

January 25, 2010

STATEMENT SUBMITTED BY DENNIS ROSEN, CHAIRMAN, NEW YORK STATE LIQUOR AUTHORITY, TO THE NEW YORK STATE ASSEMBLY STANDING COMMITTEE ON ECONOMIC DEVELOPMENT, REGARDING RECOMMENDATIONS OF THE NEW YORK STATE LAW REVISION COMMISSION'S REPORT ON THE ABC LAW AND ITS ADMINISTRATION

In this statement, I discuss the recommendations of the Law Revision Commission ("Commission"). However, I would like to begin by first providing some brief information on my background and how I came to the State Liquor Authority, then proceed to update the Committee on some recent developments at the SLA, and, lastly, offer comments directly responsive to each of the Commission's findings and recommendations.

From September 2005 to December 2006, I was the lead attorney in the statewide investigation by then Attorney General Spitzer into widespread violations of the ABC Law, which regulates the sale of wine and spirits. The investigation concluded with many of the liquor industry's largest wholesalers, manufacturers, and retailers agreeing to court orders which fined them a total of \$4.6 million. More importantly, the orders also ended what were referred to as "pay-to-play" practices that had created an uneven playing field, putting companies that followed the law at a competitive disadvantage. The orders also set forth comprehensive guidelines for all industry members to adhere to, providing a degree of clarity that had been lacking. As a result of the investigation, I was already somewhat aware of the challenges facing the SLA and the industry it regulates prior to my arrival at the agency five months ago.

As the members of the Committee are all too well aware, and as the Commission's Report makes crystal clear, the SLA faces massive challenges and the ABC Law is in dire need of an overhaul. The Report states that "Since its inception, the SLA has been plagued with problems of licensing delays, inadequate enforcement, inefficient and ineffective administration and, indeed, bribery and corruption." As the Commission notes, the task before the SLA, and I would add, before your Committee and the Legislature, is "herculean."

One of the major hurdles facing the alcohol industry as well as the SLA is trying to do business in the 21st Century with a statute that was passed in 1934 coming out of Prohibition. Since its inception, there have been various amendments to the ABC Law. While many of these amendments have been well-intentioned and indeed necessary, what I believe is needed today is a wholesale overhaul of the statute. I recently told a reporter that what we have with the ABC Law is not what one would typically call a statute. A statute is, typically, logically written. What we have with the ABC law is a collage. This is because it has persistently been jerry-rigged to suit the perceived needs of the moment without much deference to its overall structure or logic. Thus, it is difficult for even attorneys to understand, and almost impossible for the average licensee, to know exactly what their responsibilities are under the statute.

Thus, I believe we have a great opportunity, here and now, to fix an agency and a statute. The Commission's Report provides a basic blueprint for how we can move this agency and this industry forward. And for this, I think the Commission should be commended for their exhaustive and exceptional work. Likewise, I would like to thank Assemblyman Schimminger and this Committee for having the foresight back in 2007 to call on the Commission to conduct this study. I believe this Committee and the Legislature took an important step in realizing that piecemeal changes to the law were no longer sufficient if this industry and the SLA are to function in the 21st Century.

In addition to providing a blueprint for going forward, the Commission also notes that the SLA has made "remarkable" progress in the past few months. I would like to briefly outline some of the new policies and procedures we have recently implemented in our effort to process license applications more efficiently as well as to ensure that serious violations of the law are dealt with swiftly and effectively.

When I started on August 19, 2009, the agency was facing a backlog of over 3,000 pending applications. I am pleased to report that the backlog has been reduced to fewer than 2,000. Obviously, this is still a burden on entrepreneurs trying to start a business, but we are making tremendous progress. The Governor has directed me to eliminate the backlog by October, 2010, and I am prepared to live or die with that deadline.

One of the policies that we have implemented to tackle the backlog that has received a lot of attention is the Attorney Self-Certification program. But while this program has received the most attention, I want to stress it is just part of an overall strategy to eliminate the backlog; it is but one arrow in our quiver. Before describing some of the other changes we have implemented, I would like to address some of the criticisms that the Self-Certification program has received.

First, the program has been criticized as creating a “two tier” system, where the review process for applications submitted by attorneys under the program are fast-tracked. Self-Certified applications are expedited. However, expediting these applications was necessary to encourage attorneys to participate in the program. Simply put, attorneys under this program are putting a lot on the line, because, they are called upon to engage in extensive due diligence to ensure the truthfulness of certain categories of information contained in the applications. To certify that information is true which, in fact, is not, constitutes a crime. This process saves hours of reviewing time, thereby substantially shortening the waiting line for all applications. This benefits all applicants.

The self-certification program is not a “rubber stamping” of applications. Applications submitted under the program receive a full review. While there is certain information that we rely on from attorneys under the program, we are auditing these applications to verify they are complete and accurate. On January 6, 2010, my fellow Commissioners and I passed a resolution delegating power to the Deputy Commissioner of Licensing to remove any attorneys from the “Self-Certification” program who are found submitting incomplete applications or applications containing misrepresentations. In addition, any attorney found to knowingly submit an improper filing will be criminally prosecuted. I personally successfully prosecuted an attorney who submitted a false certification with respect to the conversion of a rental complex to cooperative apartments while I was with the Attorney General’s office. I can assure the Committee we will not hesitate to send a strong message if we find false certifications.

The other criticism of the program has been that it short circuits local government, including Community Board involvement, in the licensing process. This is simply not the case. Applications submitted under the Self-

Certification program are treated identically to those submitted under the normal process with respect to meeting the requirements of the ABC Law. Applicants must still notify their Community Board or municipality 30 days prior to applying for a license. This ensures the Community Board has sufficient time to comment. Also, any application that falls under the 500 Foot Law must still have a 500 Foot Hearing. These hearings are a further opportunity for the community and the Community Boards to weigh in on pending applications. In addition, applications that require a Full Board determination, for example an application that receives Community Board opposition, are not eligible for the Self- Certification program.

We have taken other steps to improve the agency, some of which I will briefly note here. As recognized in the Commission’s Report, the SLA has instituted a number of technological as well as common sense solutions designed to make the review process more efficient. These include allowing for the submission of digital photographs in place of costly front elevation diagrams, accepting digital fingerprints, and allowing licensees to submit a notice to the SLA to change their trade name, rather than going through the onerous “endorsement application” process. Additionally, in partnership with the Division of the Budget (“DOB”), the SLA is embarking on the SLA / ABC Revitalization Project. We have just issued an RFI (“Request for Information”) that is the first step towards a new agency-wide electronic data system. The RFI will include input from all of the agency’s stakeholders to ensure that the final product incorporates the improvement of all agency processes and optimizes technology. DOB has committed \$2.4 million over the next two years for this exciting project.

We have brought in highly experienced professionals to run our Enforcement Division and hired an Internal Auditor who is critically scrutinizing every procedure by which the agency conducts its business. The Board recently passed a resolution to delegate the authority to individual SLA Commissioners, on a rotating basis, to render penalties on minor disciplinary actions. This frees up a substantial portion of the calendar so that we can focus on more serious cases affecting public health and safety. Because much of the problems within the agency have emanated from our New York City office, we have moved our Deputy CEO position from Albany to New York City, and reorganized Counsel’s Office so that our newly hired Counsel is based in New York City as opposed to Albany, where our former Counsel was stationed. We are also in the process of adding five new license examiners to

our staff. We have accomplished all of this while still remaining well within our budget targets through the elimination of several administrative positions and substantial reductions in non-personnel related spending.

