional charges that may be imposed by wholesalers for the splitting of a full case, thereby ensuring that smaller retailers, those that tend toward smaller purchases, are not discriminatorily impacted by exorbitant and unjustified split case fees..

AUTHORITY RESPONSE: The Authority agrees that the Package should be adopted as a price anti-discrimination measure, one that is meant to allow wholesalers to recover the (inflation adjusted) cost of the additional effort to splitting cases, while protecting smaller retailers (those that more often utilize split cases), still recovering from the economic effects of the COVID-19 pandemic, from the discrimination of exorbitant and unjustified split case fees. The Authority notes as well that while the Alcoholic Beverage Control Law was originally designed with robust competition in mind in the wholesaler and other tiers, subsequent changes in the law to allow for wholesaler exclusivity of popular products have diminished competition and thereby given less

market choice to retailers, thus making anti-discrimination measures more essential because of the limited competitive price pressures. Lastly, the Authority agrees that SLA Rule 65.4(e) is rooted statutorily in the anti-discrimination provisions of ABCL Sec. 101-b, and therefore the Authority has ample statutory underpinning in the ABCL to promulgate and enforce this Package.

PUBLIC COMMENTER FIFTY-FIVE: The fifty-fifth person submitting public comments expressed support for the split case fee cap of \$7.39 included in the Package, as well as requiring alcoholic beverage wholesalers, and self-distributing manufacturers to post the total price per bottle – including any split case fee. This commenter also noted that manufacturers will ultimately be able to conduct business with more retailers once the Package goes into effect, as more retailers will now be able to stock a few bottles of their brands without being exposed to a high case splitting fee.

AUTHORITY RESPONSE: The Authority agrees that the package appropriately caps split case fees at the inflation adjusted \$7.39 level and makes such fees more transparent by requiring such fees to be incorporated into price posted prices for sales by the bottle.

PUBLIC COMMENTER FIFTY-SIX: The fifty-sixth person submitting public comments expresses support for the split case fee cap of \$7.39 included in the Package, as well as ensuring that the Authority actually enforce the new split case fee limits once in place. This commenter notes that the cost of doing business in the hospitality industry has increased drastically in recent years, and that while small retailers can control some costs simply by changing vendors, they have no choice but to purchase their liquor and wine from one or the other of the two large wholesalers that have developed for themselves statewide distribution monopolies on essentially every popular brand. This commenter further argues that small establishments lack sufficient storage space to purchase all but the most popular brands by the case, and that since many top shelf liquors cost \$50.00 for a liter, or more, small retailers cannot afford to tie up \$600.00 for a case that may not sell through for

six months or more. This commenter concludes that by capping split case fees at a more modest level, as proposed in the Package, the Authority will be helping countless licensees in New York make payroll, add staff members, and possibly expand their brand offerings to customers they may not have before.

AUTHORITY RESPONSE: The Authority agrees that the Package should be adopted as a price anti-discrimination measure, one that is meant to allow wholesalers to recover the (inflation adjusted) cost of the additional effort to splitting cases, while protecting smaller retailers (those that more often utilize split cases), still recovering from the economic effects of the COVID-19 pandemic, from the discrimination of exorbitant and unjustified split case fees. The Authority notes as well that while the Alcoholic Beverage Control Law was originally designed with robust competition in mind in the wholesaler and other tiers, subsequent changes in the law to allow for wholesaler exclusivity of popular products have diminished competition and thereby given less market choice to retailers, thus making anti-discrimination measures more essential because of the limited competitive price pressures .

PUBLIC COMMENTER FIFTY-SEVEN: The fifty-seventh person submitting public comments expressed support for the Package as part of an effort to support restaurants and small businesses in light of today's economic environment. This commenter noted that inflation and price increases have taken a significant toll on his restaurant business coming on the heels of the economic crisis resulting from the COVID-19 pandemic. This commenter noted that there are very few brands of liquor or wine that they order as a full case now, that that there is a minimum \$1,000.00 order enforced by the wholesalers below which they are also charged delivery charges on top of the split case fees that they have no choice but to pay. This commenter described the impact on his business of all of these factors as "devastating."

