NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF MARCH 1, 2016
REFERRED FROM: WHOLESALE BUREAU

2016-00506

REASON FOR REFERRAL
REQUEST FOR DIRECTION

BRAND LABEL REGISTRATION GUIDANCE

(PROPOSED ADVISORY)

The Members of the Authority at their regular meeting held at the Zone I New York City office on MARCH 1, 2016 determined:

STATE OF NEW YORK
LIQUOR AUTHORITY

To: All brand owners, manufacturers, wholesalers and retailers

Subject: Brand Label Registration guidance

In light of recent amendments to the Alcoholic Beverage Control Law ("ABCL"), this Advisory is being issued to provide guidance to licensees in complying with requirements for brand label registration. Please read this Advisory carefully – as a result of the amendments there are many changes being made to expedite and simplify the registration process. For example, in almost all cases, the need to file amended, "supplemental" or separate registrations is being eliminated.

All alcoholic beverages sold in this state must have an approved brand label affixed or imprinted upon the container. The only exceptions to this requirement are privately held wines and liquors being sold pursuant to ABCL §85 or ABCL §99-g. Manufacturers, wholesalers and retailers may be subject to disciplinary action for advertising or offering for sale any alcoholic beverage that does not have an approved brand label. While the changes discussed in this Advisory eliminate or reduce filing requirements, brand labels must still comply with the requirements set forth in this Advisory. Failure to comply with these requirements may subject licensees to disciplinary action.

Compliance with Part 84 of the Rules of the Authority

ABCL §107-a and Part 84 of the Rules of the Authority govern the registration and approval of brand labels. Chapter 354 of the Laws of 2013 amended §107-a. As a result of the amendments, certain provisions of the regulations in Part 84 are now inconsistent with the statutory provisions. To avoid confusion until such time as the Authority issues new regulations consistent with the amended ABCL §107-a, brand owners and licensees should be guided by the information contained in this Advisory instead of the regulations in Part 84. Licensees who comply with the provisions of this Advisory will not be subject to disciplinary action if their conduct would otherwise be considered a violation of Part 84.

Required information on brand labels

Effective March 26, 2014, ABCL §107-a requires that brand labels contain:

- The brand or trade name (see "Brand or Trade Names" section in this Advisory);
- The class and type of alcoholic beverage (see "Class and Type of Alcoholic Beverage" section in this Advisory);
- The net contents of the container (see "Net Contents" section in this Advisory); and
- All other labeling information required by TTB (see "Information Required by TTB" section in this Advisory).

Except as explained in this Advisory (see "When is a separate brand label approval required?" section), a separate brand label registration is required when there is any difference in either: the brand or trade name; or the class and type of alcoholic beverage.

Brand Names

The "brand or trade name" is the name under which the product is marketed. It is usually the most prominent information on the label and the name used by consumers to identify the product. The Authority considers the brand name to include any statement regarding: flavor description; vintage; age; and geographic designation or appellation. Generally speaking, any difference in the brand name is considered a separate brand label.

In most cases, the Authority considers any difference in the brand name as a different brand name and, therefore, a separate brand label approval will be required. For example, the addition of designations such as "kosher" or "organic" would be a different brand name from a brand label that was otherwise the same except for that designation. With respect to beer, the designations "IPA," "ale" and "pale ale," for example, would all be considered separate brand names. A whiskey that is marketed with different ages is considered to have a separate brand name for each age.

However, as discussed later in this Advisory under the "When is a separate brand label approval required?" section, certain differences in the brand name are not considered separate brand labels and, therefore, a separate approval is not

required. Please note that these are long standing exceptions to the general rule that any difference in the brand name requires a separate brand label approval.

Class and Type of Alcoholic Beverage

Brand labels must use TTB's categories for the class and type of the alcoholic beverage.

For cider

As a result of changes made to the ABCL, the permissible alcohol content of cider has been increased from 7% to 8.5%. If the product meets the ABCL definition of wine and cider, the manufacturer will have the choice of marketing the product either as wine or cider. However, if the alcohol content exceeds 7%, TTB will require that the product be brand label approved as a wine even if the manufacturer intends to market the product in this state as cider. TTB will allow the brand label to identify the product as cider. In the event the brand owner intends to market the product in New York State as a wine, that label approval will be sufficient and no state registration is required.