We are not just adding staff to licensing to address the backlog. After an extensive review of licensing processes and procedures, we initiated the following changes. We implemented a process whereby three senior experienced examiners review backlogged cases only. These designated employees are not answering telephones or receiving current applications so that they may address the backlog efficiently. Less senior and temporary staff are answering phones, typing letters, faxing, scanning and assuming all the lower level tasks previously handled by the senior examiners. We are imposing stricter guidelines on accepting applications. Higher level employees perform a thorough review at intake to eliminate accepting applications that are incomplete or not approvable, as acceptance of such applications leads to wasted staff time and adds to the backlog. Applicants are no longer permitted to “piecemeal” information or documentation required by the Authority, which has led to examiners starting and stopping and restarting the examination process. The examining process will now come back into compliance with statute. If the required information is not provided in compliance with the applicable ABC Law, the application will be disapproved for failure to comply. The applicant will have the right to request a hearing on the disapproval or may reapply. The SLA currently spends months reviewing applications that are incomplete, which is unfair to applicants who have properly filled out their applications and adds substantially to the backlog.

Our Deputy CEO in NYC is a former Manhattan Asst. District Attorney with extensive law enforcement contacts, and our newly hired Director of Enforcement is a 30-year police professional, who had a highly successful eight-year tenure as the first female Chief of Police in Indiana. Having these quality professionals on the job has allowed our agency to stretch our resources by forging partnerships with local law enforcement agencies across the state. The agency is refocusing our enforcement priorities. We are getting away from counting fruit flies in bottles to cracking down on underage drinking, sales to intoxicated patrons, and the bars and nightclubs that wreak havoc on their neighborhoods. The Emergency Summary Suspension is a regulatory tool that we are employing more than ever before.

We agree with almost all of the Commission's recommendations. Perhaps the two most significant areas of disagreement involve the Commission's discussion of General Rulemaking Authority and Bring Your Own Bottle (BYOB). The Commission would defer any decision on the former, while it would allow the latter until there is no longer a backlog of licensing applications.

Forty-three states have granted their liquor industry regulators general rulemaking authority so that they may interpret the statutes they operate under in a manner consistent with the exigencies of modern times. New York State must follow them, or the SLA cannot but continue to be rightfully accused of standing in the way of economic development in the 21st Century. How could the agency do otherwise when it has limited tools with which to temper the mandates of an archaic, idiosyncratic statute, which was passed in 1934 upon the repeal of Prohibition?

With respect to allowing BYOB, we believe that the elimination of the licensing application backlog, and the passing of a bill such as that of Assemblyman Schimminger that provides for temporary licenses for qualified applicants, would better serve the public interest than allowing the consumption of alcoholic beverages at establishments that are not subject to the supervision of the Authority.

The following are the findings and recommendations of the Commission and, after each, are my comments.

Finding

The SLA's current nine-month backlog of license applications reflects a failure in the licensing process, jeopardizes public health and safety, and exacerbates the economic crisis currently plaguing New York.

Small business owners, and some large ones as well, are forced to suffer ever-mounting expenses for months on end without the income generated from having these licenses. The situation deprives the state of new revenues from sales and income taxes, and it depresses the growth of new jobs in local communities.

Recommendations

- A) *The SLA should be permitted to fill as many of the open examiner lines as necessary to address the backlog and assure timely processing of applications in the future.*
- B) *To the extent permitted by law, the SLA should be permitted to hire temporary examiners to accelerate the application process.*

The Governor has directed the SLA to eliminate the license application backlog by October, 2010. As a direct result of improved procedures, the backlog of applications has already been reduced from 3,000 to under 2,000 over the first five months of my administration. This trend will accelerate for a number of reasons, including the filling of five license examiner lines. (Even with the filling of these positions, the Authority will remain well under its FTE target level of 155 set by DOB because of cost saving measures, such as reduction of executive administration staff and non-personnel related expenses.)

- C) *Legislation authorizing the issuance of temporary retail permits should be enacted subject to certain restrictions:*
 - 1. *only those persons and premises eligible to obtain a full license should be able to obtain a temporary permit.*
 - 2. *temporary permits should not be permitted to become permanent by default through the granting of unlimited extensions.*
 - 3. *random investigations of temporary permittees should be conducted to determine whether they are complying with the law.*

The Authority submitted proposed legislation in 2009 that would have made significant changes to the eligibility requirements for temporary retail permits. Several other bills were introduced in 2009 that also proposed changes to those requirements. In response to objections raised by elected officials and industry members to various provisions of each of the bills, the Authority has worked with Senators Johnson and Little and Assemblyman Schimminger to draft a proposal that would address those objections while preserving the goal of the bill-making temporary retail permits available to more applicants. Also, *The Wine Industry and Liquor Store Revitalization Act,*

a Budget Bill submitted by the Governor, would amend ABCL §97-a by allowing applicants to obtain the temporary permits for locations that are not currently licensed and operating. This would be an alternative to the current requirement that restricts such permits to situations where the applicant is buying an existing business. This new alternative would not be available in New York City, nor would it be available for those applications, such as package stores and locations subject to the 500 Foot Law, where a higher standard of review is required before an application can be approved. Another provision of the bill would prohibit the issuance of a temporary permit for an existing location when the current licensee/seller has failed to timely pay its wholesalers.

D) Owners of restaurants that have a wine, beer or full liquor license application pending should be eligible to secure a BYOB (bring your own bottle) permit. Issuance of the permit should be coupled with random investigations to ensure that the permittees are complying with the law's requirements. The SLA should have the authority to declare a moratorium on the BYOB provision when the backlog has been eliminated.

The Authority disagrees with this recommendation. Attacking the backlog and increasing the eligibility for temporary retail permits, rather than allowing BYOB, are the more appropriate means to address the current delays in the application process. Unlike BYOB, a temporary retail permit places an obligation on the applicant to properly supervise its alcoholic beverage business and prevent violations of the ABC Law, such as serving minors or intoxicated patrons.

E) The agency's web site should allow for online submission of applications and tracking of application status.

The Authority, after consultation with DOB and the Office for Technology (OFT), has just issued an RFI. This is the first phase of the "SLA / ABC Revitalization Project," which will result in an overhaul, over the next two years, of the Authority's computer systems. It will enable the Authority to institute user friendly online submission and tracking of applications, and will also enable the Authority to participate in the OFT E-Licensing Project whereby a single electronic portal will serve to link users with any manner of licensing services provided by numerous state agencies. The Revitalization

Project will also significantly improve our law enforcement capabilities by, among other things, enabling the Authority to share information with other agencies.

Finding

The economies of scale sought by current oversight of the SLA's administration have left the agency incapable of protecting the public health and safety through licensing and enforcement.

Recommendation

The SLA should manage its own administration to ensure that its licensing and enforcement activities address the public's health and safety.

Because of the dire economic situation, the Governor's Office and the Office of Taxpayer Accountability (OTA) have directed agencies to share resources. In particular, this includes the administrative hosting functions of the New York State Office of General Services, which hosts the Authority and the NYS CIO/OFT which hosts many of the telecommunications and data functions of the Authority. Therefore, it is not possible for the Authority to fully establish its own administration independent of these agencies. However, the Authority has worked hard to establish a closer collaborative relationship with its hosts, and this is paying dividends in the form of increased efficiencies.

Finding

The agency's mission to protect the public health, safety and welfare has been seriously undermined because others are second-guessing the SLA's fiscal needs.

Recommendation

Create a budget and management bureau, under the direction of a chief financial officer, to:

- 1) assume overall responsibility for agency budgetary and fiscal procedures;***

- 2) *evaluate the effect of budgetary decisions on the functioning of the agency and its mission, and track agency spending to ensure that funds are efficiently and properly used by the agency; and*
- 3) *oversee human resources.*

Finding

The agency's loss of administrative control has led to an overall breakdown in internal procedures.

