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May 25, 2021

Chairman Vincent G. Bradley
Commissioner Greeley T. Ford
Commissioner Lily M. Fan
New York State Liquor Authority
80 South Swan Street, Suite 900
Albany, New York 12210-9002

Re: Proposed Advisory Regarding Contracts That Compensate A Third Party Provider Of Goods Or Services With A Percentage Of The Licensee's Sales, Profits, Or Revenues ("Proposed Advisory")

Dear Chairman Bradley, Commissioner Ford and Commissioner Fan:

We represent a prospective Third Party Provider ("TPP") which has asked us to address certain issues raised by the referenced Proposed Advisory. Please accept this letter in connection therewith. The points we would like you to consider are set forth below.

1. The proposed 10% cap is not economically feasible for TPPs that provide advertising, accept and forward food and beverage orders to, and provide delivery services to licensees.

In a traditional e-commerce marketplace model where a TPP's services are limited to advertising efforts and acceptance and forwarding of food and beverage orders to a licensee, the revenue share only covers the costs of operating the marketplace platform service. A number of TPP's operate with such a model. However, when a TPP also delivers the product, the additional services offered carry with them associated expenses which should be fairly taken into account. A 10% cap on TPP Percentage Agreements makes it economically unfeasible for third party providers to both fulfill deliveries, and provide advertising and order processing support. Limiting TPPs to 10% of licensee revenues would be detrimental to the licensees that depend on the multifaceted marketing, logistics and delivery efforts of their third party support. It would make it impractical and unworkable for TPP e-commerce platforms to also provide expensive and labor-intensive delivery activities on which many licensees have come to depend.

The Proposed Advisory notes that historically the Authority permits a landlord of commercial premises to accept up to 10% of a tenant-licensee's gross revenue without having to become a co-licensee. Market lease rents are not percentage based alone. Rather, typically a lease with a percentage rent provision couples that with a fixed annual base rent also payable by the tenant. That is, the Authority accepts that the landlord receives a fixed rent, *and* a percentage rent on top of that. What we propose here is a similar structure (without having the TPP become a co-licensee), and should not be any less acceptable.

We therefore urge the Authority, in issuing its final advisory, to pre-approve contractual arrangements which compensate the TPP through a combination of percentage-based compensation (subject to the 10% cap described in the Proposed Advisory) in addition to flat fees that are commercially reasonable in light of the wider variety of services provided by the TPP. This approach is more consistent with commercially practicable arrangements and is easy to determine, monitor and enforce.

2. <u>The Proposed Advisory is unclear as to what revenues are used to calculate the pre-approved percentage cap of TPP Percentage Agreements.</u>

The Proposed Advisory variously defines the percentage calculation for purposes of TPP Percentage Agreements as being a percentage of (i) "the licensed business's total revenues," (ii) "a portion of the licensee's revenue," and (iii) "*any* sales or revenue." The industry requires greater clarity as to which of these formulations is most accurate. Moreover, to be economically feasible the final determination on the permitted percentage a TPP may receive without having to be a co-licensee, which for nearly all TPP's is impractical, should be calculated on a periodic basis (e.g. monthly, quarterly, or annually), not on the value of goods sold in a single transaction. Consider that if a TPP facilitates the delivery of alcohol to a customer at home, it can easily cost upwards of $20 per hour for labor alone; for smaller orders this often represents over 10% of the *a la carte* order amount and in such cases it would be impossible for a TPP to profitably provide delivery services given their cost structure.

Accordingly, we respectfully request that the Authority pre-approve agreements that permit TPPs to charge licensees more than 10% of an <u>individual</u> order amount so long as the cumulative revenue is below the pre-approved percentage threshold of the licensee's periodic revenue overall.

3. <u>Determining what counts as a "commercially reasonable" flat fee is unworkable and unrealistic.</u>

Subjecting flat fee arrangements to a "commercial reasonableness" test unfairly disfavors TPPs given that other parties are not subjected to similar review. For instance, as noted above, landlords are permitted to charge up to 10% rent in addition to base rent, however, the Authority does not scrutinize lease rentals to determine if they are commercially reasonable. It would thus seem arbitrary to apply such a standard to TPPs who charge flat fees. We are not aware of any other flat fee arrangement licensees have entered into that have been scrutinized under a commercial reasonableness standard.

If the undefined "commercial reasonableness" standard does remain in the final Advisory, our client, other similarly situated TPPs and licensees, require more explicit guidance on what makes flat fees "commercially reasonable" in the view of the Authority. It is unclear what factors might be considered or what evidence the Authority might rely upon. At present it is also unclear what processes and standards of review will be used to determine commercial reasonableness, or even when or how that determination will be made. Must flat fee arrangements be pre-approved as commercially reasonable, or will they be subject to analysis sometime later? If they are subject to review after the fact on an open-ended basis, it would create a great deal of uncertainty in the reliability of negotiated commercial agreements with licensees. Perhaps the Advisory can provide guidance as to what may be deemed commercially reasonable or unreasonable so that TPPs can enter into agreement with some degree of confidence.

