THE NEW YORK STATE LAW REVISION COMMISSION

REPORT

on the

ALCOHOLIC BEVERAGE CONTROL LAW

and its

ADMINISTRATION

December 15, 2009

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I. Introduction

Over the past two years, we have been examining the Alcoholic Beverage Control Law and its administration by the State Liquor Authority.[1] To place all the issues in context in this, our Final Report, we turn first to an updated version of the history of control which was contained in our Preliminary Report.[2] We then turn to the administration of the ABC Law by the SLA which we previously submitted to the Legislature,[3] and, finally, we turn to the ABC Law itself.

As we have noted in our discussion of the SLA's administration of the law, many of the SLA's problems had remained unaddressed for many years or have been addressed with only limited success. We acknowledged the monumental task facing the SLA and its Chairman Dennis Rosen, newly appointed by Governor Paterson in August 2009. We observed that the new Chairman immediately implemented changes in the administration of the SLA and adopted many of the recommendations we made. Over the past two and a half months, the SLA has continued to make substantial and significant progress. The backlog of over 3,000 applications is now down to 2,360. The licensing process has become more efficient by the SLA's adopting a self-certification process and permitting submission of digital photographs in lieu of costly front elevation diagrams and digital fingerprints. The SLA has also taken steps to increase oversight,

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1 The State Liquor Authority is the "head" of the Alcoholic Beverage Control Division of the Executive Department. ABC Law §10. For the sake of convenience, we will refer to the Division and the SLA as the SLA. When we discuss the organization of the SLA, *infra,* we use the term "Authority" to distinguish between the"head" and the Division of Alcoholic Beverage Control.

2 The Preliminary Report was delivered to the Legislature and the Governor on September 1, 2008.

3 The part of the Final Report addressing the SLA was delivered to the Legislature and the Governor on September 30, 2009.

efficiency, and efforts to protect public health and safety. It has hired a Deputy CEO in the New York City Office and an internal auditor to evaluate and recommend internal policies and procedures, and has reorganized Counsel's Office. It has also hired a small number of licensing examiners and temporary employees to work on the licensing backlog. The SLA is also working on developing, with the assistance of the Division of Budget, a new agency-wide electronic data system critical to bringing the SLA into the 21st Century.

A Board resolution has delegated authority to impose penalties in minor disciplinary actions to individual SLA Commissioners, on a rotating basis; the Full Board is now able to focus on more serious cases. The agency has also refocused enforcement efforts on the more serious compliance violations such as underage drinking, sales to intoxicated patrons, and quality of life issues. As we have noted throughout our study, underage drinking is a very serious problem that requires systematic and consistent enforcement efforts. The SLA's measures are a good first step toward achieving that type of enforcement. Much remains to be done.

Overall, the SLA's progress is remarkable. Hopefully, it will continue. We have every reason to believe that the SLA can fulfill its mission so long as the agency is not undermined by budgetary overseers as has been the case in the past.

As for the ABC Law itself, despite the well deserved criticisms of many parts of the law, New York's system for regulating beverage alcohol is basically sound.

Part of that system, the prohibition against the sale of wine in grocery stores, has been the subject of intense debate during the past two years. Proposed elimination of that prohibition by the Governor was not successful. Subsequently, a bill to eliminate the prohibition was

introduced in the Legislature but no action has been taken.[4] Wine in grocery stores has not been addressed herein because we concluded that before any action should be taken a complete and independent analysis of its economic consequences should be undertaken. Regrettably, we lacked the time and experience to conduct such a study and the financial resources to engage experts on the subject. Our silence on the subject should not be viewed as an endorsement of any particular point of view.

To help us understand the regulation of beverage alcohol we reviewed the text of the ABC Law, many historical documents as well as other statutes, court decisions, journals, and other documents. We also conducted hundreds of hours of interviews, conversations and public meetings with current and former SLA Commissioners and staff, other state agencies, including the New York State Office of Alcohol and Substance Abuse Services, the Department of Taxation and Finance, the Department of Agriculture and Markets, and the Division of the Budget, legislators and legislative staff, state and local law enforcement agencies, attorneys who practice in the field of ABC law, academics with expertise in beverage control laws, and stakeholders in New York's three-tier system of alcohol beverage control (producers, wholesalers, and retailers). With respect to the three-tier system, we heard from and listened to owners and representatives of restaurants, taverns, wine bars, entertainment venues, groceries, small and large liquor and wine retailers, convenience stores, beer wholesalers with a retail

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[4] *See, e.g.*, 2009-2010 Executive Budget – Briefing Book, http://publications.budget.state.ny.us/eBudget0910/fy0910littlebook/RevenueActions.html; A.8632A/S.5787 (Winery and Liquor Store Revitalization Act). In 1964, the Moreland Commission on the Alcoholic Beverage Control Law had recommended allowing the sale of alcoholic beverages in separate departments of grocery stores and supermarkets, but the recommendation was never adopted. *See* New York State Moreland Commission on the Alcoholic Beverage Control Law, *Report and Recommendations No. 1: The Licensing and Regulation of Retail Package Liquor Stores* 42-3, January 3, 1964.

privilege, special licensees, and bowling centers, and large and small wine, liquor and beer wholesalers and producers, including international liquor producers and national brewers, small in-state wineries, craft brewers and distillers. Finally, we solicited the views of concerned citizens and community leaders and representatives of community boards about quality of life in their neighborhoods, as well as public health professionals and advocates concerned about the deleterious impact and cost of alcohol on the health of our citizens generally, and on our children more specifically.

Four Roundtable Meetings were held during 2008 and 2009, two at Albany Law School and two at Brooklyn Law School. These meetings allowed for a full and frank exchange of views which were of great assistance to us as we worked our way through the issues.[5]

No one should underestimate the importance of regulating beverage alcohol even as social change makes its consumption more readily acceptable. Balancing the need for vigilance and social acceptability while also taking into account the desire to promote craft beverage alcohol industries in this state is no easy task.

We greatly appreciate the Legislature and the Governor for their confidence in our ability to conduct this study. It has proven to be an eye opening, challenging, interesting, and, indeed, at times, arduous task. The issues involved go to the very heart of the State's responsibility to protect the health, safety and welfare of its citizens, and to ensure the economic stability of all. Reasonable people may legitimately differ on how to meet our responsibilities but meet them we must. It is our fervent hope that this Report will serve to guide this most important and necessary legislative undertaking.

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[5] Copies of the Agendas of the meetings are attached as Appendix A.

II. Executive summary

1. Administration of the Alcoholic Beverage Control Law

Initially we thought, and we still believe, our major responsibility is the ABC Law.

It has become clear to us, however, that although the law and its administration are in some ways inextricably intertwined,[6] the problems with the administration and the revisions of the law present two distinct challenges. Thus we have chosen to address them separately. Moreover, statutory overhaul would be futile unless and until the dysfunctional and programmatically-challenged SLA is rehabilitated so that it can fulfill the mission for which it was designed. In recognizing and deciding to address that reality first, and present our findings, supporting narrative and recommendations, we seek to cast no blame on any person or institution. Indeed, if the history of the administration of the SLA is any guide, many of the current inadequacies have remained unaddressed for many years or have been addressed with only limited success. Since its inception, the SLA has been plagued with problems of licensing delays, inadequate enforcement, inefficient and ineffective administration and, indeed, bribery and corruption. And from time to time legislative committees and commissions have reported on these problems and urged changes, some of which were adopted and others which were not.

The task faced by the new SLA administration is herculean. However, the recently confirmed SLA Chairman and the new SLA administration are off to a promising start. A new

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[6] It should be noted that certain problems within the SLA are driven by current statutory requirements. For example, the suggestion has been made to eliminate label approval as required by section 107-a of the ABC Law and rely exclusively on the federal label approval overseen by the Alcohol and Tobacco Tax and Trade Bureau (TTB) as a way to streamline the work of the wholesale bureau, which, among other things, oversees brand registration and brand label approvals. The discussion of this issue and similar matters will be considered in the second part of our Report.

Chief Executive Officer of the SLA has been appointed and the SLA has been allowed to fill the vacant positions of Director of Internal Audit and Assistant CEO. The agency has re-instituted several basic administrative protocols such as time and attendance policies, proper use and authorization of state vehicles, and employee disciplinary protocols, which had apparently fallen by the wayside. The agency also has already met several times with representatives of industry and the ABC Law bar to discuss new policies and procedures. Hopefully, this first part of our Final Report addressing the SLA can facilitate its efforts and accelerate the much-needed reformation of the agency. So it is to the SLA's administration of ABC Laws that we now turn.

The SLA generated total revenues of $54,090,413 for the fiscal year 2008 - 2009, making it the third largest revenue generator among state agencies, after the Department of Taxation and Finance and the Department of Motor Vehicles. The 2009 budget for the Authority is $18,480,000.[7] The SLA's core functions are twofold: to license manufacturers, wholesalers and retailers of alcoholic beverages in New York, and to enforce the ABC Law. Of its total revenues, for 2008-2009, $46,416,311 were from licensing, and $7,674,102 from enforcement.

The agency is headed by an Authority composed of three Commissioners, all of whom are appointed by the Governor and approved by the Senate for a three year term, and one of whom is appointed by the Governor to serve as the Chairman of the Authority.[8]

Presently, the SLA's most daunting problem is the current backlog of more than 3,000 applications dating from late 2008: 1996 in the New York City office, 828 in Albany, and 315 in Buffalo. This backlog epitomizes the many failures and structural defects plaguing the agency.

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[7] Between 2003 and 2008, this figure fluctuated between $15,000,000 and $20,000,000.

[8] The ABC Law is not gender neutral so the term "Chairman" is used in this document.

Well-accepted principles of agency administration have fallen by the wayside because oversight within the agency is non-existent, requests for much needed improvements in technology have been routinely denied, necessary staffing levels are not being met, staff morale is low, the agency has not made public its decisions and policy guidelines, and inadequate enforcement jeopardizes public health and safety. All of these problems are either the result of or aggravated by an oversight bureaucracy which dictates how the SLA's appropriation may or may not be spent and what positions may or may not be filled. To be sure, we are in serious economic times, but this penny wise, pound foolish oversight is unsound and has existed even in the best of economic times. Indeed, it seems that at times the SLA refrained from necessary spending to impress its overseers with end-of-year savings, which often resulted in backlogs and agency inefficiencies; these practices ill-serve the SLA's two-fold mission to regulate the alcoholic beverage industry in a fair and expeditious manner, and to protect the health, safety and welfare of New Yorkers.

2. The Alcohol Beverage Control Law

The ABC law, as enacted in 1934, was intended to control the manufacture and sale of beverage alcohol so that it went to the right sellers, was taxed appropriately, and passed on to consumers in a transparent and accountable manner. Today, these goals remain valid. We recognize that alcoholic beverages are indeed different from other things that people consume because they are intoxicating and can cause great harm, and that a regulatory policy of control is necessary and appropriate.[9] In spite of the fact that sales of alcoholic beverages generate an

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[9] Granholm v. Heald, 544 U.S. 460, 495 (2005)(Stevens, J. dissenting).

enormous volume of tax revenue for the State,[10] improperly regulated sales and use of alcoholic beverages present both direct and indirect health and economic consequences for all members of society – consequences that extend far behind the common concerns of alcoholism and driving while intoxicated.[11]

Even so, since the law's enactment, the beverage alcohol industry has changed, social consumption of alcoholic beverages is more widely accepted, and the fostering of local beverage alcohol industries has emerged as a state priority. Regulating a product that presents both a potential threat to the public's health, safety and welfare while providing considerable tax revenue for the state as well as significant opportunity for economic development requires careful consideration.

We have examined the regulation of alcoholic beverages in New York in the context of these developments and have concluded that, despite the well deserved criticisms of many parts of the ABC Law, New York's system for regulating beverage alcohol is basically sound.[12]

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[10] For the tax year 2007-2008, the total taxable sales generated by the over 30,000 holders of some form of alcoholic beverage license was $39,669,423,939. This number includes taxes colleted on all products sold by the licensees, as the Department of Taxation and Finance has no way of distinguishing between taxable sales from alcohol and taxable sales from other goods.

[11] Figures reported from the Marin Institute and corroborated by other federal and state agencies estimate that the national costs of alcohol abuse exceed $185 billion annually, with over $3.2 billion being spent specifically on issues related to underage drinking. Recent studies indicate that alcohol is consumed by over 4 million adolescents between the ages of 12-17 each month across the nation, leading to 5,000 deaths among the underage population annually. http://www.marininstitute.org/alcohol_policy/state_alcohol_control.htm; New York State Office of Alcoholism and Substance Abuse Services, *Statewide Comprehensive Plan 2008-2012; Interim Report*, February, 2009, http://www.oasas.state.ny.us/pio/documents/5YPInterimRpt2009.pdf; International Institute for Alcohol Awareness, *Underage Drinking in New York: The Facts,* http://www.iiaaonline.org/pdf/NY_Underage.pdf; National Institute on Alcohol Abuse and Alcoholism, *Underage Drinking Research Initiative,* http://www.niaaa.nih.gov/AboutNIAAA/NIAAASponsoredPrograms/underage.htm.

[12] One element of that system, the prohibition against the sale of wine in grocery stores, has been the subject of intense debate. In 1964, the Moreland Commission on the Alcoholic Beverage Control Law recommended allowing the sale of alcoholic beverages in separate departments of grocery stores and supermarkets,. New York State Moreland Commission on the Alcoholic Beverage Control Law, *Report and Recommendations No. 1: The*

We have addressed seven key areas regarding New York's policy toward alcoholic beverages: A. The policy of regulatory control; B. Organization of the ABC Law; C. Organization and administration of the Division of Alcoholic Beverage Control; D. Retail licensing issues; E. Relationship among members of the industry; F. Economic development of New York craft breweries, distilleries and wineries; and G. Ensuring state revenues.

Promotion of temperance and moderation through the enforcement of the law is also an important component of regulation of beverage alcohol. While the statistics are staggering regarding the increase in DWI among women and young adults in recent years, alcohol abuse is also associated with chronic diseases such as liver cirrhosis, stroke, and birth defects. Aside from the serious health impacts on the individual and families, the healthcare costs associated with these conditions creates economic hardship for the state as well.[13] Less advertised but of equal impact, are the effects on the social and economic health of the individual, families, community and the state.

Recent reports from state and federal agencies draw a direct correlation between alcohol abuse and an increase in domestic violence, violent crime and suicide. Less obvious but equally concerning is the impact alcohol abuse has on overall productivity of both students and those in the workforce.

Licensing and Regulation of Retail Package Liquor Stores 42-3, January 3, 1964. More recently, there have been proposals to allow the sale of wine in grocery stores. *See, e.g.*, 2009-2010 Executive Budget – Briefing Book, http://publications.budget.state.ny.us/eBudget0910/fy0910littlebook/RevenueActions.html;A.8632A/S.5787 (Winery and Liquor Store Revitalization Act). Our report does not address that debate because any change in the law necessarily would involve an independent economic analysis that is beyond our expertise.

13 OASAS reports that in 2005 the cost to New York for underage drinking was over 3.5 billion dollars. New York State Office of Alcoholism and Substance Abuse Services, *Underage Drinking Fact Sheet*, http://www.oasas.state.ny.us/ud/OASAS_TOOLKIT/resources/Information_sheets/toolkit_factsheet.pdf.

The New York State Advisory Council on Underage Alcohol Consumption[14] has been charged by the Legislature and the Governor with making recommendations on underage drinking and we defer to their findings, which are attached as Appendix B.

A. Policy of regulatory control

The current policy of this state is that "it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages . . . . for the protection of the health, welfare and safety of the people of this state."[15]

Public health and safety remain abiding concerns in the regulation of beverage alcohol. Indeed, throughout our study, a majority of those to whom we spoke, from industry leaders to local licensees, emphasized the need to refocus the agency's objectives towards the law's health and safety policy, especially with regard to underage drinking. A competing concern, however, is the promotion of economic development, a desire that is already reflected in many provisions of the ABC Law, many legislative proposals that we have reviewed,[16] and many suggestions we received during the course of our study. Those advocating for greater economic advantage and a decrease in restrictions do not suggest that those goals are unimportant but rather deny the change would affect health and safety goals. While economic development would provide a significant advantage to New York, it is difficult to imagine how a policy that encourages economic development can co-exist with concerns over public health and safety. Yet at the same time we recognize that a call for elevating economic growth to an expressed policy concern

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14 The Advisory Council was created by chapter 275 of the laws of 2008.

15 ABC Law § 2.

16 *See, e.g.*, A.926/S.6184 (2009).

should not go unheeded.

We have concluded that any statement of policy should promote health, safety, and welfare with respect to alcohol consumption while allowing for economic growth to the extent that it does not impede the primary objectives of the ABC Law.

B. Organization of the ABC Law

The ABC Law is fraught with ambiguities and deficiencies that challenge the SLA's ability to interpret its requirements and to address the competing interests of the public's health, safety and welfare, and the desire for economic development. While at first blush the organizational structure of the ABC law seems reasonable, over time this structure has been unable to accommodate necessary and appropriate amendments in the most meaningful places. Indeed, while the Commission was engaged in its study, several sections of the law were amended to clarify certain provisions of the statute. Consequently, the current format leads to confusion, misunderstanding and error. Our proposed reorganization of the ABC statute would address these problems, eliminate redundancies and outdated language, and address inconsistencies.

C. Organization and Administration of the Division of Alcoholic Beverage Control

Organizational design of any administrative agency is not neutral, but rather is intended to cause the agency's decisions to be more responsive to the policies underlying its creation. An administrative agency can be structured in many ways. The only lesson that can be drawn from the design of alcoholic beverage control agencies in other jurisdictions is that each state operates under a scheme that it believes best suits its intention and needs both as to whether the agency is integrated into another agency or free-standing, and as to whether it has a lead by a single

commissioner or a multi-head commission or board. In the first part of our Report we address the deficiencies that have plagued the administration of the SLA over the years and concluded that, among other things, that the SLA should be truly independent and be allowed to handle its own administration. We have also given consideration to whether the agency should be led by a multi member board as it is now, or whether a single Commissioner should lead the agency. There are advantages and disadvantages to each system.

> In theory, where there is one person at the head of the agency, greater efficiency, expedition and consistency are to be found. On the other hand, theoretically at least, greater capacity and broader vision are to be expected from a board, and the public is inclined to the belief that greater justice and equity flow from board action.[17]

While there are many agencies in New York led by a single Commissioner, a multi-head State Liquor Authority can benefit from diverse opinions among its members, as well as broad representation of a geographically diverse state, and a public perception that fair and just treatment of licensees is possible. We have concluded that the current organizational structure of the Division of Alcoholic Beverage Control led by the State Liquor Authority should be retained with certain modifications to address certain perceived flaws. The ABC Law should be amended to provide that all delegations of Authority responsibilities be made public, 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, removing all such responsibility from the Authority, and to provide that in the event of a deadlock in a decision by

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[17] *See* Joint Committee of the States to Study Alcoholic Beverage Control, *Alcoholic Beverage Control, an Official Study* 57 (1950).

the Authority, the deadlock will be treated as a denial subject to judicial review.

Related to the administration of the ABC law is the relationship between the SLA and the Department of Taxation and Finance. We have concluded that the relationship should be clarified in the ABC law. Also related to the law's administration is the enforcement of SLA determinations. Right now a party challenging an SLA determination is limited to a 30 day stay. We have concluded that although prompt resolution of these matters is in the best interest of all parties, the 30 day stay under section 121 of the ABC law is unrealistic and recommend that the standards of CPLR 5519 governing stays of enforcement be incorporated into the ABC Law. Additionally, we have concluded that 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.

D. Retail licensing Issues

We have reviewed the ABC law's provisions relating to retail licenses and have suggested changes to streamline certain provisions regarding the location of retail licenses, including the location of on- and off - premises within 200 feet of churches, and schools, and the location of on-premises within 500 feet of other on-premises licensees, and overstaturation of off-premises licenses. We have also suggested changes to provisions regarding the limitations on licensees engaging on other businesses, the role of community opinion and changes in the operation of a licensed premises and license renewals.

The drafters of the original ABC law in 1934, determined to bring the retail sale of alcoholic beverages out of the shadowy and ever-shifting world of back-alleys and basements, provided detailed requirements for the location and furnishing of retail establishments. So that

the "cop on the beat" could easily view the whole interior of a package store, the law required (and still requires) the store to be located on a public thoroughfare, at street level, with "no screen, blind, curtain, partition, article or thing" on the windows or doors and no interior partition or screen that could prevent a clear view of the interior.[18] To discourage back-door dealings with unlawful purveyors, the law provides that the store can have only one entrance unless the additional entrance gives access to a parking area for at least five automobiles.[19] These and similar requirements are not in keeping with contemporary building design, and can lead to absurd interpretations and unnecessary costs for an applicant. Accordingly, we recommend that these provisions be modernized.

Another law from the post-Prohibition era required a minimum distance between package stores.[20] Although that law was repealed in the 1960s,[21] a related rule governing the removal of a package store to a new location remains in effect, although it was apparently rescinded by a bulletin issued by the SLA.[22] Observance of this obsolete rule means that the full board of the SLA spends untold hours each year hearing testimony from owners of other nearby package stores as to how a proposed new store would affect their businesses. Nevertheless, it remains important for the SLA to consider the potential oversaturation of a local market as it weighs whether to grant a particular license, and we have recommended including language to that effect

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18 *See* ABC Law § 105(2) and (10).

19 ABC Law § 105(2).

20 ABC Law § 105(4).

21 Laws of 1964, c. 531, § 13.

22 *See* "four nearest stores," *infra.*

in the statute at section 63(6).

A law that dates from New York's licensing scheme before Prohibition and that was revived in 1934, creates a buffer zone of 200 feet around a building in which a school or house of worship is located. No package stores or on-premises liquor licenses can be located within the zone. The "200 foot rule" is a complete ban on granting of such licenses, although it has been circumvented for some premises by special legislation. We recommend that the Legislature consider providing some flexibility in the application of the rule, as, for example, when the school or house of worship waives it. We also recommend the SLA be given rule-making authority to more fully explain what activities qualify a building as a place of worship which would allow potential applicants to judge more easily whether a particular location is likely to run afoul of the rule. In addition, private legislation –currently the only way a particular property can be exempted from the 200 foot rule – is an impractical solution for widespread neighborhood revitalization programs. We recommend that the law be amended to provide that if a municipality has designated an area as an economic revitalization zone, the 200 foot rule does not apply to any school or house of worship moving into the zone. With this approach, schools or houses of worship considering a location in the revitalization area would be on notice that a decision to move there also means accepting that there will be no 200 foot buffer zone.

E. Relationships among members of the industry

After Prohibition, New York, like many other states, chose to regulate the alcohol industry through what is known as the "three-tier system," which requires separate licenses for manufacturers (such as distillers, wineries, and breweries), wholesalers, and on- and off-premises retailers. Generally, under the three-tier system, manufacturers can sell only to wholesalers,

wholesalers can sell only to retailers, and only retailers can sell to consumers. Generally, a licensee in one tier cannot also be licensed in another tier: for example, a person cannot hold both retail and wholesale licenses. Sales between retailers are prohibited. The tiers are also kept separate by outright prohibitions against ownership interests between manufacturers, wholesalers and retailers. The general premise of the three-tier system, particularly as reflected in these rules, originates from a distrust of domination of the alcohol industry by a few companies. Wholesalers are generally regarded as the lynchpin of the three-tier system. Because manufacturers can only sell to them rather than directly to retailers, manufacturers are unable to achieve monopolies over retailers.

Wholesalers also play a key role in protecting state tax revenue. Under what is known as the "primary source law," the manufacturer or supplier generally designates the wholesaler from whom goods are to be purchased.[23] The wholesaler is then responsible to ensure that all excise taxes are paid, register the brand in the state, and to obtain label approval.

To insure that the manufacturers and wholesalers do not engage in price discrimination, either the manufacturer, or its designated wholesaler provides the SLA with the prices at which the product will be sold at wholesale ("price posting").

There have been challenges to the three-tier system over the past several years. *Granholm v. Heald*[24] concerned a New York law allowing in-state wineries to ship their wine directly to consumers, bypassing the three-tier system, which would normally require the winery

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[23] *See* ABC Law §101-b; ABC Law §107-a(labeling for spirits also contains a primary source requirement). The primary source law also protects the integrity of the product so that the alcoholic beverage industry generally experiences fewer problems with contaminated product than the food industry.

[24] 544 U.S. 460 (2005).

to sell wine to a distributor, which in turn sells it to a retailer, which sells it to a consumer. The United States Supreme Court held that the New York direct shipment law in effect at the time violated the Commerce Clause because it unfairly discriminated against out-of-state wineries by not extending to them the same privileges accorded in-state wineries.

In *Costco v. Maleng,*[25] Costo Wholesale Corporation claimed that the State of Washington's requirement that retailers purchase beer and wine from licensed wholesalers rather than from domestic breweries or wineries and the state's requirement that wholesalers could not change prices posted with the state's liquor authority for 30 days were restraints of trade in violation of the Sherman Anti-Trust Act.[26] The Ninth Circuit held that the prohibition against the purchases was not a "private restraint" as contemplated by the Sherman Act but "a unilaterally imposed restraint of the sovereign" and further noted that a separate "ban on retailer sales to other retailers [w]as a fundamental component of the State's 'unquestionably legitimate' three-tier distribution system."[27] Nevertheless, the court struck down the price posting requirement as a violation of the Sherman Act. Subsequently, the State of Washington eliminated the 30 day hold on prices and now requires explicit monitoring by the liquor authority inspectors of posted prices to detect price discrimination.

Mindful of concerns about the three-tier system because of the *Granholm* and *Costco* decisions and their progeny, we have proceeded cautiously in any consideration of further

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25 522 F.3d 874 (9th Cir. 2008).

26 *Costco,* 522 F.3d at 884.

27 *Id.*, citing *Granholm*, 544 U.S. at 489.

changes to the requirements of the three-tier system.[28]

We also considered the New York's scheme for brand label approval and concluded, that with minor adjustments, the scheme be retained.

Primary source rules prohibit wholesalers from purchasing alcoholic beverages from secondary markets, sources that may be outside the channels and control of the manufacturer. The purpose of these rules are threefold: providing a state with accurate excise tax assessment and collection, assuring the purity and integrity of the product, and allowing the manufacturer to control its product. New York's primary source rules are integrated with its rules on price posting, making for a complicated set of rules that should be streamlined by the separation of the primary source rules into a separate provision of the ABC Law.

F. Economic development of New York craft beverage alcohol industries.

Craft breweries, cider producers, distilleries and wineries share a common goal of showcasing New York products, and enjoy virtual unanimous support as engines for promoting economic development in New York. These craft businesses are generally capital-intensive so legislation has been regularly enacted on their behalf to encourage start-up businesses, respond to new types of businesses, and offer flexibility as to requirements for traditional commercial alcohol manufacturers or producers. Because these legislative efforts have often been done piecemeal, the state's law governing the craft industries can prove opaque and burdensome and frequently impede development. The ABC law should be clarified to remove any impediments to furtherance of the Legislature's intent that the development of these craft industries be

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[28] *See, e.g.*, transcript of Roundtable at Brooklyn Law School, June 10, 2008. Indeed, some people suggested that any changes to the three-tier system might lead to unintended consequences of altering the fundamental scheme on which the law is based.

encouraged. To the extent that it is reasonable, and otherwise consistent with applicable federal law, they should be treated similarly under New York law. Additional amendments to the ABC law to further expand economic development opportunities for wineries, distilleries, breweries and cider producers should be adopted so long as they are consistent with federal law and do not undermine the state's overarching goal of protecting public health, safety and welfare.

G. Ensuring state revenues

None of the Commission's recommendations would jeopardize the state's interest in revenue generation through the regulation of beverage alcohol. Indeed, many of its suggestions for economic development would increase revenues.

3. Summary of recommendations

Administration of the Alcoholic Beverage Control Law

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.**

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.

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.**

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

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.

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.

Finding

The SLA lacks managers in its regional officers 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.**

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

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.

Finding

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

Recommendations

A) Adopt training programs to:
1) educate new employees,
2) promote compliance with internal procedures and policies, and
3) update employees on industry, community, legal and technological developments.

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.

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.

Finding

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

Recommendations

Review case preparation procedures.

Review case decisions to evaluate current procedures.

Interpret the law in concert with the statutory intent to avoid an absurd result.

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.

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.**

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

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.**

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

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.**

Finding

The organization of the State Liquor Authority needs to be evaluated in light of current principles of administrative organization.

Recommendation

We will evaluate the current structure of the SLA in the second part of our Final Report.

Alcoholic Beverage Control Law[29]

Policy of regulatory control

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

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[29] The ABC Law is available through the SLA's website, www.abc.state.ny.us/abc-law.

hereinafter provided for. All the provisions of this chapter shall be liberally construed for the accomplishment of its primary purpose.

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.

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

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.

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.

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.

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.

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.**

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.**

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.**

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.

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.

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.

C. **200 Foot Rule**

1. **The ABC Law should be amended to give the SLA rule making authority so 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.**

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.**

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.**

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

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.**

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

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.**

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

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.

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

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

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.

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.**

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

F. **House Accounts and ATMs**

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

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.

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.**

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.**

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.

J. Brand or Trade Name Label Approval & Registrations

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

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.

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.

K. Price Posting and Holding.

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

M. Primary Source

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

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.

N. 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.

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.

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.

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

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.

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

2. Breweries

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

B. Amend the ABC Law to permit alternating proprietorships in a manner consistent with federal law.

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

D. Amend the ABC Law to clarify that brewers participating in brewing festivals can supervise the tasting of their beer.

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.

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.

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

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.

O. Underage drinking

We defer to the recommendations of the New York State Advisory Council on Underage Alcohol Consumption.[30]

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30 A few items worthy of consideration are not included in this Report because they reached us too late or escaped our attention. They include: the relationship between municipal zoning restrictions and the ABC Law; "at-rest" requirements for wholesalers; wine tasting agents; and a permit for a farmer to sell spirits distilled by a craft distillery from agricultural products the farmer sold to a craft distillery; and the proper measurement of beverage alcohol as proof gallons.

III. Historical Background

1. The Beginning

Much has been written about the history of alcohol in the United States and in New York and it will not be repeated here. Nonetheless, some elaboration is necessary to place contemporary issues in an historical context.

Popular consumption of alcoholic beverages, taxing them, and efforts to curb their use and abuse have gone hand in hand throughout this history. For example, in colonial New York, the first alcohol excise tax was imposed on hard liquor in 1709.[31] Indeed, excise taxes such as this one imposed by the British Crown on its colonies, lay at the heart of the American Revolution[32] as well as the early difficulties faced by the newborn states and the federal government they created.[33]

Notably, the first temperance society in the country was organized in Moreau, New York in 1808.[34] In 1855, the New York State Legislature enacted a short-lived law prohibiting the sale or distribution of liquor except for medical, chemical, or sacramental purposes.[35] The law was

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31 Laws of the Colony of New York 1709, c. 189. *See* R. VASHON ROGERS, DRINKS, DRINKERS AND DRINKING, OR THE LAW AND HISTORY OF INTOXICATING LIQUORS 47 (1881).

32 ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789 63-64, 74-96 &149 (Oxford University Press 2006).

33 DEXTER PERKINS & GLYDON VAN DEUSEN, I THE UNITED STATES: A HISTORY 200 (Penguin Press 1962)(describing the "Whiskey Rebellion of 1794," when farmers in Western Pennsylvania, dismayed at the 1791 tax on small whiskey stills, resorted to violence and, among other things, tarring and feathering a federal tax collector. President George Washington ultimately suppressed the rebellion by sending a 10,000 man militia to quash it.). *See also* RON CHERNOW, ALEXANDER HAMILTON 467-478 (2004).

34 THE ENCYCLOPEDIA OF NEW YORK STATE 1256 (Peter Eisenstadt, ed.-in-chief 2005), [hereinafter ENCYCLOPEDIA].

35 Laws of 1855, c. 231.

"openly defied,"[36]including by the Mayor of New York City, who refused to enforce it.[37] One year later, it was held unconstitutional by the Court of Appeals,[38] because the law deprived individuals of due process by substantially destroying their property, i.e., alcoholic beverages, which they had owned and possessed prior to the effective date of the law.

In 1857, to circumvent this judicial restraint on outright prohibition, the State Legislature enacted a new Liquor Excise Law that banned the sale of liquor on Sunday and election days.[39] Moreover, saloonkeepers were required to obtain a license from a Board of Excise Commissioners, which required, among other things, the submission of vouchers attesting to the saloonkeeper's good moral character signed by twenty resident freeholders (those with absolute ownership of an estate).[40] In addition, the saloon applicants had to post a bond and provide at least three spare beds for guests,[41] and stables.[42] It was estimated that in Manhattan these requirements would drive out of business thirteen of every fourteen saloons, and probably ninety-nine out of every hundred in the lower wards, where there were few freeholders.[43]

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36 ENCYCLOPEDIA at 1543.

37 EDWIN G. BURROWS & MIKE WALLACE, GOTHAM, A HISTORY OF NEW YORK CITY TO 1898 832 (1999) [hereinafter BURROWS & WALLACE].

38 Wynehamer v. People, 13 N.Y. 378 (1856).

39 Laws of 1857, c. 628 §2.

40 *Id.* at §6.

41 *Id.* at §8.

42 *Id.*

43 *See* BURROWS & WALLACE at 838.

Realizing that if enforcement of this law were left to the local municipal leadership (*e.g.*, N.Y. Mayor Fernando Wood), it would be rendered a dead letter,[44] the Legislature enacted a complementary statute, creating a Metropolitan Police Commission controlled by state appointees with considerable powers over the enforcement of Sunday closing laws.[45] In addition, the State Commission controlled the electoral machinery in the two most populated downstate cities, New York and Brooklyn.[46] As a result, there were two police departments in Manhattan, the state Metropolitans and the Municipals, loyal to the Mayor.[47] The situation soon became quite serious, climaxing in three violent confrontations--in mid-June, and on July 4th and 5th, and on July 14th of 1857. [48]

In late August of 1857, as Mayor Wood took stock of his position and his reelection campaign,[49] the city was rocked by the "Financial Panic of 1857," resulting in a severe recession, with banks and other businesses closing their doors, and massive unemployment,[50] and costing Fernando Wood the Mayoralty, which, however, he recaptured in 1859. By 1870, the state

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44 *See id.* at 838.

45 Laws of 1857, c. 628 §21. BURROWS & WALLACE at 838.

46 To many this was nothing more than another chapter in the ongoing struggle between Republican and Democratic political machines in Tammany Hall. *See* JAMES F. RICHARDSON, THE NEW YORK POLICE: FROM COLONIAL TIMES TO 1901, 99-100 (1970), [hereinafter RICHARDSON].

47 BURROWS & WALLACE at 838.

48 *Id.* at 839-841. *See* RICHARDSON at 104-105. The July 14th violence was a direct result of the Metropolitans' attempt to close saloons on Sundays. BURROWS & WALLACE at 839.

49 BURROWS & WALLACE at 841.

50 *Id.* at 842-51.

Metropolitan Police Commission was no more and control of the local police returned to elected city officials.[51]

By the late 1880s, there were 12,000 to 15,000 saloons in Manhattan;[52] thus, there was one saloon for every 150 inhabitants.[53] Efforts to ban alcohol had made limited progress.[54] In 1895, Theodore Roosevelt, after being appointed a Commissioner on the New York City Police Board and elected its President, decided, as part of his effort to professionalize the police and stamp out police and political corruption, to enforce the by then moribund "Sunday Closing Laws" by restricting Sunday drinking at saloons.[55] Still, "Dry Sundays" led to a public outcry, and Roosevelt was dubbed the "Patron Saint of Dry Sundays."[56] Roosevelt was supported in his efforts by the enactment of the Liquor Tax Law in 1896, which cracked down on Sunday drinking at hotels.[57] Because the saloons were central to city life for so many people, including

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51 RICHARDSON at 108.

52 EDMUND MORRIS, THE RISE OF THEODORE ROOSEVELT 516 (1979), [hereinafter MORRIS].

53 BURROWS & WALLACE at 1162.

54 *Id.* at 1164.

55 PAUL GRONDAHL, I ROSE LIKE A ROCKET: THE POLITICAL EDUCATION OF THEODORE ROOSEVELT 224 (2004), [hereinafter GRONDAHL]; BURROWS & WALLACE at 1202. *See also* MORRIS at 512-527(detailing the success of Roosevelt's efforts). In seeking to close the saloons, Roosevelt was not motivated by temperance principles, but by a fervent desire to professionalize the police, which he felt could only be accomplished by rooting out corruption that was directly related to the saloons. *Id.* at 513-515. The vast corruption far exceeded that generated by saloons, Tammany Hall or the electoral process. HERBERT ASBURY, THE GANGS OF NEW YORK: AN INFORMAL HISTORY OF THE NEW YORK UNDERWORLD 107, 249, 281, 284, 286, 291, 302 & 319 (1969); Investigation of the Police Department of the City of New York, New York State Senate Committee Report, 15, 19, 32-33, 36-37, 40-41 (1895)(also known as the Lexow Commission for State Senator Clarence Lexow, the Committee's Chairman).

56 GRONDAHL at 224; MORRIS at 561-84.

57 Laws of 1896, c. 112. The "Raines Law," which was named for Senator John Raines, the legislator who had sponsored the bill as a reform measure against prostitution, decreed that only hotels with 10 or more rooms could serve alcoholic beverages with meals on Sundays. Within weeks, almost every saloon in the city had transformed itself into a "Raines Law" hotel. Prostitutes began using the available rooms by the hour since in most cases there was no actual demand for hotel accommodations. *See* Mara L. Kiere, *The Committee of Fourteen*

the political establishment,[58] the public's rage against "Dry Sundays" created growing political pressure for Roosevelt to resign.[59] Roosevelt gracefully exited in 1897 after seeking and receiving a position in the McKinley Administration as Assistant Secretary of the Navy.[60]

The central role that saloons played in selling alcoholic beverages to multitudes of people[61] provided a perfect opportunity for competitors in the liquor and beer industry to create and maintain a competitive advantage.[62] Thus, distillers and brewers often coerced saloon owners to sell their brands by exerting direct or indirect control over saloons through various forms of credit, such as financing saloon leases, bars, beer taps and other fixtures,[63] and through "tied house" arrangements in which an establishment was obligated to sell the brand of one

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and Saloon Reform in New York City, 1905 - 1920, 26 BUSINESS AND ECONOMIC HISTORY 573, 575 (1997); John P. Peters, *Suppression of the "Raines Law Hotels,"* 32 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 86, 88 (1908); MICHAEL A. LERNER, DRY MANHATTAN: PROHIBITION IN NEW YORK CITY 25 (2007), [hereinafter LERNER].

58 K. AUSTIN KERR, ORGANIZED FOR PROHIBITION: A NEW HISTORY OF THE ANTI-SALOON LEAGUE 24 (1985), [hereinafter KERR].

59 GRONDAHL at 243.

60 *Id.* at 242; MORRIS at 561-584. Despite the pressure, Roosevelt remained committed to the "Dry Sunday" efforts. *Id.* at 517-527.

61 *See* Carl H. Miller, *The Brewer And The Saloonkeeper* (1998) [hereinafter Miller], http://www.beerhistory.com/library/holdings/saloon.shtml.

62 By 1914, only about one hundred breweries controlled over 50% of the nation's production of beer, and a single holding company controlled over 90% of the production of liquor. LERNER at 22-3.

63 *See* Miller. As one saloonkeeper wrote in 1909, "[T]he relations between the brewer and the saloon-keeper are close and complicated. . . I had found that every [saloon] was really owned by a brewery. . . The saloon is leased, the fixtures are supplied, and the license is paid by the brewer. When I 'bought' my place, I discovered that the brewery held a mortgage of $4000 on its fixtures. These fixtures, when they were new, had cost perhaps $2000. The fact that the mortgage was so much larger than the value of the property it covered made it practically certain that it would never be paid off, and that the saloon would remain the property of the brewery. . . ."quoted in JOHN KOBLER, ARDENT SPIRITS: THE RISE AND FALL OF PROHIBITION, 177 (1973)..

distiller or brewer exclusively.[64] To satisfy the demands of brewers and distillers eager to maximize their profits and recoup their loans, saloon keepers were often compelled to unduly stimulate their sales.[65] The saloons were also fertile ground for prostitution, police corruption, gangs, and political activity both benign and corrupt.[66]

Through all this period, temperance advocates continued to advocate their cause, despite their lack of success in shutting down saloons in New York City. Indeed, the high point of their movement came with the January 17, 1920 adoption of the Eighteenth Amendment to the United States Constitution, that prohibited the importing and exporting and manufacture, sale, or transportation of alcoholic beverages within the United States and its territories."[67]

2. Prohibition

To implement "Prohibition," Congress passed and the President signed the Volstead Act, which prohibited the manufacture, transportation, sale, and possession of any beverage containing one half of one percent or more of alcohol.[68] Soon, the country was awash with illegal trafficking in beer and whiskey, run by organized crime, which resorted to violence to secure and control its illicit fiefdom, and enabled by wholesale corruption of the political and

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64 M. Welch, *The Inevitability of the Brewpub: Legal Avenues for Expanding Distribution Capabilities*, 16 REV. LITIG. 173, 176 (Winter 1997) [hereinafter Welch].

65 NORMAN H. CLARK, THE DRY YEARS: PROHIBITION & SOCIAL CHANGE IN WASHINGTON 58 (rev. ed. 1988) [hereinafter CLARK].

66 BURROWS & WALLACE at 484, 635, 1192; KERR at 24; MORRIS at 515-516. *See also* Jewel Bellush, *The Politics of Liquor*, 45 NEW YORK HISTORY 114, 114 (1964)("By the turn of the century in New York, 729 out of 1002 Democratic and Republican nomination conventions and primaries were held in saloons. Local party clubs were often housed in saloons or nearby rooms. Licenses were obtained through contacts with local party leaders and served as a lucrative source of club patronage.").

67 EDWARD BEHR, PROHIBITION – THIRTEEN YEARS THAT CHANGED AMERICA 80 (1996) [hereinafter BEHR].

68 41 Stat. 305 (1919).

criminal justice system.[69] Speakeasies were ubiquitous; by 1927, in the city alone, there were over 30,000 –"twice as many as all legal bars and restaurants and nightclubs *before* Prohibition,"[70] Enforcement of the law proved elusive,[71] and federal and state governments were losing excise tax revenue to the coffers of organized crime.[72]

On December 5, 1933, the Prohibition experiment ended with the ratification of the Twenty-First Amendment of the United States Constitution, repealing the Eighteenth Amendment.[73] After the repeal of Prohibition, to regulate the liquor industry Congress passed the Federal Alcohol Administration Act, which established a federal agency to supervise the industry, created a permit system for manufacturers, wholesalers and importers of alcoholic beverages,[74] and prohibited certain industry practices, such as tied-houses, furnishing equipment and fixtures to a retailer, and commercial bribery.[75] The major objectives of the federal law were the protection of federal revenue,[76] prevention of "unscrupulous racketeers" from entering and

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69 Carl H. Miller, *We Want Beer: Prohibition And The Will To Imbibe - Part 2*, http://www.beerhistory.com/library/holdings/prohibition_2.shtml.

70 BEHR at 87 (emphasis in the original).

71 KERR at 25-28. Many people were becoming seriously debilitated or dying from the foul potions that many clandestine operations were creating out of everything from antifreeze and embalming fluid, to nitrous ether and rubbing alcohol. ERIC BURNS, A SOCIAL HISTORY OF ALCOHOL 217 - 225 (2004), [hereinafter BURNS]; BEHR at 87.

72 BURNS at 217 - 225.

73 U.S. Const., Amend. XXI.

74 27 U.S.C. §204. No permit was required for any state liquor control board.

75 27 U.S.C. §210 et seq. *See Legislative History of the Federal Alcohol Administration Act*, Appendix I (Public. No. 401, Seventy-Fourth Congress)(H. R. 8870), Office of the General Counsel, September 15, 1935, available at http://www.archive.org/stream/legislativehisto00unit/legislativehisto00unit_djvu.txt.