Recommendation

Create an audit and compliance bureau, headed by a compliance officer, to evaluate and, where necessary create, internal policies and procedures, and assure that employees are following those procedures.

The agency recently hired an Internal Auditor, who is a forensic accountant, certified fraud examiner and experienced systems analyst. She is working with the Information Technology Unit, the Enforcement Bureau and the Hearing Bureau to improve and modernize workflow procedures. She also oversees agency purchases and contracts, and is charged with updating the agency's vehicle fleet policy to ensure that agency vehicles are utilized in the best interest of the state.

Because the Internal Auditor lacks staff, including support staff, we intend to request that Civil Service establish two grade 18 auditor items. If this happens, we will then seek hiring approval from DOB and the Governor's office.

Finding

The SLA lacks managers in its regional offices to oversee daily administration of the offices, and coordinate their activities.

The lack of clear career advancement opportunities limits the agency's ability to recruit staff.

Recommendation

A) The SLA should create two positions of regional manager (one for New York City, and one for Albany, Syracuse and Buffalo) to oversee daily administration of the offices, and to coordinate the activities of the various units in the offices, including customer service.

We moved a Deputy CEO line from Albany to New York City and filed it with an attorney who is a former Manhattan Asst. District Attorney as well as a former Asst. State Attorney General. In his former role, he successfully worked with the NYPD in prosecuting major criminal cases, and, in his latter role, led successful prosecutions of massive Wall Street frauds. We also moved the Counsel to the Authority line from Albany to New York City and filled it with an attorney with impressive experience in regulatory reform. This reorganization has already led to vastly improved operational efficiency through hands on day-to-day management of the NYC office. The Deputy Commissioner in the Buffalo office, who serves as the regional manager for that office, now works in closer collaboration with senior management in Albany. The Syracuse office, which has been downsized, is essentially overseen by senior management in Albany.

B) The SLA should create career paths within the agency to maintain continuity and quality and to preserve institutional memory.

We worked with the Department of Civil Service to establish a licensing clerk series which will help considerably to incentivize and retain staff.

Finding

Inadequate staffing levels have prevented the SLA from carrying out its mission effectively.

Recommendation

Give the SLA the needed number of employees to allow it to carry out its mission.

As noted above, we have been given permission to hire five additional employees to act on license applications. In addition, the Governor’s *Wine Industry and Liquor Store Revitalization Act* would provide \$1.2 million for twenty additional fulltime employees to handle not only an increased workload pertaining to the extension of the sale of wine to grocery stores, but to assist with respect to other licensing and enforcement responsibilities of the Authority as well.

Finding

The SLA’s culture has led to apathy and burnout among staff.

Recommendations

A) *Adopt training programs to:*

1) educate new employees;

We have begun providing training, which had been non-existent, on internal controls and ethics to agency employees. We are also providing training on performance evaluations, leadership, computer software, etc.

2) promote compliance with internal procedures and policies; and

Our newly-hired Internal Auditor has thoroughly revamped our licensing application review procedures, and is currently focusing on the manner in which Counsel’s office and our investigations bureau tracks cases.

3) update employees on industry, community, legal and technological developments.

As noted above, DOB is working with us to fill a CIO position and, pursuant to our Revitalization Project template, is providing funding for a computer system and business process improvement plan. This will assist us enormously in our efforts to bring agency staff, technology and practices up to date.

- B) Investigate non-economic incentives such as those adopted by other state agencies to motivate and reward staff and alter the negative Agency culture that has evolved over time.***

The Authority is working on an awards program for years of service, etc.

- C) Invite the department of civil service to conduct an audit of employee titles and job responsibilities to ensure that staff are properly trained and compensated for their positions.***

The Authority is working with Civil Service and DOB on establishing appropriate titles. We recently were given permission to hire hourly civil service positions such as hourly ALJs and prosecutors. Because of agency-wide cost cutting measures, we will continue to remain well below our FTE targets even if these positions are filled.

Finding

The SLA often conducts itself in a manner that undermines confidence of the public, the industry and the judiciary in the authority.

Recommendations

- A) Review case preparation procedures.***
- B) Review case decisions to evaluate current procedures.***
- C) Interpret the law in concert with the statutory intent to avoid an absurd result.***

We recently moved the Counsel to the Authority position to our New York City office where it has been filled by a highly qualified, experienced attorney who, in partnership with our Deputy Counsel and new Deputy CEO and new Internal Auditor, are reorganizing Counsel's Office. While, on the one hand, the SLA Board has recently been aggressively suspending or revoking the licenses of problematic establishments, on the other hand Counsel's office has had an impressive string of corresponding successes defending the Board's actions. In addition, many matters which in the past

were referred to the State Attorney General's Office for representation are now being handled in-house. While the level of representation of the Attorney General's Office is quite high, matters were being referred for representation that would have been more appropriately handled by Authority attorneys with direct experience with certain recurring issues.

Finding

The SLA's outdated software seriously impedes the agency's ability to carry out its functions.

Recommendations

- A) *Fast track implementation of state of the art technology for the SLA and require consultation with other state agencies and other state liquor authorities to identify the most effective system.*
- B) *Fast track implementation of the global information system.*

The Authority, after consultation with DOB and OFT, has just issued an RFI. This is the first step of the "SLA / ABC Revitalization Project," which will result on an overhaul, over the next two years, of the Authority's computer system. It will enable the Authority to institute user friendly online submission and tracking of applications. The Revitalization Project will also enable the Authority to participate in the OFT E-Licensing Project whereby a single electronic portal will serve to link users with any manner of licensing services provided by numerous state agencies. The project will also ensure more effective law enforcement by, among other things, enabling the Authority to share information with other agencies.

Findings

The SLA is unable to make prevention of underage drinking a statewide priority.

Lack of regularly conducted on-site inspections neglects public health and safety.

Unsystematic and inconsistent enforcement procedures neglect public health and safety.

Lack of oversight of licensees has led to industry abuses.

Failure to analyze price posting data submitted by wholesalers prevents the SLA from evaluating whether industry members are engaging in unlawful price discrimination.

Recommendations

- A) Take proactive steps to enforce underage drinking laws and combat licensee abuses that endanger the health, safety and welfare of the public.*
- B) Develop policies that ensure that enforcement focuses on serious violations with an impact on public safety, and more closely monitors businesses with a history of complaints and violations.*
- C) Conduct regular site visits to ensure that all licensees are complying with the law and the terms of their licenses.*

The Authority's new Deputy CEO, based in New York City, has utilized his extensive law enforcement contacts, particularly within the NYPD, to begin a new era of collaboration between the Authority and law enforcement agencies in downstate NY. For example, he has: (1) met with NYPD Chief of Vice Connors who has agreed to make his officers available for underage sting operations; (2) partnered with the Mayor's Office of Enforcement to target locations in New York City that have become focal points of police and/or community concern; and (3) joined with the NYPD in implementing new methods for the expeditious sharing of information.

Upstate enforcement has been reinvigorated by the hiring of a new Director of Enforcement with 30 years law enforcement experience, including a highly successful tenure as Indiana's first female Chief of Police. Among other things, she has increased the number of underage sting operations. These have shown encouraging results. For example, in the Middletown area a September operation with local and state law enforcement uncovered ten

sales to a minor violations; visits to the same locations in December resulted in just two violations.

In addition, under the leadership of the new Deputy CEO and new Director of Enforcement, a statewide rapid response capability which lay dormant, The Rapid Enforcement Unit, has been resurrected. It is comprised of staff from the Executive Level, Counsel's Office, and the Enforcement and Licensing bureaus. It has already begun to provide a swift, effective response to licensees who pose an immediate threat to the public welfare in the form of the Authority issuing more summary suspensions of licenses.