If the product will be marketed as a cider in New York State, it must be brand label registered with the Authority as a cider. The designation of the type of pomme fruit used is considered to be part of the class and type information and must be set forth on the label.

For wine specialties

The designation "wine specialty" is considered to be part of the class and type information and must be set forth on the label. For purposes of this advisory, a "wine specialty" shall mean wine containing less than 7% alcohol by volume that: includes ingredients not permitted in "wine" as defined in ABCL §3(36); and does not meet the definition of "wine product" set forth in ABCL §3(36-a).

Net Contents

The Authority does not require that the net contents statement be included on the actual label. The information may be imprinted or otherwise set forth on the bottle/container. If the information is not included on the brand label, the application must include a photograph of the bottle/container clearly showing

where the information will be displayed. For refillable kegs, in lieu of photographs, stickers featuring net contents may be added to the actual label for purposes of compliance with this section.

Information Required by TTB

As noted above, in addition to the brand or trade name, the class and type of alcoholic beverage, and the net contents, a brand label must contain any other labeling information required by TTB. If the label sets forth this information in accordance with TTB regulations, the label will be considered in compliance with this state's brand label registration laws. Following is a list of the information currently required by TTB regulations. Please note that this information is provided only for guidance, and reference should be made to TTB regulations to assure compliance.

For liquor:

- The alcohol content;
- The name and address of the bottler and/or the manufacturer or importer;
- The country of origin (for imported alcoholic beverages);
- A statement with respect to the presence of coloring materials (if applicable);
- A statement with respect to treatment with wood (if applicable);
- A statement with respect to FD&C Yellow #5 (if applicable);
- A statement regarding the presence of sulfur dioxide (if applicable);
- A statement regarding the percentage of neutral spirits (if applicable);
- A statement of age (if applicable);
- The state of distillation for whiskeys produced in the United States; and
- A health warning statement.

For beer:

- The alcohol content;
- The name and address of the bottler and/or the manufacturer or importer;
- A statement with respect to FD&C Yellow #5 (if applicable);
- A statement regarding the presence of saccharin (if applicable);
- A statement regarding the presence of sulfur dioxide (if applicable);

- A statement regarding the presence of aspartame (if applicable);
- The country of origin (for imported alcoholic beverages); and
- A health warning statement.

For wine:

- The alcohol content;
- The name and address of the bottler and/or the manufacturer or importer;
- A statement regarding the presence of sulfur dioxide (if applicable);
- The appellation of origin (when required);
- The country of origin (for imported alcoholic beverages); and
- A health warning statement.

Items prohibited on brand labels

Effective March 26, 2014, ABCL §107-a brand label may not contain any of the following:

- Any false or untrue statement;
- Any statement disparaging of a competitor's product;
- Any statement, design, device or representation that may mislead a consumer; or
- Any statement or claim that the product has any health benefits.

Applications for approval of brand label registration will be reviewed to determine whether any prohibited statements are contained in a brand label. In addition, if a change is made to any approved brand label, the inclusion of any prohibited statement will subject the brand owner (if licensed), or the licensee filing the application on behalf of the brand owner, to disciplinary action.

The application process

An application for registration of a brand label shall include:

- A completed registration application form;
- In the event the applicant is not the brand owner, a letter from the brand owner appointing the applicant as its exclusive agent for purposes of submitting the application;

- A legible photocopy or photograph of the brand label that is being registered with each required item clearly identified. If the net contents are not set forth on the brand label, the application must include a photograph of the bottle/container clearly showing where the information will be displayed;
- In the case of ~~cider,~~ wine products, ~~non-malt beer, wine specialties~~ and kombucha, an analysis by a ~~TTB approved~~ laboratory accredited by either the ANSI-ASQ National Accreditation Board ("ANAB") or the American Association for Laboratory Accreditation ("A2LA") stating the alcohol content and ingredients of the alcoholic beverage; and
- A check or money order for the required fee.