76 *Legislative History of the Federal Alcohol Administration Act* 52 (Public. No. 401, Seventy-Fourth Congress)(H. R. 8870), Office of the General Counsel, September 15, 1935, available at http://www.archive.org/stream/legislativehisto00unit/legislativehisto00unit_djvu.txt.

remaining in the business,[77] and prevention of unfair trade practices in the industry.[78] The Twenty-First Amendment also allowed the states to prohibit or regulate the importation of alcoholic beverages into their jurisdiction, and their sale within their jurisdiction.[79] States had the option of regulating alcoholic beverages by directly controlling them or by adopting a "three-tier system" of distribution, whereby manufacturers, wholesalers, and retailers are licensed by the State to engage in business with one another.[80]

IV. New York's ABC Law

In developing the ABC Law that would govern the state after the repeal of Prohibition, New York could rely on a well-developed history of laws regulating alcohol.[81] New York had been licensing retailers of alcoholic beverages dating back at least as far as 1780.[82] For example, by 1892, it had enacted a comprehensive law that revised and consolidated all its previous laws regulating alcohol, and, among other things, created two different saloon licenses,[83] and

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77 *Id.*

78 *Id.*

79 U.S. Const., Amend. XXI § 2. *See New York State Liquor Authority v. Bellanca,* 452 U.S. 714, 715 (1981)(noting that under the Twenty-First Amendment, a State has absolute power to prohibit totally the sale of liquor within its boundaries and broad power "to regulate the times, places, and circumstances under which liquor may be sold.").

80 See *Granholm*, 544 U.S. at 466, citing North Dakota v. United States, 495 U.S. 423 (1990). Presently there are 32 states which issue licenses to private parties within the three tier system. State Alcohol Control Boards, available at http://www.marininstitute.org/alcohol_policy/state_alcohol_control.htm. Eighteen "control states" directly control retail and/or wholesale distribution of alcoholic beverages. State Alcohol Control Boards, available at http://www.marininstitute.org/alcohol_policy/state_alcohol_control.htm.

81 *See Liquor Topic Rules Session at Albany,* New York Times, January 15, 1933, p. 2.

82 Laws of 1780, c. 40.

83 Laws of 1892, c. 401. One saloon license was for all alcohol beverages, c. 401 § 19(2), and one for ale and beer only, c. 401 § 19(3).

established the rule that licensed premises could not be within 200 feet of a school or place of worship.[84]

1. The 1933 beer law

With the repeal of Prohibition, and Congress' passage of the 1933 Cullen-Harrison Act making the manufacture and sale of beer with 3.25 percent of alcohol legal as of April 1, 1933,[85] New York's first major step was to enact a beer law,[86] based on the recommendations of a specially-appointed nine-member Commission on Alcoholic Beverage Control Legislation. Organized on January 24, 1933, the Commission met in fourteen day-long continuous sessions in New York City, and issued its First Report on February 15, outlining fundamental principles to govern one phase or another of alcoholic beverage control.[87] These included: promotion of temperance, rather than the development of revenues for the state; limitation on the number of licenses to be granted, with the expectation that the value of a license would inspire a licensee to comply with the law rather than risk revocation; statutory provisions for local option, with home rule to be fostered under a State Board of Liquor Control; the dismantling of the old alliance between the brewers and saloonkeepers; the prevention of any system of chain licenses owned or controlled by a manufacturer; the elimination of the saloon, payment of all expenses of liquor

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[84] Laws of 1892, c. 401 §43. The method for measuring the 200 feet was added by the Laws of 1892, c. 480. In 1909, the Legislature enacted the Liquor Tax Law, which reorganized and amended the 1892 law. Laws of 1909, c. 39. The Liquor Tax Law would remain in effect until it was repealed to comply with the requirement of Prohibition. Laws of 1921, c. 155 §2.

[85] 27 U.S.C.A. § 64a et seq. (1933), repealed by 49 Stat. 877 (1935). *See also* Herbert H. Lehman, *Message to the Legislature Relating to Alcoholic Beverage Regulation and Recommending Establishment of State Control Boards,* March 29, 1933, PUBLIC PAPERS OF HERBERT H. LEHMAN 105 (1933).

[86] Laws of 1933, c. 180 [hereinafter 1933 Law].

[87] First Report of the New York State Commission on Alcoholic Beverage Control Legislation, 5-9, February 15, 1933.

control through revenues derived from the system; enforcement largely entrusted to local and state police, thus requiring only a limited number of liquor inspectors; license fees not be so high as to induce an underground traffic in alcoholic beverages; and local control boards to be composed of members removed as far as possible from all improper influences, particularly political influence and indirect influence through an alliance between liquor interests and political interests.

The composition and powers of the proposed local control boards proved to be the most contentious issue, as described below in the section on the organization of the Division of Alcoholic Beverage Control. Upstate Republicans strongly favored the creation of local boards, fearing that a central board in Albany would eventually be controlled by Tammany Hall, while downstate Democrats feared that local boards would be used to build up local political machines.[88]

The beer law which became effective on April 12, 1933, contained much from the Commission's proposal and many of its provisions foreshadowed those of the 1934 law and some of what appears in our current statute.

The law created a state alcoholic beverage control board consisting of five salaried members, no three of whom were to belong to the same political party.[89] Under section 17, it had the power to: grant and revoke licenses to brewers and wholesalers, remove members of local boards for cause, fix the number of breweries and wholesalers to be licensed, and their locations, fix the standards of manufacture, grant or refuse retail licenses to sell beer, adopt rules and

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[88] *Governor warns people; republican bill sets up a machine based on saloon, he says, peril to repeal is seen, state non-partisan board can prevent the old-time evils, he asserts; republicans to fight on; senate leader charges that governor supports a measure designed by Tammany*, New York Times, April 2, 1933, p. 1.

[89] 1933 law, §§ 10-12.

regulations for the supervision and regulation of the manufacture and sale of beer, prescribe forms of applications for licenses, hear testimony, examine under oath any licensee, and issue subpoenas to require the attendance of witnesses.

The law also created county boards consisted of two unsalaried members, one appointed by the state board, the other by the chairman of the board of supervisors of the county.[90] The county board could appoint a chief executive officer and other employees as needed.[91] It could recommend to the state board the granting and revocation of licenses for on- and off-premise consumption, fix the hours of sale within the county, make local rules relative to retail sale of beer in the county, examine any licensed retailer, hear testimony, and issue subpoenas.[92] New York City had its own board of four members, no more than two of whom could be members of the same political party, two appointed by state board, and two by the mayor.[93]

The declaration of policy included in the law was as follows:

> . . . [T]he provisions of this chapter are enacted as a safe-guard to temperance and in order to promote obedience to law and more effectively to prevent the unlawful manufacture and sale of beverages now prohibited by federal law. It is hereby declared to be the public policy of the state that the number of licenses in this state to traffic in beer should be restricted and the state board empowered to determine whether public convenience and advantage will be promoted by issuing such licenses, by increasing or decreasing the number thereof; and that in order further to carry out the policy hereinbefore declared, the number of licenses shall be restricted. . . .[94]

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90 1933 law §§ 30, 31, and 36.

91 1933 law, § 36.

92 1933 law, § 38.

93 1933 law, §§ 50 and 51.

94 1933 law, § 70.

The law provided for four kinds of licenses: brewers, wholesalers, and two retail licenses, one for on-premises sale, and the other for off-premises sale,[95] thus breaking up what had been the business of the saloon into two separate licenses. Certain persons were forbidden to traffic in beer, such as a person convicted of a felony, a person under age 21, a non-citizen, a partnership unless a citizen or citizens held a majority, or a person or corporation whose license had been revoked, until two years had elapsed.[96] Licenses could be revoked for cause, including: a conviction of the licensee or his employee for selling illegal beverages, making a false statement on an application, transferring a license, selling to an unlicensed buyer, or failing to pay excise taxes.[97] Retail licenses could be revoked by a county or the state board; brewers' and wholesalers' licenses could be revoked only by the state board,[98] subject to review by trial courts (county boards) or the third department (state board).[99]

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95 1933 law, §§ 72, 74, 75, and 76. The on-premises license prohibited selling beer "to be sold to be consumed at a bar, counter, or other similar contrivance . . ."

96 1933 law, § 84.

97 1933 law, § 86.

98 1933 law, § 86-a.

99 1933 law, § 87.

The law set hours for sale of beer (no sales on Sundays between 3:00AM and noon,[100] or on election day between 3:00AM and 6:00 PM), subject to further restriction by county boards.[101] Brewers were not to be interested in retail places.[102]

Licenses had to be framed and displayed in a conspicuous place in the licensed premises.[103] Penalties for violation of the law included civil penalties or imprisonment.[104] Cities and towns could choose a local option and the law included a set of ballot questions to be voted upon by the electorate, covering sales of beer on premises, off-premises, and at hotels.[105]

The New York *Times* described the system several months after it was put in place:[106]

> The New York City zone office was thronged with people seeking information on the beer law, or to be prepared to act when repeal arrived. The crowds, "a cross-section of cosmopolitan, polyglot New York," overflowed into the hall. "In it are a few dapper and sporty ones suggestive of the glad, free, lawbreaking days of prohibition; but most are plain people with a hard-working, law-abiding look. . . . It is a little congress of all peoples." The lengthy application forms were the "first line of defense against many old evils" that the board was determined to avoid, and easily revealed an applicant's intention to open a place that would be "virtually a saloon." Many restaurant applications failed to

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100 Sunday closing laws were not necessarily instituted for religious purposes. Because many workers were paid on Saturday evening, and Sunday was their day off, Sunday was the most profitable day of the week for saloons. ERNEST GORDON, WHEN THE BREWER HAD THE STRANGLEHOLD 102 (1930) [hereinafter GORDON].

101 1933 law, § 89.

102 1933 law, § 91. Of this provision, Governor Lehman said, "In an endeavor to avoid some of the former evils attendant upon the beer traffic, the bill provides that no brewer shall in any way be interested in any retail establishment. The days when the brewer financed, and really owned, chains of numerous saloons, and engaged in feverish competition of sales exploitation with each other must not be allowed to return." *Message to the legislature transmitting views relating to alcoholic beverage regulation and recommending establishment of state control board*, March 29, 1933, PUBLIC PAPERS OF HERBERT H. LEHMAN 107-8, 1933.

103 1933 law, § 94.

104 1933 law, § 97.

105 1933 law, Article VI.

106 L.H. Robbins, *Beer board plans for after repeal; pending further legislative action, it will exercise control of hard liquor*, New York Times, September 24, 1933, p. XX2 [hereinafter *Beer board plans for after repeal*].

comply with the rules requiring the establishments to be "a bona-fide eating place, with kitchen and regular meals and with table accommodation for twenty diners at once. Camouflage and the rubber sandwich do not go with the board." Also fatal to an application were "[i]nner partitions, side rooms, back rooms, window obstructions, gambling machines and unsanitary conditions." The board scrutinized the applicant's history, because the statute barred anyone with a felony conviction or conviction for a variety of misdemeanors from holding a license.

The *Times* reported that:

> the expected trouble from wildcat breweries has not materialized. The public appears to be behind the control board in combating illicit and unwholesome manufacture, and anyway, there is too little profit in beer today to attract the princely racketeers of the prohibition years. Now and then there are reports of coercion by beer thugs, but not often. The fingerprinting of all male employees of breweries and wholesalers, ordered by the board last week, is counted on to help in reducing strong-arm practices. As expressed by one close to the work, the board aims through reasonable restriction and minimum but still firm control to win for State regulation the confidence and support of the public.[107]

2. The State Board's post repeal interim rule

With full repeal of the 18th Amendment imminent, the legislature amended the beer law to provide for a temporary control and regulation system, and authorized the State alcoholic beverage control board to issue a rule for the "standards of manufacture for liquors and wines in order to insure the use of proper and healthful ingredients and methods in the manufacture of liquors and wines to be sold or consumed within the state," and for the "control and regulation of the manufacture, sale, and distribution of liquors and wines, including the location, type and character of the premise to be licensed and the hours and days and conditions of their sale, as will effectively insure temperance in the consumption of liquors and wines in the sate and promote obedience to law and order."[108]

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107 *Beer board plans for after repeal.*

108 Laws of 1933 c. 819 § 1. *See also Beer board plans for after repeal; Model liquor code urged by Lehman; asks board to set up rules that will insure victory for real temperance; example for the nation, Mulrooney pledges continued fight on racketeering – beer sales increase,* New York Times, September 29, 1933, p. 21.

Together with the beer law, this Interim rule prepared by the forerunner of the State Liquor Authority formed the basis for the permanent alcoholic beverage control law. Although the ABC Law has been amended and augmented many times since 1934, its essential bone structure and numerous provisions, drawn from the Interim rule, remain to this day; thus, it is instructive to examine the goals and policy choices underlying the Interim rule in some detail.

According to a statement by Edward P. Mulrooney, Chairman of the state board, in formulating the rule, the board kept in mind four major objectives:

> *First*, to devise a plan that would make for temperance in the use of alcoholic drinks;
> *Second*, to enable the liquor trade to establish itself on a decent plane, and to preclude, as far as possible by ordinance, a return of the shameful conditions, political and social, of the prohibition era and of the pre-prohibition days;
> *Third,* to protect the consumer in his rights; and,
> *Fourth,* to arrange a control system liberal enough to command willing obedience from a population having a wide variety of social needs and customs, and strong enough and workable enough to win the respect and the support of all citizens.[109]

> The New York *Times* approved:
> [The rule] aims to outlaw the saloon and to discourage efforts to stimulate the consumption of hard liquor, while at the same time making it so readily available as to warrant hope of defeating the vast illegal traffic which has prospered under prohibition."[110]
> A midtown tavern owner, while taking issue with a particular provision disallowing service of liquor across bars, commented that: "[The rules] will stamp out the chiseling guys who popped up all around when beer came back. They will end the hold-in-the-wall speaks. They will knock out the bootleggers" who would (as paraphrased by the *Times*)"not dare risk conviction for counterfeiting revenue stamps on liquor bottles and

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109 *Mulrooney states basic aims of the liquor-control plan; the rules have been tested, says the A.B.C. board's chairman, in light of four ideals, of which the first is temperance*, New York Times, November 19, 1933, p. XX3. The chairman noted that "A fifth ideal . . . was a program of public education in the desirability of temperance in drinking; but provision for such education was thought to be in the province rather of the Legislature than of a temporary board." *Id.*

110 *New York's liquor regulation*, New York Times, November 10, 1933, page 20.

none but 'cheap dives' would dare to put on the bar any bottle that did not bear revenue stamps.[111]

The rule prohibited ties between manufacturers or wholesalers and retailers.[112] The "tied house" was the "villain of the temperance movement" in the years before Prohibition,[113] and represented much of the evil that the temperance movement sought to eliminate.[114] As discussed above, the beer law already sketched out a framework for avoiding the political corruption side effect of the tied houses. It fell to the State Board to work on eliminating the saloon.

The rule imposed distance requirements. Off-premises stores were to be separated by distances of at least 1500 feet in cities with a population of over one million, or at least 700 feet elsewhere.[115] The board's initial thought was to have 2500 feet separating retail liquor stores, but it later changed the measurement to 1,500 feet, as this would mean that "one retail liquor store would be situated to every four blocks north and south and a block east and west."[116] Before

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111 *Liquor men differ on control plan; regulations generally held satisfactory – merchants hail end of old evils; bar rule causes concern; some hotels hint at court fight – doom of 'hole-in-wall' and bootlegging is seen,* New York Times, November 11, 1933, p. 2 [hereinafter *Liquor men differ*].

112 Interim rule §§ 17 (distillers), 36 (wholesalers), 65 (off-premises retailers), and 91 (on-premises retailers).

113 *75 Years After Prohibition,* 18-JUN BUS. Law Today 45 (2009).

114 Evan T. Lawson, *The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages* 32, SOCIAL AND ECONOMIC CONTROL OF ALCOHOL; THE 21ST AMENDMENT IN THE 21ST CENTURY, Carole L. Jurkiewicz and Murphy J. Parker, eds. 2008) [hereinafter Lawson]. Before Prohibition, a number of states tried and failed to break the ties between producers and saloons. Maryland law provided that no brewer or distiller could engage in retail sales, yet in Baltimore, brewers held long leases on 400 saloons, and owned another 400 outright. GORDON at 106. Brewers evaded a similar law in Indiana by organizing realty and loan companies to hold leases on saloons. *Id.* at 107. Missouri prohibited brewers and distillers from owning saloons, but in Kansas City alone, the brewers held 420 saloon licenses. *Id.* Pennsylvania required brewers to swear that they had no direct or indirect interest in saloons, but nevertheless they controlled thousands of saloons by mortgaging them. *Id.*

115 Interim rule § 49.

116 *Rents spurt here in rush for sites for liquor stores; competition for places that meet state rules puts the rates up sharply; 1,000 ask licenses in day; disparity in fees feared as temptation to beer dealers to bootleg spirits*, New York Times, November 12, 1933, p. 1.

Prohibition, it was not unusual for a single block to contain numerous saloons. A 1901 study of saloons included maps of neighborhoods in New York City and Buffalo, indicating as many as seven saloons on a single block.[117]

Several provisions were in place to protect against the recurrence of prohibition-era speakeasies, which, with their emphasis on drink, had to maintain some degree of secrecy.[118] An aggressive campaign to padlock illegal clubs began in 1925, and succeeded in closing 500 establishments in its first six months.[119] In response to the padlocking campaign, clubs and speakeasies simply evolved into smaller, more anonymous, bare-bones establishments that could reopen at new locations in a matter of days.[120] There were hidden entrances, peepholes, and liquor supplies hidden in adjoining buildings.[121] Speakeasies could turn up just about anywhere from warehouse basements to apartments.[122] To prevent such freewheeling relocation and secrecy, the rule included a requirement that an off-premise establishment be located in a store, with entrance at street level, located in a business center, on a main thoroughfare,[123] and with the owner's name and license number emblazoned on the front window in letters at least 3 ½ inches high.[124] A

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117 RAYMOND CALKINS, SUBSTITUTES FOR THE SALOON: AN INVESTIGATION MADE FOR THE COMMITTEE OF FIFTY UNDER THE DIRECTION OF FRANCIS G. PEABODY, ELGIN R.L. GOULD AND WILLIAM M. SLOANE 386 and 388 (1901). *See* Appendix C.

118 LERNER at 140.

119 *Id.* at 156.

120 *Id* at 153.

121 *Id.*

122 *See* RANDOLPH W. CHILDS, MAKING REPEAL WORK 10 (1947).

123 Interim rule § 47.

124 Interim rule § 51.

restaurant licensed to serve liquor could not have frosted glass, a screen, or blind covering a window and preventing a full view into the interior, an interior partition preventing a full view of the entire room for customers, any passageway for persons or things between the licensed premises and elsewhere.[125]

Numerous provisions were intended to promote moderate consumption. Alcoholic beverages could be sold only at tables where food could be served, and only beer could be sold across bars.[126] No retail sales on credit were permitted.[127] Spirits had to be sold only in their original packages for off-premises consumption.[128] No wine or liquor could be served to a minor under the age of 18, an intoxicated person, or a habitual drunkard.[129] No signs advertising brands of liquors were allowed.[130]

The Chairman of the State Board said of these measures:

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125 Interim rule § 87.

126 Interim rule § 80. The rule against serving drinks across a bar seems particularly quaint today, and even in 1933 it proved controversial, although opposition was purely for economic reasons. One hotelier explained why he thought it necessary; "At the old-fashioned bar, . . . it was impossible to refuse to serve a drink to the man who insisted on more although he already had enough." *Liquor men differ on control plan; regulations generally held satisfactory – merchants hail end of old evils; bar rule causes concern; some hotels hint at court fight – doom of 'hole-in-wall' and bootlegging is seen,* New York Times, November 11, 1933, p. 2. He proposed a simple work-around: a portable bar, which could be wheeled around the dining room, allowing the waiter to ignore a "sloppy" drunk. *Id.* Another felt that the bar rule would force a price increase for drinks, because it would require a staff of waiters to carry drinks to customers' tables. *Id.* Hoteliers vowed not to submit to the new rule without a legal fight, especially as it appeared that the "closed door clubs" had every intention of clinging to their ornate bars. *Id.*

127 Interim rule §§ 61 (off-premises) and 86 (on-premises).

128 Interim rule § 50.

129 Interim rule § 81.

130 Interim rule §§ 52 (off-premises) and 84 (on-premises).

> As a first move for moderation, . . . the board has definitely provided that hard liquor shall be less readily available than beer.[131] All our efforts have been to encourage the use of mild drinks rather than strong. . . . In order to buy hard liquor to drink in a public place, the consumer must sit down at a table. The consumer who is in a hurry will take a glass of beer at the bar rather than a glass of spirits at a table; or if he dislikes beer, he will postpone his indulgence. No, he will not go around the corner to a speakeasy bar for something stronger than beer, for there will be no speakeasies . . .
>
> Another temperance step is the rule forbidding the selling of liquor at retail on credit. The old saloon custom of granting credit, of 'putting it on the tab' until Saturday night, led always to overdrinking. In the neighborhoods of the poor it deepened poverty, when the drinking man could charge his drink he tended to drink more than was good for him, and often he had little pay left for his family at the end of the week. . . .
>
> . . . Another regulation of this kind forbids the sale of spirits in less than original-package quantities for consumption off the premises. It will prevent much of the intemperance whose effects are seen in dreary parts of town where human derelicts sleep off their drunkenness.
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> . . . [T]here are the rules against selling to minors and against serving drink to a customer who has had enough. There were such rules in the old days, and they were as hard to enforce as any other liquor rules when the bartender had political friends at court to protect him. These, however, are new days. The seller who runs his place according to law under the system now contemplated will never need pull, while the seller who breaks the law will never have pull enough to escape the penalty of losing his privilege.[132]

Distillers could sell wine and liquor only in sealed, labeled glass bottles of up to one quart, together with all applicable tax stamps;[133] had to file with the state a list of brands,[134] a monthly report of how much it had produced and shipped,[135] and a questionnaire on each male employee,

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131 Beer was generally considered to be much less dangerous than liquor. "Generally speaking, light beer is a harmless beverage, but beer that is heavily loaded with alcohol is potentially harmful because it is relatively cheap and can be consumed in large quantities." LEONARD VANCE & ELIZABETH LANE, AFTER REPEAL 28-9 (1936).

132 *Mulrooney states basic aims of the liquor-control plan; the rules have been tested, says the A.B.C. board's chairman, in light of four ideals, of which the first is temperance*, New York Times, November 19, 1933, page XX3.

133 Interim rule § 10.

134 Interim rule § 13.

135 Interim rule § 14.

together with his fingerprints;[136] and had to maintain adequate books and records on site.[137] Similar rules applied to wholesalers.[138] On-premises licensees were not allowed to suffer and permit gambling or to allow the premises to become disorderly.[139]

The Chairman framed these and other provisions as pro-consumer:

> The consumer of hard liquor is about to have a break in his favor for once in history. The new rules consider his interests. It is not enough to provide that he shan't be encouraged to drink beyond his means or his capacity. He must also be allowed to know what it is that he is drinking. The original-package rule, successfully used in other countries and now adopted for this State, is the best rule ever drawn up for making sure that the customer gets what he pays for. If the liquor he buys is blended, cut or otherwise adulterated, the label on the bottle is required to say so. The rule against the presence in a liquor shop of spirits in casks, kegs or any other containers except sealed bottles is intended to defend him from a wrong that has been worked by liquor dealers on their patrons since ancient times. The old cellar industry of making one barrel of whisky into three can't lawfully be carried on hereafter in new York State. In addition, the consumer is protected, under the rules, from drinking in disorderly and disreputable surroundings . . . The board is not out to make the use of alcoholic beverages alluring. But since drinking will be done and the majority of the people demand that liquor shall be lawfully available, the board provides regulations whereby the public drinking as well as the purchase of liquor for off-premises use shall be open and aboveboard and orderly. The back-alley dive has no place in any New York community.

Other provisions included: chain restaurants could hold more than one license, but retail off-premises and wholesale establishments were limited to a single license.[140] There could be no issuance of a license for on- and off-premises for an establishment seeking to sell liquor that was

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136 Interim rule § 15.

137 Interim rule § 16.

138 Interim rule §§ 27, 32-35.

139 Interim rule § 83.

140 Interim rule §§ 24 (wholesalers) and 45 (off-premise retailers). *See also Rents spurt here in rush for sites for liquor stores; competition for places that meet state rules puts the rates up sharply; 1,000 ask licenses in day; disparity in fees feared as temptation to beer dealers to bootleg spirits*, New York Times, November 12, 1933, p. 1.

located within two hundred feet of a school or place of worship.[141] An applicant for a retail license had to show a lease or deed as part of the application [142]

Chairman Mulrooney commented about the rule's intention with respect to business practices:

> Under the regulations, . . . the liquor dealer will have to conduct his business respectably, like any other business man. He will do so in order to keep his record clear with the State board, which alone has the power to license him or to revoke his permit. So long as he does that he will not live in fear of the exactions of petty local officialdom that in the old days sought to graft on him. If the State licensee has no violation against his record, he can expect to continue in business unmolested. He can be as independent as any other merchant in telling any blackmailing collector of tribute to go to blazes. There will be no excuse for liquor-political alliances like those of bygone times, with their consequent corruption and disgraces. The rules give the State reason to expect orderly conduct of the trade, and the trade has reason to expect in return the chance to operate without having to sink to the practices that brought disaster in the past.[143]

Like the beer law, the rule allowed issuance of four types of licenses: for manufacturers, wholesalers, and off- and on-premises retailers.[144] The three-tier system replaced the two-tier system of manufacturers and retailers, placing the wholesale tier in between. Behind the three-tier system is the "logic . . . that, by keeping the distribution levels separate and independent, the forces that promote intemperance in alcohol consumption will be tamed as the incentives to excess are minimized."[145] The policy goals underlying the system created after Prohibition were "orderly market conditions, limits or prohibitions on vertical integration, avoiding dominance by

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141 Interim rule §§ 48 and 72 (on-premises).

142 Interim rule §§ 46 (off premises) and 71 (on-premises).

143 *Mulrooney states basic aims of the liquor-control plan; the rules have been tested, says the A.B.C. board's chairman, in light of four ideals, of which the first is temperance*, New York Times, November 19, 1933, p. XX3.

144 Interim rule § 3.

145 Lawson at 31.

suppliers over retailers through bribery or predatory marketing practices, product integrity, temperance, and taxation."[146] There are other "trade practice" rules on both the federal and state levels designed to prohibit influence of the upper tiers on retailers.[147]

By the standards of the day, the State Board's rule was liberal, especially compared with the recommendations of the Rockefeller Report, which called for state control of the system.[148] Chairman Mulrooney stated:

> It was necessary for the board to take into account two stubborn facts. No system of liquor control rules can succeed in a State like New York, with a mixture of races and ideas and tastes, unless the rules are sufficiently liberal to win the respect of those who are asked to submit to them. That fact was proved true under prohibition. On the other hand, in an orderly Commonwealth like New York no plan can be expected to succeed unless it can convince thoughtful citizens of its essential soundness and its applicability to the situation. If it is too strict it won't work. If it is too lax and throws away all restraints it won't last.
>
> In these new rules the board has tried to reach a workable compromise that will insure the greatest good of the greatest number. . . . No other State that has thus far arranged for liquor control is so liberal in its rules as New York. No other State permits the serving of spirits and wines without meals, no other allows beer drinking at bars, and no other is so generous as to hours of sale. Some States on the list prescribe heavy penalties for things that here will be admitted.
>
> If the liberality required for successful administration in a large city seems excessive to citizens of rural districts, the board has the power to modify its policy in that regard to suit the needs of any locality. The rule, for example, that will allow drinking places to remain open until 3 o'clock in the morning is one that aims to prevent speakeasies, which would be encouraged to spring up if the closing hour were earlier. It is a rule particularly needed in cities. If rural opinion demands earlier closing hours in a given territory, any county board, with the approval of the State board, can rule to that effect.

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146 *75 Years After Prohibition*, 18-JUN BUS. Law Today 45 (2009).

147 *See* "gifts and services," *infra.*

148 RAYMOND B. FOSDICK AND ALBERT L. SCOTT, WITH A FOREWORD BY JOHN D. ROCKEFELLER, JR., TOWARD LIQUOR CONTROL (1933) [hereinafter FOSDICK AND SCOTT]. The New York rules were "pretty well mapped out" before the Rockefeller study was published. *Rents spurt here in rush for sites for liquor stores; competition for places that meet state rules puts the rates up sharply; 1,000 ask licenses in day; disparity in fees feared as temptation to beer dealers to bootleg spirits*, New York Times, November 12, 1933, p. 1.

> . . . There is every expectation that the new rules will make the illicit business of the speakeasy and the bootlegger unprofitable and will thus end the criminal conditions that have prevailed in the last decade - conditions that nobody, wet or dry - wants to see continue.[149]

3. The 1934 law

On May 10, 1934, New York adopted the law that is the essential framework of today's ABC Law.[150] The 1934 law closely follows the provisions of the 1933 beer law and the State Board's Interim rule, but organizes them differently, grouping the provisions for beer, wine, and liquor in separate articles (analogous provisions relating to cider were added a few years later[151]).

The law created a three tier licensing system regulated by a State Liquor Authority.[152] The SLA was composed of five Commissioners appointed by the Governor, one of whom the Governor would designate as the Chair.[153]

Seeking to ensure a sense of direct responsibility to the community in the control of alcoholic beverages,[154] and drawing on the system of local control boards established in the 1933 law regulating beer, the law created Local Alcoholic Control Boards (ABC Boards) in each county and in New York City.[155] Each ABC Board had two members, each one from a different political

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149 *Mulrooney states basic aims of the liquor-control plan; the rules have been tested, says the A.B.C. board's chairman, in light of four ideals, of which the first is temperance,* New York Times, November 19, 1933, p. XX3.

150 Laws of 1934, c. 478.

151 Laws of 1940, c. 718.

152 Laws of 1934, c. 478.

153 Laws of 1934, c. 478 §§ 10, 11.

154 First Report of the New York State Commission on Alcoholic Beverage Control Legislation, February 15, 1933.

155 ABC Law Art. 3, §§30 - 43, repealed L. 1995, c. 83, § 151.

party, appointed by the chairman of the county board of supervisors, except New York City's Board, which had four, with no more than two from the same political party, appointed by the mayor.[156] The local ABC Boards had the power to recommend actions on the issuance and revocation of retail licenses, to hold hearings in conjunction with these matters, and, with the exception of the New York City Board, to restrict the hours during which alcoholic beverages could be sold.[157]

New to the 1934 law was article 7, which provided for the issuance of various permits, such as for catering[158] or permits to remain open during certain hours in the early morning.[159] Article 8 grouped together a series of general provisions, including one restoring service of alcohol across a bar, counter, or similar contrivance,[160] a new provision barring gifts and services "directly or indirectly, to any person licensed under this chapter which in the judgment of the liquor authority may tend to influence such licensee to purchase the product of such manufacturer or wholesaler."[161].

Over the past 75 years since its enactment, there have been many changes to the ABC law, notably these additions addressed below in this Report;

In 1940, section 107-a, regulating labels on containers of alcoholic beverages;[162]

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156 ABC Law Art. 3, §30, repealed L. 1995, c. 83, § 151.

157 ABC Law Art. 3, §43, repealed L. 1995, c. 83, § 151.

158 ABC Law § 98.

159 ABC Law § 99.

160 ABC Law § 100(4).

161 ABC Law § 101(1)(c). See "gifts and services," *infra.*

162 *See* "labeling," *infra.*

In 1942, section 101-b, which prohibits unlawful discrimination between wholesalers or retailers, requires monthly price posting by wholesalers,[163] and institutes a rule requiring that a brand be attached to an owner;[164]

In 1976, section 76-a, farm winery license, together with subsequent additions for various types of small wineries, craft breweries, and craft distilleries; and

In 1993, section 64(7)(b) and (f),[165] a rule addressing over-saturation of certain on-premises establishments within five hundred feet;

In 1995, the elimination of the local boards;[166] and

In 2002, section 61(1-a), craft distillery license.[167]

From time to time during the past 75 years of New York's ABC Law, critics have claimed that the law was unworkable, that the SLA was failing in its mission, and that the system was rife with corruption. These claims led to investigations and reports by various arms of state government, and in some instances, legislative and administrative change. A few of the highlights follow.

4. Subsequent events

A. The 1930s and 1940s

In no time at all after the enactment of the beer law, corruption began. Thus, in late December of 1933, a filing clerk and five of the twenty-one inspectors with the State Alcoholic

163 *See* "price posting," *infra.*

164 Laws of 1942, c. 899. *See* "brand registration" *infra*

165 Laws of 1993, c. 183. *See* "five hundred foot rule," *infra*

166 Laws of 1995, c. 83. *See* "organization of the agency," *infra.*

167 Laws of 2002, c. 580.

Beverage Control Board were fired for accepting gratuities to expedite delivery of newly-issued licenses.[168] In addition, policemen were accepting money from applicants for help in securing licenses, through a middle man who was in contact with Board staff.[169] "Fixers" crowded the corridors of the Board, claiming to have influence with the Board and staff.[170] They were also conveying information about the issuance of licenses to third parties.[171] As a result, wholesalers "[would] approach licensees before [they] had received their licenses and promised to expedite the issuance of licenses if the applicants would buy their brands."[172]

The late 1930s and early 1940s also saw repeated price wars and chaotic market conditions, especially in New York City.[173] Prices changed so often at some package stores that owners kept blackboards in their shop windows to display hourly price changes.[174] Thugs rushed out of large crowds of people in front of certain large stores to block deliveries of liquor to the

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168 *Mulrooney ousts 5 aides for graft; finds inspectors charged fees for delivering licenses the board had approved; filing clerk suspended; confesses he rifled outgoing mail and gave permits to the accused agents*, New York Times, January 1, 1934, p. 1 [hereinafter *Mulrooney ousts 5 aides for graft*].

169 *Grand jury to get liquor graft case; accusation of clerk in state license office will be presented today; missing witness hunted, Mulrooney says 'middle man' in money-passing is suspected – Valentine plans raids*, New York Times, January 9, 1934, p. 16.

170 *See Mulrooney ousts 5 aides for graft.*

171 *Id.*

172 On January 2, 1934, Governor Herbert Lehman wrote to Edward P. Mulrooney, the Chairman of the SLA regarding this scandal, stating: "The effectiveness of liquor control in this State will depend very largely on the confidence which people have in its administration. If there is any corruption or graft in the administration of the liquor control law anywhere in this state it must be stamped out without delay and as fully as is humanly possible." *Lehman demands liquor graft war; orders Mulrooney to speed prosecution of any aides accepting bribes; 750 retail stores here; list of permits issued now will be published daily in move to discourage favoritism*, New York Times, January 3, 1934, p. 6.

173 *See* the more detailed history *infra* at "price posting and holding."

174 *Price war topples liquor costs here; retail stores are jammed as rates drop precipitately in day of hectic selling; 3 boroughs are affected; dumping by State monopolies and sales by big stores are among reasons suggested*, New York Times, May 16, 1936, p. 17.

stores.[175] In an attempt to make it impossible for its brands to suffer damaging price cuts, one distiller dispatched a group of 40 men to enter the large stores and buy up all of its products.[176] Distributors changed their prices several times a day, and gave enormous discounts to favored, usually very large, retailers.[177] During one price war, wholesale prices were so low that large retailers took advantage of the prices to buy up huge stocks of liquor, thus guaranteeing their ability to maintain artificially low prices for months on end, to the distress of small retailers who were unable to compete.[178] The SLA was powerless to do anything other than to enforce the rule prohibiting anything from blocking the windows in package stores.[179] "Fair trade" agreements to maintain minimum prices failed for lack of enforcement by the distillers.[180] Agreements among members of the tiers were able only to bring temporary truces in the wars. One particularly damaging price war came to an end after a mass meeting of over 1000 package store owners in New York City.[181] In 1942, the Legislature finally stepped in to bring order to the market with the

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175 *Liquor price war brings out thugs; deliveries at one store are blocked by strong-arm men until police arrive; peace promised today; agreement expected to end brief flare-up among the independent retailers;* New York Times, May 23, 1936, p. 17.

176 *Id.*

177 *Liquor discounts rise in price war; schedules of wholesalers are disrupted as rivals bid for retailers' trade; 12 ½% plus 1% offered; distillers, jobbers and stores group seek to halt strife involving national brands*, New York Times, April 23, 1937, p. 41.

178 *Liquor price war cannot end quickly; stores have large stocks bought at sharp concessions*, New York Times, September 22, 1940, p. F6.

179 *Liquor price war again cuts costs, further drop of 1 to 26 cents a pint brings throng of buyers to stores; small retailer gloomy; 'Not making any money," says one – end of slashing by tomorrow is seen*, New York Times, May 17, 1936, p. N1

180 *Price war on liquor remains unchecked; Dunne deplores it, announces a special meeting;* New York Times, September 4, 1940, p. 46.

181 *Liquor men move to end price war; will try scale 50 to 60 cents higher Monday in effort to stop cutting; reports distiller help; Dunne tells retail session makers pledge enforcement of the new levels,* New York Times, February 8, 1941, p. 27.

passage of a law prohibiting unlawful discrimination and requiring the posting and holding of wholesale prices.[182]

B. The 1950s

In 1955, Governor Averell Harriman ordered the State Commission on Investigation[183] to look into the affairs of the SLA because of widespread "rumors of fraud and corruption in [its] activities."[184] As a result of the investigation, substantial changes in the staff of the SLA occurred,[185] with resignations of three of the five commissioners, two deputy commissioners, an assistant counsel, eight investigators, and two auditors,[186] and the dismissal of an investigator.[187]

C. The 1960s

In 1962, the New York County District Attorney's Office commenced a grand jury investigation into "complaints that owners of bars, restaurants and package stores had to pay

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182 Laws of 1942, c. 899.

183 *See Condensation and Paraphrasal of Report Made to the Governor by J. Irwin Shapiro, Commissioner of Investigation,* October 21, 1955, PUBLIC PAPERS OF AVERELL HARRIMAN, FIFTY-SECOND GOVERNOR OF THE STATE OF NEW YORK 428, 472 (1955) [hereinafter PUBLIC PAPERS OF AVERELL HARRIMAN].

184 ERNEST HENRY BREUER, MORELAND ACT INVESTIGATIONS IN NEW YORK 1907 - 1965, 134 [hereinafter BREUER], quoting page one of the Commission's Report.

185 BREUER at 136. *See also O'Connell Leaves State Liquor Post*, New York Times, March 5, 1955.

186 *See* PUBLIC PAPERS OF AVERELL HARRIMAN at 472; Alexander Feinberg, *State liquor aide quits under fire; three others out; inquiry traces expenditures of $18,462 in excess of [deputy commissioner]'s income; conflict in testimony; $9000 payment on home of deputy commissioner and a refrigerator gift aired*, New York Times, June 25, 1955, p. 1 [hereinafter Feinberg]; Murray Schumach, *Liquor unit graft held widespread; bribery in state authority is charged – another deputy commissioner resigns*, New York Times, June 29, 1955, at 1; Layhmond Robinson, Jr., *Ex-commissioner of liquor board accused in 'deals;' Robertson named by Shapiro as the 'principal fixer' within state agency; O'Connell is not listed; Brooklyn car dealer called a power on licenses and the shifting of stores*, New York Times, November 1, 1955, p. 1.

187 *See* PUBLIC PAPERS OF AVERELL HARRIMAN at 472. *See also* Feinberg. One deputy commissioner committed suicide. *See* PUBLIC PAPERS OF AVERELL HARRIMAN at 472; *State aide gets Chapman's note; official's suicide message says 'I hope Dewey and Shapiro are satisfied,'* New York Times, April 16, 1955, p. 20.

bribes ranging from $3,000 to more than $10,000 to obtain liquor licenses."[188] When called to appear before the grand jury, the Chairman of the SLA refused to sign a waiver of immunity as required by law and was promptly dismissed by Governor Nelson A. Rockefeller.[189] In the wake of the grand jury investigation, several high profile figures were indicted, including the SLA Chairman, on a variety of charges, e.g., giving and accepting bribes, income tax evasion, and conspiracy. Four were tried and convicted or pleaded guilty and were sentenced to prison. The lawyers involved were disbarred.[190] The serious illness of the SLA Chairman led to the abandonment of the case against him.[191]

As a consequence of the grand jury investigation, in February 1963, Governor Nelson A. Rockefeller appointed a Moreland Act Commission[192] to study and reappraise the ABC Law with respect to the sale and distribution of alcoholic beverages and to propose necessary revisions in the law because of a "widespread loss of public confidence in the basic fairness and effectiveness of the law, and particularly the manner in which it is administered."[193] Although the Commission was created because of allegations of corruption, the Commission decided to examine the

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188 BREUER at 138 .

189 *Id.*

190 *See id.* at 149; People v. Morhouse, 21 N.Y.2d 66 (1967); In re Selig, 32 A.D.2d 213 (1st Dept. 1969), stay granted, 25 N.Y.2d 735 (1969); and Application of Licato, 104 A.D.2d 20 (1st Dept. 1984).

191 The conclusion of the Chairman's case was noted in an article about another figure who was involved in the investigation. *See* Ralph Blumenthal, *Morhouse, a Decade after Scandal, Is a Sick, Troubled Recluse*, New York Times, November 14, 1974.

192 The Commission was appointed pursuant to section 6 of the Executive Law enacted in 1958, which authorizes the Governor to create at any time a commission with subpoena power to examine the management and affairs of any department, board, bureau or commission in the state.

193 New York State Moreland Commission on the Alcoholic Beverage Control Law, *Interim Report to the Governor*, August 30, 1963, at 1.

licensing system to determine whether it invited corruption, rather than to focus on individual cases. The Commission's Final Reports made several recommendations, including lifting of the moratorium on licenses then in place,[194] allowing the sale of alcoholic beverages in separate departments of grocery stores and supermarkets,[195] eliminating the distance requirements between package stores,[196] the one license per owner rule,[197] the policy of not licensing grocers and other merchants,[198] and food requirements for bars and grills,[199] and repealing mandatory resale price provisions on the grounds that they led to higher prices for New York consumers.[200]

The Legislature enacted the Commission's recommendations regarding the elimination of the licensing moratorium,[201] the distance requirements of retail package stores,[202] and the food service requirements.[203] The Commission's recommendations to repeal the one license per owner

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194 New York State Moreland Commission on the Alcoholic Beverage Control Law, *Report and Recommendations No. 1: The Licensing and Regulation of Retail Package Liquor Stores* 8-10, January 3, 1964.

195 *Id.* at 42-43.

196 The existing statute provided that there be a distance between liquor stores of 1500 feet in new York City and 700 feet outside the City. ABC Law § 105(4), repealed, laws of 1964, c. 531, § 13.

197 *Id.* at 8-10.

198 *Id.* at 45.

199 New York State Moreland Commission on the Alcoholic Beverage Control Law, *Report and Recommendations No.2 , The Food Requirements in Bars and Grills*, 22-23, January 9, 1964.

200 New York State Moreland Commission on the Alcoholic Beverage Control Law, *Report and Recommendations No.3, Mandatory Resale Price Maintenance*, 30, January 21, 1964.

201 Laws of 1964, c. 531 §14.

202 Laws of 1964, c. 531 §13, repealing §§4 and 4a of §105.

203 Laws of 1964, c. 531 §4, adding §64-a(food available).

rule, and to permit the sale of alcoholic beverages in grocery stores and supermarkets were not adopted and the rules remain in effect today.[204]

Although the Commission's recommendation to eliminate resale price controls was not adopted at that time, the Legislature was compelled to repeal those provisions in 1990[205] in the wake of the 1987 decision of the United States Supreme Court holding that New York's mandatory resale price maintenance provisions violated the Sherman Antitrust Act.[206]

D. The 1980s

In the early 1980s, the ABC Law again came under scrutiny. The Management Systems Unit of the Division of Budget conducted a study of the SLA in 1980.[207] Among its recommendations were allowing liquor and wine stores to sell products associated with wine and liquor such as snacks and tobacco products, deregulating the credit system, simplifying the classes of licenses, strengthening the position of the Chairman vis à vis the other Commissioners, tightening administrative control of the local ABC boards, establishing priorities for types of SLA investigations, and establishing clear and uniform investigatory procedures and standards.

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204 The Commission marshaled the argument for and against this change and ultimately concluded that change was warranted so that "[t]he New York consumer will receive the overdue benefits of modern merchandising practices and one-stop shopping." Moreland Commission Report and Recommendation No.1, at 43. It recommended an orderly transition for the change regarding the sale of alcoholic beverages in grocery stores to "give present licensees opportunity to recoup part of their investment and to adjust to changed market conditions." *Id.* at 46.

205 Laws of 1990, c. 586.

206 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987).

