

Application of Alcoholic Beverage Control  
Law with respect to on-line coupon service  
by Living Social

DECLARATORY  
RULING  
2011-03527C

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Preliminary Statement

Section 98.1 of the Rules of the State Liquor Authority, (9 NYCRR subtitle B) provides that any person may request that the Authority issue a declaratory ruling on the applicability of the Alcoholic Beverage Control Law (“ABCL”), or the Rules of the Authority, to any person, property or state of facts. Strike & Techel, Esqs. a/k/a Beverage Law Group LLC (Kristen Techel, Esq, of counsel), on behalf of Living Social, an unlicensed business entity, seeks a declaratory ruling as to whether, under the facts presented, the service it provides to licensed on-premises retailers would violate any provisions of the ABCL.

Statement of facts

As described by Ms. Techel, Living Social is engaged in the online marketing of discount offers. These offers cover a variety of products and services, for example spas, auto shops, restaurants and dog walkers. Some of the New York businesses that advertise their offers with Living Social hold a license issued by the Authority. Offers by these licensees are structured in a variety of ways, but popular formats include \$25 for \$50 of food and drink and \$30 for a meal normally valued at \$50.

Living Social maintains a large database of subscribers. Those subscribers regularly visit a variety of web-based marketing platforms hosted by Living Social in search of interesting offers. For example, one marketing platform features a single offer per day in a given metropolitan area (“Daily Deal”), while a different marketing platform allows a licensee to promote offers for short bursts of time when business is slow or when a subscriber is nearby (“Instant Deal”).

Living Social’s business is based on the satisfaction of its subscribers, so it carefully sources offers from reputable merchants that it believes would be of interest to its subscribers. Living Social would use commercially reasonable efforts (i.e., a search of the Authority’s website and/or merchant representation) to perform a periodic check on the license status of merchants. Generally speaking,

Living Social's subscribers prefer offers where alcohol is not categorically excluded, though they do not necessarily apply the value of the offer to alcohol. The licensees and Living Social work together to develop offers that will appeal to the subscribers and comply with the ABCL. The licensees are responsible for the sale and service of any alcohol related to an offer in accordance with the ABCL.

Living Social charges a reasonable marketing fee for advertising the licensee's offers to its subscribers. The marketing fees are negotiated between Living Social and a licensee before an offer is marketed. The fee may be structured in a variety of ways, for example: a flat fee per offer sold; a percentage fee per offer sold based on value of offer; or a flat fee for a particular time period when the offer is available. Licensees that advertise with Living Social typically advertise in many additional channels. As a general matter, the money they spend advertising with Living Social is a small fraction of their business expense.

### Issues to be considered

In reviewing this proposal, there appear to be two issues raised concerning the ABCL:

(1) Whether the agreement between Living Social and a licensed retailer would be deemed an illegal "availing" of the license. ABCL §111 prohibits a licensee from making its license available to a person who has not been approved by the Authority to hold that license. ABCL §110(1)(g) requires disclosure to the Authority of any person with an economic interest in the licensed establishment.

(2) Whether the promotion constitutes a prohibited unlimited drink offering. ABCL §117-a prohibits licensees from offering unlimited drinks to patrons during a set period for a fixed price. The statute further prohibits licensees from advertising or conducting a promotion which, in the view of the Authority, is an attempt to circumvent the law. Licensees may not allow third parties to offer or advertise illegal drink promotions. The Authority has adopted an informal standard that any promotion in which drinks are offered at less than half price will be deemed a violation of §117-a.

### Determination of the Authority

Recently, the Members of the Authority addressed a similar request from Groupon, another unlicensed entity that markets on-line discount offers for retailers. With respect to the first issue, the question considered was whether the proposed method of operation provided Groupon with an interest sufficient enough to invoke the provisions of §111 and/or §110(1)(g).

The arrangement between Groupon and the retail licensee entitled Groupon to a percentage of the proceeds from the sale of alcoholic beverages. The Authority has generally considered such relationships to constitute a transfer of a financial interest in the licensed business to an unlicensed party. Absent disclosure to the Authority and the addition of that party to the licensed entity, the licensee is in violation of §111.

However, given the proposed method of operation presented by Groupon, it appeared that Groupon would be entitled to relatively insignificant percentage of the retail licensee's income from the sale of alcoholic beverages. Groupon would have no other interest in the ownership, management or business operations of the retail licensees. In light of these facts, it was the finding of the Members of the Authority that Groupon's proposal would not constitute a violation of §111.

With respect to the second issue, since these coupons gave consumers no more than a fifty percent discount off the retailer's prices, and since Groupon agreed that none of its offers would be exclusively for alcoholic beverages, the Authority found that Groupon's proposal would not constitute a violation of §117-a. In its declaratory ruling, the Authority cautioned licensees that the determination was based on the facts presented, and should not be considered approval of any other proposal which deviates, in any respect, with those facts.

As part of its request for a declaratory ruling for its proposal, Living Social has agreed to a list of conditions that would govern its activities with licensees in this state. It is the conclusion of the Authority that the provision of on-line offers, in accordance with those conditions, as set forth below, would not constitute a violation of §111 and/or §117-a.

1. Offers may not include unlimited alcoholic drinks and alcoholic drinks may not be discounted more than 50%.
2. Offers may not be exclusively for alcoholic beverages.
3. The licensee at all times remains responsible for the service and sale of alcohol in accordance with the ABCL, and can always refuse service or sale in accordance with the ABCL.
4. Each licensee at all times remains solely responsible for holding the appropriate license for sale of alcohol and remaining in good standing with the Authority.

5. Living Social will not have any interest in the ownership, management or business operations of a licensee, including without limitation, decisions relating to the purchase and/or sale of alcoholic beverages by a licensee.
6. Licensees can pay a reasonable marketing fee to Living Social for its marketing services.
7. Licensees must keep records of all payments made to Living Social and such records of payment must be made available to the Authority on request.
8. No licensee may pay Living Social more than 10% of their revenue on an annual basis.
9. No licensee may enter into an agreement with Living Social wherein Living Social is entitled to receive a percentage of the licensee's revenues (other than a percentage fee per offer sold based on the value of the offer).

As with the Authority's determination with respect to Groupon, such offers may only be conducted by retail on-premises licensees. The Authority cautions licensees and other on-line marketing entities that this determination is based on the facts presented and the conditions agreed to by Living Social. This ruling should not be considered approval of any other proposal which deviates, in any respect, from those facts or conditions.

The foregoing Declaratory Ruling was formally approved by the Members of the Authority at a Full Board meeting held on November 30, 2011.



Jacqueline Held  
Secretary to the Authority