The installation of a new computer software system over the next two years will greatly aid in case management and early identification of serious violations, including patterns and trends of violations. It will also ensure the seamless integration of all pertinent agency information (currently, some of our systems cannot intelligibly exchange information with each other).

In addition, the Enforcement Bureau is reaching out to local colleges to recruit interns to assist with the prevention efforts to reduce underage drinking. Investigators have participated in college job fairs to reach prospective students. The Albany office has recruited two interns that will begin their duties in late January of 2010. We are also training law enforcement recruits on the ABC Law, and are developing a formal outreach program for law enforcement agency heads to encourage their participation in the resolution of the problem of underage consumption.

We continue to communicate closely with County STOP DWI Programs and their Coordinators, as well as district attorneys, to target potential problem licensees, and to identify trends and patterns using Police DWI reporting statistics and direct enforcement efforts towards these high risk situations. We also participate as a member agency on the Governor's Action Council administered by the Office of Alcoholism and Substance Abuse Services (OASAS) to find preventative solutions to addictions which directly relate to reducing underage drinking. Lastly, we provide ATAP ("Alcohol Training and Awareness Program") outreach to licensees to educate them and their staff in methods to recognize and detect potential underage patrons. In addition we support local law enforcement programs, such as TIPS ("Training for Intervention Procedures") to ensure a consistent message to reinforce the importance of underage drinking prevention.

D) Work with licensees to develop a plan of correction and appropriate follow-up.

We have been successfully expanding our efforts in this regard as evidenced by the example provided above describing a follow-up operation in Middletown.

E) Provide guidance to ensure fair and consistent application of penalties, including a schedule of sanctions for a particular violation and the corresponding fine amount.

In October, the Board delegated the authority to each Member to act individually on certain routine violations so that these could expeditiously be dealt with by individual Commissioners, on a rotating basis, and thereby increase the workflow of the calendars addressed by the Full Board and emphasize more serious matters. A schedule of penalties for the delegated matters was agreed to on the understanding that the imposition of a penalty in excess of that indicated on the schedule would require Full Board action. After the trial period for this new procedure is completed, it is anticipated that the schedule of penalties will be posted on the Authority's Website as a first step in the direction recommended by the Commission.

F) Analyze the price posting data to determine if members of the industry are engaging in price discrimination.

The Authority agrees that, to insure the integrity of the three tier system, prevent violations of the gifts and services law and regulations, and to guard against price discrimination, price posting schedules should regularly be reviewed and field investigations conducted. The anticipated IT upgrades will assist in the effort to properly monitor compliance with the price posting statute, but increased staffing is also essential.

Finding

The SLA's failure to provide meaningful information about its decisions and policies leaves the regulated industry and the public in the dark.

Recommendations

- A) *Eliminate outdated, unnecessary, and overly burdensome regulations in compliance with section 207 of the state administrative procedure act and executive order 25 of August 6, 2009.*
- B) *Eliminate outdated, unnecessary bulletins and divisional orders.*
- C) *Publish all current bulletins and divisional orders, formal opinions and written agency decisions on the SLA website.*
- D) *Postpone any legislative decision to give the SLA general rule making authority until a review of its compliance with these recommendations regarding communication with the public is completed.*

The Authority was selected as one of the agencies to participate in the first round of regulatory review directed by the Governor in Executive Order 25. The public comment period recently ended and the agency, consistent with the Executive Order, will now be working to identify those regulations that meet the Governor's criteria and take the necessary steps to rescind or modify them. In addition, the Authority has commenced its own review of its regulations and statutes to identify regulations that should be amended or rescinded as well as areas where rulemaking may be needed.

The Authority has also commenced a review of its Bulletins and Division Orders. It is anticipated that by June 1, 2010, the Members of the Authority will, to the extent appropriate, designate a number of these as obsolete. Those Bulletins and Division Orders that are deemed to be in full force and effect will be available on the Authority's website.

The Authority has submitted proposed legislation to the Governor's Office that would grant it general rulemaking authority, and emphatically disagrees with the Commission's recommendation that any decision regarding granting of general rulemaking authority to the Authority be postponed. The Authority has often been accused of impeding economic development, particularly in upstate communities. This has been the case, in part, because of the archaic restrictions contained in the ABC Law, a statute drafted in 1934 on the heels of the repeal of Prohibition. Forty-three states have given our

sister agencies general rulemaking authority as a tool with which to interpret and implement for current times highly idiosyncratic, early-twentieth-century statutes.

Section 2 of the ABC Law should be amended to provide:

This chapter shall be deemed an exercise of the police power of the state, for the primary purpose of protecting the welfare, health, and safety of the people of the state, promoting temperance in the consumption of alcohol, and to the extent possible, supporting economic growth and development provided such activities do not conflict with the primary objectives. It is hereby declared that such policy will best be carried out by empowering the liquor authority of the state to determine whether public convenience and advantage will be promoted by the issuance of licenses to traffic in alcoholic beverages, the increase or decrease in the number thereof and the location of premises licensed thereby, subject only to the right of judicial review hereinafter provided for. All the provisions of this chapter shall be liberally construed for the accomplishment of its primary purpose.

The Authority agrees that economic growth and development, to the extent those objectives do not conflict with public welfare, health and safety, should be part of the underlying policy of the ABC Law. In addition, the Authority proposes that any amendment of Section 2 also be used as an opportunity to clarify the standard, or standards to be used when issuing licenses. While Section 2 uses the phrase “public convenience and advantage,” other sections of the chapter use standards such as “except for good cause shown,” or the promotion of “the public interest.” The ABC Law should provide clear guidance to the Authority, the public and applicants as to the standard by which a particular license application will be reviewed.

Organization of the ABC Law

A. *The statute should be reorganized into the following Articles:*

Article 1 - Short Title, Policy, and Definitions;

Article 2 - Agency Organization and Power;

Article 3 - General Licensing and Requirements and Procedures;

Article 4 - Off-premises licenses;
Article 5 - On-Premises Licenses;
Article 6 - Vendors' licenses;
Article 7 - Distillers' Licenses;
Article 8 - Winery Licenses;
Article 9 - Brewers' Licenses;
Article 10 - Cider Producers' Licenses;
Article 11 - Brand Registration and Labeling;
Article 12 - Wholesalers' Licenses;
Article 13 - Alcoholic Beverage Tastings;
Article 15 - Fees;
Article 16 - Alcohol Training Awareness Programs;
Article 17 - Unlawful Activities and Penalties;
Article 18 - Local Option;
Article 19 - Keg Registration; and
Article 20 - Miscellaneous provisions including deed description exemptions; laws repealed; time of taking effect.

Without adopting the specific proposal put forward by the Law Revision Commission, the Authority agrees that a reorganization by subject matter of the ABC Law, as well as a reorganization of the Rules of the Authority, would assist in eliminating confusion. Such a reorganization is needed so that related statutes and regulations, and amendments thereto, are sequential, rather than scattered throughout the various articles of the law and parts of the regulations.

B. Reorganization should include redrafting to eliminate redundancies, unnecessary and repetitious language, and antiquated references.

The Authority agrees that a reorganization of the ABC Law should not be limited to a realignment of articles of the ABC Law. It should include a review of each section of the law. As noted in the Commission's Report, there are numerous instances where related information is scattered about various sections of the statute. For example, in order to determine the basic privileges that accompany a farm winery license, one would have to read §76-a, the farm winery section; as well as §76, the winery section; §77, the provisions governing the sale of wine in bulk; §79-d with respect to direct shipping; and §80, for wine tasting.