207 New York State Division of the Budget Management Systems Unit, *Survey of the State Liquor Authority*, February 1980.

The Office of Business Permits, a predecessor of the Governor's Office of Regulatory Reform, issued a Report in March 1981,[208] recommending, among other things, streamlining the license applications and the renewal process, relaxing the tied-house rules, and allowing the industry to establish its own business practices and credit rules, and eliminating the state's labeling requirements.

Allegations of corruption caused the Senate Standing Committee on Investigations and Taxation to undertake a two-year investigation and to issue a Report in 1981.[209] That Report concluded that organized crime had infiltrated "bars, discotheques, nightclubs and restaurants."[210] In many on-premises clubs, organized crime figures would "invest money in a particular premises, . . . operate it from six months to a year and take whatever money they can out of it" and when that license was revoked, move their operation elsewhere.[211]

Unrelated to the issue of corruption, the Senate Committee concluded that the SLA's agency structure of five Commissioners with equal power diluted the Chairman's administrative power, and that the local ABC Boards as a vehicle for community input was no longer operative because the local Boards had been consolidated from 57 offices into 24 district offices and that the SLA often overruled the local ABC Boards.[212] The Committee noted that undue delays in the licensing procedure caused hardship for applicants and invited the use of political influence or

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208 New York State Office of Business Permits, *Streamlining Regulatory and Paperwork Process*, March 16, 1981.

209 Report of the Senate Standing Committee on Investigations and Taxation into the Operations of the State Liquor Authority, May 1981.

210 *Id.*

211 *Id.* at 23-24.

212 *Id.* at 32-37.

bribes.[213] The Committee also pointed to contradictory SLA interpretations of the 200 foot distance requirement between licensed premises and schools and places of worship.[214] The Committee recommended a major reorganization of the SLA, with a single commissioner, appointed by the Governor and approved by the Senate, to head the agency,[215] as well as a major overhaul of the ABC Law.[216]

In 1987, the Senate Committee on Investigations and Taxation again held a hearing at which the focus of its attention was proposed administrative reorganization of the SLA, its alleged sensitivity to political influence and pressures from gamblers and organized crime, as well as complaints concerning the extensive number of unlicensed premises operating in New York City and violations of the new 21-year-old drinking law, including activities at an East Side bar, notorious for its connection to a highly publicized "preppie murder" case.[217]

E. The 1990s

In 1995, the structural problem of the five commissioners, and the issues relating to the local ABC Boards and delays in processing licenses, were addressed as part of a restructuring of

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213 *Id.* at 6.

214 *Id.* at 34.

215 Lena Williams, *Toxic waste bills adopted in Albany*, New York Times, June 28, 1981, p. 35.

216 *Id.*

217 In the Matter of A Meeting with Chairman Thomas A. Duffy, Jr., New York State Liquor Authority, Before the New York State Senate Committee on Investigations, Taxation and Government Operations, Proceeding, March 24, 1987. *See* 1990 Second Avenue Restaurant v. New York State Liquor Authority, 75 N.Y.2d 158 (1990) (holding that the Chairman should have recused himself in a proceeding to suspend the bar's license on the grounds that his testimony before the Senate Committee reflected his bias against the bar, and reversing the SLA's suspension of the bar's license, and remitting the matter to the SLA for reconsideration.)

the SLA.[218] The number of Commissioners was reduced from five to three,[219] and the local ABC Boards were abolished.[220] Eliminating the local ABC Boards was expected to expedite the review of retail license applications.[221] However, at least one commentator expressed concern that while the licensing process might be made more efficient, the change could make it more difficult for communities to shut down disreputable bars.[222]

In 1997, the State Comptroller conducted an audit of the SLA's enforcement activities during the period from January 1, 1994 through December 31, 1995 and issued a Report concluding that the SLA lacked consistent enforcement priorities for its various types of investigations, and needed a better process for determining which cases could best be referred to the police.[223]

F. The 21st Century

In 2000 and 2001, the Assembly held public hearings to determine the extent to which community input was considered by the SLA when granting on-premise licenses.[224]

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218 Laws of 1995, c. 83.

219 Laws of 1995, c. 83.

220 Laws of 1995, c. 83. The local boards' responsibility for restricting hours of operation for licensed retail establishments was transferred to the SLA. Sponsor's Memorandum, A.8083, L. 1995, ch. 83.

221 Sponsor's Memorandum, A.8083, L. 1995, c. 83.

222 *The ABCs of State Budget*, Crain's New York Business, June 12, 1995.

223 State of New York, Office of the New York Comptroller, Division of Audit Management *Report 95-S-138*, February, 1997.

224 *See* New York State Assembly, Assembly Standing Committee on Economic Development, Job Creation, Commerce and Industry, *Community Participation in the State Liquor Authority Licensing Process*, Hearing held August 3, 2000; New York State Assembly Standing Committee on Economic Development, Job Creation, Commerce, and Industry, *Community Participation in the State Liquor Authority Licensing Process*, Hearing held March 16, 2001.

Between 2005 and 2007, a myriad of government officials investigated the alcohol industry and the SLA. In 2005, the State Comptroller conducted an audit of the SLA's oversight of wholesalers and in 2006 issued a Report indicating, among other things, that the SLA needed to: take a more active role in monitoring wholesaler and retailer activities; develop an electronic price schedule database available online to retailers and wholesalers; develop a process for recording all complaints and referrals received; develop guidance on when issuing a warning letter is appropriate; develop performance standards for processing a case, and make approximately 2000 SLA bulletins available on the SLA website.[225]

During the course of the audit there were management changes at the SLA and the appointment of a new Chairman.[226] The SLA also undertook to address the Comptroller's recommendations. When the SLA responded to the Comptroller in January 2008, the electronic price posting system had been in place for about a month. The SLA expanded its wholesale bureau, pledged better coordination of complaints and investigations and provided guidelines for issuance of letters of warning. The SLA stressed that its current system of performance standards on processing cases was always subject to numerous variables, unforeseen events, and external factors. The SLA reported that its bulletins and divisional orders were under review to determine which have been superseded, were time-specific, or needed to be amended or rescinded. To this

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225 Office of the New York Comptroller, *State Liquor Authority, Division of Alcoholic Beverage Control, Oversight of Wholesalers' Compliance with the Alcoholic Beverage Control Law Report* 2005-S-33.

226 January 24, 2008 Letter of Daniel B. Boyle, SLA Chairman, to Hon. Thomas P. DiNapoli, New York State Comptroller, on file at the Commission's office.

day, a comprehensive list of the SLA bulletins and a large number of past bulletins are not readily available to the public.[227]

In 2005, the Assembly Committee on Economic Development held a hearing on the SLA's response regarding allegations of the liquor industry's efforts to influence retailers' purchasing decisions by using illegal gifts and services as inducements.[228] In that same year, the Attorney General commenced an investigation of similar allegations. The investigation revealed that from 2003 through 2005,[229] favored retailers received illegal benefits in excess of $50 million.

The Attorney General's investigation concluded in late 2006 - early 2007 with a total of over $4,000,000 in civil penalties and costs assessed against fifteen suppliers, eight wholesalers, and thirty-one retailers.[230] The parties agreed to three Consent Orders and Judgments which prohibited suppliers, wholesalers and retailers from engaging in certain business practices, including: the giving and receiving or soliciting of cash, cash equivalents, trips, consumer items, free products, discounts, credits and rebates, free goods, and payments to third parties as inducements to retailers; advertising in retailers' in-state catalogues; buying a particular brand in order to purchase another brand; and selling and purchasing product at prices other than those filed with the SLA.

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227 *Id. See also* "administration of the Division of Alcoholic Beverage Control," *infra.*

228 New York State Assembly Standing Committee on Economic Development, Job Creation, Commerce and Industry, *Public Hearing on Oversight of the State Liquor Authority*, September 20, 2005.

229 Office of the Attorney General, *Liquor Wholesalers Settle Probe of Pay-to-play Practices; Agreement Is First in Ongoing Effort to Remove Illegal Practices in State's Liquor Industry*, Press Release,, August 30, 2006.

230 People v. Charmer Industries, Inc., *et al.*, Consent Order and Judgment, Index No. I -2006-7562, September 12, 2006; People v. Bacardi U.S.A., Inc., *et al.*, Consent Order and Judgment, Index No. 2006-9782, October 26, 2007; People v. 33 Union Square West, Inc., *et al.*, Consent Order and Judgment, Index No. I-2006012745 10 - 11, January 2, 2007.

According to the terms of the Consent Order with the retailers, any subsequent violations of the Consent Orders by the parties to it, as well as non-party retail licensees who were served with notice of the terms of the Consent Order, are deemed to be violations of the ABC Law.[231]

During the Attorney General's investigation, the SLA Chairman resigned and, as noted earlier, in January 2006, Governor George Pataki appointed a new Chairman to the SLA.[232]

In 2006, the Assembly held public hearings on problem establishments and oversaturated neighborhoods after numerous complaints that the SLA was issuing on-premises licenses in neighborhoods already crowded with bars and lounges.[233] The SLA reacted to these concerns by convening a task force to review on-premises licensure, and made recommendations on balancing the interests of on-premises licensees and the interests of the communities where they are located.[234] During the course of our interviews, we were advised by at least two community boards that the SLA has been much more responsive to their concerns. On the other hand, the business community expressed concern that perhaps the SLA is too responsive.

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231 People v. 33 Union Square West, Inc. *et al.*, at 10-11.

232 Alex Mindlin, *In Party Central, a Clamor to Keep Tabs on the Tap,* New York Times, February 12, 2006.

233 New York State Assembly Standing Committee on Economic Development, Job Creation, Commerce, and Industry and Assembly Standing Committee on Codes, *Joint Public Hearing to Examine the Impact of the Continued Operation of Problem On-premise Establishments and the Oversaturation of Licensed On-premise Establishments on Host Communities*, May 5, 2006. Andrew Jacobs, *Hearing on Liquor License Bill Draws Crowd,* New York Times, May 6, 2006. That same year the Assembly passed a bill that would, among other things, have required the approval of the local elected body within 90 days after the SLA granted a license as an exception to the 500 foot rule. *See* A. 10191. *See also Silver Hearing and Legislation on Rowdy Bars Leads to SLA Task Force,* Community Update of Honorable Sheldon Silver, available at http://assembly.state.ny.us/member_files/064/20070425/.

234 New York State Liquor Authority Taskforce for the Review of On-premises Licensure, *Report,* December 8, 2006.

In 2009, Governor David Paterson appointed Dennis Rosen as the new Chairman of the SLA.

Although there are clearly problems with the ABC Law and its administration as discussed in this Report, as well as underage drinking and intoxication and their related problems, overall it appears that the goals for beverage alcohol control first articulated in the Interim Rule and again in the 1934 law have been achieved in this state, namely, promoting temperance in consumption and respect for and obedience to the law. Given that achievement, it is not surprising that many would consider beverage alcohol as "an ordinary article of commerce, subject to substantially the same market and legal controls as other consumer products."[235] Recent developments in the UK illustrate the consequences of implementing that view."[236] Beer, wine, and liquor are sold in many different kinds of outlets, and are available for purchase 24 hours a day.[237]

The big box grocery chains provide a concentration of outlets for extremely cheap alcohol. Four chains control about 75% of the market, and frequently use alcohol as a "loss leader."[238]

There are no bans on drink specials or minimum prices at on-premises establishments, thus encouraging binge drinking.[239] According to one observer, these changes have

> transformed the average British pub from a haven of smoked glass, polished brass and mahogany into blaring dumps filled from one end to the other with quiz machines, karaoke songs, and drunken teenagers shouting at each other over lurid drinks. . . . Many of the

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235 *Granholm,* 544 U.S.at 494.

236 Pamela S. Erickson, *The Dangers of Alcohol Deregulation: The United Kingdom Experience* 1 Public Action Management, 2009 [hereinafter *Dangers of Alcohol Deregulation*].

237 *Id.* (off-premises as of 2003). *Pubs in new 24-hour opening era*, BBC News, November 24, 2005 http://news.bbc.co.uk/2/hi/uk_news/4464284.stm.(on-premises as of 2005).

238 *Dangers of Alcohol Deregulation* 11.

239 *Id.* at 1-2.

> establishments are so pressed for custom that they will do anything to fill their bar - mainly selling toxic drinks in devastating quantities to kids who consider a good night out to be one that ends in copious vomiting.[240]

During the New Year's celebrations in 2009, London set up 13 "booze buses" (field hospitals) to deal with injuries suffered by revelers; ambulance call centers reported receiving calls coming in every seven seconds.[241]

The irony of changing the longstanding rule of closing pubs at 11:00 p.m. was to discourage binge drinking and reduce the number of intoxicated individuals and to foster a "continental style café culture"[242] and a more mature approach to alcohol consumption.[243]

Instead of a refined cultured situation, the U.K. is experiencing an alcohol epidemic, characterized by increases in alcohol-related diseases like cirrhosis, rates of intoxication of 15- and 16-year olds that are double those in this country,[244] and hospital admissions for acute intoxication which have more than doubled over the past ten years.[245]

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240 Andrew O'Hagan, *Pubs are the last place I'd want to drink in*, Telegraph, August 3, 2008.

241 Neil Sears, *Boozy Britain's bloody New Year: A 999 call every seven seconds in alcohol-induced mayhem,* Daily Mail, January 2, 2009.

242 George Jones and Sarah Womack, *Gordon Brown orders review of 24-hr drinking*, Telegraph, July 26, 2007.

243 *24-hour drinking - one year on*, MSN UK News, http://news.uk.msn.com/24_Hour-Drinking-One_Year_on.aspx.

244 *Dangers of Alcohol Deregulation* 6.

245 *Id.* National Conference of State Liquor Administrators, *Why can't we sell alcohol like tires and mayonnaise?* (6/2009), http://www.ncsla.org/pdf/2009/NCSLA_Presentation_PamErickson.pdf

V. Administration of the ABC Law

Finding

I. Licensing

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.

Narrative

Of the agency's approximately 149 employees, approximately 70 are in licensing, including 22 license examiners. Licensing receives approximately 850 applications a month and processes approximately 700 in that same time period. In 2008, licensing staff processed 10,760 license applications, and issued 31,156 permits. They are now overwhelmed by a backlog of over 3,000 license applications dating as far back as nine months. This situation is untenable for many reasons.

It is not clear how the SLA's current structure, practices and staffing can address its substantial backlog of license applications and keep up with new license applications. For example, the new SLA administration estimates that at least 15 new staff are needed in licensing to address the backlog and remain current.

Some people, including those quite familiar with the SLA's budget, have remarked about the backlog: "What's the big deal, the state has already banked the license fees, the applicants can wait." This shortsighted view, to be kind, is nothing less than foolish.

The "what's the big deal" advocates both in and out of government basically view the SLA as a "cash cow" and care little about the importance of an expeditious, careful and fair licensing process dedicated to the well-being of New York's citizenry and the State itself. As noted earlier, the SLA is charged by law with regulating a product that can cause significant problems if not sold and used responsibly.

Small business owners, and some large ones as well, are forced to suffer ever-mounting expenses for months on end because of these delays. Moreover, they are reluctant to start new construction or remodeling, negatively affecting the community's economy. The people ordinarily hired – the construction crew, the plumbers, the carpenters, the electricians, the computer and communications technicians – cannot be put to work. The situation is also depressing the creation of new jobs that would normally be part and parcel of a new business and depriving the State of new revenues from sales and income taxes ordinarily generated by the new businesses.

Moreover, the backlog has seemingly enabled a new creature of corruption, the corrupt "expediter," who purports to assist applicants, but frequently takes advantage of them by submitting defective applications, failing to submit applications after accepting a fee to do so, and bribing SLA licensing staff to fast-track the application. Notably, a New York County grand jury is in the midst of concluding a criminal investigation into the bribery of SLA licensing examiners by corrupt "expediters" that is expected to be completed by the end of October. The State

Inspector General is also expected to issue a report in the near future detailing the corruption and other problems in the agency.[246]

While the premises' license application sits in limbo, many restaurants and cafés are encouraging customers to informally "BYOB" (bring your own bottle). An informal "BYOB" has a surface appeal because it satisfies customers' desire to have some wine, for example, with their meal. Some applicants are serving a complimentary glass of wine to their customers. However, both allowing informal BYOB and serving complimentary alcoholic beverages in an unlicensed retail premises are against the law.[247] BYOB and complimentary drinks create the potential for abuse as some restaurant or café owners may decide that BYOB is a cheap alternative to applying for a license. The SLA has no way of knowing what premises are engaging in this conduct which may endanger the health safety and welfare of the public.

For purposes of this discussion, "BYOB" is not to be confused with permissible conduct under a section 64-b license for a bottle club, which is a different type of license from the type of license for which most restaurants have applied. This type of license allows patrons of the premises to bring their own alcoholic beverages; however, license applications under this section are subject to the same types of delays facing all other licenses. To the extent that a BYOB privilege may be a way to deal with licensing delays, it should clearly be a privilege that is extended only when the applicant seeks a license for a premises where food is consumed and that

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246 Several days before the publication of this Report, a restaurant owner and an expediter were indicted by the New York County District Attorney for plotting to bribe the SLA. A former SLA deputy commissioner for licensing and his nephew pleaded guilty to violating the Public Officers Law revolving door law for former state employees. Edmund DeMarche, *Booze-board bribery raps*, New York Post, 12/14/09; New York County District Attorney, News Release, December 10, 2009.

247 http://www.abc.state.ny.us/bring-your-own-bottle-byob-0.

terminates when the license is issued. Moreover, if the BYOB privilege is implemented, the SLA should have the authority to declare a moratorium when it deems that the backlog of licenses has ended.

An alternative way for addressing the backlog would be to consider giving the SLA the authority to issue temporary permits as an alternative to BYOB. However, certain conditions should be met to ensure that the concerns for public health and safety are met:

1) the premises must satisfy the requirements of the ABC Law;

2) the permittee must demonstrate an interest in the premises either by lease or ownership; and

3) the permittee must be otherwise eligible to hold a license.

Assuming the above criteria are satisfied, the temporary permit should be viewed as conditional and subject to expiration; otherwise the potential exists that the temporary permit could become a de facto permanent license. To ensure that the public's health, safety and welfare are protected, these permittees should be monitored closely. Because the underlying problem of the licensing backlog is due in large measure to the SLA's lack of resources, consideration should be given to how the SLA will carry out the necessary oversight.

Finally, it is worth noting that the SLA, in an attempt to speed up the process, has decided to accept applications containing factual statements certified by an attorney as well as by the applicant. The details of the self-certification process are still in the works.

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.**

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.

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.**

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

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.

Narrative

Pursuant to section 18 of the ABC Law, the Chairman of the Authority is charged with the administration of the agency. Recent directives of the Division of Budget (DOB) have left the Chairman with little to administer. In fiscal year 2003-04, DOB directed that the human resources function and related personnel of the SLA be moved to the Office of General Services (OGS). In 2004, the DOB directed that all other administrative functions and related personnel be transferred to OGS, in an arrangement known as "hosting." "Hosting" is a term used to describe circumstances when an agency is not directly responsible for some or all of its administration. For

example, the Law Revision Commission is hosted by DOB. DOB handles our personnel administration, travel reimbursement and audits, time and attendance records, payroll, purchasing and contracts, and finances. With a budget of $150,000, and 3 part-time staff, the arrangement makes sense as we do not have the capability of attending to those affairs ourselves.

The reasoning behind requiring that the SLA be hosted is less clear. The SLA's mission is of major importance, to protect public health, safety and welfare, so it should be exercising control over its needs for budgeting, tracking spending, staffing and technology needs, and its other programs without having someone looking over its shoulder. Currently, it has a severe backlog in licensing and its enforcement is reactive rather than proactive because the concerns of economies of scale have trumped an interest in seeing the SLA fulfill its mission. Key staff positions of agency administrators who would answer directly to the Chairman and the Commissioners are vacant because decisions on staffing are not driven by concern for agency objectives. Thus, the Chairman, who is the head administrator for the agency, is reporting to OGS, rather than overseeing an administrative staff who reports to him. The result is twofold: because another agency is second-guessing the SLA's needs, the agency's mission to protect the public health, safety and welfare has been seriously undermined, and because the SLA has lost administrative control of its staff, there has been an overall breakdown in internal procedures.

Recommendation

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

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.

Narrative

The SLA has an annual budget of approximately $18,000,000 and annual revenues of approximately $54,000,000, making it the third largest revenue generator among state agencies. Despite its fiscal importance, it does not make its own fiscal decisions. With the move of all financial personnel to OGS at the direction of DOB in 2004, the agency lost the key positions which would have enabled it to evaluate how it is spending its money, where and how to spend its funds, and how to budget for its needs for additional staff and improved technology. The lack of agency oversight of its own fiscal needs has undermined its ability to effectively carry out its mission to protect the public health, safety and welfare. Instead, staffing decisions and purchases for improved technology are in the hands of individuals divorced from the daily activities of the agency, and less able to evaluate its needs.

While we understand the desire to promote fiscal restraint, requiring the Chairman and the other Commissioners to gain third party approval for decisions regarding the agency's needs undermines their authority, thus hampering their ability to assess how the agency can best fulfill its mission.

Recommendation

Create a budget & 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.

Narrative

In fiscal year 2003-2004, as noted earlier, DOB directed that the human resources function of the SLA be moved to OGS. Additionally, key positions of Chief Executive Officer, Assistant CEO, Director of Internal Audit, and the Director of New York City operations remained vacant for several months during the past year. In the absence of oversight at so many levels, it is not surprising that there were lapses in administrative protocols and that the agency experienced problems with improper use of state vehicles, improper travel reimbursement, and improper use of state time and resources by SLA employees.[248]

We have been advised by the new leadership at the SLA that it was recently allowed to fill the exempt position of Director of Internal Audit and is re-instituting basic state administration protocols such as time and attendance policies, proper use and authorization of state vehicles, employee disciplinary protocols, the necessary approvals for overtime, and spending authorizations. These are proper and necessary requirements that have been sorely lacking.

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.

Finding

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[248] Report of Office of Inspector General, September 2, 2009(criticizing the use of state vehicles by SLA personnel); Report of Office of the Inspector General, January 15, 2009(criticizing unauthorized use of state time and resources by SLA employees); Report of Office of Inspector General, July 21, 2008(investigating alleged improper reimbursement for travel expenses by SLA staff).

The SLA lacks managers in its regional officers 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.

Narrative

To ensure the proper level of oversight in the regional offices requires the creation of a mid-level manager to oversee the operations of office, to coordinate the office functions, and to communicate with senior staff across the agency. The new SLA administration has directed its new Assistant CEO to oversee all the functions of the New York City office.

Because of the clear career advancement opportunities, the agency is having difficulties recruiting and retaining staff in the licensing bureau. Apparently, the 57 Local ABC Boards that were part of the administrative structure of the SLA at its inception, served, among other things, as stepping stones on a career with the SLA. While not the only reason for a lack of a career path, the abolition of the local boards in 1995 eliminated that option. The lack of a career path for clerks, for example, has led to a high rate of turnover among the employees. The problem will only grow worse as employees reach the age of retirement, and the agency gradually loses its trained and experienced workforce.

Recommendations

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.**

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

Finding

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

Narrative

Today, the SLA staff is a shadow of its former self. When it was first established, the Authority had five Commissioners, and 57 Local ABC Boards that served as vehicles for community input, and often were a spring board to a career within the SLA. The 57 local boards were consolidated into 27 boards and then eliminated by the Legislature in 1995. At the same time, the number of Commissioners was reduced by the Legislature to three.

In fiscal year 2003-04, DOB directed that human resources function of the SLA be moved to OGS. In 2004, DOB directed that all other administrative functions be transferred to OGS, in an arrangement known as "hosting."

Without altering the licensing and enforcement responsibilities, DOB reduced the staff in 2008 and again in 2009 to 155 positions, of which 8 remain vacant. No vacant position can be filled unless the Division of Budget approves it.[249]

Many key leadership positions at the SLA have remained unfilled for long periods of time during the last several years:

Commissioner

Chief Administrative Law Judge

Chief Executive Officer

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249 See 2008 Annual Report http://www.abc.state.ny.us/system/files/2008annualreport.pdf.

Director of Enforcement

Deputy Commissioner for Enforcement/ Director of New York City Operations

Other positions that continue unfilled include Assistant Director of Enforcement, Assistant Director of Licensing, and Supervising Hearing Officer.

Between the hosting arrangement and the directives of DOB, the Chairman and the Commissioners have been stripped of their oversight of the agency's administration. However, the new SLA administration was recently permitted by DOB to fill the vacant positions of Assistant CEO and Director of Internal Audit. The Assistant CEO has been directed to assume supervision of licensing, enforcement, hearings and the legal bureau of the New York City office.

As we noted earlier, the new SLA administration estimates that at least 15 new staff are needed in licensing to address the backlog and remain current. Enforcement has 38 inspectors[250] to oversee the 70,000 licensees in the state. Enforcement has become a reactor to complaints rather than a pro-active overseer of its licensees. The new SLA administration has been told, again as noted earlier, that the only vacant enforcement position it can fill is that of Director of Enforcement. However, the agency is still calculating how many additional enforcement inspectors is necessary carry out its mission.

The effect of the reduction of SLA staff to its present level, and the continuing void in the management positions has had an adverse impact on the agency's proper functioning.

Recommendation

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

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250 These numbers are as of August 13, 2009.

Finding

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

Narrative

Staff morale at the agency is extremely low. Some employees are apathetic, putting in the bare minimum required; others are burned out from working earnestly to compensate for the agency's deficiencies. Many employees are routinely working above their pay grade, without proper supervision or training. Critical job functions normally assigned to several employees are consolidated between one or two staff members without giving them additional compensation. For example, enforcement agents are often required to serve as internal license examiners, and keyboard specialists are assigned critical roles in application approvals.

The current internal procedures related to normal business operations, such as answering phones, managing inquiries and the licensing process itself, are inefficient, leading to undue delays and staff burnout. For example, until recently, the voice mail system was discontinued due to an abundance of calls, and staff untrained in customer service skills were forced to respond to angry applicants demanding information on their backlogged licenses. The agency does not offer general training programs, such as in customer service, nor training programs targeted at specific functions such as license application examination. The agency also does not participate in inter-agency programs aimed at improving organizational culture and improving staff morale.

Recommendations

A) Adopt training programs to:
1) educate new employees,

2) promote compliance with internal procedures and policies, and
3) update employees on industry, community, legal and technological developments.

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.**

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.**

Finding

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

Narrative

In the course of our study, we encountered a number of matters illustrating the problematic nature of the SLA. Thus, at one of our open meetings we were surprised to hear from the SLA that a liquor store owner who agrees to exchange a bottle of wine just purchased by a consumer violates the ABC Law. Apparently, this is so because a sale includes an exchange, a customer is not a licensed seller and the liquor store owner is prohibited from purchasing alcohol from an unlicensed seller. Doubtless, buying from an unlicensed seller may raise "public health concerns." Nonetheless, surely the prohibition can be interpreted in a fashion that would exempt exchange of recent purchases in which such health concerns are not present.

Notably, after the SLA comments at our meeting, a package store owner approached a Law Revision Commissioner and said that "this is silly, it makes no sense. Look, what do you expect me to do in these exchange situations? Lose a good customer even though there is no real public

health concern?" A number of other package store owners made similar comments using much harsher language to describe the SLA.

In contrast to the strict textual analysis in the above wine exchange issue, recently we were made aware of an SLA interpretation of the ABC Law that seems to ignore the plain meaning of the statutory text. Under ABC Law section 64(1), an applicant for a license to sell liquor at retail is entitled to have the license granted except for good cause shown. In deciding the existence of good cause, under ABC Law section 64(6-a), the SLA determines whether public convenience and advantage and public interest will be served by granting the license. In making that determination the SLA is directed to consider certain specified information including:

a) the number and kinds of liquor licenses in proximity to the location.

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c) the effect of granting the license on vehicular traffic and parking in proximity to the location.

d) the existing noise level at the location and any increase in noise level that would be generated by the proposed premises.

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f) any other factors specified by law or regulation relevant to determine the public interest and public advantage and convenience to the community.

Despite the plain language of subdivisions (1) and (6-a), and the factors to be considered in deciding whether to grant a retail license, the SLA has opined that other nearby licensed premises, the effect on vehicular traffic and parking, existing and prospective noise levels were

not relevant considerations. The SLA bases this opinion on ABC Law section 64 (7-a). That subsection mandates a denial of an on-premises retail consumption license for any premises which is "within 500 feet of three or more existing licensed and operating on premises for consumption venues, unless after consultation with the municipality or community board that granting such license would be in the public interest." According to the SLA, the number of other licenses in proximity, evidence of vehicular traffic and parking, and existing and increasing noise levels are only relevant in 500 foot cases. That seems quite an inventive reading that has the potential of leading to absurd results. Consider if you will, two "all night" bars featuring musical entertainment, with a capacity of 350 persons within five hundred feet of each other. The bars make life difficult to unbearable for the primarily residential surrounding neighborhood. An application for a license is made for a third bar more than 550 feet from the other two. Given that there are only two other bars, the 500 foot rule has no application. Consequently, under the SLA view, overwhelming evidence of the existing and prospective noise levels, excessive vehicular traffic, and cars parked legally or illegally throughout the neighborhood is simply not material or relevant. Such a result makes little sense and certainly conflicts with the plain meaning in the language of the respective provisions. The SLA has asserted that its interpretation is supported by judicial decision. We requested those citations and have yet to receive them.

Also of interest is the SLA's recent decision to permit a licensee to move a package store license to another location where it would operate a wine store. On its face, there is nothing unusual in the SLA's approval following two previous denials. Interestingly, a little more than two years earlier, the same licensee had been fined $5,000 and had to surrender its license for safe keeping because it had obtained the license based upon false representations and conducted its

operation in an unlicensed area and in violation of restrictions placed on activities that could be conducted in a package store. Subsequently, the licensee sought to move its license to a wine store; that application was denied in part because public convenience and advantage would not have been served. Notably, the SLA gave an additional reason. Given the previous disciplinary action against the package store the Authority remained unconvinced that the proposed store would be operated in strict compliance with the ABC Law. Moreover, reasoned the Full Board, the applicant's previous conduct, including its misrepresentations in securing that license, cast a negative shadow on its character and fitness to supervise properly the proposed licensed premises. Remarkably and disappointingly, the public record of the above-mentioned 2009 wine store license approval is silent concerning the previous misrepresentation and misconduct of the applicant as well as any findings with reasons concerning its present character and fitness.

In years past, decisions of the SLA oft times found tough sledding in the courts. Unsurprisingly, recent case law also casts doubt on the SLA's competence to carry out the enforcement and licensing portion of its core mission. These cases reflect incompetent investigations, inadequate preparation of witnesses who testify at hearings, poorly-drafted findings of fact absent adequate, and at times, any factual bases, taking verbatim an applicant's or opponent's peroration that granting a license would or would not serve the public convenience and advantage and public interest, and surrounding it with boilerplate language while offering it as their own, reliance on speculative inferences, reliance on out of date, incomplete or speculative

information, unpersuasive and citationless court filings, and refusal to follow procedures required both by the ABC Law and the SLA's own regulations. [251]

Recommendations

Review case preparation procedures.

Review case decisions to evaluate current procedures.

Interpret the law in concert with the statutory intent to avoid an absurd result.

Finding

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

Narrative

The SLA license and application process remains firmly entrenched in the early 20th century, scarcely touched by the computer and digital age. Each month the SLA receives approximately 850 voluminous paper applications. All of the application's materials must be manually entered or scanned into the computer system, making the entire process both error-prone and needlessly time-consuming. The licensing software used by the SLA is incompatible with software used by the enforcement bureau, impeding the SLA's ability to cross-reference information about the history of its licensees between its two primary functions.

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[251] *See,* e.g., Riverhead Tavern, Inc. v. New York State Liquor Authority, 61 A.D.3d 877, 876 N.Y.S.2d 882 (2nd Dep't 2009); In re 25-24 Café Concerto Ltd. v. New York State Liquor Authority, __ A.D.3d __, 881 N.Y.S.2d 427, 2009 N.Y. Slip Op. 05410 (1st Dep't 2009)(3-2 decision) appeal pending; Westside Pub Corp. v. New York State Liquor Authority, 20 Misc.3d 1106(A), 866 N.Y.S.2d 96, 2008 WL 2513644, 2008 N.Y. Slip Op. 51252(U) (Sup. Ct. NY Co. 2008); N.Y. Palm Tree, Inc. v. New York State Liquor Authority, 18 Misc.3d 1102(A), 856 N.Y.S.2d 25, 2007 WL 4374275, 2007 N.Y. Slip Op. 52376(U) (Sup. Ct. NY Co. 2007); Ban Bar Coalition v. New York State Liquor Authority, 12 Misc.3d 1192(A), 824 N.Y.S.2d 752, 2006 WL 2271291, 2006 N.Y. Slip Op. 51544 (Sup. Ct. NY Co. 2006); Flatiron Community Association v. New York State Liquor Authority, 6 Misc.3d 267, 784 N.Y.S.2d 823 (Sup. Ct. NY Co. 2004).

For at least the past three years, the SLA submitted requests to DOB and the Office of Technology for the acquisition of the software necessary for an "e-licensing" system. These proposals were rejected by budget overseers, with little guidance or real assistance to the desperate need for modernization. It took investigations of industry practices with respect to gifts and services by the Office of the State Comptroller and the Attorney General to make online submissions of price posting information technically feasible. That process was completed in 2006. However, the current software still makes it impracticable to analyze the price posting data.

Finally, this year DOB directed the SLA to join with it, the Office of Technology, and several other agencies in an e-licensing project that is expected to take at least two years to complete. In the meantime, the SLA is attempting to work through OGS to acquire a Global Information System to further streamline and shorten the licensing process. The benefit of this system is that it would contain information needed to make determinations as to the number and locations of places of worship, schools, and other types of establishments surrounding the proposed licensed premises.

As a consequence of the delay, the SLA is at least three years away from obtaining and implementing state of the art technology, leaving the agency far behind other New York State agencies and other liquor authorities across the country.

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.**

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.

Narrative

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

As we noted earlier, perhaps the most troubling concern with alcoholic beverage control is that individuals who begin consuming alcohol before age 15 "are 4 times more likely to become alcohol dependent than those who did not drink before 21 years,"[252] a trend which underscores the serious nature of underage drinking. Underage drinking is a multi-faceted problem exacerbated by an extensive black market for obtaining false identification on the Internet and elsewhere, lawful admission of under-21 customers to bars and clubs, late closing hours, a proliferation of keg parties, house and hotel parties, and the many establishments that cater to underage drinking. It is possible to go into many bars across the state and see young people who are simply not 21 years of age. While many retailers work hard to avoid serving underage customers by using various methods and devices to screen fraudulent IDs, the fraudulent IDs can best many of their systems.

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252 *Underage Drinking in New York, The Facts*, Underage Drinking Enforcement Training Center, at www.unetc.org/underagedrinkingcosts.asp; *see also* Susan E. Foster, et al., *Alcohol Consumption and Expenditures for Underage Drinking and Adult Excessive Drinking*, 289 JAMA 989, 989 (2003).

Enhanced enforcement programs are widely recognized as an effective means of reducing sales to minors.[253] One of the SLA's major functions is to ensure that licensees are obeying the law with respect to serving alcoholic beverages to minors. The SLA does not have the capability to make underage drinking a statewide priority. It has only 38 enforcement officers[254] and the position of Director of Enforcement has been vacant for over six months. Only recently has the new SLA administration been told by DOB that it could fill the position. The position of Deputy Commissioner of Enforcement/Director of New York City Operations has likewise been vacant for over six months. The newly-appointed Assistant CEO has been directed to supervise the day-to-day operations of enforcement as well as the day-to-day operations of licensing and hearings as well as the legal staff. In the absence of leadership and a minimal enforcement staff, it is no surprise that enforcement by the SLA has lapsed into a passive role. Instead of playing a pro-active leadership role among the various law enforcement agencies with which it partners, it generally tags along with local law enforcement officers. Because underage drinking may not be a priority of local law enforcement, underage drinking has been left largely unaddressed in certain parts of New York State. The SLA has to be more pro-active in enforcing underage drinking laws. Enforcement officers should be out and about in local communities, where they will see that many venues are named in such a way as to attract underage drinkers, and advertisements whose only purpose is to encourage binge drinking.

B. Unsystematic and inconsistent enforcement procedures neglect public health and safety.

253 http://www.thecommunityguide.org/alcohol/lawsprohibitingsales.html

254 These numbers are as of August 13, 2009.

The same staffing issues have resulted in the vast majority of the SLA's enforcement only responding to complaints from other licensees or the public, and referrals from outside entities. In this regard, the SLA more often than not fails to conduct an independent investigation of a complaint, accepting the information provided by the informant at face value.

Time and again we heard in our interviews and meetings that the SLA's independent investigations often focus on de minimis violations that can easily be corrected without the expenditure of agency resources, or are more properly the responsibility of another agency.

Staffing limitations also contribute to the fact that the SLA does not conduct regular inspections of its licensees, such as on-site visits, to determine whether the licensed premises is observing the requirements of the ABC Law and the terms of the license.

C. Lack of oversight of licensees has led to abuses in the industry.

Between 2005 and 2007, a myriad of government officials investigated the SLA's oversight of the alcohol industry. In 2005, the State Comptroller conducted an audit of the SLA's oversight of wholesalers and in 2006 issued a report indicating, among other things, that the SLA needed to take a more active role in monitoring wholesaler and retailer activities.

In 2005, the Assembly Committee on Economic Development held a hearing on the SLA's response to allegations of the liquor industry's efforts to influence retailers' purchasing decisions by using illegal gifts and services as inducements.[255] In that same year, the Attorney General

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[255] New York State Assembly Standing Committee on Economic Development, Job Creation, Commerce and Industry, *Public Hearing on Oversight of the State Liquor Authority,* September 20, 2005, on file at the Commission's office.

commenced an investigation of similar allegations. The investigation revealed that from 2003 through 2005,[256] favored retailers received illegal benefits in excess of $50 million.

The Attorney General's investigation concluded in early 2007 resulting in over $4,000,000 in civil penalties and costs assessed against 15 suppliers, 8 wholesalers, and 31 retailers.[257] The parties agreed to 3 Consent Orders and Judgments which prohibited suppliers, wholesalers and retailers from engaging in certain business practices, including: the giving and receiving or soliciting of cash, cash equivalents, trips, consumer items, free products, discounts, credits and rebates, free goods, and payments to third parties as inducements to retailers; advertising in retailers' in-state catalogues; buying a particular brand in order to purchase another brand; and selling and purchasing product at prices other than those filed with the SLA.

According to the terms of the Consent Order with the retailers, any subsequent violations of the Consent Orders by the parties to it, as well as non-party retail licensees who were served with notice of the terms of the Consent Order, are deemed to be violations of the ABC Law.[258]

D. Failure to analyze price posting data submitted by wholesalers makes it difficult to evaluate whether the industry is engaging in unlawful price discrimination.

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256 *Liquor Wholesalers Settle Probe of Pay-to-Play Practices; Agreement Is First in Ongoing Effort to Remove Illegal Practices in State's Liquor Industry*, Press Release, Office of the Attorney General, August 30, 2006.

257 People v. Charmer Industries, Inc., et al., Consent Order and Judgment, Index No. I -2006-7562, September 12, 2006; People v. Bacardi U.S.A., Inc., et al., Consent Order and Judgment, Index No. 2006-9782, October 26, 2007; People v. 33 Union Square West, Inc., et al., Consent Order and Judgment, Index No. I-2006012745, January 2, 2007.

258 *People v. 33 Union Square West* at 10-11.

The SLA is unable to determine industry's compliance with the law. Price posting information is not monitored so it is no surprise that the SLA would fail to detect abuses in the industry. Because it does not monitor the information, it is unable to demonstrate that the objectives of the post and hold process are achieved.

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.**

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

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.**

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

Finding

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

Narrative

In response to the demands of the 21st century, the SLA maintains a website for the public. While websites can serve an important function, they are only as good as the information they

contain. The SLA's website does not contain information that is vital to understanding how the agency interprets the laws it administers. None of its written decisions are available on line.

In 2006, the Office of State Comptroller issued a Report indicating, among other things, that the SLA needed to make its 2000 bulletins available on the SLA website. To this day, a comprehensive list of the SLA bulletins and a large number of past bulletins are not readily available to the public.[259] At the beginning of our study, we asked for these documents. To date, we have received a list of bulletins and divisional orders, but we have not received the bulletins and divisional orders themselves.

Websites are not the only means for communicating such information to the public. However, the SLA's written decisions, formal opinions, bulletins and divisional orders are not disseminated in any other way to the public.

The SLA's regulations and policies have not been updated or reviewed in decades, a requirement of section 207 of the State Administrative Procedure Act and newly issued Executive Order 25 of August 6, 2009.[260] Indeed, from a review of the list of documents it is not clear to what extent they still guide agency decision-making. One bulletin that we particularly requested, Bulletin 279, issued in 1955, is a case in point. It apparently forms the basis of the SLA's current requirement that an applicant for a new liquor store license identify the four liquor stores nearest to the proposed premises, which are in turn invited to object to the issuance of the new license.

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259 *Id.*

260 Executive Order 25 Establishing a Regulatory Review and Reform Program requires 7 agencies, including the Authority, to conduct a review of its rules and regulations "to identify unsound or unduly burdensome or costly rules and paperwork that can be eliminated or reformed to . . . to reduce substantially unnecessary burdens, costs and inefficiencies and to improve the State's economy while maintaining appropriate protections for the public health, safety and welfare and the conduct of business."

However, Bulletin 279 was based on the ABC Law's now-repealed prohibition against removing an existing store to a location within 1500 feet of another store in New York City and within 700 feet of another store outside of New York. Indeed, in 1965 portions of Bulletin 279 relating to the four nearest stores were called into question by the New York Court of Appeals,[261] and Bulletin 279 appears to have been rescinded by Bulletin 390. Nevertheless, the four nearest liquor stores requirement remains current, and despite the SLA's continued reliance on it, Bulletin 279 does not appear in the ABC Law, the Code of Rules and Regulations for the Division of Alcoholic Beverage Control, nor on the Agency's website.

The need for the publication of agency documents and a review of their continued applicability is perhaps best underscored by the lack of consistency in advice to applicants and licensees. In our discussions and public meetings we heard countless complaints that licensees would get different answers to the same question depending on which office they called, on which day they called, and with whom they spoke on any given day.

In the past, the SLA has on several occasions sought statutory amendments to the ABC Law to grant it general rulemaking authority. While there are supporters of this request, a review of the implementation of the restructuring of the agency and a review of the current rules should be completed before a decision is made about general rule making authority.

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.

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261 Hub Wine & Liquor Co. v. State Liquor Authority, 16 N.Y.2d 112 (1965).

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.

VI. Policy of the ABC Law

The current policy of this state is that "it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages . . . . for the protection of the health, welfare and safety of the people of this state."[262]

Public health and safety remain enduring concerns in the regulation of beverage alcohol. Indeed, throughout our study, a majority of those to whom we spoke, from industry leaders to local licensees, emphasized the need to refocus the agency's objectives towards the law's health and safety policy, especially with regard to underage drinking. While the statistics are staggering regarding the increase in DWI among women and young adults in recent years, alcohol abuse is also associated with chronic diseases such as liver cirrhosis, stroke, and birth defects. Aside from the serious health impacts on the individual and families, the healthcare costs associated with these conditions creates economic hardship for the state as well.[263] Less advertised but of equal impact, are the effects on the social and economic health of the individual, families, community and the state.

Recent reports from state and federal agencies draw a direct correlation between alcohol abuse and an increase in domestic violence, violent crime and suicide. Less obvious but equally concerning is the impact alcohol abuse has on overall productivity of both students and those in the workforce. Regulating a product that presents both a potential threat to the public's health,

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262 ABC Law § 2.

263 OASAS reports that in 2005 the cost to New York for underage drinking was over 3.5 billion dollars. OASAS, *Underage Drinking Fact Sheet,* http://www.oasas.state.ny.us/ud/OASAS_TOOLKIT/resources/Information_sheets/toolkit_factsheet.pdf

safety and welfare while providing considerable tax revenue for the state therefore requires careful consideration.