We appreciate the time and effort the Authority has expended in working to prepare a clear roadmap for TPP's and licensees. We request that the points expressed herein be taken into consideration.

Respectfully,

BERNSTEIN REDO, P.C.

By: ______________________
Donald M. Bernstein

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May 24, 2021

VIA OVERNIGHT MAIL AND EMAIL
fbsupplemental@sla.ny.gov
New York State Liquor Authority
Attn: Thomas J. Donohue, Secretary to the Authority
80 S. Swan St., Suite 900
Albany, NY 12210

Re: Comments to Proposed Advisory Regarding Third Party Agreements

Dear Mr. Donohue:

Please be advised that our firm represents numerous food and beverage concessionaires operating within New York State as well as throughout the remainder of the country, and we represent many of these clients on a national basis. Upon your release of a draft form of the proposed Advisory regarding third party agreements dated May 12th, 2021 (the "Advisory"), we consulted with a number of these clients, as it appears that the Advisory will have a significant impact upon their operations in New York. We respectfully submit the below comments on their behalf for your review and consideration.

Proposed Inclusion of Food Sales in Analysis

The Advisory appears to significantly change the existing policy of the New York State Liquor Authority ("Authority") with respect to the types of sales which may require a landlord or other third party receiving a percentage of those sales to be included as a principal on a liquor license. Currently, third parties are only required to be included on a license if they receive a certain percentage of revenue from alcoholic beverage sales. As it was not clear from the Advisory, we first wish to confirm whether the Authority intends to include the percentage of revenue from food and non-alcoholic beverage sales in the new proposed calculation.

The inclusion of food sales in the analysis poses a significant issue for a number of our clients, particularly those providing catering and concession services at stadiums, arenas, convention centers, universities, corporate offices, hotels and other similar facilities where alcoholic beverage services comprise only a very small percentage of total sales. For instance, in a situation where such client provides daily food service across a campus or corporate facility and only provides alcoholic beverage service for a limited number of private, invitee-only events, the commission arrangement between the parties with respect to the vastly larger food service operation would be dictated (and, in our opinion, unreasonably restricted) by the minimal level of alcoholic beverage services provided by the client.

We believe that this cannot be in the intent of the Authority in changing its existing policy. Given the disparity with which the proposed change would impact concessionaires providing varying levels of food and alcoholic beverage service, we would strongly suggest that the analysis be limited to alcoholic beverage sales only. While we can understand and appreciate the reason for restricting the amount of revenue a third party can permissibly receive from alcohol sales, the same rationale does not apply when considering general food and non-alcoholic beverage sales. As such, and particularly in view of the industry disparities noted above, concessionaires should be permitted to bifurcate food sales from alcohol sales for purposes of establishing financial arrangements with third parties.

Concerns Raised by Stadiums, Concert Arenas, Airports and Similar Venues

The Advisory also seeks to definitively set forth the percentage of profits a landlord or other third party can permissibly retain without having to be included as a licensee. Specifically, its states that "[a]ny agreement that entitles a third party to a percentage not exceeding 10% of the licensee's profits is permissible and will not require the third party to be included as a principal on the license." The proposed Advisory further sets the maximum percentage of profits to 20% for non-for-profit organizations, government entities and public authorities.

While it is certainly helpful to have a bright line rule, the proposed percentages raise significant concerns for our clients operating sports stadiums, concert arenas, airport terminals and other similarly situated venues. Whether by statutory exceptions or established policies of the relevant licensing agencies, the reality is that the owners of these types of facilities nationwide are regularly receiving substantially more than 10-20% of revenue from alcoholic beverage sales without having to become licensees. In fact, it has become the industry standard for such owners to demand agreements under which they receive closer to 40-50% of profits. It has also become the industry norm for these types of facility owners to enter into advertising and sponsorship arrangements with alcoholic beverage manufacturers, which of course they would be unable to do if they are required to serve as co-licensees or otherwise be named as principals on the liquor licenses held at their venues.

There are still a large number of states which have not yet addressed this issue directly (*i.e.*, by statute, advisory or other written regulatory guideline). Some jurisdictions, such as California, look at each agreement on a case-by-case basis and determine whether the proposed profit-sharing arrangement is excessive at their discretion. Others, such as Louisiana, state that they do not allow for any sharing of profits with unlicensed entities but will accept contractual workarounds which essentially produce the same result with respect to finances. The problem with these approaches is that they tend to create uncertainty, inconsistency and disparity in the industry.

In a number of jurisdictions, it seems that the governing agencies have begun to accept that it is the industry norm for owners of stadiums, airports and similar venues to demand significantly larger shares of alcoholic beverage revenues from their concessionaires. In response, some of these states have created a separate class of license specifically for these types of venues. The new license type will usually allow for the concessionaire to serve as the sole licensee but also share in the profits with an unlicensed facility owner or other third party.