The failure of an applicant to submit any of the above items will result in disapproval of the application. Applicants are urged to read the instructions provided to insure that all required information is included in the application. If items, such as the net contents, are not on the brand label but appear elsewhere on the container, a photograph showing the location of that item on the container must also be submitted.

All applications for registration and approval of brand labels must be submitted by: certified mail, return receipt requested; registered mail, return receipt requested; or overnight delivery service with proof of mailing. A brand label approved by TTB will be deemed approved thirty days after the Authority receives the application unless the Authority issues a decision disapproving the application before that time. In light of changes at the TTB, a copy of the actual TTB approval will not have to be submitted with the application. The TTB identification number will be sufficient.

When is a separate brand label approval required?

A separate brand label registration is required when there is a difference in: the brand or trade name; or the class or type of alcoholic beverage. A separate brand label registration is also required when a "private brand label" is being placed on the container. A "separate brand label registration" requires a separate application and fee (unless the fee is otherwise waived by ABCL §107-a).

As noted in the "Brand Name" section of this Advisory, a brand name includes any statement regarding: flavor description; vintage; age; and geographic designation or appellation. Therefore, except as set forth below, any difference in

any of those items creates a separate brand label requiring separate registration and approval. The following are not considered by the Authority to constitute separate brand names:

- Cordial and liqueur brand names that differ only with respect to flavor description;
- Wine brand names that differ only with respect to vintage year;
- Gin brand names that differ only with respect to the addition of the designation "dry"; and
- Rum brand names that differ only with respect to the addition of the designation "white," "light," "dark," "gold" or "silver."

In Advisory 2013-3, the Authority stated that the placement of stickers bearing the words "Direct," "Reserve" or similar permutations thereof on bottles or cases does not create a separate brand or trade name. This Advisory does not, in any way, change the guidance provided in Advisory 2013-3.

As noted above, each brand label must include the class and type of alcoholic beverage. With one exception, any difference in the class or type of alcoholic beverage constitutes a separate brand label. Beer brand names that differ only with respect to the use of the designation "beer," "lager beer" or "lager" do not constitute separate brand names.

Vintage year and age of an alcoholic beverage

As noted above in the "Brand Name" section, the vintage year or age of an alcoholic beverage is considered to be part of the brand name. However, under Part 84 of the Rules of the Authority, a change in the vintage year did not require a separate brand label registration. Liquor labels that differed with respect to the age of the product did require separate brand label registrations. This treatment of vintage years and age of the product remains in effect.

Duration of approval

An approval of a registration shall be valid for one year. Current brand label registration approvals shall remain in effect until they expire. New applications and renewals of existing applications will be issued for one year on the following schedule:

- Liquor- October 1st through September 30th.
- Beer- July 1st through June 30th.
- Wine products- March 1st through February 28th/29th.
- Cider- March 1st through February 28th/29th.
- Wine requiring state approval, including wine specialties- March 1st through February 28th/29th.

In the case of a current registration approval that expires prior to or after the above dates, the renewal and fee will be prorated until the appropriate date. Thereafter the renewal will be issued for one year. For example, a liquor brand label approval that expires on February 28, 2015 will be renewed until September 30, 2015 at 7/12 of the fee. The registration approval thereafter will be renewed for one year periods commencing on October 1, 2015.

In the case of a new registration approval to take effect before the above dates, the initial approval will be prorated to the appropriate date. Thereafter, any renewal will be issued for one year. For example, a new beer registration approval issued on December 1, 2014 will be effective until June 30, 2015 at 7/12 of the fee. The registration approval thereafter will be renewed for one year periods commencing on July 1, 2015.

Changes in brand label agent

In the event that an unlicensed brand owner changes the licensee designated as the exclusive agent for a particular item, the new exclusive agent shall file an application for approval of the brand label. The registration approved under the former brand agent shall be deemed surrendered and the former brand agent may apply for a refund of the unused portion of the registration fee.

Designation of brand agents and licensing requirements for brand owners

If the brand owner is licensed under the ABCL, it must file the application for brand label registration approval (as well as the price schedule required by ABCL §101-b(3)(a), except in the case of a private label). A brand owner, whether located in this state or elsewhere, that is not licensed under the ABCL must designate a wholesaler licensed in this state as its exclusive agent for purposes of

filing the application for brand label registration approval as well as the price schedule required by ABCL §101-b(3)(a).