Competing with concerns over public health and safety, however, is the desire to promote economic development, a view that is already reflected in many provisions of the ABC Law, many legislative proposals that we have reviewed,[264] and many suggestions we received during the course of our study. Those advocating for greater economic advantage and a decrease in restrictions do not suggest that these goals are unimportant; rather they deny that such changes would affect health and safety goals, not that those goals are unimportant. While economic development would provide a significant advantage to New York, it is difficult to imagine how a policy that encourages economic development can co-exist with concerns over public health and safety. Yet at the same time one cannot argue with the view that economic development is important to the state. New York devotes three state agencies to fostering economic development.[265] Approximately $17 million of state funds is available to support this development.[266] Small businesses have been described as " the engine of the New York State

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264 A. 926/S.6184 (2009)(calling for modernizing "the overall policy with regard to regulating the manufacture of alcoholic beverages so that its reflects the social benefits that can be derived to the State of New York by encouraging the production of quality beer, wine, and spirits. Expanding production facilities that manufacture beer, wine, and liquors in this State can increase the demand for state produced agricultural crops, preserve working farms and open spaces, minimize future real property tax increases, and promote economic opportunities related to agri-tourism industries.").

265 2009-2010 EXECUTIVE BUDGET – BRIEFING BOOK ("The Department of Economic Development (DED) is responsible for providing policy guidance and for managing marketing and advertising activities that promote tourism and new business investment in New York. The Empire State Development Corporation (ESDC) is a public authority charged with fostering and financing key economic development projects across the state. The Foundation for Science, Technology and Innovation (NYSTAR) administers programs to foster university-based research and technology. . . . Together, the state's economic development agencies stimulate economic growth and job creation by fostering business development, enhancing industrial competitiveness, revitalizing downtown areas, advancing high technology, and promoting tourism.").

266 *Id.*

economy."[267] This recognition of the importance of small beverage alcohol business gained significant ground as early as 1976, with the passage of the Farm Winery Act.[268] It continues to this day. The ABC Law has been amended on numerous occasions to facilitate the development of small businesses by developing new licenses to address a new industry's limited capacity for production,[269] reduced or eliminated fees associated with traditional licenses,[270] and encouraging wineries' access to tourism opportunities through the development and expansion of wine trails across the state. [271] Indeed, importance of small business development to the beverage alcohol industry was most recently demonstrated by the participation of the Chairman of the SLA as a member of the New York State Small Business Task Force.[272] In its Report, issued in December 2009, the Task Force acknowledged the state's commitment to small businesses and recommended a series of initiatives to foster their growth.[273] We recognize that a call for elevating the promotion of economic growth of the burgeoning beverage alcohol business to an expressed policy concern should not go unheeded.

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267 *See Governor Paterson Unveils Comprehensive Guide for Small Business Owners and Entrepreneurs* (Press release, September 24, 2009), http://www.state.ny.us/governor/press/press_0924091.html.

268 *See* discussion of "craft beverage alcohol industries" *infra.*

269 *See* discussion of "craft beverage alcohol industries" *infra.*

270 *See* discussion of "label approval" *infra.*

271 *See Uncork New York*, http://www.newyorkwines.org

272 New York State Small Business Task Force, *Report and Recommendations* (December 2009).

273 *Id.* (The overarching recommendations were Increase Access to Capital, Reduce Red Tape and Provide Regulatory Reform, Provide New Tools and Techniques for Business Growth, Improve Access to, and Awareness of, Available State Resources.).

We have concluded that any statement of policy should promote health, safety, and welfare, with respect to alcohol consumption, while allowing for economic growth to the extent that doing so does not impede the primary objectives of the ABC Law.

Recommendation

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.**

VII. Organization of the ABC Law

At first blush, the organizational structure of the ABC law, developed as a result of the 1934 Interim rule seems reasonable. The law is divided into 11 articles: Article 1 - Short Title: Policy of State and Purpose of Chapter; Definitions; Article 2 - Liquor Authority; Article 3 - Local Boards (repealed); Article 4 - Special Provisions Relating to Beer; Article 4-a - Special Provisions Relating to Cider, Article 5-Special Provisions Relating to Liquor; Article 6-Special Provisions Relating to Wine; Article 7 - Special Permits; Article 8 - General Provisions applicable to all licensees; Article 9 - Local Option; Article 10 - Special Provisions Relating to Illicit Alcoholic Beverages and Stills, and Article 11-Miscellaneous Provisions; Laws Repealed; Time of Taking Effect.

Over time, however, this structure has been unable to accommodate amendments in the most meaningful places. Consequently, the current format leads to confusion, misunderstanding and error. A reorganization of the ABC statute would address these problems.

The interpretation of the 500 foot rule is an example of the confusion throughout parts of the ABC law that has resulted from successive piecemeal revisions to four closely related licensing sections, 64, 64-a, 64-c, and 64-d in Article 5.

The rule requiring a hearing when more than three licensed establishments are within five hundred feet of an applicant for an on-premises license appears in different iterations in these sections, so that each section contained its own rule.[274] A fifth section, 64-b, lacked an equivalent rule. This statutory confusion led to a paralyzing debate among the members of the SLA as to what on-premises licenses were covered by the 500 foot rule.[275]

After the court in an article 78 proceeding[276] held that the only establishments licensed under the same statutory provision as that of the applicant's proposed license should be considered for purposes of the 500 foot hearing, i.e, all section 64-a licensees should be when the applicant is seeking a section 64-a license, the legislature reacted to amend sections 64, 64-a, 64-

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274 The rule under ABC Law § 64 prohibited the issuance of an on-premises license for a restaurant "within five hundred feet of three or more existing premises licensed and operating pursuant to the provisions of this section," ABC § 64(7)(b). The provision for the five hundred foot hearing is at ABC Law §64(7)(f). Section 64-a (tavern license), like § 64, applied the rule when there were "three or more existing premises licensed and operating pursuant to the provisions of this section." ABC § 64-a(7)(a)(ii). Section 64-c (restaurant-brewer license) applied the rule when there were "three or more existing premises licensed and operating pursuant to the provisions of this section or section sixty-four or sixty-four-a." ABC § 64-c(11)(a)(iii). Section 64-d (cabaret license) barred issuance of a license within five hundred feet of another cabaret, or when there were "three or more existing premises licensed and operating pursuant to sections sixty-four and sixty-four-c." ABC § 64-d(8)(b). *See also* New York State Liquor Authority, Taskforce for the Review of On-Premises Licensure *Report,* December 8, 2006, at 13.

275 *See* "Organization of the Division of Alcohol Beverage Control" *infra.*

276 621 Events LLC. v. State Liquor Authority, Slip. Op. (Sup. Ct. Albany Co., 2008).

b, 64-c, and 64-d in the ways we were prepared to recommend. A.8518/S.6678 was signed into law on September 16, 2009 as chapter 463 of the laws of 2009.

Certain related components of the law should be consolidated into appropriate articles or sections. For example, although the ABC law contains a definition section,[277] definitions that have been added by way of amendments to particular sections are scattered throughout the statute.[278] In addition new definitions are needed to address gaps in the law.[279]

The law is replete with redundancies that should be eliminated. For example, fundamental requirements regarding the submission of a license application are repeated for each license.[280]

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277 ABC Law § 3.

278 Alcohol beverage officer (§ 3(9)); Alteration (§ 99-d miscellaneous fees); Alcohol vaporizing device (§ 117-b, possession or use of alcohol vaporizing device prohibited); Arm's length transaction (§ 113, premises for which no license shall be granted); Community board (§ 55 and the other sections involving notice to the community board); Device capable of deciphering any electronically readable format or device (§ 65-b(repealed)); Dwarfism (§ 106(6-b), provisions governing licensees to sell at retail for consumption on the premises); Exclusively as a place of worship (§§ 64-a(7)(a)(i)(ii)(bars, taverns and nightclubs), 64-c(11)(a)(i)(ii)(restaurant-brewery license), 64-d(8), 64-d(8)(a)(b)(cabaret license); and 105 (3)(off-premises license); Illicit alcoholic beverage (§ 150(1) special provisions relating to illicit alcohol beverages and stills); Non-alcoholic snack foods (§ 104, provisions governing wholesalers); Promotional items (§ 104(c), provisions governing wholesalers); Still or distilling apparatus (§ 153, special provisions relating to illicit alcohol beverages and stills); Soju (§ 81(3), license to sell wine at retail for consumption on the premises); Wine merchandise (§ 104, provisions governing wholesalers).

279 *See, e.g.,* definitions for applicant, cardholder, farms, and private collectors.

280 ABC Law § 51 ("All applications shall be in writing and verified and shall contain such information as the authority shall require; such applications shall be accompanied by a check or draft for the amount required by this article for such license, permit or renewal thereof. If the authority shall grant the application, it shall issue its determination in such form as shall be determined by its rules. Such license shall contain a description of the licensed premises and in form and in substance shall be a license to the person therein . . . .")

Provisions common to licenses for a winery,[281] could be consolidated, as could provisions common to licenses for a distillery.[282]

Provisions relating to tastings of alcoholic beverages form a puzzle rather than a clear rule.

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281 These include the ability to (a) operate a winery for the manufacture of wine at the premises specifically designated in the license (ABC Law §§ 76-a, 77(1)); (b) sell in bulk from the licensed premises the products manufactured under such license and wine received by such licensee from any other state to any winery licensee, any distiller licensee or to a permittee engaged in the manufacturer of products which are unfit for beverage use; §§ 76-a, 77(1)); (c) sell or deliver from the licensed premises the products manufactured under such license and wine received by such licensee from any other state to persons outside the state pursuant to the laws of the place of such sale or delivery (§ 77(1)); (d) sell from the licensed premises to a licensed wholesaler or retailer, or to a corporation operating railroad cars or aircraft for consumption on such carriers, the products manufactured under such license and wine received by such licensee from any other state as above set forth in containers of not more than fifteen gallons each and to sell or deliver such wine to persons outside the state pursuant to the laws of the place of such sale or delivery (§§ 76-a(3), 77(1)); (e) sell New York state labelled wine, by the bottle, at the state fair, at recognized county fairs and at farmers markets operated on a not-for-profit basis, provided however that an agent, representative, or solicitor from the winery must be present at the time of sale (§ 76(5)); (f) sell wine at retail in sealed containers to a regularly organized church, synagogue or religious organization for sacramental purposes, and to a householder for consumption in his home (§ 77(2)); (g) engage in what is commonly known as wine by wire services whereby a winery within the state may make deliveries on behalf of other wineries within the state (§ 76(5)); (h) manufacture, bottle and sell fruit juice, fruit jellies and fruit preserves, tonics, salad dressings and unpotable wine sauces on and from licensed premises (§ 77(4)(a)); (i) store and sell gift items in a tax-paid room upon the licensed premises. These gift items shall be limited to the following categories: (1) Non-alcoholic beverages for consumption on or off premises, including but not limited to bottled water, juice and soda beverages. (2) Food items for the purpose of complimenting wine tastings, shall mean a diversified selection of food which is ordinarily consumed without the use of tableware and can conveniently be consumed while standing or walking. Such food items shall include but not be limited to: cheeses, fruits, vegetables, chocolates, breads and crackers. (3) Food items, which shall include locally produced farm products and any food or food product not specifically prepared for immediate consumption upon the premises. Such food items may be combined into a package containing wine or a wine product. (4) Wine supplies and accessories, which shall include any item utilized for the storage, serving or consumption of wine or for decorative purposes. These supplies may be sold as single items or may be combined into a package containing wine or a wine product. (5) Souvenir items, which shall include, but not be limited to artwork, crafts, clothing, agricultural products and any other articles which can be construed to propagate tourism within the region. (6) New York state labelled wine produced or manufactured by any other New York state winery or farm winery licensee(§§ 76(4); 76-a; 76-d, 77(4)(a), (b)(1) - (4)); (j) conduct and charge for (1) tours of their premises; and (2) any wine tastings. (§§76(2); 76-a(4(a); 76-c, 76-d, 77(4)(a), (b)(1) - (4)).

282 ABC Law § 61.

For example, wine tastings permitted by winery,[283] farm winery,[284] special winery,[285] special farm winery, and micro-winery licenses appear in various winery licensing provisions. Although section 76-d governing special winery licenses is silent as to the authority of a special farm winery license to conduct wine tastings, the section does provide that the holder of the license is authorized to exercise all the operating privileges accorded to a holder of a farm winery license (76)(a), including the privilege of holding tastings.[286] Section 76-f governing micro-winery licenses is silent as to the authority of a miro-winery license to hold tastings although it does authorize the micro-winery to sell wine by the bottle at retail for off-premises consumption. Because the micro-winery has that ability under section 76-f, its tastings are covered by section 80 authorizing "any person licensed to sell wine . . . to conduct wine tastings."

Other tastings provisions are scattered throughout the statute. A 2009 SLA Departmental Bill recognizes this problem and adds a new Article 6-A to the ABC law consolidating all alcoholic beverage tasting provisions and eliminating them from their current location in the statute by repeal.

Unlawful activities that appear throughout the statute should be consolidated and a clear penalty structure should be incorporated into the law.[287]

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283 ABC Law §76(2)(a).

284 ABC Law §76(2)(a).

285 ABC Law §76-c(2)(a)(currently limited to tastings at off-premises establishments). A special winery license may apply for a license to sell wine off-premises and that license authorizes tastings. §76-c(4).

286 ABC Law §76-d(2).

287 *See, e.g.,* ABC §§ 64-b (bottle club violation), 65 (underage sales and deliveries), 65-a (procuring alcoholic beverages for persons under the age of twenty-one years, 65-c (unlawful possession of an alcoholic beverage with the intent to consume by persons under the age of twenty-one years), 65-d (failure to post signs), 117-a (unlimited drink offerings prohibited), 117-b (possession or use of alcohol vaporizing devices prohibited), 126 (persons forbidden to traffic in alcoholic beverages), 128 (certain officials not to be interested in manufacture or sale

As part of the reorganization, individual exemptions from specific provisions of the ABC law, currently appearing in the statute in the form of deed descriptions,[288] should be consolidated into one article, and any future exemptions should be included in that article. Currently, these deed descriptions are scattered throughout the statute and sometimes inserted in the middle of provisions rather than at the end, thus placing the reader who wishes to gloss over them at risk of missing an applicable part of the provision. Section 101(1) is one example. Between the first and second sentence of subdivision (1) are inserted lengthy deed descriptions exempting certain property from the applicability of section 101(1).[289] Section 64 governing the licensing of restaurants is another example. Three 200 foot rule exemptions by way of deed descriptions have been inserted between the statutory language governing the 200 foot rule prohibition and the 500 foot rule hearings. It would make better sense to move the deed descriptions to a separate section.

Given that the practice of passing private laws is unlikely to end at any time in the

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of alcoholic beverages), 151 (possession of illicit alcoholic beverages), 152 (sale of illicit alcoholic beverages), 154 (premises used for manufacture or storage of illicit alcoholic beverages), 155 (punishment for second offenders of illegal stills), 17(3)(penalties as part of Authority powers), 130(penalties).

288 *See, e.g.,* ABC Law §§ 51(exception to 101(1) manufacturers and wholesalers not to be interested in retail places) (6) for a property in Hyde Park; 64 (exceptions to the 200' rule) (e-1) 240 and 242 West 49th Street, New York City; (e-2) Village of Ellenville, Town of Wawarsing, Ulster County; (e-3) 130 West 46th Street, New York City; 64-c (exception to 106(13) retailers not to be interested in manufacturers) (18) Town of Ulster, Ulster County; § 101(1)(a) (exceptions to manufacturers and wholesalers not to be interested in retail places) (i) overnight lodging and resort facility in North Elba, Essex County; (ii) overnight lodging and resort facility in Canandaigua, Ontario County; (iii) overnight lodging facility in Manhattan, at W 54th and 7th Avenue; (iv) premises in the Village of Lake Placid, Town of North Elba, Essex County; (v) premises in the Town of Plattsburgh, Clinton County; (vi) two parcels in the town of Lodi, Seneca County, a parcel in the City of Corning, Steuben County; (3) Four Seasons, New York; (4)(a) the New York State Wine and Culinary Center, Inc. in the City of Canandaigua, Ontario County; (5)(a) the Finger Lakes Wine Center, Inc., City of Ithaca, Tompkins County; § 105-a. (exception to hours for sale of beer at retail on Sunday) (2) Matt's Brewery, Utica; § 106(13) (exceptions to retailers not to be interested in manufacturers Provisions governing licensees to sell at retail for consumption on the premises) an overnight lodging and resort facility in the town of North Elba, Essex County; a premises in the Village of Lake Placid, Town of North Elba, Essex County; and an overnight lodging facility at West 54th Street and 7th Avenue, New York City.

289 *See* Appendix D.

foreseeable future,[290] consolidating them into one article eliminates that risk. If the exemption becomes irrelevant because the premises in question no longer has a license or the need for the exemption, it can be readily ignored.[291]

To eliminate additional confusion, the rules governing 200 foot requirements and 500 foot requirements should be each assigned their own sections rather than combined as they currently are.[292]

Part of this reorganization would involve revising the language of various provisions to remove unnecessary repetitious language, and to streamline the provisions, and eliminate antiquated references.[293] Substantive changes to the current version of the ABC Law adopted by the Legislature would be incorporated into this revised version of the statute.

While reorganization is not the only answer to problems created by the statute, it will assist the SLA in carrying out its mission by providing clarity and coherence.

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290 *See* Chapters signed and bills introduced in the 2009 legislative session which exempt particular properties, e.g., Laws of 2009, c. 407 (Just Lorraine's Place, Manhattan), S 6066 (Cucina Romana, Manhattan), S100/A3555 (Tropical Paradise, Brooklyn).

291 *See* September 20, 2005 Hearing before New York State Assembly Standing Committee on Economic Development, Jobs Creation, Commerce and Industry 245 (testimony to the effect that an exemption under ABC Law §101 is no longer relevant to certain premises described therein).

292 *See* discussions of the 200 foot and 500 foot rules, *infra.*

293 ABC Law §§ 3(7-a)("taxi dance hall"), 17-a(seven day license), 103(language relating to "hogshead."); ABC Law §§3(6)(definition of board includes local board),127-b(having to do with local boards setting hours); N.Y.C.R.R . § 52.1(hearing after a *local board* has disapproved a license); 52.2 (Appearance at a hearing of a person "aggrieved by the determination of a *local board*"). *Compare* ABC Law §§ 54 (application to *appropriate board* for license to sell beer, 54-a (application to *appropriate board* for license to sell , 55, 63, 64, 64-a, 64-b, 81-a, 95 (drug store permit), *with* ABC Law §53(application to *state liquor authority* for license to sell beer at wholesale, 62(application to *state liquor authority* for license to sell liquor at wholesale), 78 (application to sell wine at wholesale governed by section 62). *See also* ABC Law § 76-a(4)(b)(the term "gift" as it relates to the items that can be sold in a "tax paid room" does not accurately describe the items that can be sold; they do not need to be gifts or items sold at tourist destinations, and the term can result in a limited interpretation.).

Recommendation

1. **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.**

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

VIII. The organization and administration of the Division of Alcoholic Beverage Control

1. Organization

The State Liquor Authority[294] is the executive head of the Division of Alcoholic Beverage Control within the executive department.[295] The Authority consists of three Commissioners who must be citizens and residents of the state.[296] The Commissioners are appointed by the Governor and confirmed by the Senate, and serve for a term of three years and until their successors have been appointed and qualified.[297] No more than two of the Commissioners can belong to the same

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294 For purposes of the discussion at this point, the Report distinguishes the Authority and the Division of Alcohol Beverage control, rather than using the colloquial term "SLA" which is typically used to describe the entire agency.

295 ABC Law §10.

296 *Id.*

297 ABC Law §11.

political party.[298] One of the three Commissioners is appointed by the Governor to serve as the Chairman, and the Chairman serves until his term as a Commissioner expires. [299]

The powers of the Authority are enumerated in the statute,[300]including the power to:

- appoint all employees,[301] and remove any employee of the authority for cause;[302]
- issue or refuse to issue any license or permit;[303]
- revoke, cancel or suspend for cause any license or permit; [304]
- hold hearings, subpoena witnesses, compel their attendance, administer oaths, examine any person under oath and order the production of records relative to the inquiry;[305] and
- make an annual report to the Governor and the Legislature.[306]

Other than the power to hire, the Authority may delegate any of its powers to the Chairman or an employee designated by the Chairman.[307]

In addition to the powers the Chairman enjoys as a member of the Authority, and the powers, if any, delegated to the Chairman, the Chairman has powers separate and apart from the Authority.

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298 ABC Law §11.

299 ABC Law §11.

300 ABC Law §§15, 17.

301 ABC Law §15.

302 ABC Law §17.

303 ABC Law §17.

304 ABC Law §17.

305 ABC Law §17.

306 The powers of the Authority regarding hiring is contained in ABC Law §15; the other powers of the Authority are contained in ABC Law §17

307 ABC Law §17(9). The hiring power is contained in ABC Law §15 and the authority to delegate is limited to section 17 which contains the other powers of the authority.

The Chairman is also charged with the administration of the Authority and the administrative duties of the Division of Alcoholic Beverage Control not otherwise vested in the Authority.[308]

Organizational design of any administrative agency is not neutral.[309] Usually its structure is intended to cause the agency's decisions to be more responsive to the policies underlying its creation.[310] So, for example, statutory structure for the administration of alcoholic beverage control "should aid rather than hinder" the agency's proper functions."[311] As can be seen from the discussion regarding the 1933 Beer Law, the Interim Rule, and the 1934 ABC Law, the design of the agency was clearly on the minds of the its creators. Original proposals regarding administration of alcoholic beverage control after repeal of Prohibition "favored the creation of specially appointed liquor authorities as against the plan of delegating the task to existing state agencies. The underlying theory was not only that the state would prove the more effective of control [than local agencies] but that in addition a specially created state body with no other official duties would constitute the best agency to be charged with this responsibility."[312] A review of the administration of alcoholic beverage control developed in the various states with the passage of the 21st Amendment suggests that despite this idealized concept, agency design and

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308 ABC Law §18(1).

309 RICHARD W. WATEMAN, PRESIDENTIAL INFLUENCE AND THE ADMINISTRATIVE STATE 40 (1989)

310 Jonathan R. Macy, *Organizational Design and Political Control of Administrative Agencies*, 8 J. LAW, ECONOMICS AND ORGANIZATION 9, 93 (1992).

311 DOROTHY CAMPBELL CULVER AND JACK E. THOMAS, STATE LIQUOR CONTROL ADMINISTRATION: A STATUTORY ANALYSIS 20 (1940) [hereinafter CULVER AND THOMAS].

312 LEONARD V. HARRISON AND ELIZABETH LAINE, AFTER REPEAL 53 (1936).

administrative structure was in large measure a product of a particular state's policies and concerns about liquor control.[313]

One scholar described the three primary concerns that governed the development of these administrative structures as: 1) collection of revenue,[314] 2) regulatory control, and 3) proprietary interest. [315]

In states where the primary emphasis was on collection of revenue, the administration was generally placed in "the existing state agency for tax administration," with selection of licensees and suppression of illegal sales left to local responsibility.[316] New York distinguished itself in that regard by minimizing the role of revenue raising.[317] When the state's role was viewed as minimally important, the form of the state administrative agency was often that of "a single administrator."[318] Although the delegation of control to an already existing agency was later criticized because "liquor law often received incomplete attention and consideration from a

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313 George A. Shipman, *State Administrative Machinery for Liquor Control,* 7 LAW & CONTEMP. PROBLEMS 600, 602 (1940) [hereinafter Shipman]. *See also* Joint Committee of the States to Study Alcoholic Beverage Control, ALCOHOLIC BEVERAGE CONTROL, AN OFFICIAL STUDY 8, 53 (1950)(noting that the states vary in the structure of their administrative agencies and ABC statutes should conform to the opinions and attitudes of the citizens of the various states).

314 CULVER AND THOMAS at 4 (commenting on "the prominent attention" given to revenue possibilities.)

315 Shipman at 603.

316 *Id.*; CULVER AND THOMAS at 21.

317 RAYMOND B. FOSDICK AND ALBERT L. SCOTT, WITH A FOREWORD BY JOHN D. ROCKEFELLER, JR., TOWARD LIQUOR CONTROL (1933); First Report of the New York State Commission on Alcoholic Beverage Control Legislation, 5-9, February 15, 1933.

318 Shipman at 603; CULVER AND THOMAS at 20.

department whose primary function is something else,"[319] this type of administrative structure continues in many states today and is recognized as an appropriate form of design regardless of which agency houses the administration of alcoholic beverage control.[320]

In states where regulatory control was the primary focus, "the foremost task is that of administrative regulation."[321] The key elements of regulation included granting licenses, supervising licensees, controlling the manner of the sale of beverage alcohol, investigating complaints, and enforcing the licensing law.[322] Usually the agency was free-standing. Today, states other than New York with free standing liquor control boards include California,[323] Illinois,[324] Indiana,[325] and Massachusetts.[326]

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319 CULVER AND THOMAS at 21 (citing Leonard V. Harrison and Elizabeth Laine, AFTER REPEAL 54-55 (1936)).

320 *See, e.g.*, Alaska Stat. § 04.06.010 (Alaska's agency is part of the Department of Public Safety; as originally established the board had 3 members. http://www.dps.state.ak.us/ABC/history.aspx); Conn. Gen. Stat. § 30-2 (Connecticut's agency is part of the Department of Consumer Protection.); Colorado (http://www.colorado.gov/cs/Satellite/Rev-Liquor/LIQ/1209635768152 -Colorado 's agency is part of its Department of Revenue); Minn. Stat.§ 340A.201(Minnesota's agency is part of the Alcohol and Gambling Enforcement Division of the Minnesota Department of Public Safety; Rhode Island (http://www.dbr.ri.gov/divisions/commlicensing/liquor.php – Rhode Island's liquor control is part of the Division of Commercial Licensing and Racing and Athletics of the Department of Business Regulation); North Dakota (http://www.nd.gov/tax/alcohol/ – North Dakota divides licensing between its Attorney General's Office (retail businesses) and its Tax Commissioner (all other licenses). Enforcement of the retail businesses in under the jurisdiction of the Attorney General's Office.. *See also* Joint Committee of the States to Study Alcoholic Beverage Control, ALCOHOLIC BEVERAGE CONTROL, AN OFFICIAL STUDY 57 (1950)(noting that effective control can be achieved when an alcoholic beverage control "is integrated with existing departments.").

321 Shipman at 603.

322 *Id.*

323 Ca. Bus. Code § 3050.

324 Ill. Comp. Stat.§ /3-2

325 http://www.in.gov/atc/2413.htm.

326 Mass.Gen .Laws. c.6, s.44. *See also* http://www.mass.gov/abcc/administration/about.htm.

In the third area of emphasis, the proprietary interest of the state, more familiarly described as a state monopoly of liquor or a control state, that proprietary component was coupled with the interest in regulatory control.[327]

The early debate over the structure of New York's administration of alcoholic beverages reflects the attempt of policy makers and law makers to address concerns about regulation and revenue. The 1933 Rockefeller Report[328] and the 1933 New York State Commission on Alcoholic Beverage Control Legislation[329] were particularly influential in the debate. Although the Rockefeller Report urged the adoption of a direct control structure with less emphasis on revenue, it recognized states' interest in adoption of a licensing system so it suggested the design of a single state licensing board with state-wide authority and responsibility to regulate and control alcoholic beverages whose members would be appointed by the governor. The report cautioned that a licensing board was a "powerful political engine"and that a state run centralized board was less likely to come under the sway of local politicians.[330] The 1933 Commission on Alcoholic Beverage Control Legislation also recommended a strong state board of liquor control which would ratify the recommendations for the granting or revocation of license by local control boards in each community.[331] All control boards were to be composed of members "removed so far as possible from all improper influences," particularly influence by way of alliance between liquor

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327 Shipman at 603. Further discussion of the control state design is beyond the scope of this Report.

328 FOSDICK AND SCOTT.

329 *See* discussion of the 1933 beer law, *supra.*

330 FOSDICK AND SCOTT at 61-2.

331 Fourth Report, §39.

interests and political interests.[332] The Commission was convinced that the control boards needed to be

> wholly outside the realm of politics. We believe that the membership of the control boards as we have recommended they be constituted will act independently and with wisdom in the exercise of the power and discretion vested in them by the proposed act. [333]

As noted in the discussion of the history of New York's law, the composition and powers of the proposed local control boards proved to be a contentious issue.[334] Upstate Republicans in the Legislature strongly supported the concept of local boards, fearing that a centralized board in Albany, issuing licenses in upstate cities and rural areas as well as in New York City, would eventually be controlled by New York City's Tammany Hall.[335] A competing bill proposed by the Democratic controlled senate[336] proposed a three-member board within the department of

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332 Fourth Report of the New York State Commission on Alcoholic Beverage Control Legislation 5-6, March 15, 1933.

333 Fourth Report of the New York State Commission on Alcoholic Beverage Control Legislation 5-6, March 15, 1933. That theme of concern about the effect of local political influence is seen throughout the literature on agency design. *See, e.g.,* JOINT COMMITTEE OF THE STATES TO STUDY ALCOHOLIC BEVERAGE CONTROL, ALCOHOLIC BEVERAGE CONTROL, AN OFFICIAL STUDY 55-56 (1950)(calling political pressure at the local level "particularly virulent and dangerous.")

334 Fourth Report of the New York State Commission on Alcoholic Beverage Control Legislation 5-6, March 15, 1933.

335 *Governor warns people; republican bill sets up a machine based on saloon, he says, peril to repeal is seen, state non-partisan board can prevent the old-time evils, he asserts; republicans to fight on; senate leader charges that governor supports a measure designed by Tammany,* New York Times, April 2, 1933, p. 1.

336 The Democrats in the Senate held a majority of one, while Republicans controlled the Assembly by a substantial majority. Upstate Assembly districts "[were] carved exclusively out of territory where drys strongly predominate among the voters." However, even upstate senate districts tended to be made up of mixed "wet and urban and dry and rural territory," and as a result the Senate was "wet." *State liquor bill offered in Senate; Kleinfeld also amends measure for extension of existing control to October 1; long, hard fight seen; wets and drys are marshaling forces for hearing set for Wednesday*, New York Times, March 21, 1934, p. 5.

taxation and finance.[337] It did not include the local boards, based on the fear they would be susceptible to political influence.[338]

The governor proposed that the state board be a division of the executive department, rather than part of the department of tax and finance, in order to place it under his close supervision.[339] The Governor came to oppose the concept of local licensing boards on the grounds that they would be merely tools for building the local political machine.[340] His bill provided for advisory county boards, which would provide the state board with the local information to "guide it in accordance with local sentiment in issuing licenses."[341] The New York *Times* described the rationale behind giving the *state* board the final word as to how many licenses were to be granted in any locality in the following way: "A community cannot be overrun with

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337 *State beer bills ready for action; liquor Commission and Dunnigan control plans will go to the legislature today; governor demands speed; "No shilly-shallying," he warns, and looks to final disposal next week; ban on gangster sought; Dunnigan measure, favored in senate, would bar undesirables by license system,* New York Times, March 15, 1933, p. 3. Among other provisions of this bill: The licensing authorities would have broad powers to issue licenses and regulate the traffic in alcoholic beverages. Among the broad powers would be careful investigation of all applications for positions, possibly including fingerprinting of those employed in on-premises establishments. Under consideration was a provision which make it easy for the residents of a neighborhood to get rid of a liquor establishment that had proved objectionable. The bill would license all involved with the "manufacture, distribution, and sale of beer, for the purpose of enabling the licensing authorities to keep a close check on all engaged in the traffic in beer and make it possible to bar from the legalized traffic the racketeering element or persons who have been identified with the illicit sale of liquor in prohibition days." *Id.*

338 *Beer bills rushed by Albany leaders; O'Brien puts one before the senate - Dunnigan and aides draft a new proposal; quick action is expected; Lehman hopes for state set-up by the time national ban is lifted,* New York Times, March 14, 1933.

339 *Governor warns people; republican bill sets up a machine based on saloon, he says, peril to repeal is seen, state non-partisan board can prevent the old-time evils, he asserts; republicans to fight on; senate leader charges that governor supports a measure designed by Tammany,* New York Times, April 2, 1933, p. 1.(The Govenor wanted the board "not so remote from guidance by him if the . . . regulatory machinery [were] placed in the [tax department].")

340 *Id.* (The Governor was on record as saying that supporters of such boards "are generally interested in seeing that all of the political power, all of the political patronage, all of the power of the prestige that can be acquired through this extensive power of granting a license to one man and refusing a license to another, of granting a license to one location and denying it to another, will be used to build up the local political machine.").

341 *Id.*

such places against its will, as often happened the country over in pre-prohibition days where the licensing power was in the hands of local rings."[342]

The first alcoholic beverage control law, enacted on April 12, 1933, created a state alcoholic beverage control board as part of the executive department consisting of five salaried members, no three of whom to belong to the same political party, [343] as well as local county boards. The state board had, among other powers, the power to grant and revoke licenses to brewers and wholesalers, and remove members of local boards for cause. The powers could be delegated to any member or employee.

The local county boards consisted of two unsalaried members, one appointed by the state board, the other by the chairman of the board of supervisors of the county,[344] with a chief executive officer and other employees as needed appointed by the board.[345] New York City had its own board.[346] The local board could , among other powers , recommend to the state board the granting and revocation of retail licenses and fix the hours of sale within the county.

Under the 1934 ABC law, the Authority and the local boards were constituted in the same manner as they were under the 1933 law.[347]

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342 L.H. Robbins, *Beer board plans for after repeal; pending further legislative action, it will exercise control of hard liquor*, New York Times, September 24, 1933, p. XX2.

343 1933 law, §§ 10-12

344 1933 law §§ 30, 31, and 36.

345 1933 law, § 36.

346 1933 law, §§ 50 and 51. The New York City Board had four members, no more than two of whom members of the same political party, two appointed by state board, and two by the mayor.

347 Laws of 1934, c. 478 §§ 10, 11.

Historical information regarding the agency's administrative structure going forward from the 1934 enactment is scarce until 1977, when the Commissioners' positions were redesignated from part time to full time and each Commissioner was assigned specific line responsibilities in Zone operations of the Division of Alcoholic Beverage Control.[348] Today, the agency still maintains three zone offices, one each in Albany, Buffalo and New York City, and a satellite office in Syracuse.[349] However, the Commissioners do not play a formal role with respect to Zone operations.

A 1980 report by the DOB criticized the Commissioners' role in the Zone operations as one which impaired the agency's functioning.[350] The Commissioner's participation process at the local level was viewed as compromising *de novo* review of licensing decisions by the SLA. The splitting of the Commissioner's time between SLA duties and the local Zone was seen as impairing his or her ability to provide daily oversight of the Zone operations.[351]

The local boards came under scrutiny in the report as well. The New York City Board was harshly criticized for its large backlog in processing applications.[352] The local boards were described as generally unwilling to take direction and supervision from the SLA and susceptible to "politics, emotions and prejudice" rather than being guided by the law in their

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348 *Survey of the State Liquor Authority*, February 1980, on file at the Commission's office [hereinafter *Survey of the State Liquor Authority]. See also* Divisional Order #: 733 (April 1, 1977)(announcing that Commissioner Hugh B. Marius will be responsible for the administration of the Authority's licensing program).

349 Office of Business Permits, Executive Department, *Streamlining Regulatory and Paperwork Process*, March 16, 1981).

350 *Survey of the State Liquor Authority* 12.

351 *Id.* at 12-13.

352 *Id.* at 16.

decisionmaking.[353] DOB viewed the local boards as a financial burden on the state because the sparse amount of licensing activity at the local boards, other than in New York City, did not justify the cost of maintaining the local offices and staff.[354] By 1981, the offices of the local ABC boards had been consolidated into 24 district offices[355] but they were still seen as a "duplicative administrative layer" by the Senate Standing Committee on Investigations and Taxation.[356] That Committee also concluded that the agency's structure of five Commissioners with equal power diluted the Chairman's administrative power.[357] The Committee recommended that a single Commissioner, appointed by the Governor and approved by the Senate, head the agency.[358]

In 1995 the Legislature addressed agency design by reducing the number of Commissioners to three, and eliminating the local boards. [359] The intent behind the reduction in the size of Authority and the elimination of the local boards was to "streamline operations at the Authority and decrease the time it takes to process applications and disciplinary actions . . . ."[360] The change resulted in a one time savings of $626,000 to the state.[361]

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353 *Id.* at 15-16.

354 *Id.*

355 Report of the Senate Standing Committee on Investigations and Taxation into the Operations of the State Liquor Authority 33 (May 1981).

356 *Id.* at 6.

357 *Id.*

358 Lena Williams, *Toxic Waste Bills Adopted in Albany*, New York Times, June 28, 1981 at 35.

359 Laws of 1995, c. 83.

360 Memorandum In Support.

361 Memorandum In Support.

Despite the elimination of the local boards, certain statutory provisions of the ABC law and certain regulations of the Division of Alcoholic Beverage Control still contain reference to the local boards.[362] For example, several statutory provisions distinguish between the Authority and other "appropriate boards" as having responsibility for the initial review of an license or permit application. The ABC law should be amended to provide that the application for any type of license or permit must be made to the Authority and outdated references to local or "appropriate" boards in the statute and regulations should be eliminated.

In the first part of this Report, we recommend that the SLA remain an independent agency responsible for its own administration. Although we have been urged to consider allowing the Department of Agriculture and Markets to regulate craft industries of beer, wine, liquor and cider, we have concluded that allowing more than one agency to regulate the production and distribution of alcohol would lead to inconsistent development of beverage alcohol policy in the state, a result that would undermine the ability of either agency to effectively regulate its area of control.

The current structure and power of the Authority raises two lingering questions. The first involves the effect of its power to delegate its responsibilities and the second involves the effectiveness of its multi-head form.

The statutory provisions which permit the Authority to delegate responsibilities to the Chairman and the Chairman in turn to delegate responsibilities to a designated employee affords

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362 *See, e.g.,* ABC Law §§ 3(6)(definition of board includes local board),127-b(having to do with local boards setting hours); NYCRR 52.1(hearing after a *local board* has disapproved a license); 52.2 (Appearance at a hearing of a person "aggrieved by the determination of a *local board*"). *Compare* ABC Law §§ 54 (application to *appropriate board* for license to sell beer, 54-a (application to *appropriate board* for license to sell , 55, 63, 64, 64-a, 64-b, 81-a, 95 (drug store permit), *with* ABC Law §53(application to *state liquor authority* for license to sell beer at wholesale, 62(application to *state liquor authority* for license to sell liquor at wholesale), 78 (application to sell wine at wholesale governed by section 62).

the agency head flexibility, and allows for agency efficiency. So, for example, the Authority has delegated responsibility to take action regarding license and permit applications with no opposition or complex or controversial issues[363] to certain employees within the Division of Alcoholic Beverage Control, collectively known as the "Licensing Board." If the "Licensing Board" denies an application, the Authority reviews the decision.[364] The power to delegate also preserves the agency head's ability to choose not to delegate certain decisions or revoke delegations in response to changing circumstances by revoking delegations where its members believe revocation serves the agency's purpose. [365]

While it is not uncommon for agency heads to have the power to delegate,[366] questions may arise as to whether the Authority has made a proper delegation and whether the public is informed about delegations that have an impact on them. In the past, the Authority's delegation of licensing power to a Licensing Board, along the lines of the current delegation, had been questioned on a number of grounds, including whether the statute contemplates delegation to a "Licensing Board" and by what standard the Authority would review the Licensing Board decision.[367] While no challenges have been asserted to the October 2009 delegation to the

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363 *See* October 14, 2009 Resolution of the State Liquor Authority.

364 *See id.*

365 *See* November 6, 2008 Resolution of the State Liquor Authority.

366 *See, e.g.*, Agri & Mkts Law § 17; Alaska's five member board may delegate authority to the director to temporarily grant or deny the issuance, renewal, or transfer of licenses and permits but the director's decisions are not binding on the board. Alaska Stat. §04.11.070.

367 *See* Sound Distributing Corp. v. New York State Liquor Authority, 144 Misc.2d 1, 542 N.Y.S.2d 489 (N.Y.Sup. Bx. Co. (1989).

Licensing Board, the earlier challenge pointed to potential flaws that may arise in such delegations.[368]

Where there have been delegations by the Authority in the past, the public has been generally uninformed about them and the chain of decisionmaking authority at the agency. The resolutions whereby the agency head makes delegations and or revokes previous delegations have not heretofore been published or otherwise been made available to the public.[369] Decisions that affect the licensees and applicants should be made public. The court in *Sound Distributing Corp. v. New York State Liquor Authority*,[370] stated that the State Constitution requires it.

> Without doubt the delegation of plenary licensing authority to the Licensing Board is a "rule or regulation" which must be filed. The test is whether the "rule or regulation" "establishes a pattern or course of conduct for the future." Clearly the creation of an inferior tribunal to which apparently all licensing discretion of the agency is granted, establishes a course of conduct. The delegation is far more than one "such as relates to the organization or internal management" of the Authority, so that it excepted from the constitutional mandate. While that portion of the delegation which designates the individuals who are to serve on the Licensing Board is an organizational or internal management matter, the creation of the Licensing Board itself does not fit into that category, as the courts held more than two decades ago. The inclusion of internal management matters in a rule which must be filed does not make the rest of the rule exempt from publication.[371]

The court noted that, as of the time of its decision, the Authority had failed to file such delegations with the Secretary of State for 20 years.

The Authority has posted one of its recent delegations to its website.

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368 *See id.*

369 *See id.* The September 30, 2009 Resolution of the State Liquor Authority regarding delegation to individual Commissioners the authority to accept and approve no-contest pleas is published on the agency website. *See* www.abc.state.ny.us.

370 *Sound Distributing,* 144 Misc.2d 1.

371 *Id.* [citations omitted].

Recent events at the agency also prompts consideration of whether an agency headed by multiple Commissioners creates the potential for problems. The lack of a full complement of Commissioners may lead to a deadlocked Authority requiring licensees and license applicants to return again and again for new hearings in the hopes that one of the two Commissioners has reversed a previous position.[372] Recently, a year-long vacancy in one Commissioner position from May 2007 to July 2008 led to several deadlocked decisions, which were treated as no decision. In April, 2008, for example, the two-member full board split in its interpretation of the 500 foot rule for a section 64-a tavern license applicant.[373] One Commissioner interpreted the language "three or more existing premises" within 500 feet of the proposed premises to include *all* types of on-premises establishments licenses under sections 64 through 64-d of the ABC law; the other Commissioner found that the 500 foot rule hearing would be triggered only if there were three or more 64-a licensed premises.[374] With the deadlocked vote, the application was deemed denied. The application returned before the full board in September, 2008, shortly after the installation of the third Commissioner, but when the new Commissioner recused herself from the decision, the vote again was deadlocked.[375]

Likewise, a majority of the members is needed to delegate authority to the Chairman; with only two members, the decision has to be unanimous.

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372 *See also Sound Distributing*, 144 Misc.2d 1(noting that a 2 to 2 tie vote was exacerbated by the vacancy on the Authority because of the death of one of the Commissioners.).

373 621 Events, 2008-01053, Full Board Meeting April 2, 2008.

374 *Id.*

375 621 Events, 2008-02981, Full Board Meeting September 3, 2008.

Although by statute, the Chairman has administrative control, he does not have the power to hire and fire.[376] The entire Board has to agree on an employment decision. If there were not unanimous agreement between the two current Commissioners, no employment decisions could be made. Staff vacancies in the past have taken an extraordinary toll on licensing and enforcement.

The multiple agency head could result in the Chairman being undermined if the other members disagree with him or her. For example, in 2008, two of the Commissioners disagreed with certain actions of the Chairman so they voted to rescind previous delegations of authority to the Chairman.[377]

As noted earlier, an administrative agency can be structured in many ways. [378] The only lesson that can be drawn from how other jurisdictions have designed their agencies is that each state is operating under a scheme that it believes best suits its goals both as to whether the agency is integrated into another agency or free-standing, and as to whether it is led by a single commissioner or a multi-head commission or board.[379]

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376 ABC Law § 15.

377 *See* November 6, 2008 Resolution of the State Liquor Authority.

378 The Model Act proposes an agency headed by three Commissioners appointed by the Governor with overlapping terms. Model Act §6. Commentary to this proposal notes that it is based on the general pattern of administration by an independent state wide liquor authority.

379 *See* CULVER AND THOMAS at 20; *see, e.g.*, Alaska Stat. § 04.06.010 (five member board; as originally established the board had 3 members. http://www.dps.state.ak.us/ABC/history.aspxAlaska agency); Conn. Gen. Stat. §30-2 (three member commission); Ill. Comp. Stat.§5/3-2(three commissioners); Indiana (http://www.in.gov/atc/2413.htm. - four commissioners); Mass. Gen .Laws. c.6, s.44. (three commissioners).