New Jersey, for instance, has created a "Sporting Facility License" specifically for stadiums, arenas, team training facilities or similar venues located on public property. The relevant section of the New Jersey alcoholic beverage code states that "the holder of this license may share direction and control of the premises to be licensed and share proceeds and profits from the sale of alcoholic beverages with the owner, operator, concessionaire, or lessee of the facility." The statute does not impose any limitation on the percentage allowed under any such profit-sharing arrangement.

In other jurisdictions, the relevant licensing authorities have dealt with the issue by allowing for a third party owner or landlord to retain any percentage of profits without having to be co-licensed (or otherwise named as a principal on the license), as long as such entity is disclosed to and qualified by the relevant licensing authority. In Massachusetts, for example, facility owners whose principals complete the requisite disclosure and qualification requirements imposed on alcoholic beverage licensees by the Massachusetts Alcoholic Beverage Control Commission ("MA ABCC") can permissibly enter into profit sharing arrangements with the concessionaires of their facilities without having to be named as co-licensees or otherwise listed as principals on the liquor license. In the eyes of the MA ABCC, such entities are excluded from tied house restrictions as they are not deemed "licensees" simply by virtue of the fact that they have been disclosed and qualified.

Suggested Approach

Solely with respect to stadiums, arenas, airports and other similar venues, we would contend that the Massachusetts approach is preferable to that suggested in the draft Advisory. Rather than create a co-licensing arrangement under which the facility owner must become a co-licensee and therefore be subject to tied house restrictions, we would propose that the Authority allow for such owners to share in profits without having to be named as principals on the license, *provided that* they duly qualify with the Authority as any licensee would, but for tied house issues. Essentially, the Authority would still be able to verify all relevant ownership information, examine the relevant funding and confirm that there is no negative criminal history which would otherwise disqualify the facility owner from holding a license in New York. At the same time, it would be creating a policy that is in line with industry norms and that puts all operators on a level playing field with respect to concessionaire contracts. To provide additional comfort to the Authority with respect to the integrity of New York's tied house laws, we also suggest that any agreement between a facility owner and licensee specifically state that the facility owner shall not dictate or require that the licensee sell (or exclude) any particular brand or otherwise unduly influence the licensee in this regard.

Alternatively, we would suggest an approach somewhat similar to the one taken in New Jersey. If the Authority does require that facility owners receiving a certain level of profits be named as principals on the liquor license, we would propose the creation of a separate class of license—solely for these specific types of facilities—which is exempt from the restrictions imposed by tied house. In doing so, the Authority would be creating a bright line rule with respect to profit sharing arrangements which would be satisfactory to the industry while also taking into account the market conditions which gave rise to the current industry practices.

Again, our suggested approach with respect to profit split issues pertains only to sports stadiums, concert venues, airports and similar large premises (as well as individually defined licensed premises which are located within such facilities)—essentially, the types of premises where it is the norm for independent concessionaires to operate food and beverage concessions. If our suggestions are adopted, the Authority could simply expand upon the existing statutory framework in Section 48.1 of the rules of the Authority to define the types of facilities which would fall under the suggested profit split exception.

We believe that in adopting these suggestions, the Authority will not only create a well-defined, even playing field, it will also attract more of these type of businesses to New York State. In essence, New York State will become a more attractive place for large, income generating facility owners to conduct business.

Co-Licensing of Governmental Entities or Public Authorities

As stated above, the proposed Advisory sets the maximum percentage of profit sharing at 20% for non-for-profit organizations, government entities or public authorities. Thus, any governmental entities or public authorities receiving revenue percentages which exceed the proposed 20% threshold must undergo the requirements of co-licensing. This raises a number of concerns.

Given our experience with these types of entities, we expect that it will be incredibly difficult to obtain cooperation from public officials when they are required to submit to the Authority's background check process. Many of our clients who seek licensing at large arenas or public venues have been hired by a State or municipal public entity, with such entity retaining a portion of premises revenue. As such, at the very least, we wish to clarify the level of disclosure required from the principals of a government entity when co-licensing is required.

Most government entities do not have a typical organizational structure with officers and directors in place. Their principals tend to consist of public officials, such as a mayor, governor or a publicly elected panel of council members or trustees. Requiring background checks and fingerprint cards from a government entity could even potentially lead to the Governor of New York being subjected to the qualification process. For their own safety, high profile public officials such as those noted above require a level of privacy with respect to personal disclosures. At a time when political sensitivity is at a high, it would be wise to ensure that any public figures maintain as much privacy as possible when it comes to the disclosure of their personal information. Thus, if the Authority will in fact require these types of entities to serve as co-licensees, we would request further clarification as to who exactly would need to complete the applicable disclosure and qualification requirements, and to what extent.