In the case of an alcoholic beverage produced in this state, the brand owner (except in the case of a private label) shall be a manufacturer licensed in this state. However, if the licensed manufacturer intends to distribute the product in this state exclusively through one licensed wholesaler (with no sales being made by the manufacturer to any other licensed wholesaler or any licensed retailer in this state), the manufacturer may designate such exclusive wholesaler as the brand owner of the label.

In the case of an alcoholic beverage produced outside of this state, an unlicensed entity doing business in this state may be the brand owner. However, the unlicensed New York entity whose alcoholic beverage is produced out-of-state may not be the importer of the product into this state or solicit purchases of the product within this state by licensed wholesalers and retailers.

In the case of a brand owner not licensed in this state, an "appointment letter" must be submitted by the brand owner identifying the licensed wholesaler who is designated as the exclusive agent to file the application for brand label approval. Please note that a separate appointment letter from the brand owner is not required for each brand name. One letter may be used to list all the brand names for which the licensed wholesaler has been appointed as exclusive agent.

"Ornamental," "enhanced," or "special" containers

The marketing of alcoholic beverages in "ornamental," "enhanced" or "special" containers is addressed in Advisory 2014-5, which replaces Advisory 2012-5. Alcoholic beverages sold in such containers do not require a separate brand label registration.

"Supplemental" brand labels

As a result of the amendments made to ABCL §107-a, it is no longer necessary to file separate, or "supplemental," brand label registrations. As noted above, a separate brand label registration will only be required when there is a change in: 1) the brand or trade name; or 2) the class or type of the alcoholic beverage.

Although the brand label must set forth the net contents and the labeling information required by TTB, if a change is made to those items it is not necessary to file an application to amend or supplement the existing approved label or obtain approval for a separate label. In addition, a second label that differs from the approved label does not require a separate registration as long as the brand or trade name and the class or type of the alcoholic beverage remains the same.

However, even if an amended, supplemented or separate brand label registration is not required, any brand label being used must comply with the provisions of ABCL §107-a and this Advisory. In particular, any brand labels changed after approval of the Authority must contain the information required by ABCL §107-a and must not include the items prohibited by ABCL §107-a. Violations will result in disciplinary action by the Authority.

Private labels

A "private brand label" is a brand label owned by a licensed retailer. It does not have to contain the retailer's name. An alcoholic beverage with a private brand label can only be sold by the licensed retailer who owns the brand label. The licensed retailer must own the brand name or otherwise have the legal right to use a brand or trade name belonging to another entity. However, in no case can the brand name be owned by a manufacturer or wholesaler. Manufacturers and wholesalers may not allow retailers to use their brand or trade name on a retailer's private brand label, except to identify the manufacturer, importer or bottler as may be required under TTB regulations. The use of phrases such as "exclusively bottled for" or "exclusive to" the retailer on a brand label owned by the manufacturer or another party does not constitute a private brand label. Such practices constitute an illegal gift or service in violation of ABCL §101(1)(c). Hotels, which operate under a common trademark, may sell beer or cider under a private brand label where a hotel chain or a hotel management company, which owns or otherwise has the legal right to use the brand or trade name, is listed on the license and the beer or cider is only sold in hotels owned in part or managed by the owner of the brand, or an affiliate of such owner.

Applications for approval of private brand labels must include proof that the retailer owns, or has the legal right to use, the brand or trade name set forth on the label. If the brand label is otherwise in compliance with ABCL §107-a and this

Advisory, a retailer does not have to obtain a separate brand label registration approval when there is a difference in the manufacturer, importer or bottler.

Wine

An application for registration approval does not have to be submitted for wine brand labels that have been approved by TTB. A wine brand label without TTB approval must be registered and approved by the Authority.