In choosing the form of the agency head as a single Commissioner or a multi member board, consideration should be given to the advantages and disadvantages of each system.[380]

> In theory, where there is one person at the head of the agency, greater efficiency, expedition and consistency are to be found. On the other hand, theoretically at least, greater capacity and broader vision are to be expected from a board, and the public is inclined to the belief that greater justice and equity flow from board action. [381]

Nothing in New York's Constitution hinders the ability to change the format of the SLA.[382] One alternative would be to have one Commissioner, like most other agencies in New York State. However, fears have been expressed that this arrangement would leave the agency with no internal checks and balances. [383] Concerns over this design are grounded in generalized fears about the consequences of allowing one person, an alcohol czar, to have power over licensing with a resulting lack of divergent views, and no reflection of geographical differences. An agency with multiple heads, on the other hand, is less likely to be affected by pressures than an individual head. [384] Multiple heads who serve rotating terms and can only be dismissed for cause are less likely to be subject to direct control.[385] They also have the opportunity for

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380 *See* Joint Committee of the States to Study Alcoholic Beverage Control, ALCOHOLIC BEVERAGE CONTROL, AN OFFICIAL STUDY 57 (1950).

381 *Id.*

382 *See* Article V §3 ("Subject to the limitations contained in this constitution, the legislature may from time to time assign by law new powers and functions to departments, officers, boards, commissions or executive offices of the governor, and increase, modify or diminish their powers and functions.").

383 Gross v. New York City Alcoholic Beverage Control Bd., 7 N.Y.2d 531 (1960) (DYE, J., dissenting)("We have repeatedly declared that the intention of the Legislature in the enactment of a law should be ascertained from the cause or necessity which led to the enactment (People ex rel. Wood v. Lacombe, 99 N.Y. 43, 49, 1, N.E. 599), and that the 'end to be served, the mischief to be averted, supply the clews and the keys by which construction must be governed'" citations omitted.).

384 ROBERT M. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN NEW YORK 51(1942).[hereinafter BENJAMIN]

385 ELIZABETH C. RICHARDSON, ADMINISTRATIVE LAW AND PROCEDURE 20 (1995).

consultation and deliberation to aid them in their responsibilities and important duties, such as determining whether a certain case should be litigated. [386]

We have concluded that the current organizational structure of the Division of Alcoholic Beverage Control led by the State Liquor Authority should be retained, but that the ABC law should be amended to address certain difficulties presented in the current structure.

Recommendation

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

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 consultations with the other members of the Authority and to remove all such responsibility from the Authority.**

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.**

2. Information sharing with the Tax Department

The New York State Department of Taxation and Finance (Tax Department) and the SLA have related interests in two specific areas: the licensing and registration of distributors of alcoholic beverages, who pay the excise tax, and licensing and registration of vendors who collect sales tax, including vendors of alcoholic beverages. Despite these interrelated interests, the law does not require the exchange of information between the agencies regarding the status of a licensee.

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386 BENJAMIN at 51.

In addition, issuance of any new or renewed license under the ABC law is not conditioned upon certification from the Tax Department that the applicant's New York State tax obligations are satisfied. Sharing this information with the SLA is precluded by a confidentiality provision in the state tax law.[387] The Commissioner of the Tax Department has some discretion for allowing disclosure of tax information when issues of concern are raised by the SLA in a judicial proceeding, but, unlike some other states, the law generally requires that information contained in a business tax return is protected.[388]

A. Exchange of information regarding status of a license

New York's excise tax on alcoholic beverage is assessed when the product is first introduced into the state's stream of commerce.[389] The excise tax is imposed on the distributor of alcoholic beverages, and generally paid on a monthly tax return which is filed in the month after the product was sold.[390] Distributors of alcoholic beverages, as defined under Article 18 of the New York Tax Law, must register with the Tax Department.[391] Approval from the Tax

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387 Tax Law § 437.

388 California and Maryland are examples of states that provide a public website listing individuals or businesses delinquent with their tax obligations. Since the inception of its "Caught in the Web Program," in 2000, Maryland recovered over $21.7 million in revenue by 2008 from those previously delinquent in paying their taxes. Further research is pending on the number of other states that have adopted a similar practice. CA Public Records Act § 6251 (2006); *Comptroller Names Top 50 Tax Scofflaws:25 Businesses and 25 Individuals Owe More Than $6Million*, http://www.marylandtaxes.com/publications/nr/current/pr13.asp.

389 New York State Department of Taxation and Finance [hereinafter NYSDTF] Publication 571, *Alcoholic Beverages Tax Rates* (2004) (For the purposes of excise taxes, alcoholic beverages are defined as beer and analogous fermented malt beverages, cider, wine liquor and distilled or rectified spirits).

390 *See* discussion of primary source law *infra.*

391 Tax Law §421 (A distributor includes those who import or remove from a warehouse alcoholic beverages for commercial purposes, or who manufacture alcoholic beverages for the purpose of "sale on the premises." A non-commercial importer of alcoholic beverages must also register. A non-commercial importer is defined as anyone who does not meet the definition of a distributor, but who imports beer or wine--not liquor--in quantities over a limit that is allowable for personal use.).

Department to operate as a distributor of alcoholic beverages is contingent upon securing the applicable liquor license from the SLA.[392] It is incumbent upon the applicant to notify the Tax Department when the applicant has obtained its distributor's license from the SLA. Once the Tax Department has received this notification, it verifies the information with the SLA. The SLA will confirm the licensee's status upon request. The status of a licensee is also available through the SLA's searchable website. The SLA makes the information available in accordance with provisions in New York's Freedom of Information Law.[393] It is not required to do so under the ABC Law. If the license has been granted, the Tax Department then approves the registration. Representatives from the Tax Department have indicated that the current informal system is operating efficiently, and requests for information from the SLA are being honored despite the lack of a mandatory provision.

Under the Tax Law, revocation or cancellation of a distributor's license by the SLA results in the immediate loss of the distributor's registration.[394] A distributor who continues to operate after the SLA has cancelled or revoked its license would be in violation of the tax laws and would be subject to criminal penalties, as well as civil penalties payable to the Tax Department.[395] Despite the language of the tax law, which provides that the loss of registration "will occur immediately"[396] when the license is revoked by the SLA, neither the Tax Law nor the ABC Law

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392 Tax Law § 421(1).

393 Pub. Off. Law §§ 84-90. The SLA's website provides a searchable database of licenses based on a number of search variables, such as name, or zip code, and lists the status of the license as either: active, inactive or expired. *See* http://www.trans.abc.state.ny.us.

394 Tax Law § 423.

395 Tax Law § 433(1)(a)(i-ii); Tax Law § 1813.

396 Tax Law § 423.

authorizes the SLA to notify the Tax Department when the cancellation or revocation of the license occurs.

All vendors collecting sales tax in New York, or having authority to waive sales, excise or use tax, must register with the Tax Department to obtain a Certificate of Authority.[397] Although the ABC Law does not require the licensee to obtain approval from the Tax Department as a New York State Sales Tax vendor, generally, the SLA requires proper registration with the Tax Department. A failure to register and obtain approval as a New York State Sales Tax vendor would prohibit anyone holding an ABC license from legally selling or distributing liquor in New York. If a retailer's license has been cancelled or revoked, or any corporate change has occurred that might affect its registration status, the ABC law does not authorize the SLA to notify the Tax Department.

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 any corporate change has occurred that might affect the validity of the licensee's tax registration. Providing this information will better coordinate tax registrations and related ABC licenses.

B. Tax clearance

A tax clearance program predicates the issuance of a state license and or some other state privilege upon notification from the state's tax department that the applicant has no outstanding tax obligations. In some states such as Kansas, the program is state-wide and encompasses virtually all aspects of state authorizations, such as, but not limited to, employment, licensing,

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397 NYSDTF Publication 850, *New York State and Local Sales and Use Tax* (2009).

mortgage applications, passports, and registrations. In other states such as Pennsylvania, the program is more tailored, limiting the need for a tax clearance to qualify for state employment or to obtain a license associated with the use, sale or distribution of alcoholic beverages.

In 2005, the Tax Department investigated options for some form of a tax clearance program in New York, but elected to forego implementation of such a program at that time. At the same time, legislation was proposed to include New York as part of a consortium of states committed to using similar procedures and policies for the collection and monitoring of sales and use taxes, known as the "Streamlined Sales Tax Project." The goal of the legislation was to encourage out-of-state vendors who are otherwise not required to charge New York sales tax, such as internet or catalogue vendors, to begin doing so. A secondary proposed benefit of the streamlining was that it would modernize and standardize sales tax collection, administration, and rates across the state, despite the initial need for substantial changes in the New York State Tax Law to accommodate the changes. The proposal failed to pass.

While a tax clearance program would have a salutary benefit in that it would facilitate the state's collection of delinquent sales or income taxes, such an initiative would require a change in the confidentiality currently accorded state tax returns. The implications of such a change are beyond the scope of this Report. Nevertheless, a license to sell alcoholic beverages is a privilege, subject to renewal at the discretion of the SLA. As part of the licensing process, the SLA is entitled to know the qualifications of the applicant. One of those qualifications should be the fiscal responsibility of the applicant.[398] The applicant for a license or license renewal should be

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[398] *See, e.g.,* 4 Del. Code Ann. § 705. Delaware Alcoholic Beverage Wholesalers, Inc. v. Ayers, 504 A.2d 1077 (Del.1986)(upholding a rule regarding delinquent retailers as within the regulatory ambit of the agency to ensure that the licensees were financially responsible.) *See also* Illinois, 235 ILCS § 5/6-1("No retailer's license shall be renewed if the Department of Revenue has reported to the Illinois Liquor Control Commission that such retailer is

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.

Recommendation

A. 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.

B. 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.

3. Enforcement of SLA determinations

ABC Law §121(2) provides for court review of certain determinations by the Authority, including revocation, cancellation and suspension of a license or a refusal to renew a license.[399] It does not cover fines assessed by the SLA because when section 121 was enacted as part of the ABC Law in 1934, the SLA was not authorized to impose penalties.[400] Although the ABC law was

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delinquent in filing any required tax returns or paying any amounts owed to the State of Illinois until the applicant is issued a certificate by the Department of Revenue stating that all delinquent returns or amounts owed have been paid by guaranteed remittance or the payment agreement to pay all amounts owed has been accepted by the Department.").

399 Refusal to issue a license or a permit; revocation, cancellation or suspension of a license or permit by the liquor authority; failure or refusal to render a decision within 30 days; transfer of a license or permit to any other premises, or the failure or refusal to approve such a transfer; issuance of an order of warning; refusal to approve alteration of premises; refusal to approve a corporate change in stockholders, stockholdings, officers or directors; or refusal to grant permission for an additional bar pursuant to section 100(4).

400 Prior to 1989, the SLA did not have the authority to issue fines. *See, e.g.,* Nostima Foods, Inc. v. State Liquor Authority, 71 N.Y.2d 648, 529 N.Y.S.2d 270 (1988); Dumbarton Oaks Restaurant & Bar, Inc. v. New York State Liquor Authority, 58 N.Y.2d 89, 459 N.Y.S.2d 564 (1983). The ABC Law was amended in 1989 during

amended in 1989 to authorize the SLA to do so, it is not clear whether this section applies when the only penalty imposed by the SLA is a fine.[401]

A court may in its discretion issue a stay of any of the determinations covered by the section for a period of 30 days but only upon notice to the SLA. The court cannot extend the 30 day period nor can it issue additional stays of 30 days.[402] When the section 121 stay expires, the petitioner cannot seek an additional stay under CPLR §5519 which generally governs a stay of enforcement[403] because where a statute such section 121 provides a specific limitation on stays, the provisions of CPLR §5519 are not applicable.[404]

The 30 day period reflects the Legislature's intent that the SLA's determination be reviewed promptly so that businesses declared unlawful by the SLA not be able to evade those "consequences indefinitely" and those who ultimately prevail are not unduly burdened.[405] When asked in 1937 to consider whether a trial court could issue a stay under section 121 that exceeded 30 days,[406] the Court of Appeals acknowledged that "the [30 day] period may be too short" and

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an economic recession to authorize the SLA to issue fines as an alternative to the harsher sanctions of suspension, revocation or cancellation in the SLA's discretion. *See* Laws of 1989, c. 658.

401 While it could be argued that section 121 does cover fines because the failure to pay the fine could result in the suspension or revocation of a license, it is equally reasonable to conclude that this statutory silence offers a petitioner seeking a stay of the imposition of the fine the option of a court ordered stay pursuant to CPLR 5519.

402 Yacht Club Catering v. Bruckman, 276 N.Y. 44, 49 (1937).

403 CPLR 5519 provides for a stay of the enforcement of a judgment that is either automatic or issued pursuant to court order. The provisions for automatic stays, applicable to cases where appellant is the state, political subdivision, an officer or agency of the state or of any political subdivision of the state; or the judgment or order commands a person to do an act such as the payment of a sum of money, are not relevant here.

404 *See* Advisory Committee notes to CPLR § 5519, citing the *Yacht Club* Case.

405 *Yacht Club*, 276 N.Y. at 49.

406 *Id.* at 44.

that it was "certainly too short" where a petitioner had to wait 30 days "before the court decides whether an order of certiorari shall issue."[407] It nevertheless held that courts could not extend the time frame; rather the courts would have to act promptly.[408] Although at least one federal bankruptcy court criticized the 30 day period as too short,[409] and enforcement of this provision is not always consistent,[410] the continuing applicability of this time frame should be addressed by the Legislature. The original intent of the Legislature, to ensure prompt determinations, is still a valid consideration; nevertheless, court dockets currently overburdened because of the large number of cases filed in the judicial system make it more unlikely that today a matter could be resolved in 30 days.[411] This situation also makes it all the more unlikely that the Legislature could choose a satisfactory time frame that would achieve its goal. Rather than arbitrarily choosing the number of days in which the courts should be able to act on an SLA determination, section 121 should be amended to provide that the court may order a stay in accordance with the provisions of

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407 *Id.* at 49. The order of certiorari was one of the common law precursors to today's article 78 proceeding. *See* PATRICK BORCHERS & DAVID L. MARKELL, NEW YORK STATE ADMINISTRATIVE PROCEDURE AND PRACTICE § 8.2 (2nd ed. 1998).

408 *Yacht Club*, 276 N.Y. at 49.

409 Burack v. State Liquor Authority of State of N Y, 160 F.Supp. 161, 165 (E.D.N.Y. 1958) (granting an injunction precluding the SLA from relying on evidence obtained from a wiretap in a revocation proceeding and concluding that the 30 day stay available under section 121(2) was inadequate, given the time left to petitioner for "filing and determination of the state court proceedings."). *But see In re* Go West Entertainment, Inc., 387 B.R. 435, 440, n. 2 (Bankr.S.D.N.Y.2008)(declining to grant a stay under bankruptcy code when the state court had declined to grant a stay under section 121 of the SLA determination to revoke petitioner's license and the bankruptcy court did not have jurisdiction to consider the merits of the SLA's determination.).

410 *See, e.g.*, Rockave Bar & Grill, Inc. v. New York State Liquor Authority, 15 A.D.2d 508, 222 N.Y.S.2d 419 (2nd Dept. 1961); Barcus v. O'Connell, 281 A.D. 1064, 121 N.Y.S.2d 366 (3rd Dept. 1953). In our interviews we were told of inconsistent application of the rule.

411 *See, e.g.*, 2007 Annual Report of the Chief Administrator of the Unified Court System (noting over four million new filings in the court system for the year 2006).

CPLR 5519,[412] 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.[413]

Section 121 should also be amended to clarify that determinations of the SLA which impose only a fine are within the coverage of the section.

Recommendation

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,[414] 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.**

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.**

4. SAPA section 401(2)

A somewhat related concern is the consequences of section 401(2) of the State Administrative Procedure Act, which provides that

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412 Under CPLR 5519, the court's discretion is influenced by any relevant factor, including the presumptive merits of the appeal and any exigency or hardship confronting any party." *See* David Siegel, *Practice Commentaries*, N.Y. CPLR § 5519 (McKinney 1996).

413 *See id.* (noting that "[the stay can be made conditional. It can be conditioned, for example, on the prompt prosecution of the appeal, perhaps requiring that the appeal be noticed for a particular term or, depending on the calendar practice of the appellate court, for a particular day. Since the granting of the stay is discretionary under subdivision (c), the court can impose conditions if the stay is granted.").

414 Under CPLR 5519, the court's discretion is influenced by any relevant factor, including the presumptive merits of the appeal and any exigency or hardship confronting any party." *See* David Siegel, *Practice Commentaries*, N.Y. CPLR § 5519 (McKinney 1996).

> [w] hen a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court, provided that this subdivision shall not affect any valid agency action then in effect summarily suspending such license.

The difficulty presented is that a licensed premises under investigation for illegal activities can continue to operate during the pendency of the SLA's investigation and disciplinary proceedings, and any appeal, provided the licensee has filed a timely and complete application for renewal application. Delays in the prosecution of the disciplinary process and any appeal work to the benefit of the licensee under SAPA 401(2).[415]

Recommendation

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

IX. Retail licenses

We reviewed the ABC law's provisions relating to retail licenses and suggest changes to streamline certain provisions regarding the location of retail licenses, including their location vis à vis churches, schools, and other retail premises. We have also suggested changes to provisions regarding engaging on other businesses, changes in operation, and license renewals.

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[415] For example, a club whose license expired in October, 2006 was able to continue operating under SAPA, yet continued a pattern of illegal activity. According to the SLA, there was a murder on the premises on Thanksgiving Day, 2007, and since then there have been over 42 arrests at the premises for a laundry list of offenses including 15 violations of suffering and permitting, larcenies, fights, and serving alcoholic beverages to underage patrons. In January, 2009, a female patron was robbed at gunpoint. More recently, a customer was raped in the ladies' room by an ex-convict working as a bouncer at the club. Milbel Enterprises, d.b.a. B.E.D. (also known as "Club Duvet" and "Club Climax"), 2009-05005AA, Full Board meeting, December 4, 2009; Philip Messing, *Chelsea 'rape' club is shut down*, New York Post, December 5, 2009.

1. Physical location of licensed premises

The drafters of the original ABC law in 1934, determined to bring the retail sale of alcoholic beverages out of the shadowy and ever-shifting world of back-alleys and basements, provided detailed requirements for the location and furnishing of retail establishments. So that the "cop on the beat" could easily view the whole interior of a package store, the law required (and still requires) the store to be located on a public thoroughfare, at street level, with no "screen, blind, curtain, partition, article or thing" on the windows or doors and no interior partition or screen that could prevent a clear view of the interior.[416] To discourage back-door dealings with unlawful purveyors, the law provides that the store can have only one entrance unless the additional entrance gives access to a parking area for at least five automobiles.[417] These and similar requirements are not in keeping with contemporary building design, can lead to absurd interpretations, and can burden the applicant with unnecessary costs. We note that the SLA has submitted Departmental Bill #07-10 to liberalize these requirements.

Recommendation

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

2. Role of community opinion

It is well established in the ABC law that community groups should have the opportunity to express their opinions about individual businesses, because the sale of alcoholic beverages accommodates consumer needs.[418] "Public convenience and advantage" and "public interest" are

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416 *See* ABC Law § 105(2) and (10).

417 ABC Law § 105(2).

418 LEONARD V. HARRISON AND ELIZABETH LAINE, AFTER REPEAL 77 (1936)[hereinafter HARRISON AND LAINE].

the guiding principles on which licenses for on-premises and off-premises licenses are to be granted.[419] Otherwise a retail establishment has no justification.[420] How public opinion is weighed is another matter.[421] "Injudicious use [of the community's opinion] may become the cause of serious hardship; overdue consideration for local prejudice may result in unjust denial of liquor licenses, whereas insufficient consideration of community wishes may deprive the residents of the respective communities of their alleged right to self-determination.. It is no easy task to too evaluate the relative rights of the two sets of claimants . . . ."[422]

The SLA has on occasion struggled with the weight to be accorded the community's input. In 2000 and 2001,[423] and again in 2006,[424] the Legislature held hearings on problem

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419 These terms first appear in the March 15, 1933 Fourth Report of the Commission on Alcoholic Beverage Control Legislation, and was adopted, with some modifications, to reflect the revised decision-making structure, in the 1933 beer law, section 70, "declaration of policy relative to number of licenses." ("It is hereby declared to be the public policy of the state that the number of licenses in this state to traffic in beer should be restricted and the state board empowered to determine whether public convenience and advantage will be promoted by issuing such licenses, by increasing or decreasing the number thereof; and that in order further to carry out the policy herinbefore declared, the number of licenses shall be restricted. . . .").

420 HARRISON AND LAINE at 77.

421 *Id.* at 53.

422 *Id.* at 77. *See, e.g.,* 200 Proof, LLC., 2009-04189E, Full board meeting, September 23, 2009 (There was, among other items, a debate about how many licensed premises there were on the street.).

423 *See* New York State Assembly, Assembly Committee on Economic Development, Job Creation, Commerce and Industry, *Community Participation in the State Liquor Authority Licensing Process,* Hearing held August 3, 2000; New York State Assembly Standing Committee on Economic Development, Job Creation, Commerce, and Industry, *Community Participation in the State Liquor Authority Licensing Process,* Hearing held March 16, 2001.

424 New York State Assembly Standing Committee on Economic Development, Job Creation, Commerce, and Industry and Assembly Standing Committee on Codes, *Joint Public Hearing to Examine the Impact of the Continued Operation of Problem On-premise Establishments and the Oversaturation of Licensed On-premise Establishments on Host Communities*, May 5, 2006. *Hearing on Liquor License Bill Draws Crowd*, Andrew Jacobs, New York Times, May 6, 2006. That same year the Assembly passed a bill that would, among other things, have required the approval of the local elected body within 90 days after the SLA granted a license as an exception to the 500 foot rule. *See* A. 10191. *See also Silver Hearing and Legislation on Rowdy Bars Leads to SLA Task Force,* Community Update of Honorable Sheldon Silver, available at

establishments and oversaturated neighborhoods after numerous complaints that the SLA was issuing on-premises licenses in neighborhoods already crowded with bars and lounges. The SLA itself responded to concerns by convening a task force which made recommendations on balancing the interests of on-premises licensees and the interests of the communities in which they are located.[425]

Achieving that difficult balance seems to be an enduring concern. During the course of our interviews, at least two community boards advised us that the SLA has been much more responsive to their concerns, while the business community expressed concern that perhaps the SLA is too responsive.

Consideration of the public convenience and advantage in licensing on-premises stores includes evaluation of the following factors:

(a) The number, classes and character of licenses in proximity to the location and in the particular municipality or subdivision thereof.
(b) Evidence that all necessary licenses and permits have been obtained from the state and all other governing bodies.
(c) Effect of the grant of the license on vehicular traffic and parking in proximity to the location.
(d) The existing noise level at the location and any increase in noise level that would be generated by the proposed premises.
(e) The history of liquor violations and reported criminal activity at the proposed premises.
(f) Any other factors specified by law or regulation that are relevant to determine the public convenience and advantage and public interest of the community.

In addition to these considerations, the ABC law provides specific opportunities for the public to comment on a proposed license or renewal. The municipality or, in New York City, the

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http://assembly.state.ny.us/member_files/064/20070425/.

[425] New York State Liquor Authority Taskforce for the Review of On-premises Licensure, *Report*, December 8, 2006.

appropriate community board where the premises is located, is entitled to notice of applications for all on-premises licenses,[426] all applications for renewals of on-premises licenses,[427] and all applications involving alterations to on-premises licenses.[428] (These requirements for notice, found in various parts of the law, are yet another example of piecemeal amendments to the ABC Law that need to be consolidated .) The municipality or community board has the ability to, and often does, advise the SLA of its concerns when it has received such a notice.

Indeed, the community is made aware of all licenses that the SLA has issued through a newspaper publication requirement,[429] and at any time the community can advise the SLA that it has concerns about a particular premises.

To the extent that there is any ambiguity as to the manner in which the community board or municipality should inform the SLA of its views, any recommendations or objections of the municipality and the community boards should be submitted in writing in a timely manner.

3. Change in the operation of the licensed premises

The municipality or community board is also entitled to notice of an application for alterations of certain premises made pursuant to section 99-d: beer on-premises licensees, restaurants, and wine at retail for consumption on the premises. Notice is not required to be given for alterations to bars or taverns, bottle clubs, restaurant brewers or cabarets.[430] The SLA has 20

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426 Laws of 2009, c. 463.

427 ABC Law § 109.

428 ABC Law § 107.

429 ABC Law § 99-d.

430 Notification of alterations is found in ABC Law §§ 55(beer on premises); 64(2-a)(restaurant), 81 wine at retail for consumption on the premises. It is not found at sections 64-a(bar or tavern); 64-b(bottle clubs); 64-c(restaurant brewers); or 64-d(cabaret).

days to approve the licensee's plans to make either substantial or minor physical alterations, and work may begin in 25 days if there is no objection.[431]

The statute distinguishes between substantial and minor alterations. According to the SLA regulations, an application for a minor alteration does not require a fee.[432] The statute defines a substantial alteration as "any enlargement or contraction of a licensed premises whether indoors or outdoors; any physical change that reduces the visibility that existed at the time of licensing; any other physical changes in the interior of a licensed premises that materially affect the character of the premises; and, in the case of establishments licensed for consumption on the premises, any material changes to the dining or kitchen facilities, or any change in the size or location of any bar . . . ." The SLA's regulations further specify what constitutes a "substantial alteration."[433]

To the chagrin of community boards, changes in operation occur with some frequency, so, for example, an applicant submits a plan for a white tablecloth restaurant, which, upon opening or shortly after, morphs into a club. Community boards have urged that, consistent with concerns about oversaturation and problem premises, they should be entitled to notice when the licensee's business plan changes from the one approved by the SLA. While the statutory definition of substantial alteration and the SLA's regulations would seem to require an application for approval to the SLA and notice to the community board in those circumstances, to address any ambiguity on the law, section 99-d should be amended to require the licensee to seek approval from the SLA for a change in the operation of the licensed premises. Allowing such practices without the SLA's

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431 ABC Law § 99-d(1).

432 *See* 9 N.Y.C.R.R. § 47.9.

433 *See* 9 N.Y.C.R.R. §§ 47.1, 47.2, 47.7.

oversight circumvents the law's intent to ensure health, safety and welfare, as the SLA may not have granted the license had the modified business plan been presented on the original application. (Part of the reorganization of the ABC Law would involve moving the provisions regarding application for approval for alterations out of section 99-d, which governs miscellaneous fees, to general provisions governing licenses.) The law should also be amended to require a licensee of any on-premises establishment to give notice to the municipality or community board of applications for a change in the operation of the licensed premises and the municipality or community board should submit its recommendations or objections in writing to the SLA in a timely fashion.

Recommendation

1. **The ABC Law should be amended to require that the municipality or community board submit its recommendations or objections to the SLA in writing.**

2. . **The ABC Law should also be amended to require a licensee of any on-premises establishment to give notice to the municipality or community board of applications for alterations, including a change in the operation of the licensed premises so that it can convey its recommendations or objections in writing to the SLA in a timely fashion.**

4. The 200 foot rule

New York has long had a prohibition against permitting licensed premises on the same street or avenue and within 200 feet of a building occupied exclusively as a school or place of worship. The 200 foot rule was first enacted in 1892.[434] In 1933, the State Liquor Board, created

[434] Laws of 1892, c. 401 § 43. The method for measuring the 200 feet was added by the Laws of 1892, c. 480. In 1909, the Legislature enacted the Liquor Tax Law, which reorganized and amended the 1892 law. Laws of 1909, c. 39. The Liquor Tax Law would remain in effect until it was repealed to comply with the requirement of Prohibition. Laws of 1921, c. 155 § 2.

by the 1933 beer law, revived the 200 foot rule[435] in its 1933 Interim rule.[436] The Legislature continued the revived rule in the 1934 statute.[437]

The rule is more complex than it initially appears. The rule applies to most, but not all retail liquor licenses for both on-[438] and off-premises[439] establishments. Places that sell beer for on- or off-premises consumption[440] are exempt, no matter how close they are to a school or place of worship,[441] as are wine bars,[442] wineries,[443] and farm wineries.[444] It is not clear whether the rule applies to "satellite stores" operated by wineries and farm wineries as additional off-premises establishments[445] pursuant to the blanket rule for off-premises retail establishments,[446] or whether these stores are exempt pursuant to exemptions granted to wineries and farm wineries. Certain specific on-premises establishments have been exempted from the application of the rule through

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435 Interim rule §§ 48 and 72.

436 Laws of 1933 c. 819.

437 Laws of 1934, c. 478.

438 ABC §§ 64(7)(a) (restaurant liquor license), 64-a(7)(i) (tavern liquor license, 64-b(5)(a)(i) (bottle club license), 64-c(11)(a)(i) (restaurant-brewer license), 64-d(8)(a), and 81 (restaurant wine license).

439 ABC § 105(3)(a).

440 ABC §§ 54, 54-a, 55, and 55-a.

441 Lincoln Park Lanes, Inc. v. State Liquor Authority, 36 A.D.2d 188 (2d Dep't 1981).

442 ABC § 81-a.

443 ABC § 76.

444 ABC § 76-a.

445 ABC § 76(4).

446 ABC § 105(3)(a).

private legislation.[447] If a licensed establishment occupies a premises within 200 feet of a building which a place of worship or school later acquires, the licensed establishment does not lose its license. But a subsequent applicant within 200 feet of the church or school is not entitled to a license.[448] Even if the school or house of worship has no objection to the issuance of a license, the rule cannot be waived.[449]

A review of case law and recent SLA hearings reveals that the term "occupied exclusively" is a term fraught with peril. The test is whether "its primary or paramount use is as a church, even though there is an incidental use not inconsistent or detracting from the predominant character of the building as a church."[450] If "part of a building functioning as a place of worship is used as the pastor's family residence, from which church-related work is also conducted, the building still may be considered to be 'occupied exclusively' as a church."[451] Thus, uses that are "merely auxiliary or incidental to the main exempt purpose and use will not defeat the exemption."[452] Religious education classes held twice a week in a building that otherwise hosts numerous community and social functions such as scout meetings and card parties do not qualify the building as a house of worship.[453] Similarly, when many activities are conducted in a building,

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447 ABC §§ 64(7)(e-1), (e-2), and (e-3) and 64-a(7)(c-1).

448 *See* Multi Million Miles Corp. v. State Liquor Authority, 55AD2d 866 (1st Dep't 1977), aff'd 43 NY2d 744 (1977).

449 *Id.*

450 Fayez Restaurant, Inc. v. State Liquor Authority, 66 N.Y.2d 978, 979 (1985).

451 *Id.*

452 Boiko v. Higgins, 195 A.D.2d 279, 282 (1st Dep't 1983).

453 China City, Inc. v. State Liquor Authority, 19 A.D.2d 832 (2d Dep't 1963).

but only a small portion are geared towards education, the building is not deemed to be a "school."[454] A small private nondenominational chapel open to the public for meditation, bible study and prayer does not merit the same protection as a church.[455]

Despite an amendment amended to sections 64, 64-a, 64-b, 64-c, 64-d, and 105 listing activities that are consistent with the use of a building as a place of worship to provide guidance in what was a confusing aspect of the 200 foot rule,[456] clarity is still elusive.

A recent case exemplifies a conflict between the 200 foot rule and economic revitalization. An on-premises applicant was located in an area in which the municipality was eager to encourage economic development, and near several licensed on-premises establishments. Also nearby, and within 200 feet of the applicant, was a Salvation Army. The full board, in a 2 to 1 vote, applied the "primary or paramount use" test. It found that the building was primarily in use as a social service center, and issued the license.[457] But even with numerous similar businesses in the neighborhood and strong community support for the issuance of the license, if the building housing the Salvation Army were found to be occupied exclusively as a place of worship, the 200 foot rule would have been an absolute bar to the issuance of the license. A similar situation has arisen in another city whose downtown business improvement district has recently become home to several new storefront churches. When the 200 foot zones around the new and existing

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454 111 E. 22nd Management Corp. v. State Liquor Authority, 191 A.D.2d 363 (1st Dep't 1993).

455 Jane Street Seafood Cafe Corp. v State Liquor Authority, 426 NYS2d 200 (Sup. Ct., N.Y. Co., Special Term 1980).

456 Laws of 2007, c. 406 (State Liquor Authority departmental bill #2-07).

457 2009-04359, Mekas Lounge, Full Board Meeting September 30, 2009.

churches and schools are laid out over a map of the neighborhood, it is apparent that there is effectively no location in which a new licensed premises may legally open.[458]

Other jurisdictions with similar laws are facing similar conflicts. Washington, D.C. has seen the opening of charter schools in "unusual places," effectively eliminating the chances for restaurants or bars to open in those neighborhoods.[459] In Tucson, Arizona, charter schools and churches have set up in strip malls within business districts, effectively thwarting development desired by the municipality and preventing owners of commercial property from renting to certain types of tenants.[460] A legislative proposal to allow cities and towns to designate areas where liquor licenses can be granted within the statutory distance of schools and churches, and to allow schools to waive their right to a buffer zone failed to pass the Arizona Senate in June 2009.[461]

While the passage of private legislation can exempt a particular property from the application of the 200 foot rule, it is impractical as a solution for widespread neighborhood revitalization programs. The ABC Law should be amended to provide that if a municipality has designated an area as an economic revitalization zone, the 200 foot rule does not apply to any school or house of worship moving into the zone.[462] With this approach, schools or houses of

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458 Robert Cox, *Downtown development thwarted by the proliferation of storefront churches in the New Rochelle Business Improvement District*, New Rochelle Talk, 11/9/09, www.newrochelletalk.com/node1236.

459 Lyndsey Layton, *Request for liquor license uncorks dispute; restaurant near school splits neighbors, prompts education board meeting tonight,* Washington Post, June 29, 2006.

460 John Paul Mitchell, *Bill would allow bars near churches and schools*, Freedom Arizona, April 26, 2009, http://freedomarizona.org/2009/04/26/bill-would-allow-bars-near-schools-and-churches. Arizona currently prohibits issuance of a retail license within the statutory distance of churches, schools, and school playgrounds. AZ. Rev. Stat. § 4-207(A).

461 2009 AZ H.B. 2302.

462 *See* Gen. City Law § 20(25); Town Law §§ 262, 263; Village Law §§ 7-700, 7-702. *See generally* DJL Restaurant Corp. v. City of New York, 96 N.Y.2d 91 (2001); People v. De Jesus, 54 N.Y.2d 465 (1981).

worship considering a location in the revitalization area would be on notice that a decision to move there also means accepting that there will be no 200 foot buffer zone.

Recommendations

1. **Exclusively a church**

The ABC Law should be amended to give the SLA rule making authority so 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. **Waiver**

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. **Economic Revitalization**

If 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.

5. **The 500 foot rule**

In 1993, the Legislature added the 500 foot rule allowing the SLA discretion in approving the location of licensed establishments for on-premises consumption to the ABC Law in order to provide municipalities and communities with a way of combating oversaturation of on-premises establishments.[463] The rule came in response to the fatal shooting of an off-duty housing police officer who had broken up a brawl at 3:30 AM inside a bar on Bell Boulevard, Bayside,

[463] Laws of 1993 c. 183.

Queens.[464] As the officer escorted several people away from the fight, the killer drove up and let loose a "wild fury of gunfire on a sidewalk full of early morning bar-hoppers," killing the officer with a point-blank shot to the head, as well as killing a second man and injuring a third.[465] According to a letter from a member of the assembly to the governor in support of the bill, the proliferation of bars on Bell Boulevard "led to an ongoing deterioration of the quality of life for residents of the surrounding neighborhood. Bars and taverns are so densely located in this neighborhood that they are literally packed one on top of another, attracting large unruly crowds of young people."[466]

The original version of the bill prohibited granting a license to a premises within five hundred feet of three or more existing premises licensed and operating under the same section, but allowed the municipality or community board to approve an application so that the SLA could waive the restriction.[467] The 500 foot rule hearing requirement was added later in 1993.[468] This provision requires the SLA to conduct a hearing upon notice to the applicant and municipality or community board.[469] After this consultation, the SLA may issue the license if it determines that doing so would be in the public interest.[470] The hearing is not triggered for all on-premises liquor

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464 Steven Lee Myers, *Shock of Officer's Slaying Spurs Intensive Manhunt*, New York Times, July 26, 1992, p. 27.

465 *Id.*

466 Letter from Assemblyman Brian M. McLaughlin to the Governor, June 23, 1993.

467 Laws of 1993, c. 183.

468 Laws of 1993, c. 720.

469 *See* ABC Law § 64(7)(f), 64-a(7)(d), and 64-c(9)(c).

470 *See* ABC Law § 64(7)(f), 64-a(7)(d), and 64-c(11)(c).

license applications. There is no hearing when the proposed premises is located within a municipality with a population of 20,000 or less,[471] or when the proposed premises is a cabaret and there are already either one cabaret or three other on-premises liquor licensed establishments within 500 feet.[472]

A. The extent of the applicability of the 500 foot rule to licenses for on-premises consumption

At the time we undertook this study, the five hundred foot rule was a poster child for the confusion that reigns in many parts of the ABC law as a result of successive piecemeal revisions to a series of related sections.

The problem was that a simple rule, requiring a hearing if there are more than three licensed establishments within five hundred feet of an applicant for an on-premises license, appeared in different iterations in four closely related licensing sections of the alcoholic beverage control law, 64, 64-a, 64-c, and 64-d, so that each section contained its own rule.[473] A fifth section, 64-b, lacked an equivalent rule.

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471 *See* ABC Law §§ 64(7)b), 64-a(7)(a)(ii), and 64-c(11)(a)(ii).

472 *See* ABC Law §64-d(8)(b).

473 The rule under ABC Law § 64 prohibited the issuance of an on-premises license for a restaurant "within five hundred feet of three or more existing premises licensed and operating pursuant to the provisions of this section," ABC § 64(7)(b). The provision for the five hundred foot hearing is at ABC Law §64(7)(f). Section 64-a (tavern license), like § 64, applied the rule when there were "three or more existing premises licensed and operating pursuant to the provisions of this section." ABC § 64-a(7)(a)(ii). Section 64-c (restaurant-brewer license) applied the rule when there were "three or more existing premises licensed and operating pursuant to the provisions of this section or section sixty-four or sixty-four-a." ABC § 64-c(11)(a)(iii). Section 64-d (cabaret license) barred issuance of a license within five hundred feet of another cabaret, or when there were "three or more existing premises licensed and operating pursuant to sections sixty-four and sixty-four-c." ABC § 64-d(8)(b). *See also* New York State Liquor Authority, Taskforce for the Review of On-Premises Licensure *Report,* December 8, 2006, at 13.

In April, 2008, during a lengthy period when one Commissioner position remained vacant, the two-member full board split in its interpretation of the 500 foot rule for a section 64-a tavern license applicant.[474] One Commissioner interpreted the language "three or more existing premises" within 500 feet of the proposed premises to include *all* types of on-premises establishments licenses under sections 64 through 64-d of the ABC law; the other Commissioner found that the 500 foot rule hearing would be triggered only if there were three or more premises licensed under 64-a.[475] Under the deadlocked vote, the application was deemed denied. The application returned before the full board in September, 2008, shortly after the installation of the third Commissioner, but when the new Commissioner recused herself from the decision, the vote again deadlocked.[476]

In the applicant's subsequent article 78 proceeding,[477] the court held that the only licensed establishments which should be considered for purposes of the 500 foot rule hearing are those licensed under the precise statutory provision as that of the applicant's proposed license, i.e, all section 64-a licensees should be counted in determining whether there are three or more existing premises when the applicant is seeking a section 64-a license, but premises licensed under sections 64, 64-b, 64-c, and 64-d should not be counted unless they were specifically referenced in the section governing the proposed license. The fact that each section relating to licenses for on-premises consumption have the same statutory number but are differentiated from one another by

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474 621 Events, 2008-01053, Full Board Meeting April 2, 2008.

475 *Id.*

476 621 Events, 2008-02981, Full Board Meeting September 3, 2008.

477 621 Events LLC. v. State Liquor Authority, Slip. Op. (Sup. Ct. Albany Co. October 17, 2008).

a letter added to the section number created ambiguity as to whether the word "section" related to all the sections because they had the same number or only the individual section accompanied by the letter.

After our review of these confusing provisions, we were prepared to recommend to the Legislature that all the licenses granted under section 64 through 64-d should be counted in the application of the 500 foot rule because the basic issue is one of possible oversaturation of on-premises establishments within a neighborhood. The rest of the provisions would remain the same. The SLA would continue to have the discretion to grant a license after a hearing.

During the pendency of our study, and after the *621 Events* decision, the Legislature passed an amendment to sections 64, 64-a, 64-b, 64-c, and 64-d in the ways we were prepared to recommend which was signed into law on September 16, 2009.[478]

One problem remains, however. Only two of the five on-premise liquor license sections, namely those for restaurants,[479] and cabarets,[480] provide the factors that the authority is to consider in determining whether public convenience and advantage and the public interest are promoted by granting a license. These are:

> (a) The number, classes and character of licenses in proximity to the location and in the particular municipality or subdivision thereof.
> (b) Evidence that all necessary licenses and permits have been obtained from the state and all other governing bodies.
> (c) Effect of the grant of the license on vehicular traffic and parking in proximity to the location.
> (d) The existing noise level at the location and any increase in noise level that would be generated by the proposed premises.

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478 Laws of 2009, c. 463 (A. 8518/S.6678).

479 ABC Law § 64(6-a).

480 ABC Law § 64-d(7).

(e) The history of liquor violations and reported criminal activity at the proposed premises.
(f) Any other factors specified by law or regulation that are relevant to determine the public convenience and advantage and public interest of the community.

The sections providing for on-premises licenses for taverns, bottle clubs, and restaurant-brewers do not contain these factors.

B. The exemption of municipalities of 20,000 or less from the 500 foot rule

Municipalities of 20,000 or less are exempt from the application of the 500 foot rule.[481] This exemption was added to the law in 1996 when smaller municipalities complained that they were unfairly burdened. They have "condensed commercial districts that comprise compact downtown areas. . . . [T]here are very limited resources available for the construction of new buildings and there is a shortage of available rental space for the establishment of such premises that do not violate the 500 foot rule. . . ."[482]

The 500 foot rule as currently expressed in the ABC law could easily lead to a misunderstanding of how it operates.

Section 64(7) is typical. It begins as follows:

7. No retail license for on-premises consumption shall be granted for any premises which shall be
(a) on the same street or avenue and within two hundred feet of a building occupied exclusively as a school, church, synagogue or other place of worship or
(b) in a city, town or village having a population of twenty thousand or more within five hundred feet of three or more existing premises licensed and operating pursuant to the provisions of this section . . . .

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481 *See* ABC Law §§ 64(7)b), 64-a(7)(a)(ii), 64-c(11)(a)(ii), and 64-d(8)(b).

482 Letter from Assemblyman Thomas P. DiNapoli to the Governor's counsel, June 7, 1996.

The 200 foot rule with its blanket prohibition appears in subdivision (a) and what appears to be a blanket prohibition of the 500 foot rules appears in subdivision (b). Paragraph (c) explains how to measure the distances, (d) explains one of the measurement terms in (c), (d-1) explains the word "exclusively" in the 200 foot rule (paragraph (a)), (e) provides a partial exception to the 200 foot rule, and (e-1), (e-2), and (e-3) provide lengthy deed descriptions for properties permanently exempted from the 200 foot rule.

At long last, more than two pages after the apparent flat prohibition against more than three licensed premises within 500 feet in paragraph (b), paragraph (f) provides that notwithstanding the provisions of paragraph (b), the SLA *may* issue a license if, after consultation with the community or municipality, it finds that granting the license would be in the public interest. The consultation takes the form of a hearing conducted by the SLA.[483]

Exempting small municipalities from the 500 foot rule thus means that there is no special hearing during which the SLA may consult with the municipality. It also means that only in small municipalities is there no limit on the number of cabarets that may be licensed within 500 feet of each other.