We would also like to raise a concern with respect to situations where there is a private entity acting as a "sub-landlord" with a governmental entity serving as the "master landlord." For example, at airports operated by the Port Authority of New York & New Jersey (PANY&NJ), there is often a management company hired by the PANY&NJ to manage the food and beverage concessions throughout the airport. The management company then subleases specific premises within the airport to a food and beverage concessionaire. Often, the percentage that the management company receives exceeds 10%, however, a portion of such percentage rent ultimately goes to the PANY&NJ. Considering the foregoing, we would suggest that the entire flow of percentage rent is considered in determining the actual percentage that a private sub-landlord is receiving from an applicant. For example, if the sub-landlord is receiving 20% of revenue, but 50% of that revenue is going to a government entity master landlord, the sub-landlord should only be viewed as receiving 10% of the revenue of the business.

Clarification on Total Revenue Statements

Finally, the proposed Advisory suggests that an applicant can submit a sworn statement from the applicant's principal stating that the "percentage compensation to be paid to a TPP pursuant to a TPP Percentage Agreement is not reasonably expected to constitute more than 10% of the licensed business's total revenues, including a sworn statement (with supporting documentation) in the form attached to this Advisory as Exhibit A." Further, the proposed Advisory implies this analysis is the "same analysis the Authority has applied to landlords and leases."

Should this Advisory be adopted, we respectfully request additional clarification on this requirement to ensure that it is applied consistently for all applicants and that there is no confusion. First and foremost, the referenced "Exhibit A" must be disclosed as it was not attached to the Advisory. Furthermore, we would propose that such Exhibit allow for minimum guaranteed rental amounts to be taken into consideration when factoring the percentage of total revenue listed in these "Total Revenue Statements."

For example, an applicant can have a percentage rent of 18% of gross sales on food and 21.5% of gross sales on alcohol, less a Guaranteed Minimum Rental amount of $150,000/year. If the gross sales for one location is $1,000,0000/year with $600,000 in food sales and $400,000 in alcohol sales, the total percentage rent payment would be $194,000 (18% x $600,000 + 21.5% x $400,000). The percentage rent ($194,000) less the Guaranteed Minimum Rental ($150,000) makes the actual percentage rent due only $44,000. In this hypothetical, $44,000 represents only 4.4% of the total gross sales.

For leases that impose Guaranteed Minimum Rental amounts, we propose that such arrangements be taken into account when determining the percentage rent obligations under the lease, similar to that which is proposed for TPP Percentage Agreements. In preparing a Total Revenue Statement, applicants should be able to submit supporting documentation showing that, while the lease provides for a percentage rent payment above 10% (or 20% to a government entity/non-profit) based on projected revenue, there is no plausible way the percentage rent would ever be above 10% (or 20% for government entities/non-profits) based on the projected sales.

Upon your review of the foregoing, please do not hesitate to contact me at (732) 727-5030 or via e-mail at rdskene@skenelawfirm.com should you have any questions or if you wish to discuss any of the above in further detail. Thank you in advance for your time and consideration.

Very Truly Yours,

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May 26, 2021

BY EMAIL
Chairman Vincent G. Bradley
Commissioner Lily M. Fan
Commissioner Greeley Ford
New York State Liquor Authority
80 South Swan Street, Suite 900
Albany, New York 12210

Re:Uber Technologies Inc. Comments relating to Proposed Advisory on Contracts that compensate a Third Party Provider ("TPP") of goods or services with a percentage of the Licensee's sales. Profits or Revenues

Dear Chairman and Commissioners:

We represent Uber Technologies Inc. ("Uber") and respectfully submit this correspondence on its behalf in response to the New York State Liquor Authority's ("SLA" or "Authority") proposed advisory, "Contracts That Compensate A Third Party Provider ("TPP") Of Goods Or Services With A Percentage Of The Licensee's Sales, Profits, Or Revenues" ("Proposed Advisory"). Portier LLC, a wholly-owned subsidiary of Uber Technologies Inc. ("Uber") provides third-party services via the Uber Eats app to businesses with licenses issued by the SLA. In New York, merchants may use the Uber Eats app to facilitate delivery and pickup of items by consumers across the state. As such, Uber has a significant interest in the outcome of the Proposed Advisory and we thank you for the opportunity to offer comments.

A. Request for Additional Time and Ability to Participate at Hearing

Initially, we request that the Members of the Authority delay voting on the proposed Advisory. The prior iteration of this Advisory, which the Proposed Advisory supersedes, remained without a vote for nearly two years. It would be helpful if we had more time to review and then comment on the new and amended proposal. Additionally, we believe an advisory that has such far-reaching potential consequences should await a full-board meeting at which stakeholders can discuss the issues with the Authority in person.

B. The Advisory is Overly Broad

Respectfully, we believe the Proposed Advisory is overly broad and consequently creates unnecessary administrative burdens both for TPPs and for licensees. Uber is particularly concerned with issues that relate to app-based sales (by the licensees) of items from retail establishments to consumers, whether those sales are for alcohol or not.