Rather than simply amending relevant existing provisions, separate provisions have been added to address new issues. For example, when the ABC Law was first enacted, only restaurants, hotels and catering establishments could obtain a license to sell spirits, wine and beer for on premises consumption. Thirty years later the statute was modified to allow taverns to obtain such licenses. However rather than changing the existing section of law, a new section was added. Thirty-three years after that, a new section was added to allow “brew-pubs” to obtain licenses. There are two sections for on premises wine and beer licenses. Each section provides identical privileges and contains the same language to describe the establishments that are eligible for the license.

The Authority has offered proposals in the past to address problems arising under particular sections of the ABC Law. More recently, the agency has worked with the Department of Agriculture & Markets to draft a complete overhaul of the statutes governing wine manufacturers. This proposal would consolidate and clarify the many provisions of the laws pertaining to wineries and farm wineries. The release of the Commission’s Report should be used as an opportunity for similar efforts with respect to the other articles of the ABC Law.

Organization and Administration of the Division of Alcoholic Beverage Control

A. Organization

- 1. The ABC Law should be amended to provide that all delegations of Authority responsibilities be made public.***

While any delegation of power by the Members of the Authority is a public act, conducted at an open, webcast meeting of the Full Board, sufficient dissemination of such information to the public has nonetheless been lacking. The Authority is currently making delegations of power available on the agency’s website as soon as practicable after they are issued.

- 2. The ABC Law should be amended to grant the Chairman of the Authority exclusive executive authority over both the division of alcoholic beverage control and the Authority, including the authority to hire, assign, and fire deputies, counsels, assistants,***

investigators and all other employees within the limits of the agency appropriation, in consultation with the other members of the Authority; and to remove all such responsibility from the Authority.

While the current Members of the Board have worked well together, vesting sole administrative power in the Chair would grease the wheels of administration and lighten the burdens of staff who must, under the current scheme, report to three individual Members. The Commission's position that no grant of exclusive administrative authority to the Chair should include a reduction in the number of Board Members or the granting of sole decision-making authority to the Chair regarding regulatory matters such as the approval or disapproval of licenses or determination of penalties for violations of the ABC Law has merit. For the reasons discussed by the Commission, these functions are best performed by a deliberative body as opposed to one person.

- 3. The ABC Law should be amended to provide that in the event of a deadlock in a decision by the Authority, the deadlock will be treated as a denial subject to judicial review.*

The Authority would support an amendment to either the ABC Law, or the Administrative Procedure Act, that would make clear the implications of a tie vote by the Members of the Authority. From mid-2007 until mid-2008, as the result of the retirement of one of the Commissioners, the Full Board consisted of only two Members. On several occasions they cast opposing votes on licensing applications. Initially it was suggested that, relying on the NYS Supreme Court decision in *Sound Distributing Corp v. State Liquor Authority*, 144 Misc 2d 1 (1989), a tie vote was the equivalent of a "non-determination" and the application should be returned to the Authority's Licensing Bureau. However, such an approach left unresolved what would happen after the application was returned to the Licensing Bureau and whether the "non-determination" was a final decision, affording the applicant the ability to litigate the Authority's actions. Instead, the two remaining Members of the Authority, relying on the Court of Appeals' decision in *Tall Trees Construction v. Zoning Board of Appeals of the Town of Huntington*, 97 NY2d 86 (2001), agreed that a tie vote should be considered a denial of the license, providing the applicant with a final decision that can be reviewed in an Article 78 proceeding.

B. Information Sharing with the Tax Department

- 1. The ABC Law should be amended to authorize the SLA to notify the Tax Department when a retail license or a license for a distributor, as that term is defined by the Tax Law, has been granted or renewed, or when such a license has been canceled, revoked, transferred or expired, or when any corporate change has occurred that might affect the validity of the licensee's tax registration.***

This recommendation prompted recent discussions with the Department of Taxation and Finance. They have informed us that unreported income by licenses has probably resulted in over \$100 million in uncollected taxes. We are discussing the type of information each agency requires from the other to better enforce the laws within its jurisdiction. Some of the information may be available through changes or upgrades in each agency's IT systems, while the sharing of other data may require legislative or regulatory action.

- 2. The applicant for a license or license renewal should be required to waive the confidentiality of specific tax information on file with the Tax Department by supplying requested information to the SLA. The SLA should have rulemaking authority to determine which information is necessary for the processing of an application.***

In addition to requiring waivers from applicants to allow the Authority to obtain otherwise confidential information from Taxation & Finance and other agencies, the Authority is considering promulgating rules that would require applicants and licensees seeking renewals to demonstrate that they have no outstanding compliance issues with such agencies as Taxation & Finance, Workers Compensations, and Department of Labor. Requiring such information would serve to ensure that all licensees are meeting their obligations under state law.

C. Enforcement of Judgments

- 1. The ABC Law § 121 should be amended to provide that the court may order a stay in accordance with the provisions of CPLR 5519, provided that any stay under section 121 place certain obligations on the petitioner to ensure prompt resolution of the matter, such as the prompt prosecution of the article 78 proceeding, and that any section 121 stay must be renewed upon motion of the petitioner before prosecuting an appeal of an unsuccessful article 78 proceeding.*

The 30-day limitation to a stay under Article 78 is typically ignored by the courts when entertaining a request from a licensee to stay the imposition of a penalty. Given that, as well as the fact that an Article 78 proceeding is ordinarily not resolved within the 30- day period, the Authority is not opposed to amending the statute to allow for a stay pursuant to CPLR 7805 . However, such stays should not be automatic but granted only upon an appropriate showing and reserving the agency’s ability to bring a summary suspension if warranted by the licensee’s subsequent conduct.

- 2. The ABC Law § 121 should be amended to clarify that determinations of the SLA which impose only a fine are within the coverage of the section.*

The Authority disagrees with this recommendation. The payment of a fine has exponentially less of an economic impact on a licensee than a suspension or loss of a license, and the licensee can be “made whole” with a refund in the event that the penalty is rescinded as a result of litigation. Only penalties that impair the use of a license, such as suspensions, cancellations, and revocations should be subject to the imposition of a stay of a Board decision, as is the current practice.

D. SAPA section 401(2)

The SLA should investigate the procedure that is followed in renewing licenses facing disciplinary action to ensure that SAPA § 401(2) does not become a haven for unlawful licensees.

We have taken steps to ensure that disciplinary charges against any licensee who is operating pursuant to SAPA are prosecuted in a timely fashion. The Authority has also revised its policies with respect to licensees

who apply for renewals that also have disciplinary charges pending against them. Decisions on renewal applications are no longer postponed pending a resolution of the disciplinary matter. Unless the outcome of the disciplinary proceeding will be a factor in the licensing decision, the license is renewed with a stipulation that the renewal is without prejudice to any penalty that may be imposed as a result of the disciplinary proceeding.

Retail Licenses

A. Physical Location of Licensed Premises

The ABC Law should be amended to liberalize the location requirements of subdivision 2 of section 105, in accordance with SLA Departmental Bill #07-10.

The Authority has submitted proposed legislation to the Governor's Office that would eliminate or modify the restrictions placed on package store locations. The Authority's proposal would remove the requirements that the entrance to a package store be on street level and that such stores can only have two entrances. The agency's bill would allow multiple entrances provided they are on a public thoroughfare or parking lot.

B. Change in Operation

The ABC Law should be amended to clarify that a substantial alteration to the premises includes a change in the licensee's plan of operation.