AUTHORITY RESPONSE: The Authority agrees that the Package should be adopted as a price anti-discrimination measure, one that is meant to allow wholesalers to recover the (inflation adjusted) cost of the

additional effort to splitting cases, while protecting smaller retailers (those that more often utilize split cases), still recovering from the economic effects of the COVID-19 pandemic, from the discrimination of exorbitant and unjustified split case fees.

PUBLIC COMMENTER FIFTY-EIGHT: The fifty-eighth person submitting public comments expressed support for the Package as part of an effort to support restaurants and small businesses in light of today's economic environment, noting that the restaurant industry faces many challenges on a daily basis. Among such challenges this commenter listed are the split case fees that wholesalers charge when retailers need to purchase less than twelve bottles of a brand of liquor; minimum order charges, and fuel charges assessed by their wholesalers. This commenter stated that the additional fees the liquor wholesalers are currently getting away with are hurting the small independent restaurant businesses.

AUTHORITY RESPONSE: The Authority agrees that the Package should be adopted as a price anti-discrimination measure, one that is meant to allow wholesalers to recover the (inflation adjusted) cost of the additional effort to splitting cases, while protecting smaller retailers (those that more often utilize split cases), still recovering from the economic effects of the COVID-19 pandemic, from the discrimination of exorbitant and unjustified split case fees.

PUBLIC COMMENTER FIFTY-NINE: The fifty-ninth person submitting public comments expressed support for the Package, stating that his hotel has been in operation since 1987, and that after the COVID-19 pandemic small businesses could use a break during these difficult times. This commenter argued that he does not have a choice which wholesalers to purchase his liquor or wine from, and that wholesalers hold all the cards and he has no choice but to play the game. This commenter is requesting a "new Deal."

AUTHORITY RESPONSE: The Authority agrees that the Package should be adopted as a price anti-discrimination measure, one that is meant to allow wholesalers to recover the (inflation adjusted) cost of the

additional effort to splitting cases, while protecting smaller retailers (those that more often utilize split cases), still recovering from the economic effects of the COVID-19 pandemic, from the discrimination of exorbitant and unjustified split case fees.

PUBLIC COMMENTER SIXTY: The sixtieth person submitting public comments expressed opposition to the Package, stating that: the statutory basis for the rule at issue was the now repealed ABCL 101-bb, which related to interstate pricing of liquor and wine; the Authority does not have general rule making authority; the intent of ABCL Sec. 101-b is for each wholesaler to set its own bottle and case price; the Authority does not have the power to set or control prices; and that the reforms contained in the Package are unlawful because they would restrict wholesalers' right to set their prices, would have the effect of banning quantity discounts, and forces wholesalers to discriminate in favor of retailers who purchase by the bottle. This commenter also argues that the Package proposals are arbitrary and capricious and lack any basis in law or fact. This commenter concludes that the Authority underestimates the impact of its proposal, and that if approved as is the Package will not have the intended effect of a partial reallocation of the split case fees among retailers who buy by the bottle to those that buy by the case, rather it will force wholesalers to reevaluate and change many of their current methods of operation, reducing the number of brands available for sale by the bottle and increasing prices and quantity discount levels to make up the difference – resulting in higher prices and fewer choices for consumers.

AUTHORITY RESPONSE: The Authority disagrees that the Package should be rescinded for lack of statutory underpinning, since Rule 65.4(e) is clearly rooted statutorily in the anti-discrimination provisions of ABCL Sec. 101-b and therefore has ample statutory underpinning. However, the Authority notes as well that were it to be true that no statutory authority exists to promulgate this Package as suggested, the result would not be an unchecked ability of the wholesalers to create and charge split case or other fees, rather it would be the inability to add *any* fees to the posted bottle and case prices and therefore the requirement that all overhead and

