

STATE OF NEW YORK: LIQUOR AUTHORITY

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Operation of Mobile Phone Application  
TabbedOut

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DECLARATORY  
RULING  
2016-00132B

**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.

The Members of the Authority are in receipt of a request for a declaratory ruling from attorney Theresa Russo on behalf of her client ATX Innovations, Inc. doing business as TabbedOut, a mobile payment application ("app"). Ms. Russo asks whether, under the facts presented, the app violates portions of the Alcoholic Beverage Control Law.

**Statement of Facts**

The TabbedOut smartphone app is available to consumers free for downloading. When they visit a participating retailer, the consumers can open their tab on their phone and share the tab code with their server. When the consumer is ready to pay their tab, they can pay their entire tab from their mobile phone or split it among multiple app users. The app offers consumers a secure way to pay with their credit card that is encrypted on their device and the app will automatically e-mail a receipt. The consumer's full payment is then transmitted to the retailer. TabbedOut does not retain any portion of the consumer's payment.

Retailers pay a monthly fee to TabbedOut for the ability to use the app which captures data about the consumers purchasing behavior and feedback regarding their experience at the retailer's location. TabbedOut does not pay retailers. TabbedOut also contracts with manufacturers of alcoholic beverages to provide sales data.

TabbedOut may offer promotions that discount certain alcoholic beverages. When TabbedOut offers a promotion that discounts an alcoholic beverage the retailer is unaware that such promotional discount is being offered. The retailer is paid the full price of the alcoholic beverage however, TabbedOut pays a portion of the full price to the retailer, and the other portion is paid by the consumer. TabbedOut subsidizes the consumer's cost. Per the request, the TabbedOut discount will not exceed 50 percent of the retailer's regular price. Only one discount can be redeemed per day at each venue. TabbedOut offers the discount at its own discretion. Manufacturers and wholesalers are not involved in TabbedOut's decision to offer a discount on an alcoholic beverage.

When TabbedOut makes a discount offer on an alcoholic beverage the offering will indicate that TabbedOut, not the retailer is paying for a portion of the alcoholic beverage. TabbedOut will select what brands to offer discounts on independent of what brands retain services from them. Most specifically, TabbedOut will not run a discounted drink offer that is specifically paid for/commissioned by a brand.

TabbedOut will have banner advertisements on the app from manufacturers and will use direct messaging to customers. TabbedOut will not hold VIP events as described in their initial request for a declaratory ruling.

### **Questions Presented**

1. Does TabbedOut exercise control over the retailer in violation of ABCL Section 111?
2. Do the promotional drink offerings discounted by TabbedOut constitute an impermissible gift and or service in violation of ABCL Section 101(1)(c)?
3. Do the promotional drink discounts on alcoholic beverages violate the prohibition on unlimited drink offerings in ABCL Section 117-a?

### **Determination of the Members**

Based upon the above representations the retailer selects all menu items and prices with the exception of promotional discounted offerings. Additionally, TabbedOut does not receive any portion of consumer's payments. Therefore, the Members find that TabbedOut does not exercise control over the retail sale and does not have a financial interest in either the sale of the alcoholic beverages or in the licensed retailer.

As for the promotional discounted drink offers, the Members find that they are analogous to a third party coupon. They do not permit TabbedOut to select products the retailer sells. They simply enable consumers to redeem the discount at the licensed location. The contracts submitted indicate that the retailer will be aware that from time to time TabbedOut may pay a portion of the customer's bill however; it provides that the retailer will have no knowledge as to when this occurs because the retailer always receives full payment. Accordingly, TabbedOut never makes business decisions that are the province of the retailer nor do they receive any portion of the retailer's profits or consumer payments. The app thus does not constitute an availing violation under ABCL Section 111.

As for the promotional discounted drink offerings, the Members reviewed the operations to determine if they permitted a manufacturer or a wholesaler to indirectly buy back their product from a retailer. TabbedOut states that it collects analytical data that it shares/sells to manufacturers and wholesalers and that it conducts studies via the discounted promotional drinks. Therefore, TabbedOut in no uncertain terms receives money from manufacturers and wholesalers.

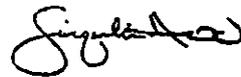
However, TabbedOut stated that the brands which receive the promotional drink discounts are not selected by the manufacturers or wholesalers who retain them. Additionally, TabbedOut stated that it would refrain from accepting payments from a manufacturer or wholesaler to conduct a study with a promotional discount on any brands owned and or sold by the manufacturer or wholesaler. The Members termed these studies "commissioned" studies and based upon the representation that TabbedOut would not engage in "commissioned" studies the Members find no basis upon which to view the payments by manufacturers and wholesalers to TabbedOut to be an indirect gift or service to a retailer. Accordingly, under these terms the operations do not violate ABCL Section 101(1)(c).

Additionally, the manufacturer's banner ads appear on the consumer's phone, not on any device owned by the retailer. The ads provide a link to the manufacturer, not the retailer, so they render no gift or service to the retailer.

As for the promotional drink discount, it does not exceed a 50 percent discount and thus the Members hold it does not violate ABCL §117-a.

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 with 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 5, 2016.



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Jacqueline Held  
Acting Secretary to the Authority