The location of on-premises licensees can present an oversaturation issue for small college towns just as it can for large urban neighborhoods. If a small town is already crammed with bars and a new one seeks licensure, the community facing increased costs for law enforcement, traffic and parking control, ambulance services, street cleaning, and other indirect costs, is denied the same kind of local hearing to air its concerns that somewhat more populous communities currently enjoy in a 500 foot hearing. In turn, the applicant is denied a convenient opportunity to

483 *See* "500 foot rule hearings," *infra.*

hear and respond to community concerns, perhaps by agreeing to improved sound-proofing, limited late night hours, and other stipulations that can help assure community members that the newcomer will be a responsible neighbor. While it is true that such discussions can take place at the full board meeting, as a practical matter, discussion of such issues and the development of solutions is more effective, and more efficient because the application presented to the full board can reflect any stipulations agreed upon.

Nothing in the 500 foot rule bars the SLA from considering an economic development project or other community-supported objective.

Accordingly, we recommend that the exemption from the 500 foot rule for municipalities of 20,000 or less be eliminated.

C. The conduct of 500 foot rule hearings

The language of the ABC Law in its description of the 500 foot rule hearings is overly vague. It says that, before issuing the license for a premises whose proposed location triggers the 500 foot rule, "the authority shall conduct a hearing, upon notice to the applicant and the municipality or community board, and shall state and file in its office the reasons therefor."[484] The purpose of the hearing is to determine whether the issuance of a license to the applicant would be in the public interest.[485]

Lacking any guidelines in the statute or any SLA regulations, these hearings have become somewhat freewheeling affairs in which the presiding officer has little role beyond acting as a stenographer to record what was said. The public interest factors upon which the hearing officer

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[484] ABC Law §§ 64(7)(f), 64-a(7)(d), and 64-c(11)(c). Section 64-d does not provide for a hearing. *See* discussion above.

[485] ABC Law §§ 64(7)(f), 64-a(7)(d), and 64-c(11)(c).

is to base his or her findings do not appear in all of the relevant sections of the law. There are no guidelines on who may appear on behalf of an applicant, how the meeting is to be scheduled, the form of the notice to interested parties, the conduct of the hearing, the hearing officer's report, post-meeting submissions, the record of the proceedings, or what happens when the full board receives the report.

We recommend that to the extent that reasonable minds might differ as to whether the SlA has the authority to draft rules on this topic, the SLA be allowed to promulgate regulations regarding the conduct of 500 foot rule hearings.

Recommendations

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.**

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.**

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

6. Four nearest liquor stores

Bulletin 279, issued in 1955, apparently forms the basis of the SLA's current requirement that an applicant for a new liquor store license identify the four liquor stores nearest to the proposed premises, which are in turn invited to object to the issuance of the new license. However, Bulletin 279 was based on the ABC Law's now-repealed prohibition against removing an existing store to a location within 1500 feet of another store in New York City and within 700

feet of another store outside of New York. Indeed, in 1965 portions of Bulletin 279 relating to the four nearest stores were called into question by the New York Court of Appeals,[486] and Bulletin 279 appears to have been rescinded by Bulletin 390. Nevertheless, the four nearest liquor stores requirement continues, and despite the SLA's continued reliance on it, Bulletin 279 does not appear in the ABC Law, the Code of Rules and Regulations for the Division of Alcoholic Beverage Control, or on the Agency's website.

The issue of public convenience and advantage is still an issue regarding the location of off-premises licences and naturally should be considered by the SLA in determining whether to grant a license. We recommend that section 63 of 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.

Recommendations

1. **ABC Law section 63 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.**

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

X. Industry Practices

1. Prohibition against multiple licenses

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486 Hub Wine & Liquor Co. v. State Liquor Authority, 16 N.Y.2d 112 (1965).

Under the current ABC Law, no more than one off-premises liquor or wine license may be issued to a "person" (e.g., individual, corporation, partnership, etc.).[487] This limitation, enacted in 1934, was designed to keep the retail sector fragmented and weak in an effort to promote temperance.[488]

It is not clear whether continuing this limitation is necessary today. Our neighboring states of Massachusetts and New Jersey, for example, allow a person to hold three and two off-premises licenses, respectively. [489] Even New York permits wineries to hold up to five licenses for satellite stores to sell wine for off-premises consumption. However, a determination as to the number of off-premises licenses a person should be permitted to hold is beyond the scope of this Report. Making a rational rather than arbitrary determination of how many off-premises licenses should be issued to one person requires a complex study of the economic impact of this change.

Recommendation

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.

2. Cooperative purchasing

Discounts for alcoholic beverage purchased from wholesalers increase with the amount of bottles bought. Small liquor stores are generally unable to take advantage of large volume price

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487 ABC Law §§ 3(22), 63(5) & 79(2).

488 Evan T. Lawson, *The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages* 32, 34 SOCIAL AND ECONOMIC CONTROL OF ALCOHOL; THE 21ST AMENDMENT IN THE 21ST CENTURY, Carole L. Jurkiewicz and Murphy J. Parker, eds. 2008).

489 Ma. Gen. Laws Ann. 138 §15; N.J. Stat. Ann. §33-1.12-31.

discounts because their stores are not large enough to store a great number of bottles.[490] Moreover, they are also unable to find a better discount from a different wholesaler because that ability has been virtually eliminated by the consolidation of the alcoholic beverage industry. The vast majority of major brands of alcoholic beverages are distributed by just two wholesalers in New York, and who do not offer the same products.

The large "box" liquor stores are less likely to suffer from the lack of brand competition because their size allows them to buy larger quantities at greater discounts from any wholesaler. In turn, they are able to sell the product to consumers at a lower price than that offered by a small liquor store while still maintaining a profit margin. The lower prices offered by the larger stores can have a significant impact on the smaller stores' ability to retain their customers.

We recommend that New York permit cooperative purchasing by holders of off-premises licenses, to remove the current disadvantage being experienced by small liquor stores. Guidance in structuring statutory provisions governing cooperative purchasing can be found in the laws of Arizona, [491] California,[492] Delaware, [493]Florida,[494] New Jersey,[495] and the District of Columbia,[496] all of which permit cooperative purchasing or pool buying. The statutes generally impose certain

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490 Although theoretically they could acquire a warehouse permit and warehouse their product, it is more likely that they need to sell their inventory rather than store it.

491 Arizona Coop Buying Regulations 19-1-303.

492 Ca. Bus. & Prof. Code §§24400("Group purchase of distilled spirits and wine by retail licensees").

493 Del. Admin. Code, Title 4, Rule 29(XI)(consortium buying).

494 Fla. Stat. Ann. §561.14 (3).

495 New Jersey Cooperative Purchasing, *Alcoholic Beverage Control Handbook for Retail Licensees* 20-21, http://www.nj.gov/oag/abc/downloads/abchandbook02.pdf.

496 *See, e.g.,* D. C. Code § §25-101 (37A)(definition of pool buying agent; 37B (definition of Pool buying group." 25-102, 25-411 ("Application and responsibilities of pool buying retail agent").

restrictions on the pool buying arrangement. For example, the purchases by the pool must be carried out by a designated agent.[497] A retailer can be a member of only one pool.[498] The merchandise purchased for a particular pool must be delivered to and stored in a single licensed premises or licensed storage area. [499] The agent makes payment to the wholesaler on behalf of the pool.[500] The agent for the pool must maintain the records for the pool.[501] If a pool member is delinquent in making payments, the member may be expelled,[502] or put on "COD" status.[503] In Florida, delinquency in payment by any member of the pool buying group makes all group members delinquent.[504]

3. Engaging in other businesses by off-premises licensees

Section 63(4) of the ABC law prohibits an off-premises licensee from "engag[ing] in any other business on the licensed premises" while permitting a list of activities that do not constitute "engaging in another business.[505] The interpretation of this section has led to confusion. It is

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497 *See, e.g.,* Arizona Coop Buying Regulations 19-1-303(1); Ca. Bus. & Prof. Code §§24400; 4 Del. Code §701; D. C. Code § §25-101 (37A).

498 *See, e.g.,* Ca. Bus. & Prof. Code §§24400(b); Fla. Stat. Ann. §561.14(3).

499 *See, e.g.,* Arizona Coop Buying Regulations 19-1-303; Ca. Bus. & Prof. Code §§24400(b).

500 *See, e.g.,* Ca. Bus. & Prof. Code §§24400(b); D.C. Code 25-411(a)(3)(e).

501 *See, e.g.,* Ca. Bus. & Prof. Code §§24400(d); D.C. Code 25-411(f)(2).

502 *See, e.g.,* Ca. Bus. & Prof. Code §§24400(f);

503 New Jersey Cooperative Purchasing, *Alcoholic Beverage Control handbook for retail Licensees* 20-21, http://www.nj.gov/oag/abc/downloads/abchandbook02.pdf.

504 Fla. Rules 61A-3.0305 Pool Buying Procedures.

505 "The sale of lottery tickets, when duly authorized and lawfully conducted, the sale of corkscrews or the sale of ice or the sale of publications, including prerecorded video and/or audio cassette tapes, designed to help educate consumers in their knowledge and appreciation of wine and wine products, as defined in section three of this chapter, or the sale of non-carbonated, non-flavored mineral waters, spring waters and drinking waters or the sale of glasses designed for the consumption of wine, racks designed for the storage of wine, and devices designed to

important to establish criteria as to what constitutes "engaging in any other business" that will allow for economic growth without impeding the primary objectives of the ABC Law.

Without impairing the ability for section 63 licensees to carry the products listed in the section, we believe that guidelines can be established by categorizing merchandise into two broad categories: (1) 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. With this guidance, the SLA could exercise rule making authority to accommodate the development of products that might be appropriately included within the concept of permissible merchandise.

Items that can be sold for service and presentation of the alcoholic beverage would include non-food items only, including gift bags, and items strictly related to service and presentation of alcoholic beverages. Examples include, but are not limited, to glasses, carafes, coasters, napkins, trays, swizzle sticks, corkscrews, ice buckets, bottle holders, sake sets, sake heaters, flasks, trays, stoppers, pourers, wine racks, gift cards, gift baskets and gift packaging. Further elucidation could be in the discretion of the Authority, but the intention is to prevent the creation of a party store that could attract underage customers; therefore, there should be a requirement limiting such items to 10% of the premises' inventory.

Allowing an off-premises licensee to sell food items or packages containing food items such as salt, sweetener, or bitters would attract people whose reasons for being in the store have nothing to do with the purchase of alcoholic beverages, and could have the unintended consequence of promoting the use of alcoholic beverages.

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minimize oxidation in bottles of wine which have been uncorked, shall not constitute engaging in another business within the meaning of this subdivision." ABC Law §63(4).

(2) Items related to purchase and carrying alcoholic beverages. Alcoholic beverages should not be promoted through the use of gaudy bags; however, as the state seeks the reduction of waste, in furtherance of that goal a licensee should be allowed to offer different types of re-usable carriers.

The sale of any items with imprinted logo of a manufacturer of an alcoholic beverage, would be governed by the rules regarding gifts and services.

Recommendations

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.**

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

3. **The SLA should be given rule making authority to promulgate regulations as to permissible merchandise.**

4. Convenience stores

Convenience stores and grocery stores are both licensed as ABC Law §§ 54/54-a licensees – licenses to sell beer or licenses to sell beer and wine products at retail for off-premises consumption. Both sections provide that the only premises which can hold such a license are "a grocery store, drug store, or duly licensed supply ship operating in harbors in Lake Erie."[506] The

[506] ABC Law §§ 54(4); 54-a(2).

ABC Law defines a grocery store as "any retail establishment where foodstuffs are regularly and customarily sold in a bona fide manner for the consumption off the premises."[507] Convenience stores are not defined in the statute.

Currently, the SLA requires, through a Divisional Order, that any licensee who sells food and food products maintain 50% of the wholesale dollar value of its total display as food and food products.[508] No distinction is made in this requirement between traditional grocery stores and convenience stores. Convenience stores serve a different purpose than traditional grocery stores and are unlikely to carry many of the items that the SLA lists in its Divisional Order such as butchered meat and fish.

An alternative to the current requirement would be to require 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 the unit pricing section of the state Agriculture and Markets Law. Section 214-h(2-a) of that statute defines "consumer commodities" to mean "however packaged or contained: (1) food, including all material, solid, liquid or mixed, whether simple or compound, used or intended for consumption by human beings or domestic animals normally kept as household pets and all substances or ingredients to be added thereto for any purpose; and (2) napkins, facial tissues, toilet tissues, foil wrapping, plastic wrapping, paper toweling, disposable plates; and (3) detergents, soaps and other cleansing agents; and (4) non-prescription drugs, female hygiene products and toiletries."

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507 *See* ABC Law § 3(13).

508 *See* Divisional Order 780 (9/16/83).

These products can generally be found in both traditional stores or convenience stores unlike some of the items prescribed by Divisional Order #780. The remaining requirements of the SLA would continue.

This new definition should ensure that supermarkets and convenience stores stock a sufficient mix of grocery items so as to meet the license requirements, and affords the licensee the necessary flexibility to adjust their inventory to meet customer needs.

There seems to be no affront to concerns about public health and safety in such a change. Additionally, it will hopefully reduce enforcement efforts that currently are a drain on limited agency resources.

Recommendation

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.

5. C licenses

A C license is a beer wholesaler's license issued under section 53 of the ABC Law prior to July 1, 1960, and which allows the licensee to operate as an off-premise beer retailer.

Currently there are approximately 400 C licenses, many of which are minority owned, and many of which are located in New York City. For the most part, C licensees are more likely to utilize their retail privilege rather than engage in wholesaling of beer.

Their wholesale activities have been in large measure curtailed for a number of reasons, one of which is the creation of exclusive franchise agreements between certain major brewers and their distributors starting around 1982. Under these arrangements, New York was divided into

territories and the brewer appointed a single wholesaler (or franchisee) for each territory. The brewers agreed to allow wholesalers to sell beer in particular territories. C licensees which were not parties to these agreements challenged them as a violation of the Sherman Antitrust Act. In 1993, in *State of New York by Abrams v. Anheuser-Busch, Inc.*, the federal district court for the Eastern District of New York held that, consistent with the decision of the United States Supreme Court in *Continental T. V., Inc. v. GTE Sylvania Inc.*,[509] these vertical arrangements were not per se violations of the Sherman Act and were to be assessed in accordance with the rule of reason.[510] The court found that the agreements did not violate the rule of reason because the procompetitive effects of the agreements on interbrand competition outweighed any limited effect on intrabrand competition.

In 1996, the ABC Law was amended to incorporate terms governing such franchise agreements.[511]

Although the C licensees continue to express concern over the impact of these exclusive franchise agreements, they are also concerned by the limits imposed on the items they can sell at retail. The items which they can sell are governed by the general provisions for wholesalers. Section 104 of the ABC Law limits these items to:

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509 433 U.S. 36 (1977).

510 811 F.Supp. 848 (E.D.N.Y. 1993).

511 *See* Laws of 1996, c. 697, amending the ABC law to add section 55-c. Note also that legislation has been proposed to allow small breweries to terminate those agreements without cause, but with consideration paid. A488-B/S5614-A (2009). *See* discussion of efforts to create an exemption from the provisions of 55-c for craft breweries.

non-alcoholic snack foods[512], non-alcoholic carbonated beverages and non-carbonated soft drinks, mineral waters, spring waters, drinking water, non-taxable malt or cereal beverages, juice drinks, fruit or vegetable juices, ice, liquid beverage mixes and dry or frozen beverage mixes, wine products, or promotional items.

As a retailer, C licensees are also permitted to sell tobacco products.[513] As the C licensees are now essentially retail oriented, it seems reasonable to expand their retail items. Consistent with the treatment of retail products in other stores that sell beer, we would recommend that their permissible non-alcoholic products be measured as 25% of the displayed inventory which would include food and seasonal specialty items related to their business. The SLA already has rule making authority with respect to C licenses so it will be able to promulgate rules detailing the permissible items.[514]

Consistent with our recommendations regarding the ability of an off-premises licensee to maintain an ATM on the premises, we recommend that a C licensee be permitted to do so as well.

Recommendation

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 their business.**

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

6. House accounts and ATMs

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512 ABC Law §104(1)(b)("Non-alcoholic snack foods" . . . include ready to eat finger foods ordinarily intended to be served cold or at room temperature, such as nut and seed meats, cooked pork rinds, pretzels, popped corn and a variety of other similar finger foods which are prepared from high-starch and/or cellulosic edible materials.").

513 ABC Law §104(1)(b).

514 ABC Law § 104(1).

As noted earlier in this Report, the 1934 law prohibited the sale of beverage alcohol to a customer on credit. The rationale behind such a prohibition entailed the promotion of temperance. The amount of cash the consumer had limited in the amount of beverage alcohol he or she could purchase. With the advent of the credit card as a routine form of payment, the rationale is no longer meaningful. We were unable to draw any real distinction between a credit card and a house account and so we recommend that a retail licensee be permitted in its discretion to offer house accounts to its customers.

Although it has been argued that allowing retailers to have ATMs on their premises presents a health and safety issue, it is not clear that they do. While allowing an ATM on the premises may present a competitive issue among retailers, we recommend that a retail licensee be permitted in its discretion to have an ATM on the premises.

Recommendations

1. **A retail licensee should be permitted, in its discretion, to offer house accounts to its customers.**

2. **A retail licensee should be permitted, in its discretion, to have an ATM on the premises.**

7. Prohibition against gambling

Section 106(6) of the ABC Law states that gambling should not be permitted on a licensed premises. The term "gambling" is defined with reference to the penal law, which provides that in gambling "the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein."[515] Although there is certainly anecdotal

[515] Formal Opinion No. 84-F1(Office of the Attorney General, 1984 N.Y. Op. Atty. Gen. 11)(citing L.1887, Ch. 479).

support for permitting pools for sporting events under the ABC Law, and, indeed, such pools are open and notorious in many bars and taverns, making such sporting pools lawful requires a change to the state's Constitution as well as section 106(6) of the ABC Law and section 225.00 of the Penal Law.[516] Article 1, section 9 of the Constitution provides:

> [N]o lottery or the sale of lottery tickets pool-selling, bookmaking, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, . . . shall hereafter be authorized or allowed within this state.

A brief history of the Constitutional prohibition against gambling in New York is instructive. Although in colonial times and for a period after New York became a state, private lotteries were prohibited, publicly sponsored lotteries were permitted. Eventually, publicly sponsored lotteries fell into disrepute[517] and in 1821, the state's Constitution was amended to prohibit all lotteries.[518] In 1877, the Legislature enacted chapter 178 which provided that it was a misdemeanor to "record or register bets or wagers, or sell pools upon the results of any trial or contest of skill, speed or power of endurance, of man or beast, or upon the result of any political nomination, appointment or election. . . ."[519] Ten years later, the Legislature passed the "Ives pool law" which permitted "such gambling to occur at race tracks during which time racing associations could conduct races at their tracks."[520] Although the Ives pool law was challenged as

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516 As a general rule other states do not permit such forms of gambling in premises licensed to sell beverage alcohol.

517 Formal Opinion No. 84-F1(Office of the Attorney General, 1984 N.Y. Op. Atty. Gen. 11).

518 *Id.* (citing LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK, VOL. 3, p. 46.).

519 *Id.*

520 *Id.* (citing L.1887, Ch. 479).

unconstitutional on the theory that it violated the constitutional ban on lotteries, the statute was upheld on the ground that " wagering on the outcome of human or animal contests was not a lottery."[521] Shortly after that decision, a Constitutional Convention was held, and an amendment to the Constitution adopted, providing that "[no] lottery or the sale of lottery tickets, pool-selling, bookmaking or any other kind of gambling hereafter [shall] be authorized or allowed within this state."[522] In 1895, the penal code was amended to make it a crime to wager "on the 'contests of speed, skill or power of endurance of man or beast.'"[523] Although the constitutional ban has been modified to permit parimutuel betting on horse races, a state-run lottery, and games of bingo or lotto and other games of change conducted by religious, charitable and other not-for-profit groups, these amendments have not nullified the otherwise broad prohibition against gambling.[524]

Subsequent attempts to expand the scope of legalized gambling have been unsuccessful.[525]

XI. Relationships among the tiers of the industry

1. Gifts and services

Alcoholic beverages are unlike any other market commodity. Most industries thrive on free market competition such as targeted advertising, wholesaler to retailer inducements, consumer price incentives, and promotions designed to attract various members of the population.

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521 *Id.* (citing Reilly v. Gray, 77 Hun 402 (1894)).

522 *Id.*

523 *Id.*

524 *Id.*

525 *Id.*

Competition between suppliers, wholesalers and retailers in other industries leads to increased sales and lower consumer prices, and encourages relationships between the three tiers to benefit industry members and consumers. Applied to the alcohol beverage industry, these same practices can lead to bootleg markets (black markets), divergence, overconsumption, and increases in underage drinking. The establishment of the three-tier system following Prohibition forces separation between manufacturers, wholesalers and retailers, preventing "vertical integration," the domination of one tier by another. Vertical integration can take many forms, but most dangerously results in the manufacturer controlling production, distribution and retail sales, thus fostering overconsumption through consumer price incentives and marketing to underage drinkers. Such vertical integration between the three tiers can also concentrate marketing power in out-of-state entities, compromising state legislative efforts to regulate for temperance and public welfare.

Through state and federal legislation, restrictions and prohibitions designed to prevent vertical integration fall under four categories: tied-house arrangements, consignment sales, commercial bribery and exclusive outlets. Tied-house prohibitions restrict activities that would influence a retailer to purchase a supplier or wholesaler's products through a comingling of ownership interests or the giving and receiving of "things of value." Things of value, commonly known as "gifts and services," refers to a broad array of potential inducements such as money, credit extensions, free services, promotional items, advertising or other promotions that might, alone or in the aggregate, create an incentive for the retailer to purchase products predominately or exclusively from a specific wholesaler or supplier.

The relationship between a common trade practice and the negative consequence to the public's health, safety and welfare is seldom intended and not always easy to track and monitor, especially not before the negative effects materialize. For example, marketing promotions that allow retailers to give away free tee shirts, caps and other specialty items imprinted with a supplier or manufacturer's logo can increase underage drinking, despite the promotion being geared to the adult market. A recent study conducted in South Dakota found that 19% of the sixth graders queried owned clothing imprinted with an alcohol related slogan or logo, and that these youngsters were twice as likely to be drinking or planning to drink in the future as their peers.[526]

Supplier and wholesaler incentives, designed to promote price competition and competitively encourage retailers to choose one brand over another, lead to vertical integration. Not only do such practices facilitate suppliers' controlling the availability of product, and possible diversion of product out of the regulated system, attempts to reduce prices to promote sales ignore the relationship between price and consumer consumption. It is well documented that lower prices are an important factor associated with increased and overconsumption of alcoholic beverages. Although states have the power to increase prices via excise taxes, prices that are too high can also result in bootleg activities, as consumers resort to unlicensed entities and out-of-state purchases to obtain alcohol beverages at reduced prices.

States are not required to implement gifts and services provisions, nor are they confined to implementing the restrictions defined under the federal system, but all states have some provisions governing trade practices. While tied house restrictions have been challenged in the courts, a recent court of appeals decision affirmed Washington State's right to regulate trade practices for

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526 *See* Rebecca L. Collins et al., *Early Adolescent Exposure to Alcohol Advertising and Its Relationship to Underage Drinking*, 40 J. ADOLESCENT HEALTH 527 (2007)

public safety and welfare under the 21st Amendment, provided the regulations demonstrate an effective relationship between the restriction and the stated purpose. Other challenges to the constitutionality of the three-tier system were dismissed by a Louisiana court of appeals, ruling that the state's police powers under the 21st Amendment took precedence over Sherman Act anti-trust concerns, and the state's trade practice restrictions did not establish a Commerce Clause violation.[527]

While many in the industry lobby for reduced regulation over marketing practices, claiming the need for restrictions no longer exists or can be met through increased excise taxes, evidence to the contrary is available from the United Kingdom. As noted earlier in this Report, decisions to raise taxes and deregulate the alcohol beverage industry in England have resulted in a two-fold increase in the number of alcohol related hospitalizations, and a rise in underage drinking that is double the number of underage drinkers in the United States. Coupled with an increase in direct and indirect alcohol related crime, the situation in the U.K. has led the chief medical advisor to admit publicly, "England has an alcohol problem."[528]

Closer to home, a two-year investigation by the state's Attorney General completed in 2006 revealed multiple breaches of the ABC Law by suppliers, wholesalers and retailers--illegal practices that led to the 2007 consent decrees discussed below. Although enforcement remains an issue for the SLA, discussions with the new Chairman and with industry professionals indicate that the increased restrictions under the consent decrees have led to a decrease in complaints and abuses by industry members.

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527 Manuel v. State, 982 So. 2d 316 (La. Ct. App. 3d Cir. 2008).

528 John Swaine, *Sir Liam Donaldson unveils alcohol minimum price plan,* Telegraph, March 16, 2009.

Finding a regulatory balance that promotes fair competition, while guarding against a recurrence of the trade practice abuses that historically monopolized the industry and led to unsafe products and black markets, is challenging for any state. Controlling the symbiotic relationship between alcohol beverage prices and consumption is equally challenging. Federal laws established under the Federal Alcohol Administration Act (FAAA) in part to protect consumers from unfair trade practices on a national level, may not be enough at the state level, where geographic concerns and diverse populations may require more targeted regulations. Given a state's awareness of local customs, needs and populations, stronger legislative controls permitted under the 21st Amendment are necessary to prevent underage drinking, over-consumption, and potential threats to the public's health, safety and welfare with respect to alcohol beverages and industry practices.

A. Federal law

Section 205(b) of Title 27 of the United States Code provides that producers or wholesalers can not furnish, give, rent, lend, or sell to the retailer, among other things, money, services or things of value, to directly or indirectly induce that retailer to purchase products, to the exclusion of products offered by other purchasers or wholesalers, or use such inducements to restrain or prevent other transactions, or if the direct effect of such inducement is to prevent, deter, hinder or restrict other persons from selling or offering for sale any such product to such retailer.

"Exclusion" is defined under a two prong test of whether:

(1) A practice by a manufacturer or distributor, whether direct, indirect, or through an affiliate, places (or has the potential to place) retailer independence at risk by means of a tie or

link between the manufacturer or distributor and the retailer or by any means of manufacturer or distributor control over the retailer; and,

(2) the practice results in the retailer purchasing less than it would have of a competitor's product.[529]

The federal rule, first promulgated under the authority of the FAAA in 1935, is designed to promote fair trade practices and competition, while recognizing the need for alcohol regulation to prevent the abuses associated with tied house practices, exclusive outlets, commercial bribery and consignment sales. In 1995, the Bureau of Alcohol, Tobacco and Firearms revised the gift provisions under the FAAA, following a decision in *Fedway Associates, Inc. et al. v. United States Treasury, Bureau of Alcohol, Tobacco and Firearms*[530] that found the bureau's regulatory prohibitions vague and unenforceable. In *Fedway*, the D.C. Circuit Court ruled that a distributor's promotion of giving away videos and televisions to retailers purchasing large quantities of its brands of liquor was allowable, over the BATF's objection that the promotion threatened retailer independence.[531] The court reasoned that the FAAA did not prohibit a distributor from giving such items to retailers as inducements, as the BATF had failed to define when and how a retailer's independence might be compromised under the statute. According to the court, such promotional practices not only fostered the traditional benefits of competition in terms of lower prices and improved product quality, but also supported Congress's intent to promote a competitive alcohol market, thereby helping to deter the formation of a black market.[532]

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529 27 CFR, Subchapter 6, Subpart E, Section 6.151(a)(1) & (2).

530 976 F.2d 1416 (D.C. Cir. 1992).

531 *Id.*

532 *Id.*

Under the revised FAAA trade practice restrictions, trade practice violations require evidence of exclusion. Exclusion results from a threat to a retailer's independence, as evidenced by either per se prohibitions or satisfaction of other factors defined in the statute, and evidence that a competitor suffered decreased sales due to a link or tie influencing the retailer's free choice. Unlike federal anti-trust laws that govern free-trade and competition within a general market, the FAAA seeks to prevent a producer or wholesaler from directly or indirectly controlling an individual retailer's purchasing decisions through ties, links or other coercive measures.

B. New York's statute, regulations and consent decrees

New York's statutory scheme is comprised of several statutory provisions, regulations, disseminated and non-published SLA Bulletins and Divisional Orders, and the 2006-2007 consent decrees. Prior to the revision of the FAAA in 1995, many of New York's regulations regarding trade practice restrictions were based on the federal rule, but the statute was not updated with the new federal provisions. Although several provisions and sections have been amended, repealed or modified over the years, the statute has not undergone a structured revision in the past 40 years. With respect to the bulletins and divisional orders, it is unknown how many of these agency documents are outdated, time-specific or superseded as there is no comprehensive list of the provisions published or available for review.

ABC Law section 101(1)(c) prohibits manufacturers or wholesalers from

> [making] any gift or [rendering] any service of any kind directly or indirectly to any person licensed under this chapter which, in the judgment of the Liquor Authority, may tend to influence such licensee to purchase the product of such manufacturer or wholesaler. The provisions of this paragraph shall not be construed to prevent a manufacturer or wholesaler from entertaining a licensee at lunch or dinner, or to prevent a manufacturer or wholesaler from participating in or supporting bona fide retailer association activities such as, but not limited to, associate memberships, dinners, conventions, trade shows, product tastings and product education where such participation is in reasonable amounts and does not reach

proportions that indicate attempts to influence the purchase of products of contributing manufacturers and wholesalers by the members of such retailer associations.

SLA rules part 86.1 through 86.17 govern gifts and services. Gifts and services that are permissible under these regulations include:

1) product displays such as wine racks, bins, barrels, casks, shelving not exceeding $100 per brand for in use at any one time in any one retail establishment;
2) inside signs including such things as posters, placards, designs, mechanical devices and window decorations which bear advertising matter, with no secondary value except as advertising;
3) retailer advertising specialties such as trays, coasters, mats, menu cards, meal checks, paper napkins, foam scrapers, thermometers, clocks and calendars, with a value not exceeding $50 per brand.
4) A manufacturer or wholesaler may give on-premises retailers and off-premises beer licensees' consumer advertising specialties including ashtrays, bottle or can openers, cork screws, shopping bags, matches, printed recipes, pamphlets, cards, leaflets, blotters, postcards and pencils.

The 2006-7 consent decrees[533] followed a two-year investigation by New York's Attorney General into practices by specific industry members that violated the ABC Law's trade practice restrictions. Examples included wholesalers refusing to sell small retailers hard-to-get brands, and retailers setting up advertising agencies under a relative's name to circumvent rules prohibiting advertising relationships between wholesalers and retailers. It was reported that over 1,000 small liquor stores were forced to close in the 1990s, due to the unfair and discriminatory trade practices between favored retailers, and some wholesalers and suppliers. Between 2003 and 2005, the aggregate value of the illegal benefits bestowed upon favored liquor stores, restaurants, nightclubs and bars by wholesalers and suppliers exceeded $59 million dollars.

C. Industry feedback

[533] People v. Charmer Industries, Inc., *et al.*, Consent Order and Judgment, Index No. I -2006-7562, September 12, 2006; People v. Bacardi U.S.A., Inc., et al., Consent Order and Judgment, Index No. 2006-9782, October 26, 2007; People v. 33 Union Square West, Inc., et al., Consent Order and Judgment, Index No. I-2006012745, January 2, 2007.

During our study, many suppliers and wholesalers complained that the law and regulations were inconsistent, overly restrictive, ambiguous or unworkable. In the words of one commenter, the ABC Law is "anachronistic, discriminatory, anti-competitive and out of sync with current marketplace realities . . . ." Examples from industry members ranged from SLA interpretations that wholesalers were prohibited from replacing a retailer's outdated products or damaged packaging, to prohibitions against quality control services, such as a wholesaler cleaning the service taps necessary for dispensing a manufacturer's product at sporting events. A common theme voiced throughout the discussions was that the prohibitions impede common marketing practices permitted in other industries and that such restrictions inhibit free trade.

Representatives from the liquor and wine industry also complained about the disparities in trade practice restrictions for liquor, wine and beer licensees. Examples included New York's prohibition against liquor and wine wholesalers stocking retailer shelves or attaching price stickers on products, practices that are permitted for wholesalers of beer and wine products (also known as wine coolers). Other complaints concern the types of consumer specialty items that bar, tavern, restaurant, and off-premise beer retailers may distribute, such as corkscrews, ashtrays, bottle-openers and those that liquor and wine store retailers may distribute. While on-premise licensees and off-premise beer licensees can distribute an array of items bearing the name of both the wholesaler and retailer, off-premise wine and liquor licensees are restricted to distributing recipe books and matchbooks with only the manufacturer or wholesaler's name.

Liquor and wine industry representatives argue that the motivations for trade practice restrictions remain the same whether the alcohol product is beer, wine or spirits, so differentiating between advertising items based on license type makes little sense. Several industry members

also complained about the $50.00 per brand limit on advertising materials that a wholesaler may sell or supply to a retailer.

The presumption by many that the consent decrees are incorporated into the New York statutory scheme adds to the confusion and frustration experienced by industry members seeking guidance on permitted practices. Many industry members also criticized the law's reliance on agency discretion in determining which marketing practices fall within acceptable standards, claiming that a lack of clear guidance and after-the-fact determinations lead to ambiguities and impede the manufacturer or wholesaler's ability to plan marketing promotions without seeking prior SLA approval. Inconsistencies generated by guidance letters offered to some, but not all, industry members further add to the frustrations reported by suppliers, wholesalers and retailers across the industry. The SLA confirmed that it receives multiple calls each day from industry members seeking direction and clarification on which marketing promotions fall within statutory exceptions. A commenter complained that "there is a dysfunctional jumbled set of 'rules' with differing regulatory standards."

D. Statutory revision

The need for consistency and clarity with respect to permissible trade practices and exceptions in New York dictates revision to the gifts and services statute. While we are sympathetic to the difficulties of competing in a heavily regulated market, results of our research, and the virtual unanimous agreement at all levels of the industry, persuade us that alcoholic beverages are unlike any other product. We believe that safeguarding the alcohol beverage industry in New York against the threat of corrupt and unfair business practices that weaken the

3-tier system and foster opportunities for vertical integration, overconsumption of alcoholic beverages or underage drinking, is in the best interests of the State.

As recently as 2007, unfair business practices, wholesaler domination and other egregious activities dangerous to the core protections established under the 3-tier system were exposed and prosecuted by the Attorney General, leading to the 2006-2007 consent decrees governing many industry members. The health, safety and welfare concerns associated with an unfettered loosening of prohibitions against vertical integration, as well as the dangers and costs of overconsumption and underage drinking dictate an alcohol beverage control policy that focuses on health and safety first, and economic advantage second.

In making a determination about treatment of gifts and services, consideration must be given to the SLA's ability to properly oversee and enforce the law.

Several options for modifying the gifts and services provisions of the ABC Law were reviewed, including suggestions from industry members, policies from other states and the federal regulations.

Based on our review of federal and state laws, history related to alcohol beverage control, recent developments in New York, and discussions with industry members, we believe that controlling and preventing tied-house abuses requires a two-pronged approach.

The first requirement is the establishment of rules and regulations that clearly outline impermissible trade practices and permissible exceptions, with some degree of discretion left to the SLA to determine whether an activity falls outside the scope of permitted practice. The SLA must also retain the authority to respond to changes within the alcoholic beverage industry and

enhance or modify permitted statutory exceptions accordingly, within the goals defined for the agency.

The second requirement is a solid enforcement bureau that not only responds to complaints, but also conducts routine and random compliance audits, responding swiftly and uniformly to any breaches.

Adopting the consent decrees into the statutory scheme may not resolve the enforcement issues cited by the Attorney General in the 2006 report and echoed earlier in this Report; however, such a statutory revision addresses the first prong of successful tied-house controls. Because it is not possible to statutorily define all activities which may or may not fall within the regulations, preserving agency judgment regarding activities which may serve as impermissible inducements between the three tiers is critical, especially given documented abuses by some industry members. Suspect trade practices that may fall under the radar of the federal scheme may rise to the level of impermissible inducement in the state, given the unique geographic and local concerns of the state, and the goals of the ABC Law. Having clearly defined rules also meets the concerns expressed by many industry members that the rules in New York are difficult to navigate and inconsistent. Incorporating the consent decrees into any statutory revision is beneficial, since many of the prohibitions listed in the 2007 consent decrees were a direct reflection of illegal practices that went unchallenged, or were overlooked for several years. The consent decrees addressed tied-house abuses specific to industry members within New York. Adopting the restrictions and prohibitions included in the consent decrees into New York's statutory scheme therefore makes sense, even if the result appears more restrictive than the federal rules. In this context, consideration should be given to whether the rules regarding industry sponsorship of

certain activities such as bowling tournaments and the like, can be modified consistent with the overall goals of the rules.

Adopting the exclusionary approach defined by the federal rules may not meet the specific needs of New York in terms of identifying threats of impermissible inducements between the three tiers, and may increase the burdens on the SLA's already challenged enforcement division. The exclusion rule requires not only a threat to a retailer's independence, but also proof that the retailer's purchasing decisions were solely a result of the prohibited trade practice. Such a requirement thwarts the SLA's ability to prevent potential abuses before they influence the market, and establishes an exceptionally narrow threshold for SLA investigation.

Any revisions under this proposal should incorporate: 1) the provisions of the consent decrees, as appropriate; and the SLA regulations under 9 NYCRR 86.1-86.17 and divisional orders and bulletins should be amended 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 SLA.

Recommendation

1. **The ABC Law should be amended to incorporate the terms of the 2006-2007 consent decrees regarding gifts and services.**[534]

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.**

2. Prohibited consumer exchanges

534 The Consent Decrees are included at Appendix E.

When read together, ABC Law section 3(28), which defines a sale as "any transfer, exchange or barter in any manner or by any means whatsoever for a consideration" and ABC Law section 100(1), which provides that a person cannot sell any alcoholic beverage within the state without an appropriate license, appear to prohibit consumer exchanges and returns. Thus, during the course of our study, we were advised that, in light of the interpretation of these sections, a retailer is barred from exchanging a bottle of wine for a customer who mistakenly purchases a bottle of Merlot wine instead of a desired Cabernet. We were also told that retailers will on occasion accommodate their customers' desire to return or exchange a product.

Although federal law permits a retailer to return defective product or product delivered in error,[535] state laws in this regard are few and far between. Under Michigan law,[536] an off-premises licensee may accept a return from a customer, for a cash refund or exchange, "if the product is demonstrably spoiled or contaminated or the container damaged to the extent that the contents would likely be of an unsanitary nature or unfit for consumption . . . ." California permits an exchange without regard to the product's condition.[537] Under its trade practices rules, a refund to, or exchange of products for, a dissatisfied consumer by a licensee authorized to sell to consumers is not treated as "a gift, or free goods given in connection with the sale or distribution of an alcoholic beverage." The rules do not include "a consumer who overbuys for a party and then

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535 27 C.F.R. §§ 11.32,11.33.

536 Michigan State Office of Administrative Hearings and Rules, 436.1531, Rule 33 (Return of alcoholic liquor product).

537 Ca. Bus. & Prof. Code § 25600(a)(2)(A) (Premiums, gifts, or free goods; refunds or exchanges)

wishes to return any of the unused alcoholic beverages."[538] Nor under California's law can a recipient of a gift exchange it for other merchandise or be given a credit.

The prohibition against a consumer return seems too rigid. We recommend that the ABC law 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 is 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.

This is a health and safety issue, with the secondary concern that a wholesaler and manufacturer may be unjustly harmed because the customer may have adulterated the product or mishandled the product so as to destroy its quality. It is not an issue of the customer not having a license to engage in retail sales. Because it involves health and safety rather than a licensing issue, we recommend giving some discretion to the licensee while recognizing that a retailer's incentive to exercise that option may be tempered by any potential liability for any tampering or spoilage.

Recommendation

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.

3. Brand or trade name label approval and registrations

538 California Department of Alcoholic Beverage Control, *Quick Summary of Selected Laws for Retail Licensees*, available at http://www.abc.ca.gov/FORMS/ABC608.pdf.

Federal and state labeling requirements were established after the repeal of Prohibition to protect the consumer from false, misleading or otherwise deceptive product information [539] At that time, state alcoholic beverage administrators were urged to adopt the federal statute, at least as a minimum standard.[540] By 1938, thirty-two states, including New York, had adopted the federal labeling requirements to some degree, usually with language reserving the state's authority to impose additional or alternative requirements, and specifying that state laws would prevail over any conflicting provisions.[541] Consistent with the objectives of protecting consumers, New York's Interim rule included labeling provisions that guaranteed "the customer gets what he pays for."[542] Any permitted alterations of the alcoholic beverage had to be clearly indicated on the bottle, and liquor stores were prohibited from storing the alcohol in any containers other than a sealed bottle.[543]

Most of the states that adopted the federal labeling requirements in whole or in part have also maintained their authority to regulate, while keeping within the spirit of uniformity.[544] Many

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539 LEONARD V. HARRISON AND ELIZABETH LAINE, AFTER REPEAL 27 (1936) at 27. (Under the Federal Alcohol Control Act, which was established by Executive Order No. 6474 and later replaced by the FAAA in 1935, bottles or labels were mislabeled if any graphic or writing contained "...any statement that is untrue in any particular, or directly or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter, tends to create a misleading impression of distilled spirits.").

540 Wallace A Russell, *Controls over labeling and advertising of alcoholic beverages*, LAW & CONTEMPORARY PROBLEMS at 660-663 (1940).

541 *Id.*

542 L.H. Robbins, *Mulrooney states basic aims of the Liquor-Control Plan,* New York Times, November 1933.

543 *Id.*

544 Based on an informal study performed by the LRC, thirty-two states have adopted the federal provisions while reserving the ability to regulate for additional requirements, or require that the COLA be filed with the state alcohol authority.

states explicitly or implicitly regulate labels for health, safety and welfare, and the prevention of underage drinking.[545] Some states also include economic considerations in their statutory language.[546] Requiring brand label registrations at the state level, with or without additional state approvals, can provide economic benefits to the state. In addition to creating a means of tracking state excise tax and local sales tax revenue, state level brand registrations also provide a potential source of revenue from registration and renewal fees. In New York, for example, revenues from the registration of new and renewed brand labels exceeded 1.3 million dollars in 2008.[547]

A. Federal law

The Federal Alcohol Administration Act (FAAA) authorizes the federal Alcohol and Tobacco Tax and Trade Bureau (TTB) to implement such labeling regulations as are necessary to ensure that consumers are provided with adequate information as to the identity and quality of alcohol beverages.[548] The labeling and advertising provisions of the FAAA apply to malt beverages only if the laws of the state into which the malt beverages are to be shipped impose similar requirements. The FAAA prohibits the use of statements in the labeling and advertising of wines, distilled spirits and malt beverages that deceive the consumer with respect to such

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545 Examples of states that explicitly or implicitly regulate to prevent underage drinking: KY (KSA 41.210); LA; MN; and NH.

546 Examples include: DE (29 Del. Code § 204) "To ensure the health, safety, and welfare … while permitting open competition and legal marketing practices that meet the lawful needs and convenience of the consumer…"; IN (http://www.in.gov/atc/) "To protect the economic welfare, health, peace, and morals of the people of this state…limit the manufacture, sale, possession, and use of alcohol and alcoholic beverages… To provide for the raising of revenue;" WI ("... for the benefit of the public health and welfare and this state's economic stability..." (WRS 125.01).

547 New York State Liquor Authority 2008 Annual Report: Wholesale Bureau (Total includes new and renewed brand label registrations, but does not include returns or disapprovals.)

548 The registration system also provides information for tracking federal excise taxes from interstate and foreign commerce.

products,[549] and statements, irrespective of falsity, relating to age, manufacturing processes, analyses, guarantees and scientific or irrelevant matters that are likely to mislead the consumer. The implementing regulations contain more specific prohibited practices.[550] They prohibit the use of false labeling or advertising statements, statements, irrespective of falsity, that tend to create a misleading impression directly, or by ambiguity, omission or inference, or by the addition of irrelevant, scientific or technical matter,[551] and health-related statements, if such statements are untrue in any particular or tend to create a misleading impression.[552] TTB evaluates health related statements on a case-by-case basis, and may require a disclaimer or some other qualifying statement to dispel any misleading impression.[553] All alcohol beverage labels must include a health-warning label defined by the Alcoholic Beverage Labeling Act (ABLA).[554] Lastly, alcohol beverages that do not require a TTB Certificate of Label Approval (COLA), based on statutory definitions, must still comply with the labeling requirements under the Internal Revenue Code (IRC)[555]and the labeling provisions under the Food, Drug and Cosmetic Act, administered under the FDA.[556]

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549 *See* 27 U.S.C. 205(e) and 205(f).