Cider

Effective January 15, 2014, the definition of cider contained in the ABCL was amended. Among other changes, the maximum alcohol content by volume was increased from 7% to 8.5%. In addition, an alcoholic beverage that meets the definition of cider and wine may be marketed either as a cider, or as a wine. If the brand owner decides to market the product as a cider, it must be brand label registered as a cider. That product may be offered for sale by any licensed retailer. If the brand owner decides to market the product as a wine, the brand label must be approved (as a wine) by TTB or the Authority. The product must also be price posted and sold only by retailers who are licensed to sell wine.

Deviations or changes in alcohol content

Except for cider and wine products, the Authority will allow a deviation of no more than 1.5% between the alcohol content stated on the label and the actual alcohol content of the product as shown in the laboratory analysis. In the case of cider and wine products: the Authority will allow a deviation of no more than 0.5%; and the actual alcohol content cannot exceed the statutory limit set forth in the ABCL.

If the alcohol content stated on the label or container is changed after the brand label has been approved, a new, amended or supplemental registration is not required. As long as the brand label otherwise conforms to the requirements set forth in this Advisory, the change will be deemed part of the approved label. Please note that this applies if the alcohol content is being changed. If two products have brand labels that are identical in all other ways, with the only difference being the alcohol content, each product will require its own brand label approval.

Nutrition Facts Sheet

Brand labels that do not require TTB approval (such as wine products, wine specialties and cider under 7% alcohol content) must include the Nutrition Facts Sheet required by the FDA. If the FDA has granted an exemption from this requirement, or if the FDA does not require the inclusion of the facts sheet, an affirmation to that effect must be included with the application.

"Small batch" fee exemptions

ABCL §107-a provides for exemptions from the fee for brand label registration for liquor, beer and cider produced in "small batches." For liquor, "small batches" means 1,000 gallons or less. For beer and cider, "small batches" means 1,500 barrels or less. While there is a fee exemption, an application for registration of the brand label must still be filed and approved.

In determining whether the product has been manufactured in a "small batch," please note that:

- The fee exemption applies to product under the same state brand label registration number. If the total annual amount manufactured for a product, or products, under one brand label registration number exceeds (or is anticipated to exceed) the limitations stated above, a fee will be required to register the label.
- The total amount manufactured includes not only the amount of product manufactured for sale in this state, but the entire annual amount of the product that is manufactured, regardless of where it will be sold.

Beer and wine products sold in "soft pouches"

As noted above, brand labels cannot contain any statement, design, device or representation that is likely to mislead the consumer. In the view of the Authority, beer and wine products sold in "soft pouches" (whether or not intended to be frozen prior to consumption) can be mistaken for non-alcoholic products sold by off-premises beer retailers. Therefore, to avoid consumer deception and confusion, as well as to assist in preventing sales of these products to underage persons, the Authority requires that the front label of any such container, as well as the case or

pack for such containers, include the following statement: "CONTAINS ALCOHOL – NO SALES UNDER 21."

Personalized Bottles and Containers

The addition of personalized engraving, stamping, writing, etc., to a bottle or other container in compliance with the Authority's "Containers, packaging and personalization of bottles" Advisory does not require a separate brand label registration approval.

"Use Up" Period For Non-Complying Labels

The Authority anticipates that manufacturers and wholesalers will have an inventory of labels on hand that may not comply with the amendments made to ABCL §107-a and the guidance provided by this Advisory. Such labels may continue to be used until the current registration period for the label expires and for an additional six month period.

NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF MARCH 1, 2016
REFERRED FROM: WHOLESALE BUREAU

2016-00507

REASON FOR REFERRAL
REQUEST FOR DIRECTION

PROPER MARKETING AND SALES OF "LIMITED AVAILABILITY" ITEMS AND "CLOSEOUT SALES" OF WINE AND/OR DISTILLED SPIRITS

(PROPOSED ADVISORY)

The Members of the Authority at their regular meeting held at the Zone I New York City office on MARCH 1, 2016 determined:

STATE OF NEW YORK
LIQUOR AUTHORITY

To: All manufacturers, importers, wholesalers, retailers and agency staff

Subject: Proper marketing and sales of "limited availability" items and "closeout sales" of wine and/or distilled spirits

The purpose of this Advisory is to provide guidance to manufacturers, importers and wholesalers with respect to their ability under the Alcoholic Beverage Control Law ("ABCL") to properly price post and solicit sales for "limited availability" items and "closeout sales" of wine or distilled spirits. This Advisory replaces and rescinds Advisory 2013-5a issued on September 25, 2013.