The Authority agrees with this recommendation. The ABC Law is not clear with respect to whether a change in a licensee's method of operation is an event that requires approval of the Authority. Certainly, if a licensee sought to modify its business to the extent that it would fall within a different license class, an application for a license under the other license class must be filed and subject to the same review as any other new application. However, the law is not clear with respect to licensees who seek to change the nature of their business but would still fall within the same license class. For example, a neighborhood tavern is licensed under the same section as a nightclub. While the community might have no objection to the tavern, and the Authority satisfied that the applicant has the appropriate character and fitness to

operate such an establishment, the same might not be said if the applicant were to later decide to operate under an entirely different business model.

At a minimum, treating changes in the method of operation as “substantial alterations” would trigger application and notice requirements similar to that of an original application. However, what must also be addressed is the standard of review to be applied to such applications. For instance, if the original application was subject to the “public interest” test under the 500 Foot Law, would the alteration application be subject to that test as well?

C. 200 Foot Rule

- 1. The ABC Law should be amended to give the SLA rule making authority to that it can more fully develop the definition of “exclusively,” and thus allow potential applicants better to judge whether a particular location is likely to run afoul of the 200 foot rule.*
- 2. The ABC Law should be amended to permit schools and houses of worship to waive the application of the rule if they have no objection to the issuance of a license to a particular applicant without impairing the discretion of the SLA to apply the 200 foot rule.*
- 3. The ABC Law should be amended to provide that when a municipality has designated an area as an economic revitalization zone, the 200 foot rule does not apply to any schools and places of worship moving into the zone.*

The Authority generally agrees with this recommendation, although it would suggest that the grant of discretion be broader than that recommended by the Commission. On a number of occasions the Board has been compelled, by the lack of discretion in the statute, to deny approving a license even though all segments of the community supported its approval.

In 2007, the 200 Foot Law was amended to provide greater clarity as to what activities could be conducted at a church while still having the location considered “exclusively occupied” as a church. This amendment codified

court decisions that had addressed various activities on a case-by-case basis. Even with this amendment, questions persist as to whether certain uses should be considered incidental to the building’s primary character as a school or place of worship. The statute should simply be amended to provide the Board with the discretion to determine whether or not application of the 200 Foot Law is appropriate in a particular case. Such discretion would include an analysis of all the activities taking place at the school or place of worship, the support or opposition of the school or place of worship, the commercial or residential character of the neighborhood, and input from other segments of the community.

D. 500 Foot Rule

- 1. The ABC Law should be amended to include the public interest factors in all of the on premise license sections at sections 64, 64-a, 64-b, 64-c, and 64-d.***

In 2007, the Authority submitted bills for consideration during the 2008 legislative to address drafting issues with the 500 Foot Law. One proposal sought to correct a perceived drafting error in the manner in which existing establishments were “counted” to determine whether the 500 Foot law applied. The second sought to address the issue raised by the Commission. Neither bill was acted upon by the legislature.

As a result of the inaction on the first proposal, litigation followed that dramatically altered the way in which the 500 Foot Law was applied. In response to that litigation, the Authority’s first proposal was enacted into law in 2009. However, the other “fix” to the 500 Foot Law, the issue now raised again by the Commission, was not addressed. The Authority would support reconsideration of its 2007 proposal.

- 2. The ABC Law should be amended to eliminate the exemption of municipalities of 20,000 or less from the applicability of the 500 foot rule.***

The 500 foot law, as originally enacted in 1993, was applicable statewide in every municipality, regardless of population. In 1996, it was amended to apply only to municipalities with a population of at least 20,000. Consideration should be given to the rationale supporting that amendment,

and whether smaller municipalities, with limited centers of economic activity, would be in favor of a return to the original law.

3. *The ABC Law should be amended to clarify the SLA's authority to promulgate regulations regarding the conduct of 500 foot rule hearings.*

The authority to promulgate regulations for 500 Foot Law hearings is already clearly established in law. The ABC Law requires that a hearing be conducted. The State Administrative Procedure Act requires that when a hearing is required in the licensing process, an agency must issue rules governing the manner in which those hearings are conducted. Agency staff has drafted proposed regulations that will be presented soon to the Full Board for consideration as the first step in having the rules adopted.

E. Four nearest stores

1. *The ABC Law should be amended to provide that the SLA may consider the number and character of licenses in proximity to the location and in the particular municipality or subdivision thereof in determining whether public convenience and advantage and the public interest will be promoted by the granting of licenses and permits for the sale of alcoholic beverages at a particular unlicensed location.*

Consistent with the court decisions addressing licensing decisions regarding package stores, when determining “public convenience and advantage” the Authority takes into consideration, among other things, the proximity of the applicant to existing stores, the demonstrated need for another store based on population and sales at existing stores, and the unique services or products that the applicant would provide. However, it would be appropriate to include in the statute a clear definition of the term “public convenience and advantage,” or, in the alternative, set forth a list of those factors that should be considered when determining “public convenience and advantage.”

2. *The SLA should end its reliance on Bulletin 279.*

Bulletin 279, which addressed removals (relocations) of package stores, is no longer relied upon by the Authority. The licensing determination, as noted above, is based upon a number of factors derived from court decisions addressing the issue of “public convenience and advantage.”

Industry Practices

- A. *A study of the economic impact of this change would be necessary to make a rational determination of how many off-premises licenses should be issued to one person.***

The Governor, in *The Wine Industry and Liquor Store Revitalization Act*, has proposed eliminating the restriction on the number of package/wine store licenses that a person may have. The question of whether the rationale supporting this restriction is still relevant today is a question to be decided through the legislative process.

- B. *Cooperative purchasing by holders of off-premises licenses should be permitted to remove the current disadvantage experienced by small liquor stores.***

The Governor, in *The Wine Industry and Liquor Store Revitalization Act*, has proposed allowing package and wine stores to enter into agreements to make joint purchases of liquor and wine. Such agreements would allow these licensees to take advantage of discounts on high quality purchases that they would not otherwise be able to make. The proposed legislation grants rulemaking power to the Authority to regulate these arrangements.

C. *Engaging in other businesses*

- 1. *ABC Law section 63 should be amended to provide for two categories of merchandise that can be sold in an off-premises store: (1) non-food items that can be sold for service and presentation of the alcoholic beverage; and (2) items that can be sold for purchase and carry of alcoholic beverages.***

The Governor, as part of the 2010-2011 Budget, has proposed an amendment to expand the categories of items that a package store sells without violating the “second business” prohibition.

2. *The SLA should be given rule making authority to promulgate rules regarding such merchandise.*

In light of the Governor’s budget proposal, rulemaking power in this particular area is not necessary.

3. *Merchandise and other activities already permitted under section 63 should continue to be permissible.*

The Authority agrees that no further restrictions should be imposed.

D. Convenience Stores

The SLA regulations should be amended with respect to grocery stores and convenience stores to provide that more than 50% of the product display space (as opposed to dollar value) in the grocery store consist of “consumer commodities” as defined in section 214-h(2-a) of the Agriculture and Markets Law. The remaining requirements of the SLA would continue.

The existence of convenience stores and “mini-marts” was not contemplated when the ABC Law was drafted over 75 years ago. Given the vague definition of a “grocery store” in the ABC Law, the Authority, as a matter of policy (since there is no specific rulemaking power in this area), adopted guidelines with respect to the inventory that should be maintained by a licensee to qualify as a “grocery store” and thus be eligible for an off-premises beer license. However, convenience stores, mini-marts, and even “big box” grocery stores may often find it difficult to follow these guidelines. The Authority has proposed legislation to give the agency rulemaking power to establish standards for the types of businesses that can be classified as a “grocery store.” In the alternative, the ABC Law should be amended to redefine the type of establishment that is eligible for an off-premises beer license.