550 The regulations appear in 27 CFR Parts 4, 5 and 7.

551 *See* 27 CFR 4.39(a)(1), 4.64(a)(1), 5.42(a)(1), 5.65(a)(1), 7.29(a)(1) and 7.54(a)(1).

552 3 - TTB Ruling 2004–1.

553 *See* 27 CFR 4.39(h), 4.64(i), 5.42(b)(8), 5.65(d), 7.29(e) and 7.54(e).

554 27 CFR part 16.

555 27 CFR part 25, subpart J.

556 21 CFR part 101.

B. New York law

No alcoholic beverages may be offered, sold or advertised in New York, unless the brand name label is registered and approved by the SLA, the appropriate fee is paid, and the label is affixed to or imprinted on the container.[557] ABC Law section 107-a authorizes the SLA to promulgate rules and regulations governing the labeling and offering of alcoholic beverages bottled, packaged, sold or possessed for sale in the state.[558] The purpose of the rules is to "prohibit deception"and to provide the consumer with adequate information regarding the "quality and identity" of the product, and, to the extent possible, achieve national uniformity in the field.[559] Brand name labels must conform to the rules and regulations of the SLA as well as the FAAA; in the event of a conflict between the federal provisions and the rules and regulations of the SLA, the SLA's rules prevail.[560] The SLA may reject labels, even ones approved by TTB, if the SLA finds that they contain statements or representations, irrespective of truth or falsity, which may tend to deceive a consumer.[561] It is unlawful for a beer label to contain any reference to the alcoholic content, with the exception that labels for beer containing 2.5% alcohol by volume or less may include an indication denoting low or reduced alcohol content.[562] Brand name labels for wine

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557 ABC Law§107-a(4). Henceforth, we will use "brand name" for brand or trade name. No brand name registration is required for cereal beverages containing less than .5% alcohol by volume.

558 ABC Law §107-a.

559 ABC Law § 107a(2); *See* Integrated Beverage Group Ltd., v New York State Liquor Authority, 27 A.D.3d 159, 807 N.Y.S.2d 74 (1st Dep't 2006)(SLA has discretion to disapprove the proposed "Freaky Ice" labels where there was the potential that the frozen alcoholic products could be confused with non-alcoholic ice treats that appeal to children.).

560 9 NYCRR § 84.1(h).

561 9 NYCRR § 84.1(e).

562 9 NYCRR § 84.6. Beer is defined under the SLA as "any fermented beverage of any name or description manufactured from malt, wholly or in part, or from any substitute therefore containing .5% or more of

approved by the TTB are deemed registered and approved by the SLA without the need for any additional processing by the SLA.[563] Wines with a TTB COLA were excluded from the registration, approval and fee requirements in 1993, in an effort to promote and facilitate economic growth for local wine producers.[564]

Registration of the brand can be sought by the owner if the owner is licensed in New York,.[565] a licensed wholesaler selling the brand and appointed in writing as the exclusive agent for the purpose of registering the brand, [566] or any wholesaler, approved by the SLA, if the unlicensed owner of the brand or trade name does not file, or is unable to file, and unable to designate an agent to file.[567] If the owner of the brand name is a retailer, the SLA may approve any wholesaler to file the registration upon the consent of the retailer.[568]

The annual fee for brand name registration is $250.00 for liquor, $150.00 for beer, and $50.00 for wine not already approved by the TTB.[569] Brand name label registrations run

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alcohol by volume.." 9 NYCRR § 84.1 (f)-(g).

563 *See* ABC Law § 107-a(3).

564 Laws of 1993, c. 490, § 20: "William L. Parment, Member of Assembly, sponsor of legislation, July 7, 1993 letter to governor's counsel:("Since [the passage of the farm winery bill in 1976] we've been fine tuning the state laws in an effort to remove barriers in an effort to advance this industry. This legislation reduces unnecessary state mandates and eliminates or simplifies reporting requirements, hopefully making the grape and wine industry a more profitable and productive business.").

565 Cordials and wines which differ only as to fluid content, age, or vintage year are treated as the same brand but the SLA may determine whether differences based on class or type will be considered the same brand. *See* ABC Law § 107-a(4).

566 ABC Law § 107-a(3).

567 ABC Law § 107-a(4).

568 ABC Law § 107-a(5).

569 *See* ABC Law § 107-d(3).

concurrently with the term of the license of the person who filed the application and are not transferable.[570]

If the SLA denies an application, the registration fee is returned to the applicant, less twenty-five percent of the fee, along with specific reasons for the denial.[571]

A significant complaint about the label approval requirements is the time required to obtain brand name approval and the three-month backlog of applications. Currently the applications for brand name approvals and registrations are processed manually in the order in which they are received. Applications that are complete and received by certified mail along with a copy of the TTB COLA are deemed registered and approved if the applicant does not receive a written denial within thirty days.[572] Although some complaints were raised that the thirty-day time frame is overly burdensome to licensees, especially those with seasonal products, the court in *Shelton v. New York State Liquor Authority* recently affirmed that the thirty-day time frame is reasonable.[573] Utilizing an online processing of label and brand registration would be consistent with our recommendation that licensing be handled online.

As part of our study, we considered a number of options regarding label approval, ranging from ceding the field to the TTB, approving only product that does require TTB approval, or approving all labels. We have concluded that while the federal provisions provide excellent guidelines on a global scale, New York's policy on alcohol beverage control justifies the need for

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570 *See* ABC Law § 107-d(3).

571 *See* ABC Law § 107-e.

572 ABC Law § 107-a(4)(c)(2)(ii).

573 2009 WL 937260 (N.Y.A.D. 3d Dep't 2009). TTB's time frame for denial is 90 days, with the possibility of a 90 day extension if applicant is notified in writing of the need for the extension. 27 U.S.C. § 13.21.

registering brand names and regulating which licensees may register for brand name approval. New York requires the flexibility of its own registration system to achieve three goals: ensuring labels are not misleading, deceptive and/or otherwise out of compliance with either TTB or New York's requirements; verification of brand owners, as the licensee filing the application may not be the brand owner, and the brand owner may not be licensed under the SLA; and collection of registration and renewal fees to support the agency's efforts towards alcohol beverage control. While uniformity is a desirable objective, indeed one that was sought between state and federal regulations at the inception of the FAAA and supported by many industry members and state administrators including New York's,[574] it was also recognized that in the event of a conflict between state and federal requirements, the state's requirements should prevail.[575] Seventy-five years later, only approximately a third of the states have adopted the TTB's regulations exclusively, suggesting that complete uniformity may be untenable as states have requirements specific to their own jurisdictions.[576] New York's policy of "uniformity within the field . . . but only to the extent possible," reflects the desire for consistency with federal rules with the understanding that achieving the goal should not compromise the state's core objectives.[577]

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574 Wallace A. Russell, *Controls over labeling and advertising of alcoholic beverages*, LAW & CONTEMPORARY PROBLEMS at 660-663 (1940).

575 *Id.*

576 Our informal study suggests that only 15 states have policies that exclusively rely on the TTB without additional requirements or exceptions. Examples: AL; DE; ID; IW; MD; MA; ND; VT; WI; WY; VT; RI; ND; NM; MI; KY; IN.

577 ABC Law § 107-a(2).

Requiring the registration of alcohol products distributed and manufactured in New York provides a significant safeguard against "knock-off" or bootleg products entering the market. Currently, tracking of alcohol beverages occurs in a bifurcated system: wine with a TTB approved COLA is tracked indirectly through the state's price posting system, while all other alcoholic beverages are listed in the brand name registration system. Knowing which products are introduced into New York's market is critical to maintaining the safety of the public. All alcoholic beverages should be tracked in one easily accessible system that is open to public view. To the extent that some alcoholic beverages are excluded from the registration and approval process, this exclusion should be reviewed to determine whether this inconsistency makes sense in light of the SLA's health and safety goals.

Without a label registration process, it is not clear what other means would be available to identify the individual(s) ultimately responsible for the safety, production and marketing of a product. The brand name verifications in combination with New York's price posting system constitute New York's current primary source laws.[578] Removing the verification process, specifically when an agent is acting on behalf of a brand owner who is unlicensed in New York or not a New York resident, would jeopardize New York's ability to establish an audit trail should questions arise regarding product purity or quality.

While brand name label registrations are free under the federal system, in New York, the collection of registration and renewal fees generated over $1.3 million in 2008.[579]

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578 ABC Law § 101-b.

579 Some industry leaders have commented that the disparity between fees for beer, distilled spirits and low alcohol wines should be revised. Others have commented that the exclusion of TTB approved wine from the registration, approval or fee requirements is discriminatory.

Although the TTB has extensive regulations specific to the labeling, and in some respects to the packaging of alcoholic beverages, certain gaps in the TTB's oversight and the limited scope of its objectives raises concerns for New York. Low alcohol wine, cider, certain beer and malt beverages, and certain high alcohol specialty products are not regulated under TTB's provisions. Moreover, some TTB approved products raise concerns for New York and other states.

C. Gaps in TTB oversight

TTB regulations exclude wines that are below 7% alcohol by volume (ABV). New York licensees manufacture, distribute and sell several wines and wine products, often referred to as wine coolers, containing less than 7% ABV. Although labels for low alcohol wines fall under the jurisdiction of the Federal Food, Drug and Cosmetic Act (FDA), and must conform to FDA regulations, the FDA does not pre-approve product labels.[580] Consequently, consumers are not protected from ingesting potentially harmful or misbranded low alcohol wines and wine products until the product has entered the marketplace and a problem is reported. While the FDA prohibits false statements, it does not define the same restrictions outlined in the TTB provisions for potentially deceptive or misleading information.[581] An illustration of the resulting problem is provided by Yophoria Peach and Yophoria Strawberry, two low alcohol wines distributed by T & Beer, Inc., that met the FDA's ingredient and label requirements, but did not require a COLA from the TTB. The wine contains 4% ABV and includes 5% yogurt. The product label is includes the phrase "Smart Choice Lifestyle Drink." Because the product is a low alcohol wine, it

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580 *See* 27 CFR part 4.10; 21 CFR part 101.

581 *See* 21 CFR Part 101.

falls within New York's definition of a wine product.[582] New York disapproved the brand name label for several reasons, chief among them that the product label, read together with the company's marketing literature, deceptively portrayed the health benefits of the product.

Consistent with the TTB's exclusion of wine below 7% ABV, the TTB has no classification for non-alcoholic wine. Under the FDA guidelines, such products would be approved for sale in grocery stores, since they are not classified as an alcoholic beverage under the TTB. New York defines wine containing ".1 to .31% ABV" as non-alcoholic wine and prohibits their sale in grocery stores to avoid their potential attractiveness to underage drinkers. Wines that contain no alcohol must state so explicitly on their label and are currently restricted from sale in liquor stores.

The FDA, rather than the TTB, has authority for cider under 7% ABV, although all cider containing alcohol must display the ABLA health warning label.[583] New York classifies cider that contains more than 3% ABV but less than 7% ABV as an alcoholic beverage, subject to the rules and regulations of the SLA.[584]

Malt beverages are defined by the FAAA and subject to the TTB rules, regulations and certificate of label approvals, but only to the extent that a state maintains the same requirements.[585] Under the TTB, only malt beverages made from malted barley or hops are

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582 ABC Law § 3(36-a)("Wine product" means "a beverage containing wine to which is added concentrated or unconcentrated juice, flavoring material, water, citric acid, sugar and carbon dioxide and containing not more than six per centum alcohol by volume, to which nothing other than such wine has been added to increase the alcoholic content of such beverage."). Yogurt is not listed as a qualifying ingredient for a wine product.

583 27 CFR part 16. Note: exceptions for hard cider and tax-exempt cider can be found at 27 CFR 27.257.

584 ABC Law § 3(7-b).

585 27 CFR part 7.

considered beer.[586] Malt beverages that fall outside of the FAAA are governed by the ingredient and labeling requirements of the FDA.[587] Beer is defined under the Internal Revenue Code for purposes of excise tax collection subject to IRC bottling and formula restrictions.[588] Beer is not subject to the TTB labeling requirements, although all beer containers must display the ABLA health and warning statement.

Several malt beverages and beer products that come into the New York market fall outside the jurisdiction of the TTB. Beers made from sorghum or cactus juice are two examples. Because New York's definition of beer and malt beverages is more encompassing than both the IRC and the FAA Act definitions, it is possible for New York to maintain control over products that escape TTB review.[589]

Some products that have a high alcohol content come in crystal or solid form and thus do not require a TTB COLA based on the TTB's classifications. One example is *Subyou*,[590] a crystal-like alcohol product that dissolves in liquid. New York's definition of an alcoholic beverage encompasses all forms of alcohol, liquid, solid or vapor, patented or not. As such, the SLA has

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586 27 CFR § 7.10.

587 Department of the Treasury, TTB Ruling 2008-3 (July 2008) at 5.

588 26 U.S.C. § 5051; 27 CFR part 25; 27 CFR § 25.11(Beer is defined as: "beer, ale, porter, stout, and other similar fermented beverages (including sake or similar products) of any name or description containing .5% or more alcohol brewed or produced from malt, wholly or in part, or from any substitute therefor."); 27 CFR 25.15 (Malt substitutes are limited to: rice, grain of any kind, bran, glucose, sugar, and molasses).

589 ABC Law § 3(3) ("'Beer' means and includes any fermented beverages of a New York name or description manufactured from malt, wholly or in part, or from any substitute therefore containing alcohol, spirits, wine or beer and capable of being consumed by a human being...").

590 http://outhouserag.typepad.com/outhouserag/2005/08/powered alcoho.html (description of process for alcoholic crystals).

the jurisdiction to review the product's label and determine whether it meets the standards defined for the protection of the public safety and welfare.

Alcopops are alcohol products derived from mixing two or more varieties of alcohol, or mixing alcohol with non-alcohol products. Common classifications include: flavored malt beverage (FMB), alcoholic lemonade/hard lemonade; pre-packaged spirit (PPS); and ready to drink alcoholic beverage (RTD).[591] Typically, the flavored beverages fall between 4% to under 7% ABV.[592] After an eight-year review fraught with debate by various industry members and state authorities, the TTB has declared that the states can classify an alcopop as a beer, wine or distilled spirit regardless of the definition assigned under the TTB.[593]

Some states use their authority to limit the types of alcopops or mixed beverage products that can be introduced into the state. [594] Other states create additional requirements for product labels, or regulate specifically for those alcohol beverages that fall outside TTB oversight.[595] A

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591 http://www.bookrags.com/wiki/Alcopop (description of various types of alcopops across the states)

592 *Id.*

593 70 Fed. Reg. 1, 219 (Jan. 3, 2005)(codified at 27 CFR Parts 7 and 25 in 2006).

594 Examples of states with provisions in addition to TTB approval include: CA – "Beer … if alcohol content is greater than 5.7% by volume must state alcohol content…Special provisions for malt beverages that derive .5% or more of alcohol (CA ABC Act 25205, effective 7/09); CO - specifics for beer & malt beverages (C.C.R 203-2, 47-0600); KA – special labeling requirements for Flavored Malt Beverages (KSA 41-331(a)); Montana – will disprove a New York thing that is misleading in packaging (tube shooters, jello shots, etc.), and also requires all ingredients to be listed if a mixed product contains non alcoholic beverage)(Administrative rules sec 42.11.402 & 123); MI– disapproves a New York label that promotes sexism, racism, violence or intemperance (although the terms are not further defined) Rule 436.1611; 436.1829; MN will disapprove a label that falsely or unintentionally implies a connection to a dead American Indian leader.(MS 340.311; 340A.301(7-b).

595 27 U.S.C. 211, 27 CFR 7.10, 27 CFR 4.36. The federal labeling provisions do not apply to wine , wine products or cider under 7% alcohol by volume or over 14% ABV, nor to malt beverages made from a New York thing other than barely or hops. Beer must be brewed from malt or from substitutes for malt. 27 U.S.C. 211, 27 CFR 7.10,.Malt substitutes are limited to: rice, grain of a New York kind, bran, glucose, sugar, and molasses. 27 CFR 25.15.

few retain language that, although vague, allows flexibility for disapproving a brand name or a product package based on the state's primary objectives regarding health, safety and welfare. [596] The SLA in New York has expressed concern that some mixed beverage drinks that combine alcohol with FDA approved products, such as caffeine drinks would qualify for approval under the federal scheme, but could be potentially harmful or misleading.

Neither the FAAA, FDA, nor ABLA explicitly or implicitly regulate labels to prevent underage drinking, a goal that falls within New York's policy of protecting the public health, safety and welfare.

The listing on a label of common, yet potentially fatal, food allergens is voluntary, despite strong lobbying from advocacy groups requesting that such information be included on alcohol beverage products for public safety.[597]

Several label changes are exempt from the TTB resubmission requirements for COLA approval, but the changes may be significant to New York because the language is sometimes inconsistent. For example, the TTB does not require that suppliers obtain a new COLA when changes are made to the alcohol content of a malt beverage. New York maintains that this is a

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[596] AR; KY; MS; ME; MO; NH; OR; PA; WA (standards for label disapproval in these states are often left to the discretion of the Commissioner with no explicit criteria stated in the statutes or regulations.) A few states (AS, ME, OR) have explicit statements permitting or prohibiting private labels, alcohol beverages sold under the label exclusively through one retailer; At least 17 states explicitly regulate for "health, safety and welfare," Examples include: CA, CT; DC; DE; HW; KS; KY; LA; MI; MO; NE; OK; VT; VA; WI.

[597] T.D. TTB–53 (July, 2006) "Under the interim regulations, producers, bottlers, and importers of alcohol beverages may voluntarily declare the presence of milk, eggs, fish, Crustacean shellfish, tree nuts, wheat, peanuts, and soybeans, as well as ingredients that contain protein derived from these foods, in their products, but they are not required to do so."

significant change requiring additional approvals as increased alcohol could reflect on public safety.[598]

D. TTB's narrow scope of review

The FAAA's goals and objectives for label approval are not aimed at overall public health and safety. While the list of prohibited statements and graphics is lengthy and specific to each type of alcohol product, the focus is narrowly tailored to insuring that consumers are not deceived as to quality or content of the alcohol beverage.[599] Common restrictions for all alcohol beverages within TTB's jurisdiction include statements that are false or that may directly or indirectly, through ambiguity, omission, irrelevancy or other means create a misleading impression.[600] Examples of statements that are deceptive or misleading include statements or terms that imply the health benefits of an alcohol product; statements against a competitor's products or graphics, which may imply an endorsement, such as flags or insignias.[601] The list of mandatory statements is somewhat less exhaustive, though again, specific requirements are listed under separate provisions for malt beverages, wine or spirits. Common among the requirements is that the product label must list a non-deceptive or non-misleading brand name, the name of the bottler or

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598 TTB F 5100.31 (Other changes that do not require TTB approval include: changes to alcohol content for wine or distilled spirits, provided that the alteration does not change the class or type; changes to wholesaler, retailer or importer trademark information; deletion of any non-mandatory label info, etc.); *see* ABC Law § 107-b.

599 27 CFR 5.34; http://www.ttb.gov/pdf/brochures/p51902.pdf.

600 Rev. Ruling 55-618;Rev. Ruling 54-514.

601 27 CFR 4.29; Rev Ruling 55-618; 27 CFR 5.42; 27 CFR 7.29.

importer, the country of origin, the alcohol content, with the exception of malt beverages, and the net contents.[602]

In addition to conforming to the TTB's regulations, alcoholic beverages must meet the FDA's standards with regard to the safety of their ingredients and formulas.[603] Products not included under TTB review must adhere to the FDA requirements for labeling. Lastly, ABLA requires that all alcohol beverages include a warning label stating that drinking alcohol while pregnant can cause birth defects, and that drinking can impair the ability to drive and cause health related problems.[604]

Despite what appears to be a rather rigorous review, two examples illustrate the TTB's limits in addressing state concerns. Everclear, a high potency grain alcohol, is an example of a product that may meet the federal requirements, but nevertheless poses a potential danger. Approved by the TTB as a neutral spirit, Everclear's high alcoholic content, 75.5% ABV or 151 proof, and 95.5% ABV or 191 proof makes it extremely dangerous, especially if consumed without being diluted.[605] The allure of its "dangerous" reputation makes it popular among

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602 27 CFR 4.32; 27 CFR 5.32; 27 CFR 7.32.

603 TTB Ruling 2008-03 (July 7, 2008).

604 Alcoholic Beverage Labeling Act (ABLA), 27 CFR part 16.21 "GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems."

605 John Brick, *Alcohol Poisoning*, Intoxicon Alcohol and Drug Studies, http://www.intoxikon.com/Pubs/Facts%20on%20ALCOHOL%20POISONING_4_7_05.pdf.

underage drinkers.[606] Several states, New York included, have banned one or both versions of the product.

The state's ability to restrict where a product is sold can also alleviate concerns regarding health and safety, especially for products that have a high alcohol content. Soju,[607] a Korean alcoholic beverage approved by the TTB, comes in various degrees of potency, up to 24% ABV. New York approves one version for retail in liquor stores, and another for on-premise establishments such as taverns, bars and restaurants.

Finally, the TTB's oversight capability is questionable due to staffing shortages, and, more importantly, its distance from state-level concerns. States that approve brand labels, despite the brand's TTB COLA, provide a 'second-look' that may ensure that labels are not accidentally approved, and that a state's specific interests are addressed.

E. Deceptive packaging

The TTB does not specifically regulate for packaging, aside from mandating standard container sizes to avoid misleading consumers as to the amount of alcohol beverage contained therein.[608] Some unique packaging may be dangerously deceptive or attractive to underage drinkers, while meeting the TTB size restrictions.

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606 A search using the Google search engine with the terms "alcohol, Everclear, dangerous" returned over 400,000 hits. A preview of the first forty sites included several posts authored by people claiming to be underage or college age, requesting information about obtaining Everclear and seemingly fascinated with its inherent dangers.

607 ABC Law § 81(3). "Soju" shall mean an imported Korean Alcohol beverage that contains not more than twenty-four per centum alcohol, by volume, and is derived from agricultural products."

608 27 CFR 5.46; 27 CFR 4.71; 27 CFR 7.28.

A few New York cases have addressed this concern with mixed results, due to ambiguity in the scope of the agency's authority over label or packaging approvals. In *Integrated Beverage Group vs. New York State Liquor Authority*, the New York Court of Appeals agreed with the SLA that an alcohol beverage package marketed as Freaky Ice was misleading and potentially dangerous to children because it was a frozen product that could not necessarily be isolated with other alcoholic beverages in food stores.[609] Conversely, in *Matter of Hawkeye Distilling Co.*, the court agreed with the petitioners that vodka packaged to resemble an intravenous bag, complete with apparatus to invert the bag and a tube that could go into the consumer's mouth was not misleading.[610] Noting that New York lacked the authority to deny labels that "offended good taste," the court also indicated that a few states have statutory authority to deny packaging on grounds other than deception,[611] the inference being that with such explicit statutory authority, New York's decision to deny approval would have withstood a challenge. Clarifying 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, would enhance the SLA's authority to regulate for the public's health, safety, and welfare.

F. Attractiveness to underage drinkers and 1st Amendment protection of commercial speech

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609 27 A.D.3d 159, 807 N.Y.S.2d 74 (1st Dep't 2006), *aff'd*, Integrated Beverage Group Ltd. v. New York State Liquor Authority, 6 N.Y.3d 883, 849 N.E.2d 960, 816 N.Y.S.2d 737 (2006).

610 Matter of Hawkeye Distilling Co. 118 Misc. 2d 505 (1983) (article 78 hearing brought by Hawkeye Distilling Company on grounds that SLA's rejection of the packaging for its vodka was arbitrary & capricious.)

611 *Id.* Such states include: MT ('nothing misleading' is extended to packaging such as 'tube-shooters'; jelloshots, etc. As per Steve Swenson, Distilled Spirits & Program Manager); VA (3 VAC §5-40-20, 30, 40, 50); FL (FAC § 61A-4.005(3); TX (VTCA §45.8-45: marketing practices; §101.41).

The *Central Hudson* test for commercial speech has played a role from time to time in cases involving beverage alcohol. In *Central Hudson Gas & Elec. Corp. v. Public Serv. Commission of N. Y.*[612] the United States Supreme Court articulated a four prong test for analyzing under what circumstances commercial speech[613] is afforded limited 1st Amendment protection. Provided the speech relates to a lawful product or service and that the information disseminated is truthful, e.g., not deceptive or misleading,[614] the test requires that the government demonstrate a substantial interest in restricting the speech, that the method chosen for restriction reduces the harm or concern in a material way, and that the impingement is only as restrictive as is necessary to accomplish the government's objective. [615]

In *Rubin v. Coors Brewing Co.*, the TTB sought to prohibit the advertising of alcohol content on beer and malt beverage labels to prevent strength wars, which could lead to overconsumption.[616] The United States Supreme Court held the government's interest was not substantially advanced by the restriction, when the same restriction was not applied to the other forms of malt beverage advertising.[617] Applying the *Central Hudson* test again in *Lorillard Tobacco Co. v Reilly,*[618] the Supreme Court found that the Massachusetts Attorney General's ban

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612 447 U.S. 557 (1980).

613 Bad Frog Brewery, Inc., v. New York State Liquor Authority, 134 F.3d 87 (2d Cir. 1998) (To the extent that a graphic, slogan or logo is related to an advertisement of a particular product for the purpose of economic benefit, it is likely to fall within the parameters of commercial speech.)

614 533 U.S. 525, 554 (2001).

615 *Id.*

616 514 U.S. 476 (1995).

617 Rubin v. Coors Brewing Co.514 U.S. 476 (1995).

618 *Lorillard Tobacco*, 533 U.S. 525.

on outdoor smokeless tobacco or cigar advertising within 1,000 feet of a school was more restrictive than necessary to achieve the goal.[619] Finding no fault with the State's reasoning that limiting exposure to smoking advertisements could deter minors, the Supreme Court concluded that the state had failed to engage in the proper cost-benefit analysis before enforcing the ban in such a wide-geographic radius.[620]

The United States Court of Appeals for the Second Circuit applied the *Central Hudson* test in the case of *Bad Frog Brewery*, invalidating the SLA's denial of the Bad Frog Brewery label.[621] The SLA had denied the label on the grounds that the label's depiction of a cartoon frog making a common obscene gesture accompanied by a slogan "he just don't care" violated the state's interest in promoting temperance, and protecting children from vulgarity.[622] The SLA argued that the graphic, placed in close proximity to the required warning about the dangers of consuming alcohol, taunted the public into ignoring the health message,[623] and the labels attractiveness to minors coupled with the product's accessibility in grocery stores would encourage underage drinking and expose minors to the offensive material.[624]

The Court of Appeals agreed that the label fell within the protections of 1st Amendment commercial speech under the first prong of the *Central Hudson* test, as the activity promoted was

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619 *Id.*

620 *Id.* at 563.

621 *Bad Frog Brewery,* 134 F.3d 87.

622 *Id.* at 91(the frog in the graphic was holding his middle digit out straight, while the other webbed digits were curled.).

623 *Id.*

624 *Id.*

legal, and the label--though potentially offensive--was not deceptive or misleading.[625] The court also agreed that the SLA's interests in promoting temperance and shielding minors from vulgarity were substantial enough under the second prong to impinge on commercial speech.[626] The court then reviewed the relationship between the agency's denial of the labels and its two stated interests, under the "direct advancement" requirement of the *Central Hudson* third prong.[627] In considering the temperance claim, the Court of Appeals found no evidence that the public was actually ignoring the health warnings because of the label, and thus held that the SLA's actions had failed to "materially advance" that objective.[628] The Court also found that the SLA had failed to advance a material interest in its second stated objective--shielding children from vulgarity--but not due to a lack of evidence. Finding that the state's interest in protecting children from obscenity was broader than simply protecting them from vulgarity on alcohol beverage labels, the Court questioned how effective the SLA could be in meeting the state's objective given that its denial of the label was an isolated response to a larger problem of displays of vulgarity.[629] Nevertheless, presuming that to the extent possible the SLA had advanced a material interest by preventing children from being exposed to the offensive label, the Court held that the SLA's action failed under the fourth prong of the test. Noting the need for a narrow tailoring of any restrictive action to advance the state's interest, the Court found that the agency's categorical ban

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625 *Id.* at 96.

626 *Id.* at 98.

627 *Id.*

628 *Id.* at 101.

629 *Id.* at 100.

on the label under all circumstances was "excessive."[630] The Court cited several alternative solutions offered by the brewer that would limit a child's exposure to the label, without unnecessarily banning the label altogether.[631]

Aside from the analysis of 1st Amendment rights and commercial speech, the case is instructive regarding the scope and effectiveness of the SLA's authority under the labeling provisions. Although the court declined to rule on the state claims advanced by Bad Frog Brewery, the company raised what the court described as "novel and complex" issues regarding the agency's authority to enact a decency regulation prohibiting obscenity on outdoor signs and to extend its application to a label denial.[632] The SLA's scope of label review should be clarified to include a determination as to whether a label is attractive to underage drinkers in accordance with the *Bad Frog*[633] case.

In addition, some statutory modifications would modernize language and address inconsistencies between requirements, such as bottle deposit label requirements but those changes can be incorporated as part of a reorganization of the statute.

Recommendations

1. **Maintain New York's brand registration and label approval regime.**

2. **Enlarge the scope of the brand label approval to include a determination as to whether the package is dangerously deceptive or attractive to underage drinkers.**

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630 *Id.* at 101.

631 *Id.* at 100(These included "The restriction of advertising to point-of-sale locations; limitations on billboard advertising; restrictions on over-the-air advertising; and segregation of the product in the store.").

632 *Id.* at 102.

633 *Bad Frog Brewery, Inc., v. New York State Liquor Authority*, 134 F.3d 87 (2d Cir. 1998).

3. Clarify the scope of the brand label approval to include a determination as to whether a label is attractive to underage drinkers in accordance with the *Bad Frog* case.

4. Price Posting and Holding

Pursuant to section 101-b, it is unlawful for manufacturers and wholesalers to engage in price discrimination or to grant any "discount, rebate, free goods, allowance or other inducement of any kind whatsoever, except a discount or discounts for quantity of liquor or for quantity of wine and a discount not in excess of one per centum for payment on or before ten days from date of shipment."[634] Section 101-b requires manufacturers and wholesalers of wine and liquor to file price schedules that report future prices.[635] After the prices are filed, the SLA produces a composite for inspection, and there is a three-day window in which wholesalers may lower their prices to the lowest posted prices for the same products.[636] After this window is closed, the prices cannot be changed for the entire month without prior written permission from the SLA.[637]

These requirements were added to the ABC Law in 1942 to prohibit unlawful discrimination between wholesalers or retailers and to promote an orderly market after there had been a series of price wars in New York City in the late 1930s and early 1940s.[638] An early example of the wars, described as the worst since repeal of prohibition, began among package stores in Manhattan one day in mid-May, 1936, and spread to the Bronx and Brooklyn by evening,

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634 ABC Law § 101-b(2).

635 Beer manufacturers are not required to post and hold prices for beer in the same way as wine and liquor manufacturers.

636 ABC Law §101-b(4).

637 ABC Law § 101-b(4).

638 Laws of 1942, c. 899.

with 5-20% discounts on imported champagne, domestic whiskies, scotch, and imported cognac and vermouth.[639] Three early theories emerged for the reasons behind the war: a large store in Manhattan had a regular sale, and its major competitor met its prices; state liquor monopolies in the mid-west were dumping large quantities of imported products in New York just ahead of upcoming cuts in duties; or "bad feelings" had developed between some retailers and their wholesalers over volume discounts.[640] Prices moved so rapidly that by the third day, many stores had put blackboards in their windows to show hourly price changes.[641] The SLA said it had no jurisdiction in the price war, except to enforce rules prohibiting signs in windows that obstruct a clear view of the interior of the premises.[642] Large stores limited purchases to one bottle per brand.[643] Wholesalers and retailers talked of demanding federal regulations to prevent control states from selling liquor at "sacrifice prices" outside their territories, charging that Pennsylvania and two western state had dumped thousands of cases of imported whiskeys into the New York City market in 1935.[644] By day four, when the war was winding down, another theory emerged, that the two price-cutting competitors in lower Manhattan were aided by distillers who sought to

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639 *Price war topples liquor costs here; retail stores are jammed as rates drop precipitately in day of hectic selling; 3 boroughs are affected; dumping by State monopolies and sales by big stores are among reasons suggested*, New York Times, May 16, 1936, p. 17.

640 *Id.*

641 *Id.*

642 *Liquor price war again cuts costs, further drop of 1 to 26 cents a pint brings throng of buyers to stores; small retailer gloomy; 'Not making any money," says one – end of slashing by tomorrow is seen*, New York Times, May 17, 1936, p. N1.

643 *Id.*

644 *Monopolies are blamed for liquor price war*, New York Times, May 17, 1936, p. N2.

force their competitors into line.[645] At around the one week mark for the war, a "gentlemen's agreement" between retailers restored normal prices,[646] but the price war broke out anew one day later.[647]

When the war was renewed, "strong-arm men" showed up to block delivery of three truckloads of liquor to Nussbaum's, one of the price war's original price-cutting retailers in Manhattan.[648] The men came out of the crowd in front of the store and "swarmed over" the trucks, telling the drivers not to deliver the liquor.[649] A similar event took place at a second discount liquor store, but this time, the men who emerged from the crowd got on the running board of the truck, which then drove away.[650] Distillers were incensed over retail price cuts where retailers were selling their brands at a loss.[651] One distiller dispatched a group of 40 to buy its products from a single price-cutting store downtown, buying hundreds of bottles before moving

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645 *Liquor price war virtually at an end; all but a few stores go back to normal rates – leaders act to avert new outbreak; cause is still in doubt; retail guild head accuses the distillers of using unfair marketing practices,* New York Times May 19, 1936, p. 4.

646 *Truce is declared in liquor price war; 'Gentlemen's agreement' is in effect, retailers say, to restore old costs*, New York Times, May 21, 1936, p. 25.

647 *Liquor price war brings out thugs; deliveries at one store are blocked by strong-arm men until police arrive; peace promised today; agreement expected to end brief flare-up among the independent retailers;* New York Times, May 23, 1936, p. 17.

648 *Id.*

649 *Id.*

650 *Id.*

651 *Id.*

on to other establishments to buy out their stocks of the brands.[652] Retailers held a meeting, and agreed to return prices to previous levels.[653]

Another price war occurred in early 1937, again involving Nussbaum's, which said it was only matching prices of its competitors – which in turn undercut Nussbaum's.[654] Counsel to a state package store association sent a telegram to the SLA urging it to put an end to the war.[655] Nussbaum's, he charged, was giving away cases of vermouth (cost approximately $10.50 a case) at 3 cents per bottle, the New York City sales tax.[656] "He has consistently started every price war by the same practices. Ask immediate action."[657] The store denied it was doing anything but providing the finest merchandise at the best prices, and said it would not be influenced by "price fixing associations".[658]

A month later, there was a price war among distributors, with discounts as high as 15% offered to retailers.[659] Normal discounts were 2 to 5%, depending on the quantity purchased. Yet

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652 *Id.*

653 *Id.*

654 *Liquor men band to end price war; appeal to State Authority, alleging violation of law in sharp reductions; blame Nussbaum's store; manager for dealer denies he started fight – says he only matched competitors*, New York Times, February 7, 1937, p. 17.

655 *Id.*

656 *Id.*

657 *Id.*

658 *Id.* The store's statement was: "[Our] policy has always been to serve the public the finest quality of merchandise at the lowest price and [the store] has never been influenced by any profiteering combines or exorbitant price-fixing associations organized solely for their own benefit with utter disregard for the consumer."

659 *Liquor discounts rise in price war; schedules of wholesalers are disrupted as rivals bid for retailers' trade; 12 ½% plus 1% offered; distillers, jobbers and stores group seek to halt strife involving national brands*, New York Times, April 23, 1937, p. 41.

another price war a month later, in April, saw distributors' discounts rising in one day to 8% and, the next day, to 12 ½ %.[660] Distillers and wholesalers denied that they were trying to increase sales volume in New York City.[661] This time, the price cuts did not benefit the consumer, because retail prices of nationally known brands of liquor were maintained through price maintenance contracts under the Feld-Crawford Fair Trade Act.[662] Fair Trade acts were passed in most of the states in the mid-1930s, allowing producers of trademarked commodities to enter into contracts with retailers to fix retail prices on branded products.[663] Enforcement of the law was by an action brought by the producer, and nothing compelled a trademark owner to take action to protect its products' retail prices.[664] Even if not a party to fair trade agreements fixing prices on branded products, a retailer who was on notice of the fixed prices was as amenable to the Feld-Crawford Act as one who did sign.[665] The April price war ended a week later when the large producers allowed regular discounts to resume.[666] A wholesalers' association announced its intention to

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660 *Id.*

661 *Id.*

662 *Id.*

663 New York's Feld-Crawford Fair Trade Act, Former Gen. Bus. L. § 369-a through -e, was enacted laws of 1935, c. 976; repealed laws of 1975, c. 65.

664 Nat'l Distillers Products Corp. V. Columbus Circle Liquor Stores, Inc. (Sup. Ct., N.Y. Co. Spec. Term 1938).

665 Calvert Distillers Corp. V. Nussbaum Liquor Store, Inc., 166 Misc. 342 (Sup. Ct., N.Y. Co., Spec. Term 1938).

666 *Liquor Price war ends; last of the large distillers here announces regular terms*, New York Times, April 29, 1937, p. 30.

combat similar price cuts in the future by exercising close vigilance on the market, and, if necessary, bringing suit against offending distillers and wholesalers.[667]

In December, 1938 another price war broke out among retailers.[668] This time, a distiller successfully sued a retailer for selling its brands below prices fixed in fair trade contracts, and soon, most retail stores had restored prices on that distiller's products according to the price schedule.[669] As soon as the decision was announced, other distillers announced actions against 18 additional retailers, and, in a new approach, one retailer filed suit for a temporary injunction against a neighboring liquor store.[670]

A year later, in December 1939, the traditional holiday season price war began with slashed prices on imported scotch, all on price-fixed brands.[671] It started when one store began a legal close-out sale, after which the importer accepted cancellation of a large order of the same product in transit.[672] Customers, by now expert in dealing with various types of liquor price wars, did not immediately rush to the stores, despite the likelihood of an impending shortage of supplies of scotch and the additional costs of importation due to World War II.[673] Sure enough, the

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667 *Id.*

668 *Fine of $100 curbs liquor price war; quick return to fixed costs after one dealer is punished by court; other suits are pending; new actions are instituted in day – discounts on many brands continue heavy*, New York Times, December 15, 1938, p. 2.

669 *Id.*

670 *Id.*

671 *Liquor price war spreads rapidly; many stores meet cuts made by Bloomingdales – only scotch affected so far; importer weighs action; calls slashed unjustified – reaction of customers to reduced costs varies*, New York Times, December 17, 1939, p. 52.

672 *Id.*

673 *Id.*

department stores soon cut prices on scotch as loss leaders, in hopes of luring customers in to buy other merchandise, whereupon local liquor retailers, too, cut their prices on scotch, especially on the private label brands not covered by the Feld-Crawford Act.[674]

The following March saw a rebellion by bar owners against the big distillers, who discriminated against them in prices, offering far greater discounts to package stores than to on-premises establishments.[675] August, 1940 brought the beginning of a very long price war, with liquors initially selling for over $1 below prices required by price maintenance contracts - for example, Canadian whiskey price-fixed at $3.81 was selling at $2.69 a fifth, a 26% discount.[676] The price war spread to the wholesalers, who offered discounts of up to 16%, well in excess of the normal 4%.[677] After several days of sitting back and waiting for the price war to kick into high gear, consumers began thronging to liquor stores to take advantage of the "price collapse" in liquor.[678] Stores undercut each other in order to stay competitive, changing their prices several times a day.[679] Several stores began with "under the counter" price cuts; others cut prices openly

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674 *Liquor price war laid to big stores; G.F. Dunne says department establishments use bargains in scotch merely as lure; his charges are denied; meantime, quotations on one brand drop 10 cents – other lines at Saturday levels,* New York Times, December 19, 1939, p. 28.

675 *Bar owners split over ultimatum; Manhattan group quits united effort to force clean-up in distillers' practices; methods are disliked; members are urged to seek support of measures aimed to solve problems,* New York Times, March 23, 1940, p. 24.

676 *Price war on liquor remains unchecked; Dunne deplores it, announces a special meeting*; New York Times, September 4, 1940, p. 46.

677 *Id.*

678 *Stores act to end liquor price war; dealers call mass meeting in an effort to stop their week-old competition; slashes spur business; cuts of as much as $1 a bottle bring out throngs to retail places,* New York Times, September 6, 1940, p. 22.

679 *Id.*

in retaliation.[680] Trade groups, recently cited by the Federal Trade Commission for anti-trust law violations, failed to take action.[681]

Weeks passed, and the war roared along. Retailers took advantage of the wholesalers' discounts of 20 - 30% to buy up huge stocks of liquor.[682] A retailers' association pressed for enforcement of price contracts, charging that distillers who had placed their merchandise under contracts were not enforcing them.[683] As the war ran on, new price contracts were supposed to be drawn up to replace the ones breached during the price war, and in the meantime, retailers could sell the products at any price they chose.[684] But many distillers refused to issue new contracts, saying that the normal 40% retail markup was too high, initially slowed sales, and eventually would lead to the very price wars that the fair trade contracts were meant to discourage.[685] The New York Times reported that representatives in other industries worried that the collapse of price maintenance in the liquor industry could imperil the fair trade system generally.[686]

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680 *Id.*

681 *Id.*

682 *Liquor price war cannot end quickly; stores have large stocks bought at sharp concessions*, New York Times, September 22, 1940, p. F6.

683 *Price war on liquor remains unchecked; Dunne deplores it, announces a special meeting;* New York Times, September 4, 1940, p. 46.

684 *Liquor price war cannot end quickly; stores have large stocks bought at sharp concessions*, New York Times, September 22, 1940, p. F6.

685 *Id.*

686 *Id.*

Despite a dozen attempts to halt it,[687] the price war that had begun in August of 1940 was still ongoing more than five months later.[688] At a mass meeting in early February, 1941 of over 1000 liquor store owners, the retailers agreed to a new schedule of prices which would increase prices 50 to 60 cents a quart, with several additional gradual increases to bring prices back to normal levels.[689] Distillers said they would "make every effort" to enforce the new levels, and wholesalers agreed to a top discount of 15%, down from the 25 - 30% they were then offering.[690]

By this time, the wholesale and retail sectors were losing money steadily during the price war and were seeking a way to finally stabilize the market.[691] Clearly, industry agreements and inconsistent enforcement of frequently breached price contracts were getting nowhere.

In 1942, the Legislature stepped in, creating new section (101-b) of the ABC Law to prohibit price discrimination and require wholesalers to post their prices with the SLA, and hold those prices for one month. In vetoing three other bills which would have regulated the retail sector by similar price posting and other requirements, Governor Lehman wrote:

> That present conditions in the [liquor] industry have created a disorderly and unstable market, cannot be questioned. And it is equally true that the liquor industry – retailers, wholesalers, distillers and manufacturers – had been itself responsible for causing the chaotic market. As a result, the consumer is confronted with abrupt and frequent changes of prices. Furthermore, the rapid fluctuation in prices, from high levels to too low levels and then back again, may stimulate purchasing and thus nullify the intent and purpose of the liquor control laws to foster and promote temperance. Further governmental regulation and control of the distribution and sale of liquors may be necessary. But such

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687 *Liquor men move to end price war; will try scale 50 to 60 cents higher Monday in effort to stop cutting; reports distiller help; Dunne tells retail session makers pledge enforcement of the new levels,* New York Times, February 8, 1941, p. 27.

688 *Id.*

689 *Id.*

690 *Id.*

691 *Id.*

> regulation should not be made an excuse for price-fixing or result in increased prices for the consumer. I have today approved . . . [a] bill [which] makes it unlawful for a distiller or wholesaler to discriminate in the sale of liquor between his customers. All must be sold at the same price – excessive discounts, rebates, free goods and other allowances are made unlawful. This bill, it seems to me, strikes at the root of the difficulties in the industry. It effectively eliminates special deals by wholesalers to favorite retailers, as a result of which in New York City a small part of the licensees do the greater part of the business. I believe that my approval of [this] bill will correct the major evil in the industry.[692]

The SLA's memorandum in support of the bill[693] noted that it allowed the wholesalers freedom to set their own prices, and afforded them an opportunity to meet a lower price on the same brand submitted by a competitor. Each retailer, regardless of size and whether on-premises or off-premises, could purchase under uniform conditions, with no special deals offered to some and denied to others. With all retailers placed on an equal footing, drastic price reductions to the customer would be eliminated, because without the indirect subsidy of the distiller and wholesaler to favored retailers, the retailer would have to sustain the entire loss by himself.