For purposes of this advisory "limited availability" items are those items bearing the same brand or trade name, or combo packs pursuant to Advisory #2013-1, for which the manufacturer, importer or wholesaler has reason to believe market demand exceeds or will soon exceed available inventory.[1] Such reasonable belief may be based upon the knowledge that the manufacturer, importer or wholesaler: (1) does not have sufficient inventory to meet demand; or (2) cannot purchase sufficient inventory to satisfy demand; or (3) does not intend to sell or purchase further inventory for a period of at least one year; or (4) has a seasonal item which is limited or for which the season is over; or (5) has an item that has been discontinued by the supplier; or (6) has price posted a subsequent vintage[2]; or (7) has terminated their business relationship.

For purposes of this advisory "closeout sales" occur when it is the intent of the manufacturer, importer or wholesaler to sell its entire remaining inventory, and there is a reduction in the posted price of at least 10% from the previous month. "Closeout sales" are one acceptable method of allocation for sales of "limited availability" items as further set forth below. "Closeout sales" are a special

[1] Any items for which a wholesaler owns, controls, or is able to procure more than 10 cases from the supplier but for which a wholesaler has owned or controlled 10 or fewer cases for a period of three (3) months shall be exempt from this Advisory provided that no more than 10 cases of any said item are sold in such manner.

[2] The price filing of a later vintage does not, in and of itself, convert any prior vintage to a limited availability item.

category of limited availability items created because the manufacturer, importer or wholesaler does not intend to sell additional inventory once the current inventory runs out. Except for seasonal items, no item should be subject to a "closeout sale" unless it has been offered for sale in New York for a period of at least six months.

Manufacturers, importers and wholesalers are required to notify the Authority in advance of all "limited availability" price postings. Beginning with the ~~March, 2014~~ May, 2016 ~~wholesale~~ wine to retail and ~~wholesale~~ liquor to retail price postings (due ~~January 25, 2014~~ April 5, 2016), manufacturers, importers and wholesalers will be required to specify a method of allocation for each "limited availability" posting via the online price posting module (www.sla.ny.gov/e-postings) as the limited.availability@sla.ny.gov email inbox will no longer be available. Said notification with a method of allocation specification shall be posted together with the monthly price filing in a manner prescribed by the Authority, which will enable the manufacturer, importer or wholesaler to select "limited availability" and a method of allocation. ~~At that time, manufacturers, importers and wholesalers will have the ability to utilize the new price posting system or continue to utilize the old price posting system (as well as the limited availability email inbox: limited.availability@sla.ny.gov) at their discretion until the May, 2014 retail wine and retail liquor price postings (due April 5, 2014) when only the new price posting system will be available.~~

In the event that an item is not filed as a limited availability item, and a subsequent unexpected event (e.g., the item receives a high score from a trade or consumer publication or a celebrity endorsement) occurs during the month which creates a demand for the item which is greater than the existing inventory of the item, for the remainder of the month and upon notice to the Authority via the limited availability ~~email inbox (limited.availability@sla.ny.gov)~~ function of the price posting module, a wholesaler may either file a mid-month limited availability allocation or limit the amount which any customer may purchase to one purchase at the smallest quantity discount filed for the month in question. In the following month such an item must be filed as a limited availability item. ~~For all allocation changes made after the initial filing and prior to the first day of the month for which the price posting is effective, the limited availability email inbox (previously utilized for all "limited availability" postings) will remain available and will now~~

~~be utilized solely for allocation changes made during that period.~~[3] ~~The below form for email submission of such mid-month "limited availability" price postings is required unless permission is obtained from the Authority to use an alternate form.~~ With respect to such allocation changes, except as may be authorized in section 101-b of the ABCL, there shall be no price changes without permission from the Authority for good cause shown until the next month's price posting has been filed and is in effect. NOTE: (1) Once the month for which the prices are posted has begun, the method of allocation may not be changed without permission from the Authority; (2) any changes to the price posting must be properly price posted the following month; and (3) "closeout sales" may not be implemented via mid-month allocation changes and must be properly price posted.[4]

Manufacturers, importers and wholesalers are reminded that quantity discounts are not permitted for "limited availability" price postings. Manufacturers, importers and wholesalers are reminded that value added packs that are limited in nature must be price posted as "limited availability" items. All combination packages which are not intended to be delivered to the consumer intact are considered to be "limited availability" items with the exception of distributor assembled ("DA") items pursuant to paragraph 16 of Advisory #2013-1. Please refer to Advisory #2013-1 with regard to when a value added pack is to be considered a limited availability item.

