

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 2014-5 issued on April 10, 2014.

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 vintage²; 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

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. However, if more than 10 cases are available and can be obtained by the wholesaler and an order is placed by a retailer, then commercially reasonable efforts must be made by the wholesaler to obtain and sell such product to the retailer.

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

availability” items as further set forth below. “Closeout sales” are a special 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 June, 2016 wine to retail and liquor to retail price postings (due May 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.

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 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. 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.³

³ All such changes to the “limited availability” postings will be published via the authority’s website (www.sla.ny.gov).

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:

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 up to two years) 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 reasonable 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.