E. C Licenses

1. *The ABC Law should be amended to provide that the permissible inventory of non-alcoholic products be measured at 25% of its*

displayed inventory which would include food and seasonal specialty items related to its business.

Beer wholesaler licenses issued before July 1, 1960 carry with them the right to sell beer directly to consumers. There are a number of these licenses still in effect, either in the hands of the original licensees or successor owners. Beer wholesaler licenses issued after that date do not have the retail sale privilege. Those that can conduct retail sales are designated as “C” licensees while those that are limited to wholesale are designated as “CO” licensees. Other than the retail privilege, all beer wholesalers are governed by the same restrictions regarding what items besides beer that they can sell.

Many of the “C” licensees now can no longer be considered bona fide wholesalers; they have become, through the use of the retail sale privilege, “beverage centers.” They are, for all practical purposes, in competition with grocery stores but not bound by the inventory requirements discussed above. A further expansion of the types of products that these licensees can sell would blur the distinction between these two separate license classes.

2. The ABC Law should be amended to provide that a C licensee can maintain an ATM at its discretion.

The inability of wholesalers to maintain ATMs in their establishments is the result of a provision in the Banking Law that defines operating an ATM as conducting a business. The Authority has no objection to an amendment of the law to allow ATMs in any licensed establishment.

F. House Accounts and ATMs

The ABC Law should be amended to permit house accounts and ATMs in the discretion of the licensee.

The Governor, in *The Wine Industry and Liquor Store Revitalization Act*, has proposed eliminating this restriction with respect to package stores.

The ABC Law prohibits all off-premises licensees, whether grocery stores or package stores, from selling on credit. However, if a retailer wishes to accept the risks involved by extending credit, the Authority would have no

objection to an amendment to allow, in the retailer's discretion, the ability to allow customers to maintain house accounts.

G. *Prohibition against Gambling*

The ABC Law should retain the prohibition against gambling as it is required by Article 1, section 9 of the New York State Constitution.

The constitutional prohibition against gambling should continue to be re-affirmed in the ABC Law. However, given recent matters that have come before the Authority with respect to whether certain conduct constitutes gambling, consideration should be given to adopting, either explicitly or by reference from the Penal Law, a definition of "gambling." In the alternative, a system in which proposed conduct must obtain approval as comprising "non-gambling activities" from the state's Racing & Wagering Board should be considered. Perhaps it is not appropriate for the Members of the Authority to be determining what constitutes gambling if the question falls more squarely within another agency's jurisdiction.

H. *Gifts and Services*

1. The ABC Law should be amended to incorporate the terms of the 2006-2007 consent decrees regarding gifts and services.

The ABC Law contains a general prohibition against gifts and services by manufacturers and wholesalers which "in the judgment of the liquor authority" are meant to influence retailers. With two exceptions, the statute does not identify what conduct would, or would not, constitute a violation of that prohibition. The Authority has, by regulation, provided licensees with a list of items that are considered permissible. It would be helpful to incorporate the provisions of the consent decrees into those regulations. This would provide an opportunity to reconcile those areas where the law and the existing regulations differ from the provisions of the consent decrees.

2. The SLA should amend the governing regulations, Divisional Orders and Bulletins such that trade practice restrictions and exceptions apply uniformly to all licensed entities, regardless of alcohol beverage product, to the extent that such changes do not conflict with other sections or the goals of the authority.

As noted in the Law Revision Commission’s report, there are several provisions in the Authority’s regulations where the rules are different depending on the type of retail licensee involved. Most notably is the ability of a wholesaler or manufacturer to provide “stocker services” for grocery store beer licensees. This exception to the general prohibition against manufacturers and wholesalers providing gifts or services allows them to stock shelves, rotate product, price mark and set up displays for beer in licensed grocery stores. No such exception applies to package stores or on-premises licensees. Given the fact that beer, as well as other items sold in grocery stores, have a designated “shelf life” documented by various coding procedures, it has been a traditional practice in the grocery store industry to have the product suppliers monitor their own products. Arguably, this consideration does not exist with respect to package stores or on premises establishments.

Another distinction is with respect to “consumer advertising specialties,” the items carrying brand logos that are meant for distribution to the consumer. While such items as hats, shirts, bags, etc., can be given to all other retailers by manufacturers or wholesalers, current regulations allow package stores to receive only recipe or match books. Whether such a distinction is still required will be considered by the Authority as it reviews its regulations.

Finally, the regulations do allow for certain items, such as wine lists and decanters, to be given only to on premises retailers. However these items are specifically related to the “on premises” nature of the retailer’s business.

I. Prohibited Consumer Exchanges

The ABC Law should be amended to clarify that a retailer has the discretion to accept the return of a container of alcoholic beverage, for a refund or exchange, provided that the product is under its original seal and accompanied by the receipt for the sale of the beverage. In the event of a return, the licensee may be held liable for any tampering or spoilage of the product.

The Members of Authority will be considering, at an upcoming Full Board meeting, whether this long standing interpretation of the ABC Law

should be modified to allow consumer-to-retailer returns, such as where a consumer purchases a particular product by mistake.

J. Brand or Trade Name Label Approval & Registrations

1. The ABC Law should maintain New York's brand registration and label approval regime.

The Authority agrees that brand label registration and approval should continue. This process serves to protect the public from deceptive advertising while also serving as a means to enforce the primary source doctrine. However, there is a broader issue that should be addressed that impacts not only brand labeling but the price posting scheme as well. The Authority has been receiving requests to brand label or price post products that do not fall within the statutory definitions of beer, wine and liquor. For example, federal regulations recognize “wine specialties” as a distinct class of alcoholic beverages. Under New York law, however, these products do not meet the definition of wine or wine products. Another example is flavored malt beverages, which are treated like beer under federal regulations but could well be classified as liquor under New York law. The confusion over which category of alcoholic beverage a product falls into impacts brand labeling, price posting, and the class of licensee that can sell the product. We urge an updating of the statutory definitions of “beer,” “wine” and “liquor.”

2. The ABC Law should be amended to clarify the SLA's scope of label review to include a determination as to whether a label is attractive to underage drinkers in accordance with the Bad Frog case.

Using the standards set out in the statute, the Authority has successfully prohibited labels that are deceptive in a manner that tend to attract underage drinkers. The issue here is not a need for clarity in the statute, but rules imposed by the Authority in an attempt to regulate the content of advertising of alcoholic beverages. The statute, §107-a, provides that the regulations governing the labeling of alcoholic beverages should be calculated to: prohibit deception of the consumer; afford the consumer adequate information regarding the quality and identity of the product; and achieve national uniformity when possible. The Authority's regulations, however, go far beyond those goals and prohibit labels from containing such things as: “any

illustration which is not dignified, modest and in good taste;” “the name of or depiction of any biblical characters;” or anything that “is obscene or indecent or which is obnoxious or offensive to the commonly and generally accepted standard of fitness and good taste.” We intend to address this.

3. *The ABC Law should be amended to enlarge the scope of the SLA’s review of packaging of the product to address concerns about packaging that may be dangerously deceptive or attractive to underage drinkers.*

The Authority agrees with this recommendation. The manner in which an alcoholic beverage is packaged, along with the content of the brand label, may materially deceive consumers or attract underage drinkers. Approval of the packaging of individual containers and cases/packs of alcoholic beverages should be included in the Authority’s jurisdiction.

K. *Price Posting and Holding*

The ABC Law should maintain the price posting and holding requirement.