We respectfully request the Authority narrow the draft advisory to apply only to the extent TPP service facilitates, or is otherwise involved in, sales of alcohol. Where alcoholic beverages are not a part of the TPP's services or only a de minimis part of those services, the Proposed Advisory should not apply. For example, today, with very limited exception, Uber Eats works with restaurants in the state to facilitate delivery or pickup of food and non-alcohol beverages only (and not alcohol or liquor).[1]

Under the Proposed Advisory each business with a license issued by the SLA will be required to submit a 10% of Total Revenue Statement as a condition of doing business with Uber on a percentage fee basis, even if none of the parties reasonably expect the fees to approach 10 percent of the licensee's gross revenues. This is true, even though the amount of alcoholic beverages it expects to handle for such a business is so low, there is no risk that Uber would be regarded as a co-licensee of the business. In fact, the relationship may only come under the Proposed Advisory because it defines a "TPP Percentage Agreement" as an agreement where the TPP's compensation is based on a percentage of sales or revenues of the licensed business, "whether such sales or revenue are for alcoholic beverages or not."[2]

In addition, the advisory would apply to licensees even where alcohol is a small part of their inventory or sales. For example, Uber may provide TPP services to a grocer, for which beer is less than 10 percent of the grocery store's overall inventory. In such a case, it would be unrealistic to anticipate that fees paid to a TPP for alcohol items would exceed 10 percent of annual revenue, and therefore little reason to add an administrative burden for such a business.

For these reasons, we ask that, should the Proposed Advisory pass, it include the following exceptions from its purview:

i. A TPP's provision of goods or services to the licensee that do not involve beverage alcohol (for example, a TPP that facilitates the delivery of beauty products or OTC medication from a pharmacy that also has a grocery beer license);

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[1] Under Executive Orders issued during the Coronavirus crises, on-premise licensees were permitted to deliver alcoholic beverages with food orders. Unless the law changes, once the Executive Orders expire, on-premises licensees will only be permitted to deliver beer).

[2] N.Y. State Liquor Auth., Draft Advisory No. 2021-x ("Contracts that Compensate Third Party Provider ("TPP") of Goods or Services with a Percentage of the Licensee's Sales, Profits, or Revenues") 3 (May 12, 2021).

ii. TPP Percentage Agreements where alcoholic beverage sales and/or deliveries amount to 10 percent or less of the TPP's business activity; and

iii. TPP Percentage Agreements where alcoholic beverage sales amount to less than 10 percent of the licensee's business activity.

C. Changes in Revenue Percentage and Ongoing Obligations Should be Assessed Annually

The sale and delivery of alcoholic beverages can be seasonal. One might expect a distortion of the percentage of gross annual sales to appear in the three-month period of November (Thanksgiving), December (Christmas) and January (New Year's Eve and Day). One might also expect to see an escalation in gross sales to occur during the summer months. For this reason, the requirement for licensees to reevaluate their agreements with TPPs should be annual rather than based upon any three consecutive months.

There may be an ease in administrative burdens, as well, with an annual calculation.

D. Clarification of "Total Revenues"

The Proposed Advisory does not consistently refer to "total revenues" when discussing the percentage of revenues that fall within its ambit, whether contemplated or realized.

It refers to the "10% of Total Revenue Statement" as "a sworn statement from an applicant's or licensee's principal stating that the percentage compensation to be paid to a TPP pursuant to a TPP Percentage Agreement is not reasonably expected to constitute more than 10% of the licensed business's total revenues, including a sworn statement (with supporting documentation) ..." (Emphasis added).[3] While it includes "total revenues" in its description of the "10% of Total Revenue Statement," it excludes it elsewhere. For example:

- "Any TPP Percentage Agreement that entitles the TPP to a percentage of any sales or revenue, but where that percentage does not exceed 10%, will not require Notice or Co-Licensing of the TPP."[4]
- "[I]f a TPP Percentage Agreement calls for the TPP to be compensated by more than 10% of even a portion of the licensee's revenues (or for not-for-profit organizations, government entities, or public authorities, more than 20%), Notice is required."[5]
- "If a TPP is not Co-Licensed due to expected or projected revenue-sharing levels referenced in an applicant's or licensee's submission of a Total Revenue Statement, but the TPP's percentage of a licensee's revenue that exceeds 10% (or for not-for-profit organizations, government entities, or public authorities, exceeds 20%) for any three consecutive months

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[3] N.Y. State Liquor Auth., Draft Advisory No. 2021-x ("Contracts that Compensate Third Party Provider ("TPP") of Goods or Services with a Percentage of the Licensee's Sales, Profits, or Revenues") 3 (May 12, 2021).

[4] N.Y. State Liquor Auth., Draft Advisory No. 2021-x ("Contracts that Compensate Third Party Provider ("TPP") of Goods or Services with a Percentage of the Licensee's Sales, Profits, or Revenues") 4 (May 12, 2021).

[5] N.Y. State Liquor Auth., Draft Advisory No. 2021-x ("Contracts that Compensate Third Party Provider ("TPP") of Goods or Services with a Percentage of the Licensee's Sales, Profits, or Revenues") 4 (May 12, 2021).