The Authority recognizes that good cause has been shown to allocate "limited availability" items differently between on and off premises licensees, and a manufacturer, importer, or wholesaler may consider the nature of, and the consumer market for, a limited item when choosing a method of allocation. If a different method of allocation is used for a given channel (i.e., on-premises or off-premises), licensees within the same channel must have an equal opportunity to obtain the "limited availability" item.

PROPER TYPES OF "LIMITED AVAILABILITY" ALLOCATIONS:

[3] Once a "limited availability" allocation is filed there may no longer be sales at the smallest quantity discount level. Additionally, quantity discounts may not be utilized with any "limited availability" allocation.

[4] All such changes to the "limited availability" postings will be published via the authority's website (www.sla.ny.gov).

The list below sets forth methods of allocation deemed permissible by the Members of the Authority. A different method of allocation may be used for each channel. Other methods of allocation than those set forth herein may be utilized. However, if the manufacturer, importer or wholesaler utilizes another method of allocation and does not obtain prior written approval from the Authority, it does so at its own risk.

1) Past sales history (within preceding 12 months) with 10% holdback allowance (i.e., set aside and held in inventory) for prospective new business as long as such past sales were not themselves discriminatory;

2) Lists of retailers published by respected third party sources such as: a listing as best wine list in Wine Spectator Magazine; a listing in Zagats as best restaurants; a listing in Michelin Guide or the like;

3) Unsold accounts (retailers that have not purchased the item within the past year);

4) First come first served with a maximum per account;

5) Advance interest, provided all accounts are given reasonable notice and the opportunity to express their interest but no pre-ordering is entered into;

6) "Closeout sales" – The following method should be used for items designated for "closeout sales."

- First month filing of maximum number of cases per retailer (not to exceed 10% of the available inventory) together with a notice that in the next month and thereafter the item will be marked "first come first served - no maximum."

- Second and subsequent months, first come first served - no limit, until inventory of the item is depleted to zero. Manufacturers, importers and wholesalers may begin accepting such orders at 9:00 a.m. on the twenty-fifth day of the month preceding the second month in which any such posting goes into effect. NOTE: If the price is reduced in the second or any subsequent month, the process must be repeated

from the beginning (with a new first month maximum case allocation filing) until inventory of the item is depleted to zero.

Regardless of the method of allocation utilized, if a 70/30 split between channels is utilized, the manufacturer, importer or wholesaler will be deemed to be operating within a safe harbor as pertaining to allocations between channels for any given month. If the 70/30 split allocation formula is deviated from, the burden will be on the manufacturer, importer or wholesaler to demonstrate that an approved method of allocation from the above list was utilized for any given month. Although price posting is done on a month by month basis, a manufacturer, importer, or wholesaler may create an allocation plan for a limited availability item that extends over a commercially reasonable period, not exceeding twelve months, provided there is no change in price during that period. If a price reduction is filed for any limited availability item that is so allocated, the 70/30 split between channels must occur at each price utilized during said commercially reasonably period. The manufacturer, importer or wholesaler is under an obligation to keep proper internal controls and records to justify the need to designate any item as limited availability as well as the method of allocation chosen.