operational costs be incorporated into that pricing. Additionally, the Authority notes that while the Alcoholic Beverage Control Law was originally designed with robust competition in mind in the wholesaler and other tiers, subsequent changes in the law to allow for wholesaler exclusivity of popular products have diminished competition and thereby given less market choice to retailers, thus making anti-discrimination measures more essential because of the limited competitive price pressures . Further, the Authority has not actually changed the split case fee in SLA Rule 65.4(e) since 1980 (increasing from \$0.96 to \$1.92 maximum per case), however today the two largest wholesalers in the state are charging \$30.00 to \$36.00 per case, or between 15 to 20 times the legally authorized limit for this service, an unjustified amount far above any inflation adjusted increase. As a result, New York's small retail and restaurant licensees (the ones that do not have the ability to store cases of multiple brands of liquor or wine) are forced to pay thousands of dollars per year in split case fees to these two statewide wholesaler monopolies each year, all during these challenging economic times brought on by the aftermath of the COVID-19 pandemic. The Authority emphatically disagrees that the Package constitutes impermissible price fixing in any way, and notes instead that the Package is quite obviously an anti-discrimination measure, in the same vein as the Authority's rule permitting the addition of delivery fees only to the extent they reflect actual cost to the wholesaler. SLA Rule 65.4 as amended by the Package does not constitute a price control regulation since wholesalers would remain free to charge whatever price they wish for the brands of liquor and wine they sell. The Package merely imposes inflation adjusted limits to the additional charges that may be imposed by wholesalers for the splitting of a full case, and thereby ensures that smaller retailers, those that tend toward smaller purchases, are not discriminatorily impacted by exorbitant and unjustified split case fees.

PUBLIC COMMENTER SIXTY-ONE: The sixty-first person submitting public comments expressed opposition to the Package, stating that: the Authority has demonstrated bias against wholesalers by wrongfully describing their \$30.00 to \$36.00 split case fees as "exorbitant." This commenter argues that they advanced

their position concerning the proposed changes contained in the Package to the Authority during its development and drafting, but that their practical concerns largely went unheard by the Authority, and that there will be substantial economic impact and negative effects on the industry that may result.

This commenter argues the Authority lacks authority to promulgate Rule 65.4(e) in light of the Supreme Court of the United States (“SCOTUS”) having struck down ABCL Sections 101-bb and 101-bbb - which formerly set forth minimum pricing requirements such that New York wholesalers and retailers could not charge New York customers more than they were charging customers anywhere else in the country - as impermissible restraints on interstate commerce. This commenter then argues that the inflation adjusted split case fee maximum charges set forth in the Package are the equivalent of the impermissible price controls formerly contained in ABCL Sections 101-bb and 101-bbb, and claims current SLA Rule 65.4(e) is itself moot and unenforceable as a result.

This commenter then argues that if the Package is adopted the proposed limits on split case fees would result in adverse economic impacts for the industry and consumers, stating it would likely aggravate economic differences between retailers, as larger retailers would still be in a better position to absorb the impacts of increased retail prices, and since retailers are likely to pass on their increased costs to consumers there would be higher consumer prices for all. This commenter concludes by arguing that wholesalers cannot be expected to absorb such cost increases, and may seek to diminish the Packages’ impact by reducing service levels, delivery schedules, and other operational changes, including possibly cutting jobs.

AUTHORITY RESPONSE: The Authority disagrees that the Package should be rescinded for lack of statutory underpinning, since Rule 65.4(e) is clearly rooted statutorily in the anti-discrimination provisions of ABCL Sec. 101-b and therefore has ample statutory underpinning. However, the Authority notes as well that were it to be true that no statutory authority exists to promulgate this Package as suggested, the result would not

be an unchecked ability of the wholesalers to create and charge split case or other fees, rather it would be the inability to add *any* fees to the posted bottle and case prices and therefore the requirement that all overhead and operational costs be incorporated into that pricing. Additionally, the Authority notes that while the Alcoholic Beverage Control Law was originally designed with robust competition in mind in the wholesaler and other tiers, subsequent changes in the law to allow for wholesaler exclusivity of popular products have diminished competition and thereby given less market choice to retailers, thus making anti-discrimination measures more essential because of the limited competitive price pressures . Further, the Authority has not actually updated the split case fee in SLA Rule 65.4(e) since 1980 (increasing from \$0.96 to \$1.92 maximum per case), however today the two largest wholesalers in the state are charging \$30.00 to \$36.00 per case, or between 15 to 20 times the legally authorized limit for this service, , an unjustified amount far above any inflation adjusted increase. As a result, New York's small retail and restaurant licensees (the ones that do not have the ability to store cases of multiple brands of liquor or wine) are forced to pay thousands of dollars per year in split case fees to these two statewide wholesaler monopolies, all during these challenging economic times brought on by the aftermath of the COVID-19 pandemic. The Authority emphatically disagrees that the Package constitutes impermissible price fixing in any way, and notes instead that the Package is quite obviously an anti-discrimination measure, in the same vein as the Authority's rule permitting the addition of delivery fees only to the extent they reflect actual cost to the wholesaler. SLA Rule 65.4(e) as amended by the Package does not constitute a price control regulation since wholesalers would remain free to charge whatever price they wish for the brands of liquor and wine they sell. The Package merely imposes inflation adjusted limits to the additional charges that may be imposed by wholesalers for the splitting of a full case, and thereby ensures that smaller retailers, those that tend toward smaller purchases, are not discriminatorily impacted by exorbitant and unjustified split case fees. .

PUBLIC COMMENTER SIXTY-TWO: The sixty-second person submitting public comments expressed opposition to the Package, stating that: the regulation arbitrarily places a cap on the amount a wholesaler may

charge for the price of a split case, arguing that the economy is headed toward recession, inflation is rising along with the price of labor and fuel, and wholesalers require the flexibility to accurately price their services to absorb increased costs. This commenter states that, if passed, the Package will result in wholesalers being faced with a decision to discontinue split cases or provide the service at a loss, adding this in turn harms the small producers who may lack the ability to efficiently get their product to the retail sector, and that they may find themselves unable to establish themselves in the New York market as a result.

AUTHORITY RESPONSE: The Authority disagrees that the maximum split case fees included in the Package are in any way arbitrary, being mere inflation adjusted increases from the already existing limits set forth in SLA Rule 65.5(e). Further, the Authority has not actually updated the split case fee in SLA Rule 65.4(e) since 1980 (increasing from \$0.96 to \$1.92 maximum per case), however today the two largest wholesalers in the state are charging \$30.00 to \$36.00 per case, or between 15 to 20 times the legally authorized limit for this service, an unjustified amount far above any inflation adjusted increase. As a result, New York's small retail and restaurant licensees (the ones that do not have the ability to store cases of multiple brands of liquor or wine) are forced to pay thousands of dollars per year in split case fees to these two statewide wholesaler monopolies, all during these challenging economic times brought on by the aftermath of the COVID-19 pandemic. The Package merely imposes inflation adjusted limits to the additional charges that may be imposed by wholesalers for the splitting of a full case, and thereby ensures that smaller retailers, those that tend toward smaller purchases, are not discriminatorily impacted by exorbitant and unjustified split case fees.

PUBLIC COMMENTER SIXTY-THREE: The sixty-third person submitting public comments expressed support for the Package generally, but opposes setting the maximum split case fee at \$7.39 since that number is not divisible by the usual case configurations of six, twelve, or twenty-four.

AUTHORITY RESPONSE: The Authority disagrees. The Package contains inflation adjusted limits to the additional charges that may be imposed by wholesalers for the splitting of a full case, and thereby ensures that smaller retailers, those that tend toward smaller purchases, are not discriminatorily impacted by exorbitant and unjustified split case fees. There is no reason wholesalers cannot charge less than \$7.39 to split a case and make their price posted charges divisible by any case configuration they wish for accounting purposes.

COMMENTS AT THE AUTHORITY'S PUBLIC MEETING:

At the public meeting on September 14, 2022, three persons appeared, all in support of the Package. All expressed the need to support restaurants and small businesses generally in light of today's economic environment featuring high inflation and heightened costs across the board for small businesses. Two of them stressed the need for the Authority to properly enforce the new split case fees once the regulations are adopted. One argued that split case fees must be related to the actual costs incurred by wholesalers for providing these services, and also stated that wholesalers were given the opportunity to provide information to the Authority regarding actual costs incurred during the development of the Package, but that the wholesalers chose not to shed light on their processes.

AUTHORITY RESPONSE: The Authority agrees that the Package should be adopted as a price anti-discrimination measure, one that is meant to allow wholesalers to recover the (inflation adjusted) cost of the additional effort to splitting cases, while protecting smaller retailers (those that more often utilize split cases), still recovering from the economic effects of the COVID-19 pandemic, from the discrimination of exorbitant and unjustified split case fees. In addition, several wholesalers were requested to provide information to the Authority regarding their actual costs incurred as a result of their existing split case processes, but all declined

to do so. The Authority has systems in place already that will ensure compliance with the new fee limits included in the Package.