> and/or for any annual period based on the Licensed Business's fiscal year, the licensee shall (a) notify the TPP and the Authority…."[6]

Accordingly, should the Proposed Advisory pass, it should include "total revenues" in the provisions above or otherwise make clear that the percentage derived by a TTP is based on the total revenues annually.

In addition, even if this change is not adopted, it is imperative that the SLA clarify what is meant by "even a portion" in the following directive:

> "[I]f a TPP Percentage Agreement calls for the TPP to be compensated by more than 10% of even a portion of the licensee's revenues (or for not-for-profit organizations, government entities, or public authorities, more than 20%), Notice is required." (Emphasis added.)[7]

This is particularly important, as the provision can easily be interpreted to require Notice when the TPP derives 10 percent of, for example, one week's revenue, one sales transaction, or one month's revenue, but does not result in the TPP deriving more than 10 percent of total annual revenues. Said another way, a TPP may derive 15-20 percent of a month's revenue, but remain well under the 10-percent threshold for total revenues.

E. Definition of "Licensed Business" and Centralized Bookkeeping

A number of licensees in New York have centralized bookkeeping letters. This allows them to have centralized bookkeeping and accounting for the records of the licensed businesses. Should the Proposed Advisory pass, the Authority should consider licensees operating under a centralized bookkeeping letter as one "Licensed Business" for the purpose of determining the percentage of sales or revenues a TPP derives from the goods or services it offers.

This can be incorporated by including a definition of "Licensed Business" that identifies businesses under a centralized letter in this way and also excludes the TPPs and relationships identified in Section B of these comments.

F. Definition of "Flat Fee" Should Include Agreements Based on Clicks and Through Sales

The Proposed Advisory defines "Flat Fee" as "compensation under a TPP Agreement, at a pre-determined fee that is not dependent on the sales, profits, or revenues made by the licensee."[8] This definition excludes TPP agreements based upon the number of clicks that are made on its website,

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6 N.Y. State Liquor Auth., Draft Advisory No. 2021-x ("Contracts that Compensate Third Party Provider ("TPP") of Goods or Services with a Percentage of the Licensee's Sales, Profits, or Revenues") 5 (May 12, 2021).

7 N.Y. State Liquor Auth., Draft Advisory No. 2021-x ("Contracts that Compensate Third Party Provider ("TPP") of Goods or Services with a Percentage of the Licensee's Sales, Profits, or Revenues") 4 (May 12, 2021).

8 N.Y. State Liquor Auth., Draft Advisory No. 2021-x ("Contracts that Compensate Third Party Provider ("TPP") of Goods or Services with a Percentage of the Licensee's Sales, Profits, or Revenues") 3 (May 12, 2021).

the number of through sales generated through a website, the number of orders, the number of deliveries or some other metric that may be dependent on sales, but are not predetermined. These relationships are also not within the purview of a "TPP Percentage Agreement" because they are not based "on a percentage or share of the monetary value of sales or revenues that would otherwise belong to the licensee." They are fixed fees dependent on one of the variables mentioned above (or a similar variable). Therefore, the SLA should amend the definition of "Flat Fee" to contemplate such an agreement. For example:

> "For purposes of this Advisory, a 'Flat Fee' shall mean compensation under a TTP Agreement, based upon a fee that is not dependent on the monetary value of sales, profits, or revenues made by the licensee."

G. Request for Addition Time for Licensees Subject to Current TPP Agreements to Comply

The Proposed Advisory requires licensees subject to current TPP Percentage Agreements to comply with the requirements of the Proposed Advisory within ninety (90) days from the date of issuance. Due to the variety of agreements contemplated by this Advisory, it would be beneficial for licensees to have addition time, such as one-hundred-and-eighty (180) days from the date of issuance, to comply with the Advisory's terms. This is especially important as New York restaurants and other members to the hospitality industry adjust to re-opening while Covid-19 rates decline. Furthermore, it will offer more clarity to the licensees of what annual sales may look like post-Covid-19.

Conclusion

We believe New York wishes to be business friendly and therefore open to new ideas and concepts. As a result of consumer experiences during the Covid-19 crises, people are more open to online shopping through apps and other tech platforms operated by TPPs. The SLA should expect the number of TPPs to grow. Many of these new TPPs will bring with them innovative strategies that will serve the public convenience and advantage. By placing limitations and new burdens now, the Proposed Advisory may have the unanticipated consequence of restraining growth and innovation.
We again ask that you delay the vote until stakeholders can meet with the Authority in person to discuss the future and all it holds.

Once more, we appreciate this opportunity to comment on the Proposed Advisory and are available to answer any questions you may have.

Respectfully submitted,

Arielle Albert

Arielle J. Albert
Partner

Amy Healy
Head of Public Affairs
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908-305-1400

May 26, 2021

Vincent G. Bradley, Chair
NYS Liquor Authority
80 S Swan St, # 900
Albany, NY 12210

RE: Opposition to SLA Draft Advisory 2021-x

Dear Chairman Bradley:

Grubhub respectfully opposes the new draft advisory under consideration by the State Liquor Authority ("SLA") which would require the inclusion of any third-party delivery platform on a business partner's liquor license if that platform generates revenue in the form of commissions and consumer fees in excess of ten percent of the restaurant's revenue.