~~Limited Availability Mid-Month Allocation Change Reporting Form~~

~~Wholesaler name (not d/b/a):~~

~~Wholesaler NYSLA license number:~~

~~Month and year for this report:~~

~~Name of person completing this report:~~

~~Contact person's name, phone number, email address:~~

~~Product and pricing information (as reported on the price posting noted above):~~

~~TTB/CoLA # or Brand Label Registration #:~~

~~Wholesaler Item #:~~

~~Regular / Combo / VAP (R, C, V):~~

~~Brand name and product description (including age if applicable):~~

~~Price per bottle and per case (BT $, CS $) (specify and list NYC if applicable) as reflected in the price posting:~~

~~Number of bottles per case:~~

~~Requested allocation changes details:~~

~~*****No quantity discounts allowed on Limited Availability items*****~~

~~Forward via electronic mail to: limited.availability@sla.ny.gov~~

STATE OF NEW YORK

LIQUOR AUTHORITY

TO: All manufacturers, importers, wholesalers, and agency staff

SUBJECT: Improper marketing of wines bearing the same brand, trade name and vintage

The purpose of this Advisory is to provide guidance to manufacturers, wholesalers and importers with respect to their ability under the Alcoholic Beverage Control Law ("ABCL") to sell wines featuring the same brand, trade name and vintage with or without the addition of a sticker featuring the wording "Direct," "Reserve," or ~~any similar~~ wording intended to give the impression that the product differs from the other product being sold under the same name. This Advisory assumes compliance with Advisory ~~#2012-5~~ 2014-23.

Pursuant to ABCL §101-b(2)(a), manufacturers and wholesalers are prohibited from discriminating, directly or indirectly, in price, in the sale at wholesale or retail of liquor or wine bearing the same brand or trade name of like age and quality. The Authority is aware that certain entities involved in the chain of distribution of wine have engaged in the practice of obtaining separate federal Certificate of Label Approvals ("COLAs") for both the standard brand labels of wines as well as for substantially similar labels which bear the words "Direct," "Reserve," or ~~similar~~ wording intended to give the impression that product differs from the other product being sold under the same name on the label. These entities subsequently place stickers bearing words such as "Direct," "Reserve," or similar permutations thereof on bottles and/or cases of standard labeled wine as needed to satisfy the needs of their preferred New York business partners. The substantially

similar labeled or "stickered" product is ~~thus~~ then marketed and sold at different prices from the standard labeled product, and ~~is thus~~ utilized for discriminatory market behavior at both wholesale and retail in New York. The Authority ~~thus~~ finds that the act of placing stickers on bottles and/or cases of a given brand, trade name or vintage of alcoholic beverages - even if said stickers ~~appear to~~ comport with a separate federal COLA – does not create a separate brand or trade name[1] sufficient to support separate pricing in compliance with §101-b(2)(a), and this determination is not dependent upon whether it is the manufacturer or wholesaler that is the entity responsible for the actual stickering of the product, or by whether there is one wholesaler or multiple wholesalers filing wholesale price schedules for the items that are alleged to be different brands.

This Advisory is not intended to impact the ability of manufacturers, importers or wholesalers to sell the same brand, trade name and vintage of wine in different "ornamental" labels at different prices from standard labels – industry members are reminded that said practice is provided for in Advisory ~~2012-5~~ 2014-23, and that a request must first be sent to the Wholesale Bureau in writing or via electronic mail at: wholesale.bureau@sla.ny.gov. This Advisory is also not intended to affect the ability of manufacturers to use terms such as "Reserve," "Select," or similar wording on the brand label to distinguish different wines. Licensees should refer to Advisory 2014-7 concerning Brand Label Registration.

[1] As set forth in Advisory 2014-7 the "brand or trade name" is the name under which the product is marketed. It is usually the most prominent information on the label and the name used by consumers to identify the product. The Authority considers the brand or trade name to include any statement regarding: flavor description; age; and geographic designation or appellation. Generally speaking, any difference in the brand name is considered a separate brand label.

NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF FEBRUARY 16, 2016
REFERRED FROM: COUNSEL'S OFFICE

2016-00373 (OVER)
2016-00547

REASON FOR REFERRAL
REQUEST FOR DIRECTION

PALATE WIZARDS, LLC

(DECLARATORY RULING)

The Members of the Authority at their regular meeting held at the Zone I New York City office on FEBRUARY 16, 2016 determined:

Item carried over to 3/01/2016

The Members of the Authority at their regular meeting held at the Zone I New York City office on MARCH 1, 2016 determined: