

STATE OF NEW YORK: LIQUOR AUTHORITY

Operation of Mobile Phone Application
Swill

DECLARATORY
RULING
2015-01557D

Preliminary Statement

Section 98.1 of the Rules of the State Liquor Authority (9 NYCRR subtitle B) provides that any person may request the Authority to issue a declaratory ruling on the application of the Alcoholic Beverage Control Law (ABCL), or the Rules of the Authority, to any person, property or state of facts.

By letter dated June 5, 2015, a request was submitted by attorney Michael Bruk, on behalf of his client Swillio Inc. ("Swill"). As described by Mr. Bruk, Swill is a mobile phone application ("app") that enables off-premises licensees to offer their products for sale on the app. Swill does not hold any licenses relating to alcoholic beverages. Mr. Bruk requests a declaratory ruling as to whether the operation of Swill violates the ABCL.

Statement of Facts

Swill is a mobile phone app that works with New York off-premises retailers who sell wine, spirits, and beer. Retailers contracting with Swill offer their products via the app to be delivered to the customer's location. Customers using Swill input their address and are directed to a page containing option tabs for wine, spirits, or beer. Swill also lists non-alcoholic items such as cranberry juice and ice. After selecting an option tab, the customers sees a menu of products with prices that are all selected and priced by local retailers.

When customers view items, the name of the retailer selling that item is listed, as well as when the customer places the item in their shopping cart. Lastly, on the customer receipt, the retailer information is listed. All order histories also list the retailer who sold the product.

Swill charges partnering retailers \$5.00 for every "item" sold via the app. For example, one six pack of beer is one item. An order of one six pack of beer, one bottle of wine, and one bottle of rum will require the beer retailer to pay Swill \$5.00 and the wine and spirits retailer to pay \$10.00. Swill also charges retailers a licensing fee of \$100.00 per month, but this licensing fee does not accrue unless the app generates at least \$3,000 in sales for the retailer per month.

The customer funds are received via a credit card processor and are deposited into a bank account of the retailer's choice, which can only be accessed by the retailer. All orders are received electronically and reviewed by the retailer, and the retailer either accepts or rejects each order. All deliveries are made by the retailer, which means orders for beer are delivered by a separate retailer than orders for spirits and wine. All retailers are responsible to ensure that sales are only made to those of legal drinking age.

Swill also intends to have banner ads on the app, including ads for alcoholic beverages. When one clicks on the ad, they will be taken to the manufacturer's website and not the website of any participating retailer.

Applicable Law

Section 111 of the ABCL prevents a licensee from making their license "available" to anyone. Section 111 states that a license issued ". . . shall not be transferable to any other person or to any other premises . . . it shall be available only to the person therein specified . . ."

Issues Presented

- (1) Is Swill engaged in the sale of alcoholic beverages?
- (2) Does the operating method of Swill constitute an availing?

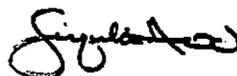
Determination of the Members

When determining if a retail licensee has made their license available to another, the Members examine the role of the licensee in the operation of the premises. The Members ask: (1) whether the licensee is playing a passive role and if an unlicensed person is acting in their place; and (2) whether an unlicensed party has an ownership or financial interest in the licensed premises.

Under the facts as presented by Mr. Burk it appears that Swill does not control traditional retail functions and that the licensees contracting with Swill retain control of their operations and sales. The licensee selects the products to sell, selects the price at which it will be sold, receives all customer funds and delivers the product to the customer. Additionally, the Swill app clearly identifies the licensed seller. Swill does not engage in any aspect of the sale but merely operates the platform from which the licensed seller may sell. Accordingly, Swill is not engaged in sales of alcoholic beverages.

As to the specific financial payments between the licensee and Swill, Swill receives a flat monthly service fee for services provided in addition to a flat fee of \$5.00 for every item sold. The rate of \$5.00 may be high proportionally to the price of the product actually sold but the consistent flat rate ensures that Swill's compensation is not a portion of the licensed premises' sales but rather a per transaction fee. In many ways, Swill resembles previous declaratory rulings such as, Declaratory Ruling 2013-02526, relating to Drizly, and 2014-02578, relating to BottleRush. Swill's model does not constitute an availing.

In conclusion, the specific operation of Swill as described by Mr. Bruk does not violate the ABCL. Licensees are reminded that this ruling is limited to the facts set forth herein. This ruling should not be considered approval for any other proposal which deviates in any respect from the representations as set forth above. The foregoing Declaratory Ruling was formally approved by the Members of the Authority at a Full Board meeting held on July 14, 2015.



Jacqueline Held
Secretary to the Authority