We do not believe the SLA has the jurisdiction to regulate *non-alcohol revenues* received by an unlicensed third party because the SLA only has the ability, under the Alcoholic Beverage Control Law (the "ABC Law"), to regulate alcohol sales and service. Any effort by the SLA to regulate the sale of non-alcoholic items is an improper expansion of the SLA's authority and exceeds the scope and intent of the ABC Law.

Since the pandemic began, Grubhub and our industry partners have helped small and medium businesses reach and compete against larger enterprise chains across New York. Throughout the pandemic Grubhub has been a lifeline, enabling our restaurant partners to keep the lights on. The draft advisory would reduce the amount of legally-contracted business partnerships, and increase liability to third-party providers to a point which effectively prohibits our ability to serve restaurants that offer alcohol.

At the onset, the proposed rule puts the administrative burden directly on restaurants to determine the percentage of revenues that go to third-party delivery platforms on an ongoing basis. To comply with this requirement, many small and medium businesses would be forced to decide between forgoing their liquor license or not partnering with delivery apps that provide a valuable service by helping to reach a much broader customer base. As restaurants are beginning to reopen and recover, this additional constraint is ill-timed and would significantly impair Grubhub's ability to support restaurants in their greatest time of need.

For the reasons above, Grubhub urges the SLA to reconsider the proposed draft in favor of a solution that does not penalize both third-party delivery platforms and small businesses in New York for working together to improve New York's economy after significant financial stagnation.

Thank you and please do not hesitate to contact me with any questions.

Amy P. Healy
Head of Government Affairs

DOORDASH

MAY 26, 2021

NEW YORK STATE LIQUOR AUTHORITY
ALFRED E. SMITH OFFICE BUILDING
80 S. SWAN ST., SUITE 800
ALBANY, NY 12210

Re: New York State Liquor Authority Advisory Regarding Contracts With Third Party Providers

DoorDash respectfully submits the following comments in opposition to the State Liquor Authority's ("SLA") draft advisory (the "Advisory") in relation to contracts between a SLA-licenced business ("Licensed Business" or "Licensee") and a third party provider ("TPP") which compensate TPPs with a percentage of a Licensee's revenues.

DoorDash's mission is to grow and empower local economies. We do this by offering transformational access to our audiences: consumers, merchants and Dashers. As such, we are concerned with the effects the Advisory would have on Licensee agreements with TPP delivery platforms like DoorDash and its potential impacts on the numerous and diverse New York communities that we serve.

First, we believe the Advisory would impose a considerable regulatory burden on New York small businesses, many of which have borne significant hardship to keep their doors open during the COVID-19 pandemic and have come to depend on the revenue streams that TPP delivery platforms provide. Second and equally problematic, the Advisory would prove harmful to millions of New York residents who now rely on the delivery of food and beverages they previously had little or no affordable access to, as well as the hundreds of thousands of New Yorkers who have signed up to deliver with DoorDash for supplemental income. Third, if adopted the Advisory would amount to a broad overreach of the SLA's authority, regulating transactions with little or no nexus to the sale and distribution of alcohol.

I. Impact on New York Small Businesses

The Advisory threatens to hurt small businesses across the state which have come to depend on TPP delivery platforms for a vital stream of additional revenue. Now more than ever, small businesses are relying on TPP delivery platforms to significantly expand their customer bases beyond the four walls of a physical location. In fact, a recent survey of DoorDash customers, Dashers and merchant partners found that more than two thirds of restaurants now rely on DoorDash to grow revenue and reach new customers (75 percent), and a majority of merchants reported to us that their business may not have survived the economic crisis that COVID-19 wrought were it not for DoorDash. Additionally, 65 percent of restaurants reported that they were able to increase their profits during COVID-19 because of DoorDash.

DoorDash

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Moreover, even if Licensees continue to enter into agreements with TPP delivery platforms, the Advisory would saddle these businesses—many of which are under-resourced in the wake of the pandemic—with costly and time consuming reporting requirements. Per the Advisory, Licensees would either need to amend their liquor licenses, an onerous and time-consuming process that is not practical for most Licensees, or continually monitor and calculate whether revenues paid to a TPP delivery platform increase above the 10 percent of total revenue threshold. In an effort to avoid the headaches of a new compliance regime, and the potentially costly fines for inadvertent violations, small businesses might forgo the benefits that TPP delivery platforms provide, which include not only pickup and delivery service, but powerful marketing tools to help businesses attract new customers and drive growth. Or alternatively, those Licensees who do retain relationships with TPPs would bear extensive costs and logistical burdens associated with notifying the SLA if any of their contracts begin to exceed the stated threshold. As the economy finally begins to open up, now is not the time to make it harder for New York small businesses to make money and get back on their feet.

