STATE OF NEW YORK: LIQUOR AUTHORITY

Operation of Smart Phone application
"Century Club"

DECLARATORY
RULING
2015-00074

Preliminary Statement

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

By letter dated November 13, 2014, that includes a sample contract, Mr. Jim An and Mr. Ayan Roy requested a declaratory ruling from the Authority as to whether the operation of the Century Club ("The Club") violates the Alcoholic Beverage Control Law. The Century Club is a smart phone application ("app") to provide discounts for food and beverages from participating licensed on-premises locations to The Club members.

Statement of Facts

The Century Club intends to have members who pay a monthly fixed membership fee so that they may receive discounts of up to 50% on food and beverages at participating venues. Participating venues control which menu items at what prices are available for selection by Club members. The Club members have a limit of 100 orders via the club per month. Once a month, the Club will pay participating on-premises locations a fixed fee of $1.50 per club sale during the month. The Club provides participating on-premises locations with a computer tablet. The Club members place orders via smart phone at the licensed premises and show their phones to the servers who use the computer tablet to generate a confirmation code. The confirmation code is then inputted by the Club member into their Club app.

Club members have two ways to pay for The Club orders: by using a credit card on file with The Club's third party processor, or by paying The Club directly for the purchased item, including a preset tip. In the first method, the member is charged for their purchase and a preset tip. The funds are held in an account that may only be accessed by the participating on-premises licensee. In the second method, The Club, after collecting the fees and tips, will, on a weekly basis, distribute the designated funds to the licensed premises. The Club intends to distribute 100% of the funds collected to the licensed premises.

The Club's sole income is derived from membership fees. Mr. An and Mr. Roy do not intend to have any advertisers on the app.

Applicable Law

Section 111 of the Alcoholic Beverage Control Law prevents a licensee from making their license "available" to anyone. Section 111 states, 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 The Club engaged in the sale of alcoholic beverages?
(2) Does the operating method of The Club violate ABCL §111?

Determination of the Members

The Members of the Authority find that The Club, using either of the two payment options presented, will not be engaged in the sale of alcoholic beverages. Under the facts presented by Mr. An and Mr. Roy, The Club does not receive any portion of the licensed premises' profits, nor does The Club receive a fee from the participating on-premises locations for its services. The Club's sole source of income is from its membership fees. The Club's business model is selling access to discounts at participating licensed premises. The Club pays the licensee and the licensee never pays The Club.

The payment options are similar to other third party provider requests previously approved by the Members. In the first option, using a credit card on file with The Club's third party processor, The Club member is charged for their purchase and a preset tip. The funds are held in an account that may only be accessed by the participating on-premises licensee. The recent decisions in Drizly (2013-2526) and Lot 18 (2014-1059) (both rulings involved third party providers and package store sales where customer funds went into an account only accessible to the retailer who then paid the provider for the services rendered) are instructive. The important distinction to note is that under The Club facts, the licensee does not pay anything to The Club.

The second payment option is much like the payment method used in the Slingr (2013-02826B) decision. Slingr, an unlicensed entity transmitting orders for alcoholic beverages and food to on-premises licensees, is permitted to collect customer funds for later distribution to the licensee, minus a transaction fee. Under the present facts, unlike Slingr, The Club intends to remit the entire payment to the licensed premises and will not retain a fee or percentage from the customer funds. Groupon (2011-3001) and Living Social (2011-3527C) also permit a payment scheme where third party providers collect customer funds for on-premises licensees.

To determine if there will be a violation of ABCL §111, the Members also consider the role of the licensee in the operation of the premises and the degree of financial interest, if any, of the unlicensed party in the licensed premises. Under the facts presented, participating licensees retain all controls in the operation of the premises pursuant to The Club transactions. Licensees who participate in The Club determine what food and beverages are offered pursuant to The Club program and at what price, are responsible to determine that all The Club sales of alcoholic beverages are made to customers of legal age, distribute tips for The Club sales to the appropriate servers, and make no payments to The Club.

In conclusion, The Club does not receive any portion of customer funds for alcoholic beverages or food sales. Accordingly, The Club is not engaged in the sale of alcoholic beverages and there is no violation of ABCL §111.

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 January 30, 2015.

Jacqueline Held
Secretary to the Authority