The clear intent of the price posting statute is to prevent manufacturers and wholesalers from discriminating between retailers. As demonstrated by the NYS Attorney General’s investigation into trade practices, if left to their own devices, manufacturers and wholesalers will provide special discounts, rebates, allowances, etc., to selected retailers. Together with the Gifts & Services Law, the price posting statute serves to insure an orderly market of a controlled substance.

L. *Primary Source*

1. *The ABC Law should be amended to include a formal primary source statute.*

As noted in the Commission’s Report, “primary source” laws serve to ensure that the alcoholic beverages offered for sale to consumers have been authorized for sale by the manufacturer. Primary source laws prevent counterfeit products from entering the marketplace. This not only protects

the manufacturer's financial interest in the distribution of its products, but serves to prevent adulterated products from reaching the consumer.

Numerous ABC Law provisions regarding brand label registration and price posting are designed to ensure that alcoholic beverages being sold in the state are being distributed through the primary source. However, a specific primary source statute would help to re-enforce these provisions and assist in the enforcement of the primary source requirements.

2. *The ABC Law should be amended to define private collections to restrict the ability of wholesalers and retailers to use private collections to circumvent the price posting requirement.*

The ABC Law allows unlicensed parties to sell their "privately held" wine and liquor to licensees, or through licensees to other unlicensed parties. However, as noted in the Commission's Report, the lack of a definition as to what constitutes "privately held" allows individuals to circumvent the brand label registration and price posting requirements, both of which are used to enforce the primary source concept. Consideration should be given to imposing requirements such as: (a) the liquor or wine must have been purchased at retail; (b) the product must be in the possession of the unlicensed person for a minimum period; and (c) the product is no longer in production or available for sale at retail.

M. *Economic Development of Craft Breweries, Distilleries and Wineries*

1. *Wineries*

- a) *Amend the ABC Law to include requirements for alternating proprietorship that are consistent with federal law to eliminate the potential for confusion.*

Alternating proprietorships, through the use of special winery and special farm winery licenses, are currently permitted in New York. There is a perception in the industry that the federal regulations allow much greater flexibility than the ABC Law with respect to operating these types of businesses. In fact, in the agency's discussions with federal regulators it has been established that just the opposite is true.

- b) Amend the ABC Law to clarify custom crush as a permissible arrangement between two wineries and to permit custom crush in a manner consistent with federal law.*

While custom crush is permitted under New York law, it is clear that not everyone understands that fact. The proposal by the Authority and the Department of Agriculture & Markets to overhaul the statutes governing wine manufacturers will define and expressly provide for ‘custom crush’.

- c) Amend the ABC Law to allow any licensed winery to exercise the privilege to provide tastings at licensed off-premises establishments, licensed on-premises restaurants, events sponsored by charitable organizations, the state fair, recognized county fairs and recognized farmers markets upon notice to the SLA.*

The issue is not whether wineries and farm wineries can conduct tastings, but, as noted in the Commission’s report, the patchwork manner in which this privilege is granted. In 2008, for consideration during the 2009 legislative session, the Authority submitted a proposal to consolidate all the tasting provisions for all licensees into one section of law.

- d) The Legislature should reconsider the issue of whether satellite stores are exempt from all the requirements of an off-premises wine store.*

A bill proposed by the Department of Agriculture & Markets, on which the Authority collaborated, would overhaul the statutes governing wine manufacturers. It would, among other things, exempt winery satellite stores from the requirements imposed on locating package and wine stores. The satellite stores would be considered “branch offices” of the winery. The Governor, as part of the 2010-2011 Budget, has proposed an amendment to eliminate these requirements with respect to all retail package and wine stores.

- e) Amend the ABC Law to permit an existing winery, micro-winery and other entrepreneurs to operate home*

winemaking centers, so long as the commercial (if any) and home operations are segregated.

The production of wine for personal use, or “home winemaking,” is permitted under federal regulations. In response, entrepreneurs created home winemaking centers, establishments where private citizens could use the business’ equipment to produce their own wine and then store it at the facility. The ABC Law provided no such license for such a practice. At one point, without the Full Board’s approval, former Counsel McKeon allowed these businesses to operate the facility using a warehouse permit. The customers were required to obtain a miscellaneous permit to allow them to produce the wine. Finding that there was no authority in the law for such a practice, and absent Full Board approval, his successor, former Counsel Donohue, directed the Licensing Bureau to cease issuing such permits (both for the businesses and the private citizens). The Authority supports legislation which has been proposed to create a license for such facilities so that these operations can be supervised by the agency.

f) Amend the ABC Law to permit the sale of wine making equipment by wineries.

Legislation was introduced in 2009 to allow farm wineries to sell wine making equipment. Allowing such sales by farm wineries and wineries is consistent with the goal of fostering wine production in the state.

2. Breweries

a) The Legislature should consider an exemption from section 55-c for craft brewers.

As noted in the Commission’s Report, creating the exception requested by the craft brewers may create legal and practical problems. As a legal matter, the proposal seeks to modify existing contractual relationships between brewers and wholesalers by allowing smaller brewers to terminate the agreements without cause. As a practical matter, wholesalers may be reluctant to enter into contracts with small brewers that can, at the option of the brewer, be terminated without cause. Wholesalers may not wish to expend resources promoting the brewer’s product if the brewer is free to move from one wholesaler to another.

- b) Amend the ABC Law to permit alternating proprietorships in a manner consistent with federal law.*

Since alternating proprietorships are allowed for wine manufacturers under New York law, there appears to be no reason why brewers should not be able to enter into such arrangements.

- c) Amend the ABC Law to clarify that contract brewing arrangements are permissible in a manner consistent with federal law.*

Contract brewing is the equivalent of a winery providing “custom crush” services. Since custom crush operations are allowed for wine manufacturers under New York law, there appears to be no reason why brewers should not be able to enter into such arrangements.

- d) Amend the ABC Law to clarify that brewers participating in brewing festivals can supervise the tasting of their beer.*

Rather than clarify the ABC Law with respect to brewers being able to supervise tastings, consideration should be given to expanding the ability of brewers to conduct tastings to include such events.

3. Distillers

- a) The ABC Law should be amended to streamline the number of distiller licenses to reflect current practices consistent with federal law and to distinguish between craft distilleries and other commercial distilleries.*

The current system of distiller licensees distinguishes between the types of activities that the distiller can engage in, and the production capacity (which is relevant primarily to the fee that is charged for the license). As with the proposed overhaul of the wine manufacturing statutes, the distiller statutes can be consolidated while maintaining, to the extent appropriate, any distinctions between permitted activities and licensee fees.

b) The ABC Law should be amended to clarify what products a craft distillery can sell and the locations where the products can be sold.

Currently, the ABC Law provides for a “farm distiller” license. If the intent is to allow such licensees to sell other products, consideration should be given to incorporating into the farm distiller’s statute the list of items that a farm winery can sell, rather than create another separate class of distiller’s license.

c) The ABC Law should be amended to permit alternating proprietorships by craft distilleries consistent with the requirements of federal law.

Since alternating proprietorships are allowed for wine manufacturers under New York law, there appears to be no reason why distillers should not be able to enter into such arrangements.

4. Cider Producers

The ABC Law should be amended to make it clear that the production of craft cider is analogous to the production of wine and craft beer.

In most respects, the provisions regarding the production of cider are similar to the provisions regarding the production of wine, beer and liquor. In other respects, cider producers, regardless of the amount produced, are granted greater privileges than their wine and beer counterparts. It is not clear to me what the Commission is referring to here.

In closing, I would like to again thank the Committee for calling for this study and I would like to offer the SLA’s assistance with your effort in overhauling this outdated statute. Again, thank you, Mr. Chairman and committee members, for the opportunity to appear before you today. I stand ready to answer any questions you might have.