II. Impact to New York Residents

On-demand delivery platforms like DoorDash have filled an essential need in the State of New York and across the country by significantly expanding the availability of food and beverage options to New Yorkers, particularly those who are prohibited geographically from affordable access to nutritious and high-quality food options. As the effects of the COVID-19 pandemic continue, never has there been a more important time to expand food delivery options in every region of the state. In fact, 86 percent of DoorDash customers recently surveyed reported that DoorDash played an important role in helping them access food during the pandemic. Because the Advisory applies to Licensee revenues from the sale of both food and alcohol, merchants in vulnerable and underserved areas of the State may retreat from using TPPs regardless of whether they use a TPP for alcohol delivery—thereby negatively impacting countless New Yorkers who live in these areas.

TPP delivery platforms also provide flexible and well-paying jobs to New Yorkers with limited barriers to entry. Hundreds of thousands of New Yorkers use DoorDash to supplement their incomes, help provide for themselves and their families, and strengthen their local economies. In fact, nearly 2 million Dashers nationwide joined our platform after the onset of the pandemic and from January through March of 2021, earned over $25 per active hour worked. This flexible work is a source of help for many New York families. Because adoption of the Advisory as drafted is likely to decrease the number of merchants who use TPP delivery platforms, these economic benefits to numerous communities across the State are likely to be blunted.

III. Unprecedented Overreach

While there is no doubt that the SLA has broad power to regulate the sale and distribution of alcohol, the proposed regulation of a Licensed Business' *non-alcoholic* food and beverages would constitute unchartered territory. Should the advisory be adopted, the SLA would effectively be regulating far more Licensee transactions regarding non-alcoholic products than those that do involve alcohol. Nothing in the New York Alcoholic Beverage Control Law suggests that the SLA's authority is this broad. The Advisory analogizes to the SLA's long standing rule governing landlords of Licensees but a landlord's relationship to a Licensee is far more legally intertwined than that of a Licensee to a TPP. A TPP shares no real property interest with a Licensee and Licensed Businesses can and do switch between and stop using TPPs at will.

DOORDASH

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DoorDash appreciates the opportunity to comment on the Advisory and is eager to work with the SLA on this and other important issues. We are incredibly proud of our economic impact on the State of New York and grateful to further our mission to empower local economies by connecting consumers with the restaurants they love and supporting our merchant partners. Please do not hesitate to reach out to us with any questions.

Sincerely,

David London
Head of U.S. East, U. S. Federal & Canada Government Relations

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May 26, 2021

Chairman Vincent Bradley
New York State Liquor Authority
163 W 125th Street
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fbsupplemental@sla.ny.gov

Re: **Advisory 2021-x**
Contracts That Compensate A Third Party Provider ("TPP") Of Goods Or Services With A Percentage Of The Licensee's Sales, Profits, Or Revenues

Dear Chairman Bradley:

We represent Maplebear Inc. dba Instacart ("Instacart"), a technology company that partners with retailers to enable same-day, on-demand grocery delivery services to consumers across the country, including New York consumers.

Instacart respectfully submits the below comments to the New York State Liquor Authority ("SLA") in response to the SLA's draft proposed Advisory No. 2021-x, "Contracts That Compensate A Third Party Provider ("TPP") Of Goods Or Services With a Percentage Of The Licensee's Sales, Profits, or Revenues."

The Advisory states that TPP Percentage Fee Agreements below ten percent are permissible and do not require notification or co-licensing, but the Advisory does not clearly define the parameters of calculating the ten percent (i.e., ten percent of "what"). Instacart respectfully requests the SLA confirm the ten percent calculation is based on the reasonable approximation of the retailer's total gross revenues, and not some other, more narrow calculation. Instacart understands that the ten percent threshold, as written, is based on the retailer's "total revenues," that is, the retailer's total revenue generated by its business.

Instacart has no objection if the ten percent threshold is based on the reasonable approximation of a retailer's total gross revenues. Instacart's retailer service fees do not exceed ten percent of a retailer's total gross revenues.

A different calculation could, however, have significant, seemingly unintended, implications for both Instacart and Instacart's Retail Partners. For example, in some situations, Instacart's platform fees may exceed ten percent of an individual consumer order. But, as mentioned above, under no circumstance would its fee exceed ten percent of the retailer's total gross revenues.

Instacart has no control over the sale, pricing, availability, etc. of alcohol beverages or the Retailer's licensed business, and therefore, it is not a proper co-licensee. Moreover, because Instacart works with multiple Retailers, it could not effectively operate in New York if required to be a co-licensee. Requiring notice and co-licensure based on a narrower calculation of a retailer's revenues would have broad ramifications for retailers and TPPs and may ultimately result in TPPs having to exit the New York market.

For these reasons, Instacart opposes a ten percent threshold based on anything other than a retailer's total gross revenues.

Accordingly, we request the SLA confirm the ten percent calculation is based on the retailer's total gross revenues.

We appreciate the SLA's consideration.

Very truly yours,

Carrie L. Bonnington

Carrie L. Bonnington