

STATE OF NEW YORK: LIQUOR AUTHORITY

Sale of "electronic cigarettes" by
"C" licensed beer wholesalers

DECLARATORY
RULING
2011-03687

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 applicability of the Alcoholic Beverage Control Law ("ABCL"), or the Rules of the Authority, to any person, property or state of facts. Fogelman & Fogelman LLC (Leonard Fogelman, Esq, of counsel) has requested a ruling as to whether the sale of electronic cigarettes by "C" beer wholesalers would violate the provisions of the ABCL.

Applicable law

ABCL §104(1) contains a prohibition against licensed wholesalers conducting "any other business" in the licensed premises. However, the statute contains exceptions to this general restriction allowing for the manufacture, storage and/or sale of specified items. With respect to what can be sold (other than the alcoholic beverages allowed by the license), §104(1) the statute provides that:

1. Beer wholesalers are allowed to sell wine products and the following non-alcoholic items: certain snack foods; carbonated beverages; soft drinks; mineral waters; spring waters; drinking water; non-taxable malt or cereal beverages; juice drinks; fruit or vegetable juices; ice; liquid beverage mixes; dry or frozen beverage mixes; and "promotional items", as defined by the ABCL.
2. Beer wholesalers who are licensed to sell beer at retail (otherwise known as "C" beer wholesalers) are allowed to sell tobacco products.
3. Wine wholesalers are allowed to sell products falling under the ABCL's definition of "wine merchandise".

Section 104(1) does not appear to provide the Authority with any discretion to expand the list of items that can be sold by licensed wholesalers. However the statute has been amended over the years to add to the list of items that licensed wholesalers can sell. For example, the sale of wine merchandise by wine wholesalers was not authorized until 2002. Fruit and vegetable juices were added to the list of items in #1 above in 1988. Snack foods and tobacco products were also added in the 1980s.

Issue to be considered

Mr. Fogelman asks whether a "C" beer wholesaler can sell electronic cigarettes. It appears from his attached letter that he received an informal opinion from the Authority's Office of Counsel that the activity is permissible. It would appear, given the provisions of ABCL §104(1), that the question to be considered is whether an electronic cigarette is a "tobacco product" that can be sold by a "C" licensee. There is no definition of "tobacco product" in the ABCL.

Based on the information supplied by Mr. Fogelman and the Authority's Office of Counsel, an electronic cigarette is a battery operated device usually designed to resemble a traditional cigarette, cigar or pipe. Within the device are containers of nicotine, flavoring and other chemicals that are heated to turn into a vapor. The vapor is inhaled by the user of the device. As noted in the advertisements supplied by Mr. Fogelman, the primary use of the electronic cigarette is as an alternative to tobacco smoking, or a smoking cessation device.

In 2009, the United States Food and Drug Administration ("FDA") originally classified the items as "drug delivery devices", meaning that their importation and sale would be subject to the laws and regulations governing other drug and medical devices. The FDA's determination was challenged with the manufacturers arguing that the item was not being marketed as a medicinal product to help those trying to quit smoking. The United States Court of Appeals held that the FDA could not regulate the item as a medical or drug device.

Determination of the Authority

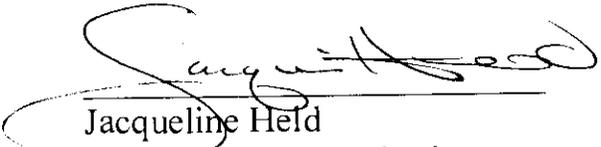
While the ABCL does not define "tobacco products", the term is defined in other chapters of state law. Under §470(2) of the Tax Law, a "tobacco product" is defined as "any cigar, including a little cigar, or tobacco, other than cigarettes, intended for consumption by smoking, chewing, or as snuff." Cigarettes are

defined separately as “any roll for smoking made wholly or in part of tobacco or of any other substance, irrespective of size or shape and whether or not such tobacco or substance is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material but is not made in whole or in part of tobacco.” A retailer must be registered with the Department of Taxation and Finance in order to sell cigarettes or tobacco products. Mr. Fogelman concedes that a retailer does not need such registration to sell electronic cigarettes.

Under §1399-AA of the Public Health Law, a “tobacco product” is defined as a cigarette, cigar, chewing tobacco, powdered tobacco, nicotine water or any other tobacco product. The sale of such tobacco products to persons under the age of eighteen is illegal. In 2010, a bill was introduced in the New York State Senate (S7234) and Assembly (A9529) that would include electronic cigarettes as “tobacco products” within the Public Health Law definition. As set forth in the memorandum in support of the bill, electronic cigarettes are not currently considered “tobacco products” within the meaning of state law.

As noted above, ABCL §104 provides no discretion to the Authority to add to the list of items that can be sold by a licensed wholesaler. Since it appears that electronic cigarettes are not considered “tobacco products” under either of the two definitions contained in state law, the Authority is not persuaded that it should adopt a contrary definition of that term. Accordingly, the Members of the Authority find that electronic cigarettes are not “tobacco products” within the meaning of §104, nor can they otherwise be sold by “C” beer wholesalers.

The foregoing Declaratory Ruling was formally approved by the Members of the Authority at a Full Board meeting held on December 14, 2011.


Jacqueline Held
Secretary to the Authority