The SLA observed that when certain outlets selected by the distillers are given preferential treatment, small neighborhood stores are unable to compete, and eventually only those stores selected by the distiller would be able to remain in business. When that point is reached, instead of the Liquor Authority having selected the location of package stores pursuant to its statutory authority to make that determination based on public interest, it would instead be the distiller who selects the location of stores.

It also noted that the customary discrimination between on- and off-premises retailers was injurious to the three-tier system. When an on-premises retailer has to pay a higher price at

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692 Herbert H. Lehman, *Three Bills Amending the Alcoholic Beverage Control Law Concerning the Retail Sale and Distribution of Wines and Liquors in this State, May 19, 1942*, PUBLIC PAPERS OF GOVERNOR LEHMAN FOR 1942, 296-7.

693 State Liquor Authority, Memorandum on Legislation, Assembly Int # 1718, Principal. # 2636.

wholesale for a given item than an off-premises retailer sells the same item at retail, it pushes the on-premises retailer into making his purchases from the package store in violation of the law. The SLA felt that the requirement for uniform pricing to the two types of retailers would help stabilize the three-tier system.

It further noted that a uniform price schedule would compel the distiller or brand owner to adopt a stable merchandising policy, rather than stimulating sales by favoring one distributor one month, and another the next month. The SLA hoped the new price schedules would help strengthen the wholesalers as an integral part of the system, rather than as tools to disguise the distillers' methods of granting preferential treatment to certain favored retailers. It felt that if wholesalers serve any function or utility in the industry's distributive system, they should be in a position to establish themselves by their own value and not be used as a tool to cover up the distillers' merchandising methods of granting preferential treatment to retailers.

The Counsel to the Governor recommended approval of the bill:

> There is no doubt that the distillers have deliberately destroyed the market in New York City. There is no rhyme or reason behind the discounts which they give. For instance, a manufacturer will sell to store X on Queens Boulevard at a 20 percent greater discount than they sell the same quantity to store Y, fifteen hundred feet down the street. They do this in order to induce X to handle their brand rather than another brand. They also give unduly large discounts for quantity purchasing. Since our law requires retailers to pay for merchandise delivered within thirty days, the retailers are forced to resort to all sorts of methods to get their cash in. I know for a fact that every retailer in New York City sells in case lots to restaurants and bars. They have to do this in order to purchase in quantities and get the discount. Consequently, they have to violate the law in order to sell their unwarranted large purchases.
>
> This bill may mean higher prices, but that does not necessarily follow. It all depends upon how the large distillers react. If they try to cut each other's prices, their competition will be reflected in the retail sales.
>
> We get substantial revenue from the retail licensees. We are, therefore, interested in maintaining stability in the industry. We charge store X in Queens County the same

license feel that we charge Macy's and Hearns. Yet Macy's and Hearn and a few other large licensees do a disproportionate business because they are able to undersell the local licensees.

If this were a business which was not regulated in any way by the State, I would be opposed to any sort of price-posting. However, this business is regulated by the State and we go get a substantial income from it.[694]

The Chairman of the Assembly Ways and Means Committee, writing to the Governor, said:

While I do not approve in general of price-fixing legislation, I think everyone was agreed that the present chaotic conditions in the liquor industry, involving devastating price wars, is exceedingly unhealthy and detrimental not only to the industry but to the public. After listening to a good many arguments regarding the legislation, I became convinced that the root of the evil lies in the wholesale discount and rebate system, which definitely favors the large retailer and is the basis for the price wars and the flooding of the upstate market.[695]

The retail sector in New York City was almost uniformly in strong support of the bill. One retail organization wrote:

. . . Heretofore price wars have been started and helped on their way by the granting of unreasonable and sometimes secret discounts and rebates to retailers. The retailer who is the recipient of such a discount can sell the brand of liquor in question at a ridiculously low price. Other retailers who did not receive such a secret discount or rebate must either meet this low price and sell the brand in question at a loss, or else must be reconciled to the loss of their customers. . . [Under this bill] the sudden price changes from one day to the next will not be possible, the market to the retailers will be stabilized and the natural consequence will be a stabilization in the prices charged to the ultimate consumer. It should be noted that this bill will not result in a fixed price of liquor charged by all retailers. The enterprising retailer who is an expert in his field and knows how to keep his overhead down and to work economies will still be able to pass these economies on to the consumer, only one element of his overhead, namely, the cost of his branded liquor, will be uniform. The wholesalers and distillers who are charged with the responsibility of setting of prices for a calendar month will not set the prices so high as to put themselves at

694 Memorandum from Nathan B. Sobel, Counsel to the Governor, to the Governor In Re: Assembly Int. 1718, Print 2636 by Mr. Hollowell, May 7, 1942.

695 Letter from Abbot Low Moffat, Chairman, Assembly Ways and Means Committee, to the Governor, April 30, 1942.

a competitive disadvantage with other wholesalers and distillers of branded liquors. The normal rules of competition will force them to keep the prices at reasonable levels and the consumer cannot be harmed. By the same token, they cannot set the prices too low since a low price for one retailer means a low price for all retailers.[696]

Unsurprisingly, ABC Law 101-b (1) provides that, as a matter of legislative intent,

it is necessary to regulate and control the manufacture, sale, and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. **In order to eliminate the undue stimulation of sales of alcoholic beverages and the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods, and other inducements to selected licensees, which contribute to a disorderly distribution of alcoholic beverages, and which are detrimental to the proper regulation of the liquor industry and contrary to the interests of temperance,** it is hereby further declared as the policy of the state that the sale of alcoholic beverages should be subjected to certain restrictions, prohibitions and regulations.

But the chaotic market returned a year later, when the War Production Board halted the production of alcohol for beverages, causing a liquor shortage, "scare buying," hoarding,, inequitable distribution by the distillers and wholesalers, and a resurgence of racketeering.[697]

Fast forward to the 2000s, and the industry was again engaged in the activities that 101-b is designed to prohibit. In 2005, the Assembly Committee on Economic Development held a hearing regarding allegations of the liquor industry's efforts to influence retailers' purchasing decisions by using illegal gifts and services as inducements.[698] In that same year, the Attorney

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696 Memorandum from Retail Wine and Liquor Guild, Inc., to the Governor in support of Assembly Introductory 1718 (Hollowell).

697 *WPB may permit making of liquor; Nelson says agency is seeking 'possibility of solution' of evils due to shortage; 15 states urge reforms; officials in conference here ask OPA to simplify ceilings and enforce them;* New York Times, December 4, 1943, p. 15.

698 New York State Assembly Standing Committee on Economic Development, Job Creation, Commerce and Industry, *Public Hearing on Oversight of the State Liquor Authority*, September 20, 2005.

General commenced an investigation of similar allegations. The investigation revealed that from 2003 through 2005,[699] favored retailers received illegal benefits in excess of $50 million.

The Attorney General's investigation concluded in late 2006 - early 2007 with a total of over $4,000,000 in civil penalties and costs assessed against fifteen suppliers, eight wholesalers, and thirty-one retailers.[700] The parties agreed to three Consent Orders and Judgments which prohibited suppliers, wholesalers and retailers from engaging in certain business practices, including: the giving and receiving or soliciting of cash, cash equivalents, trips, consumer items, free products, discounts, credits and rebates, free goods, and payments to third parties as inducements to retailers; advertising in retailers' in-state catalogues; buying a particular brand in order to purchase another brand; and selling and purchasing product at prices other than those filed with the SLA. Virtually all of the conduct that led to the Consent Orders violated section 101-b.

While traditionally seen as a fundamental part of the three-tier system, and an important tool to advance a state's goals of promoting temperance and an orderly market through stable prices, price posting and hold requirements have been challenged successfully in some states. In *TWFS, Inc. v. Schafer,*[701] for example, the Fourth Circuit affirmed a district court holding that

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699 *Liquor Wholesalers Settle Probe of Pay-to-play Practices; Agreement Is First in Ongoing Effort to Remove Illegal Practices in State's Liquor Industry*, Press Release, Office of the Attorney General, August 30, 2006.

700 People v. Charmer Industries, Inc., *et al.*, Consent Order and Judgment, Index No. I -2006-7562, September 12, 2006; People v. Bacardi U.S.A., Inc., et al., Consent Order and Judgment, Index No. 2006-9782, October 26, 2007; People v. 33 Union Square West, Inc., et al., Consent Order and Judgment, Index No. I-2006012745, January 2, 2007.

701 242 F.3d 198 (4th Cir.2001).

Maryland's price posting statute was a hybrid restraint of trade[702] because "the State requires wholesalers to set prices and stick to them, but it does not review those privately set prices for reasonableness; the wholesalers are thus granted a significant degree of private regulatory power."[703] It also concluded that the state's anti-trust conduct could not be accorded state action immunity but remanded the case to the district court for evidentiary findings on whether the state's interests under the 21st Amendment outweighed the federal interest in promoting competition.[704] On remand, the district court found that the state's laws had "minimal impact" on its interest in promoting temperance.[705] After a tortuous round of litigation, the Fourth Circuit affirmed that holding.[706] The court found that Maryland's scheme lacked sufficient evidence to support its regulation. "[U]nsubstantiated state concerns under the Twenty-first Amendment are not sufficient to trump the goals of the Sherman Act; a state must demonstrate that its liquor regulatory policies directly serve [are effective in furthering] the interests it proffers under the Twenty-first Amendment . . . ."[707]

In 2004, Costco Wholesale Corporation filed suit against the Washington State Liquor Control Board (LCB), alleging that portions of the state's alcohol beverage control law were restraints of trade in violation of the Sherman Antitrust Act and that the state lacked a "clearly

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702 "Hybrid" restrains on trade are governmentally-imposed trade restraints that enforce private pricing decisions . . . ." TFWS, 572 F.3d 186, n.1.

703 *Id.* at 209.

704 *TFWS*, 242 F.3d 198.

705 TFWS v. Schaefer, 2007 WL 2917025 (D. Md. 2007).

706 TFWS, Inc. v. Franchot, 572 F.3d 186 (4th Cir. 2009).

707 572 F.3d 186 (4th Cir. 2009)(quoting TFWS, 242 F.3d at 212.

articulated . . . policy of eliminating competition in liquor sales and failed to monitor market conditions or reasonable prices."[708] Included among the challenged laws were a uniform pricing rule, requiring suppliers to sell each product at the same price to every distributor, which in turn must sell products at the same posted price to every retailer, and price posting and holding. The state claimed that these measures led to orderly markets, but the court was skeptical, quoting the Supreme Court that "protecting small retailers simply [is] not of the same stature as the goals of the Sherman Act."[709] The district court found that the state's posting and holding, uniform pricing, as well as other portions of the law were all per se violations of the Antitrust Act, and that they constituted hybrid restraints of trade.[710] The district court also concluded that the state failed to demonstrate that antitrust immunity applied in the case of price posting and holding because the state did not review the reasonableness of wholesalers' prices.[711] As to whether the state could show that the challenged regulations promoted the "core concerns" of the 21st Amendment by promoting temperance, ensuring orderly market conditions, and raising revenue, the district court found that the state raised sufficient issues of fact to survive summary judgment.[712] After trial on that portion of the case, the district court concluded that there was no persuasive evidence that the state's low rates of per capita alcohol consumption - a classic temperance goal - arose from the

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708 522 F3d 874, 882 (9th Cir. 2008).

709 Costco v. Hoen, 2006 U.S. Dist. LEXIS 27141 at 24 (W.D. Wash. 2006) (quoting 324 Liquor Corp. v. Duffy, 479 U.S. 335, 350 (1987)).

710 Costco v. Hoen, 407 F. Supp. 2d 1234, 1241-3 (W.D. Wash. 2005).

711 *Id* at 1244.

712 Id. at 1246.

challenged restraints.[713] Even if the restraints promoted temperance by raising prices of alcohol, the court concluded that the state could achieve the same goal by other means, such as raising excise taxes.[714]

On appeal, the Ninth Circuit upheld the district court's holding only so far as it had struck down the price posting and hold requirement. It agreed with the district court's conclusion that the state's requirement was not saved by the 21st Amendment because the state had failed to demonstrate that its method promoted temperance and, hence, its interests did not outweigh "the federal interest in promoting competition under the Sherman Act."[715]

Subsequently, the State of Washington eliminated the 30 day hold on prices and now requires explicit monitoring by the liquor authority inspectors of posted prices to detect price discrimination.

New York survived an earlier challenge to its price posting requirements.[716] In 1984, the requirements of the price post and hold statute were challenged in *Battipaglia v. New York State Liquor Authority* as a violation of the Sherman Act.[717] In its opinion, the court quickly dispelled the notion that the trend of the Supreme Court's cases required that "attacks on state regulation of the liquor business as conflicting with the antitrust laws are to be decided as if § 2 of the

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713 *Costco*, 2006 U.S. Dist. LEXIS 27141 at 16.

714 *Id.* at 22.

715 Costco v. Maleng, 522 F3d 874, 903 (9th Cir. 2008) (quoting the district court).

716 Battipaglia v. New York State Liquor Authority 745 F.2d 166 (2d Cir. 1984).

717 *Id.*

Twenty-First Amendment did not exist."[718] It concluded that the price posting and hold statute was not a violation of the Sherman Act and that, if it were, the statute would still prevail by virtue of the protection afforded state action. The court found that New York's statute did not constitute resale price maintenance as was the case in *Midcal* because the wholesalers could set their own prices. However, the court did note that New York's statutory requirement that the wholesalers are made aware of each other prices and required to hold them for a month would be an antitrust violation if it were an agreement among the wholesalers. The court declined to rule on the effect of this element of the statute and instead chose to rely on the Supreme Court's ruling in *Rice v. Norman Williams Co,*[719] which stands for the rule that if a statute does not mandate conduct that is an anti-trust violation or create "irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute,"[720] it must be examined pursuant to the rule of reason which requires an examination of the economic practices involved.[721] The Second Circuit concluded that

> Section 101-b thus does not mandate or authorize conduct "that necessarily constitutes a violation of the antitrust laws in all cases." New York wholesalers can fulfill all of their obligations under the statute without either conspiring to fix prices or engaging in "conscious parallel" pricing. So, even more clearly, the New York law does not place "irresistible pressure on a private party to violate the antitrust laws in order to comply" with it. It requires only that, having announced a price independently chosen by him, the wholesaler should stay with it for a month.[722]

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718 *Id.* at 170.

719 458 U.S. 654(1982).

720 *Battipaglia*, 745 F.2d 166 at 174)(citing *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982)).

721 *Id.* at 166.

722 *Id.* at 175.

Having found that section 101-b was not a violation of the Sherman Act,[723] the court did not need to take the next steps in the analysis; nevertheless, it chose to discuss whether, if the statute constituted an anti-trust violation, the statute was protected because it involved state action under the *Midcal* test and whether the state's interests under the 21st Amendment were sufficiently substantial to withstand challenge.

As to the state action, the court in dicta noted that there was a "grave question" as to whether the *Midcal* test could be satisfied.[724] Although the state did not establish the prices, nor review the established prices, similarly to California in *Midcal,* the court suggested that New York's situation could be distinguished from that in *Midcal* because New York's goal was to prohibit price discrimination by establishing an orderly market, rather than to set resale price minimums, and therefore, "under such a program there is nothing that the state can 'actively supervise' except to see that the statutory requirements are obeyed-and there is no claim that the state has neglected this."[725]

As to the substantial nature of the state's interest in an orderly market, the court also concluded that

> Promotion of temperance is not the only interest reserved to the states by § 2 of the Twenty-First Amendment. The [New York] Legislature thus at least thought it was promoting price competition. Furthermore it expressly found that "price discrimination and favoritism are contrary to the best interests and welfare of the people of this state" - a policy which is reflected in the federal antitrust laws, 15 U.S.C. § 13. There can be no doubt that requiring wholesalers to post their prices and to observe them for a month is an effective way, perhaps the only really effective way, of enabling the SLA to prevent price

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723 The Second Circuit declined to decide whether the exchange of information between wholesalers permitted by section 101-b was a per se violation of the Sherman Act. *Id.* at 174-175.

724 *Id.* at 176.

725 *Id.* at 174-175.

> discrimination. The provision in § 101-b(4) allowing a wholesaler, within three days after disclosure of the price schedules, to meet any lower price, while not strictly necessary to enforcement of the policy against discrimination, was a reasonable effort by the legislature to prevent the one month adherence provision from severely damaging the competitive position of a wholesaler who had posted prices even slightly above the lowest ones.[726]

The Second Circuit's holding should not make the SLA nor the Legislature sanguine about the price posting and hold requirements.[727] All the price posting cases have been at the federal circuit court of appeals level. While the Supreme Court's jurisprudence on the 21st Amendment is evolving, and it has stated, "clear as day, that 'the three-tier system itself is 'unquestionably legitimate,'"[728]it has not ruled on price posting. As a renowned jurist sitting on the Second Circuit writing about the trend of Supreme Court's decisions regarding the 21st Amendment recently noted:

> this sort of updating presents another problem, and one that is especially apparent in the context of the Twenty-First Amendment: It can leave state legislatures and lower federal courts with no firm understanding of what the law actually is. . . . and we cannot decide the case before us on the basis of . . . . prognostications.[729]

Hence, in light of the state's expressly articulated policy regarding the promotion of an orderly market and temperance, as we noted earlier in this Report, the SLA should be vigilant in

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726 *Id.* at 178. This articulated policy was the direct result of the pernicious effect of the price wars in the 1930s and 40s.

727 *See* Costco Wholesale Corp. v. Maleng 522 F.3d 874 at 893 (commenting that the Second Circuit decision failed to account for the "hold" requirement.).

728 *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 197 (2nd Cir. 2009)(Calabresi, Circuit Judge, concurring.).

729 *Id.* at 200. Interestingly, the two major beverage alcohol wholesalers in the state have differing views about the continued need for the price posting and hold requirement. One urges its continuation; the other suggests that it is no longer needed in part because of the exclusive nature of the relationships between wholesalers and suppliers in this state.

its monitoring of wholesale prices, and the Legislature should provide its total support for the SLA's efforts.

5. Primary source

While much of the law regulating beverage alcohol across the nation focuses on drinking and driving, fair trade practices, sales, and taxation, ABC laws also govern the distribution and importation of alcohol beverages within a state's borders.[730] Primary source laws or analogous requirements form the heart of a state's distribution system, ensuring that all brands introduced into that state are authorized for distribution by the manufacturer and traceable to the wholesaler.[731]

Generally, the primary source is defined as the supplier closest to the manufacturer in the chain of distribution--it could be the manufacturer, the importer or a wholesaler licensed by the state and acting pursuant to a contract with the manufacturer or brand owner. Under a primary source statute, wholesalers are prohibited from purchasing alcoholic beverages from secondary markets, sources that may be outside the channels and control of the manufacturer.[732] A secondary source consists of products that were manufactured by the primary source, but distributed in foreign or out-of-state markets (secondary source) before being obtained and sold by

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730 Terrel L. Rhodes, *Policy, Regulation, and Legislation*, SOCIAL AND ECONOMIC CONTROL OF ALCOHOL; THE 21ST AMENDMENT IN THE 21ST CENTURY 82 (Carole L. Jurkiewicz and Murphy J. Parker, eds. 2008).

731 John Williams *et al., Distilled spirits, liquor importation, and Minnesota's lack of a primary source law* 2 (1996)[hereinafter Williams]. http://www.senate.leg.state.mn.us/departments/scr/report/liq_rpt.pdf page 9, (1996) Primary Source laws were challenged but largely upheld by the Supreme Court in 1982 in *Rice v Williams*, 458 U.S. 654. They are also a form of franchise agreement. *See* Draft Model Alcohol Beverage Act (June 21, 1981).

732 Williams at 9.

in-state licensees.[733] Purchase from such secondary sources may be legitimately cheaper than purchasing directly from the manufacturer, especially in states like New York that regulate against price discrimination.[734] Primary source laws may actually increase wholesale and retail prices by reducing a wholesaler's ability to shop around for better deals.[735] Nonetheless, the lack of competition prevents brand owners from being out-priced in the market by wholesalers, a critical factor in the preservation of the three-tier system.[736] Absent such protection, a wholesaler may dominate the brand owner, blurring the separation between the supplier, wholesaler and retailer tiers, and potentially jeopardizing the public's safety and welfare.[737]

Primary source laws also provide a brand owner some control over where its products are introduced and how its products are portrayed, a necessary advantage given tight federal and state trade-practice restrictions. Allowing wholesalers to purchase from secondary sources may undermine the brand owner's intent to promote or restrict its product in a particular market. The consequences are detrimental not only to the brand owner, but also for consumers looking for product diversity. Distillers in Minnesota, for example, admit that Minnesota's lack of a primary source law for spirits significantly decreases the marketing of new brands in the state.[738] Introducing a new product requires extensive marketing resources and brand owners are reluctant

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733 *Id.*

734 *Id.* at 12; *See* ABC Law § 101-b.

735 Williams at 13.

736 *Id.* at 18.

737 *Id.*

738 *Id. at* 13.

to make the investment in a state that allows an influx of product from sources untraceable through the brand owner's distribution chain.[739]

Primary source laws provide a state with accurate excise tax assessment and collection.[740] Excise taxes for alcohol beverages are assessed upon distribution from the manufacturer or from the wholesaler. Having a primary source law that identifies all wholesalers able to distribute a manufacturer's brands decreases the potential for lost revenues from inaccurate reporting. By far the most compelling reason to impose a primary source law or system involves the protection of the public's health and safety. Brand owners and industry professionals alike express concern that the absence of a primary source law decreases the brand owner's ability to assure the purity and integrity of the product.[741] Unable to designate who can distribute a particular brand, the distiller or vintner, and, ultimately, the consumer is vulnerable to counterfeiting or product adulteration. Allowing wholesalers to purchase from sources unknown to the brand owner also decreases the state's ability to trace and recall adulterated products introduced into its market.

Far from a hypothetical concern, several reports from the United Kingdom indicate that poisonous spirits distributed throughout Europe and via the internet under the trade- name, "Vodka Russia" caused multiple deaths and injuries.[742] In November 2009, customs officials in

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739 *Id.*

740 *Id. at* 16.

741 *Id. at* 15; *See* submissions to the Commission, on file at its office.

742 *IPC reports rising levels of counterfeit alcohol in the UK*, Talking Retail, http://www.talkingretail.com/news/independent-news/8020-ipc-reports-rising-levels-of-counterfeit-alcohol-in-the-uk.html (1/2/2008). The International Federation of Spirit Producers UK reported that the alcohol seized had the composition of diluted industrial strength methanol alcohol.

Ireland intercepted a shipment of fake vodka contained in 5-liter drums marked as carwash.[743] The phony liquid was allegedly imported from Bulgaria and en route to an Ireland counterfeiting operation capable of producing over 20,000 bottles of fake product.[744] Sham alcohol and multi-million dollar counterfeiting operations are not limited to the U.K. or to vodka. Experienced traders throughout Vietnam and southeast Asia snare unsuspecting travelers shopping for gifts overseas, offering discount prices on presumably brand name products such as Hennessey XO, Remy Martin, Martini, Moutai, and Chivas, Johnny Walker Black and Gold label, to name a few.[745] Although less prevalent due to importation standards, counterfeiting is not foreign to American markets. In 2004, alcohol control agents in Columbus, New Mexico seized bottles of counterfeit Stolichnaya vodka from a licensed duty-free retailer.[746]

Wine distributed in the United States is also not immune to counterfeiting or adulteration. While vintages under a hundred dollars a bottle pose less of a concern, an estimated 5% of high-end wines and collectables distributed through auctions and secondary markets are fraudulent.[747] In New York last year, for example, hours before being auctioned to consumers, 106 bottles of

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743 *Customs foil fake vodka gang*, Drinks International, September 10, 2009.

744 *Id.*

745 *Tet approaching, fake alcohol rampant*, Look At Vietnam.com, November 25, 2008, http://www.lookatvietnam.com/2008/11/tet-approaching-fake-alcohol-rampant.html. Undetectable by most consumers, the traders siphon some alcohol out of genuine bottles, add water and refill the containers, sealing the hole. Alternatively, non-genuine bottles are filled with colored water and falsely labeled.

746 *Arrests Made in Illegal Alcohol and Tobacco Sales in Columbus,* New Mexico Department of Public Safety, Media Alert,February 20, 2004, http://www.dps.nm.org/newsReleases/DPS/2004/DPSnewsRelease_02.20.04.htm.

747 Amelia Whitcomb, *Wine Counterfeiting*, Las Vegas Restaurant.com, March 31, 2009, http://www.adnas.com/uploads/las%20vegas%20restaurants%203-31-09.pdf.

counterfeit vintage wine were intercepted by the vintner.[748] Recognizing that it only takes one bottle of tainted product to potentially harm or fatally injure a consumer, the introduction of any adulterated product into the stream of commerce poses significant concern.

On the federal level, the brand name registration must be completed by the bottler for a domestic product and the importer for foreign products; a federal Certificate of Label Approval (COLA), therefore, does not necessarily provide information regarding the primary source.[749] On the state level, primary source generally pertains to the manufacturer, but can also indicate the distiller, bottler, brewer, brand owner, vintner or exclusive agent designated by the manufacturer or rectifier from which product can be purchased.[750] Thirty-two states, including the District of Columbia have some form of statutory primary source law restricting wholesalers from purchasing alcoholic beverages from anyone other than the American source of supply (primary source).[751] Some states' policies restrict the wholesaler from purchasing all alcohol beverages from other than the American primary source, while in other states the limitation is only on a

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748 Dominique Schroeder, *Tasteful counterfeiters target the world's most coveted wines*, AFP, November 29, 2009, p. 12. "At a sale in New York last year, the vintner was shocked to discover that '106 bottles out of 107' were fakes. The catalogue listed 'a sale of 1945 Clos Saint Denis 1945 and other old vintages, when we didn't even begin producing this particular appellation until 1982," said the vintner. *Id.*

749 27 C.F.R. 5.31; 27 C.F.R. 13.11 "The permittee or brewer whose name, address, and basic permit number, or plant registry number, appears on an approved Form 5100.31, certificate of label approval..."

750 Representative wording taken from Arizona: "Primary source means the distiller, producer or owner of the commodity at the time it becomes a marketable product. This also includes an exclusive agent appointed by the distiller, producer, owner, etc. If the product is imported from outside the United States, the primary source of supply is the foreign producer, owner, bottler or agent or the prime importer from same, or the exclusive agent of the foreign producer, bottler or owner in the United States." A.R.S. § 4-243.01.

751 Only 14 states, of which only Idaho, Louisiana and Oklahoma are pure license states, have no restrictions on wholesaler purchases.

particular type of alcohol, such as wine or spirits.[752] Most states have explicit wording prohibiting wholesalers from purchasing from other than the primary source, but exceptions are sometimes allowed for situations where there is a shortage of supply.[753] Five states, including New York, do not have a statutory provision, but do have some alternative system in place that is recognized as a substitute for a primary source law.[754]

While New York does not have a primary source law, per se, it achieves some of the benefits of a primary source requirement through two independent channels: the brand name label registration system and the price posting system.[755] Using a complex scheme of rules that differ depending on whether the product is classified as beer, wine, a wine product or liquor, virtually all alcohol beverage products distributed in New York are known to the authority through one or both of these systems.[756] Although all wholesalers distributing alcohol beverages in New York

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752 In California, for example, the restriction applies only to the purchase of distilled spirits, whereas in Minnesota the restriction on primary source applies to beer and wine, but not to distilled spirits. Ca. Prof. & Business Code §23672; MN - §7515.0810, Regulations; §340A.311©.

753 In the District of Columbia, wholesalers are required to purchase alcoholic beverages from the primary American source of supply. It is unlawful for a wholesaler to sell any alcoholic beverages in the District of Columbia that have not been purchased from the primary source of American supply. Code of D.C. 23-900; Rhode Island does not preclude purchases from other Rhode Island wholesalers, or even wholesalers outside the state carrying the same brands, when the purpose is to alleviate a temporary shortage. RI Gen Laws § 3-6-16.

754 Connecticut, Delaware, Massachusetts, Michigan and New York. In Connecticut, for example, there are no specific statutory or regulatory provisions. However, as a practical matter, due to the registration requirements imposed upon suppliers, it would be extremely difficult, if not impossible, for a wholesaler to purchase from other than the primary source of American supply or its duly appointed agent. Regs., Conn. State Agencies § 30-6-B7.

755 ABC Law §§ 107-a; 101-b.

756 Exception: New York does not yet have a definition for a wine specialty, a wine product made from combining wine with other flavoring or alcohol products, although the authority is currently drafting language to define such products. Because it is a wine, wine specialties will be required to be price posted. ABC Law 101-b; Submissions to the Commission, on file at its office. Another exception applies to "Vat to Tap" products, beer manufactured in small quantities by a brewer, but not intended for bottling or sale outside the brewer's premises. Submissions to the Commission, on file at its office.;Currently, a systematic review of all products is virtually unattainable given the current software limitations. For a discussion of the operational deficiencies, see Final Report – Part One, herein.

must be licensed by the authority, the primary source or brand owner is identified separately for most products in the label registration system.[757] Wine that contains between 7%-14% alcohol by volume (ABV) and has a COLA from the TTB is excluded from the brand registration system.[758] Consequently, the brand owner or primary source may not be readily identified in New York. Price posting provisions allow a brand owner or primary source to identify for the authority one or several wholesalers who are authorized to distribute the supplier's product, establishing exclusivity over a product's distribution in some cases.[759] In most cases, the wholesaler or brand owner who files for brand label approval is the same licensee that files the price posting.[760]

Several gaps in New York's scheme challenge the system's ability to meet the intent of a primary source statute. Beer,[761] wine products and malt beverages, and cider are not price posted; therefore, tracking how a product was obtained is more difficult. Although primary source laws affect distribution between the supplier and wholesaler tier, requiring wholesalers to purchase from a primary source provides an additional level of protection against illegally obtained product at the retailer level, as well. Without having to purchase from a primary source, product can enter the New York market outside of the proper distribution system.

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757 *See* ABC Law § 107-a.

758 ABC Law § 107-a(4)(c)(3), "Provided, however, that where a brand or trade name label for wine has been approved by the federal bureau of alcohol, tobacco and firearms, it shall be deemed registered and approved by the authority and no application, application fee, or annual registration fee shall be submitted to the authority."

759 ABC Law § 101-b.

760 The rules are summarized at Appendix F.

761 Beer is also governed under franchise agreements (ABC Law § 55-c) but little protection is provided by means of a primary source because wine and spirit wholesalers are able to distribute beer as well.

Recently, a New York City bar was cited by the SLA for selling beer manufactured in Wisconsin but unauthorized for sale outside that state.[762] Having a primary source law in place curtails such practice, as wholesalers can readily identify products that were introduced by a retailer outside of the proper distribution chain. Most wholesalers understand that wine and liquor purchased outside New York must be price posted, even though the product was purchased from a non-New York licensee. An inference was raised during our study that some confusion regarding this interpretation of the statute exists. Whether or not examples are forthcoming, the mere potential that such confusion is entertained exposes a gap in the system that requires correction; especially considering that TTB, approved wine does not require brand label registration in New York. Given the rise in overseas counterfeiting, products entering the market from unknown sources seriously jeopardize the public's welfare. Additionally, such products, if not price posted, provide no audit trail for the collection of excise taxes.

Wine acquired by non-licensees wishing to distribute such products under a private collection label pose a special concern. Currently, wine obtained at an auction or through other means by non-licensees may be sold to licensed wholesalers or retailers for resale. Given the recent rise in fraudulent wine, the risk to consumers is increased by the statute's ambiguous restrictions on the wine-holder.[763] Wine is not immune to tampering; thus, the potential that adulterated products could enter the New York market undetected poses concern.

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[762] Barry Adams, *Spotted Cow confiscated from New York City bar*, Wisconsin State Journal, November 24, 2009, http://host.madison.com/wsj/business/article_65f24bc0-d955-11de-81e9-001cc4c002e0.html. The SLA confiscated 50 cases of Spotted Cow beer manufactured by New Glarus Brewing Company of Green County, Wisconsin.

[763] ABC Law § 85.

New York may be losing excise tax revenues, as the lack of a primary source law makes it difficult to audit the distribution chain to ensure accurate reporting. Recent regulatory changes in New York State Department of Taxation and Finance pave the way for primary source incentives related to the collection of excise taxes. Adopted in 2009, these rules require many wholesalers to report their monthly sales to retailers on an annual basis, provided no sales or use tax was collected in the transaction.[764] In addition to filing the information, wholesalers included under the statute must also provide to each vendor individually the sales information the wholesaler reported regarding transactions with the vendor.[765] Although adopted primarily as a means to verify reported vendor income and sales taxes, an indirect benefit of the new provision is the enhanced ability to track and reconcile excise tax revenues between wholesalers and retailers. Given the administrative means to exercise such oversight, the establishment of a primary source law bolsters audit accuracy, as a wholesaler's source of supply for all alcohol beverages is traceable, making reconciliation between a wholesaler's inventory and distribution sales to retailers more practicable. Lastly, notwithstanding the administrative complexity generated by the bifurcated system, and the inherent confusion such a system imposes, recent challenges to price posting systems across the states raise questions as to whether having a primary source law partially dependent on the price posting system is in the best interest of the state.[766]

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764 Chapter law 57, Subpart G, section 163; TSB-M--9(10)S, July 2009. Exemptions apply to wholesalers that distribute to other wholesalers who do not hold a license making them able to sell alcohol beverages at retail: "Sales made to an exempt organization or to another alcohol beverage wholesaler whose license does not allow it to make retail sales of alcoholic beverages do not need to be reported on the return"

765 *Id.*

766 *See, e.g., Costco,* 522 F.3d 874.

Considering the health and safety concerns associated with a lack of a primary source law, and the gaps inherent in New York's system, we recommend the adoption of a formal primary source statute. The language of statutes in other states such as Massachusetts or Colorado can serve as models.[767] In addition, the primary source statute should take into account the impact that implementation of the statute may have on New York's brand registration system, and price posting requirements under ABC Law section 101(b) (4). To the extent that such systems can be streamlined for ease of administration, use and public accessibility such options should be entertained. Lastly, although the ABC Law does reference private collections, the term is not adequately defined.[768] Private collections should be redefined to restrict the ability of wholesalers and retailers to use private collections to circumvent the price posting requirement. California's definition of a private collection can serve as a model.[769]

Recommendation

1. **The ABC Law should be amended to include a freestanding primary source law.**

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

XII. Economic development of craft beverage alcohol industries

Craft breweries, cider producers, distilleries and wineries share a common goal of showcasing New York products, and enjoy virtual unanimous support as engines for promoting

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767 Co. Rev. Stat. § 12-47-901; Mass. Gen. Laws Ann. Ch. 38 §18.

768 ABC Law §§85, 99-g.

769 Cal. Bus. & Prof. Code § 23104.6 "Permitted to sell wine. (a) Any nonlicensed person owning bottled vintage wine purchased by that person at retail, is authorized to sell that wine to a licensee authorized to sell that wine if each bottle has a permanently affixed label stating that the wine was acquired from a private collection"

economic development in New York. These craft businesses are generally capital intensive, so legislation has been regularly enacted on their behalf to encourage start-up businesses, respond to new types of businesses, and offer flexibility as to requirements for traditional commercial alcohol manufacturers or producers. Because these legislative efforts have often been done piecemeal, the state's law governing the craft industries can prove opaque and burdensome and frequently impede development. The law should be clarified to remove any impediments to furtherance of the Legislature's intent that the development of these wineries, craft breweries, craft distilleries and craft cider producers be encouraged. To the extent that it is reasonable, and otherwise consistent with applicable federal law, they should be treated similarly under New York law. Additional amendments to the ABC Law to further expand economic development opportunities for wineries, distilleries, breweries and cider producers should be adopted so long as they are consistent with federal law and do not undermine the state's overarching goal of protecting public health, safety, and welfare.

The recent decision in *Granholm v. Heald*,[770] shows the unintended consequences of state legislation designed to boost local economic development by by-passing the three-tier system of alcohol production, distribution, and sale. Post *Granholm*, any additional changes to the law need to be approached cautiously – with an eye toward the evolution of the law relating to the interplay between the 21st Amendment and the dormant commerce clause – because it is unclear "what if any governing principles may be derived from the [Supreme] Court's Twenty-First Amendment decisions."[771]

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770 544 U.S. 460 (2005).

771 *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185,192 (2nd Cir. 2009)(Calabresi, Circuit Judge, concurring).

The report commissioned by John D. Rockefeller in 1933 concluded that if a state did not choose direct management of sale and distribution of alcoholic beverages, but instead chose to regulate by license, it was essential that "[t]he 'tied house,' and every device calculated to place the retail establishment under obligation to a particular distiller or brewer, should be prevented by all available means."[772]

After Prohibition, New York, like many other states, chose to regulate the alcohol industry by license, through what is known as the "three-tier system," which requires separate licenses for manufacturers (such as distillers, wineries, and breweries), wholesalers, and on- and off-premises retailers.[773] Generally, as already noted, under the three-tier system, manufacturers can sell only to wholesalers, and wholesalers can sell only to retailers – and only retailers can sell to consumers.[774] To promote economic development and foster the growth of domestic manufacturing, the Legislature has granted limited exceptions to the three-tier system, for example, to wineries[775] and farm wineries,[776] which may bypass the three-tier system to sell their wine at retail for consumption on or off-premises.[777] Without these exemptions, it can be exceedingly difficult for

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772 RAYMOND B. FOSDICK AND ALBERT L. SCOTT, WITH A FOREWORD BY JOHN D. ROCKEFELLER, JR., TOWARD LIQUOR CONTROL 43 (1933).

773 Evan T. Lawson, *The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages* 33-4, SOCIAL AND ECONOMIC CONTROL OF ALCOHOL; THE 21ST AMENDMENT IN THE 21ST CENTURY, (Carole L. Jurkiewicz and Murphy J. Parker, eds. 2008).

774 ABC Law §§ 100(2), 102(3-b).

775 ABC Law §§ 76(3) and (4).

776 ABC Law §§ 76-a(3)and 76(4).

777 The statute also exempts brew pubs, which may sell their beer for on- and off-premises consumption, ABC Law § 64-c; cider producers, which may sell for off-premises consumption ABC Law §§ 58(4) and 58-b(1); brewers, which may sell beer in an adjacent restaurant owned by the brewery or in bulk for consumption at clambakes and similar gatherings, or for off-premises consumption ABC Law §§ 51(4) and (3) and 52; and farm distillers, which may sell their liquor for off-premises consumption ABC Law § 61(2-c)(a).

a small winery to make its products available to the public. For a variety of reasons, the distributors, which are large multi-state businesses, often do not take the risk of handling the marketing and distribution of small wineries' products to package stores and restaurants or taverns.[778] The exemptions thus also help consumers gain access to products from very small producers. Direct sale benefits wineries because they can sell their wine at retail prices. Otherwise, under the three tier system, there are successive markups as the product passes through the two other tiers, wholesalers and retailers.[779]

In support of local producers, legislatures have carved out other exceptions that have recently come under attack by out-of-state interests seeking equal privileges. In the *Granholm* line of cases, the out-of-state interests and in-state consumers seeking out-of-state products, look to the Commerce Clause of the federal Constitution, while the states counter, often unsuccessfully, with their rights under the 21st Amendment.

1. The Commerce Clause: *Granholm* and progeny

Granholm concerned state laws allowing wineries to ship their wine directly to consumers, bypassing the three-tier system. The case involved a challenge to direct shipment laws enacted in Michigan and New York. Both states legalized direct shipment by local wineries to consumers, but erected various barriers against out of state wineries seeking to ship to in-state residents.[780] Under Michigan law, an out-of-state winery could apply for a special license that only allowed for

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778 Tom Wark, *The Three-Tier System and Consumer Access to Wine,* http://fermentation.typepad.com/fermentation/2009/06/the-threetier-system-and-consumer-access-to-wine.html

779 *Id.*; see also *Granholm*, 544 U.S. at 474.

780 Mich. Comp. Laws Ann. §§ 436.1113(9), 436.153792)-(3); ABC Law § 76-a(3).

sale to in-state wholesalers.[781] Under New York's law an out-of-state winery could ship directly to New York consumers only if it established a "branch factory, office, or storeroom within the state of New York."[782]

In-state consumers in Michigan,[783] and wineries outside the state of New York, brought suit in separate cases, contending that the direct shipment laws discriminated against interstate commerce in violation of the Commerce Clause of the U.S. Constitution.[784] The United States Supreme Court consolidated the two cases, and concluded that the states could permit direct shipment of wine, as long as they did so on "evenhanded terms."[785] They could not "ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers."[786]

The question before the Court was whether a "State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate[s] the dormant Commerce Clause in light of § 2 of the Twenty-first Amendment."[787]

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781 Mich. Comp. Laws Ann. §§ 436.1109(9) and 436.1525(1)(e).

782 ABC Law § 3(37).

783 *Granholm*, 544 U.S. at 469.

784 *Id.* at 470.

785 *Id.* at 493.

786 *Id.*

787 *Id.* at 471.

The Court described the overall context of the cases as an "ongoing, low-level trade war,"[788] a "patchwork of laws – with some States banning direct shipments altogether, others doing so only for out-of-state wineries, and still others requiring reciprocity," and warned that "[a]llowing States to discriminate against out-of-state wine 'invite[s] a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.'"[789]

The Commerce Clause provides that Congress has the power to "regulate Commerce . . . among the several States."[790] Paired with the affirmative power invested in Congress is the negative, or "dormant" Commerce Clause, which prohibits a state from enacting laws that interfere with or burden interstate commerce.[791] The Court observed that even thought New York's law was unlike Michigan's scheme in that it did not bar out of state wineries from direct shipment,[792] its requirement that out-of-state wineries establish a distribution operation in state in order to be allowed direct shipment into the state, was "just an indirect way of subjecting out-of-state wineries, but not local ones, to the three-tier system."[793] The Court concluded that laws of both states discriminated against interstate commerce, and thus violated the dormant Commerce Clause.[794]

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788 *Id.* at 473.

789 *Id.*

790 U.S. Const. art. I § 8, cl.3.

791 *See, e.g.,* Dennis v. Higgins, 498 U.S. 439, 447 (1991).

792 *Granholm,* 544 U.S. at 474.

793 *Id.*

794 *Id.* at 476.

The Court then turned to the states' contention that their direct shipping laws were saved by section 2 of the 21st Amendment, which provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[795] As the Court had noted earlier, section 2 generally protects the states' core interests in "promoting temperance, ensuring orderly market conditions, and raising revenue" through the states' regulation of the production and distribution of alcoholic beverages.[796] The states argued that the 21st Amendment gave them free rein to regulate beverage alcohol coming into their jurisdictions; invalidating their direct shipment laws would threaten the constitutionality of the three tier system. The court disagreed on all counts. As to the power given the states by the 21st Amendment, the Court stated that the purpose of the 21st Amendment was "to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods."[797] The Court found that the states could regulate direct shipping, as long as they treated wine produced out of state the same as wine produced in the state, not the case here, where both states had made "straightforward attempts to discriminate in favor of local producers."[798]

As to the threat to the three-tier system, the Court noted that "the three-tier system itself is 'unquestionably legitimate.'"[799]

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795 U.S. Const. art. XXI, § 2.

796 North Dakota v. United States, 495 U.S. 423, 432 (1990).

797 *Granholm,* 544 U.S. at 484-5.

798 *Id.* at 489.

799 *Id.* [internal citations omitted].

Finally, the court rejected as "unsupported" the states' claims that direct shipment increases the risk of underage drinking and the potential for tax evasion.[800] The Court found that "mere speculation" fails to support discrimination against out-of-state products: to withstand Commerce Clause scrutiny, a state must produce "concrete record evidence that a State's nondiscriminatory alternatives will prove unworkable."[801]

Justice Stevens dissented, dismayed that alcohol has become, to younger generations, "an ordinary article of commerce, subject to substantially the same market and legal controls as other consumer products,"[802] despite its unique status as a product that spurred the majority of the country to amend the Constitution on not just one, but two separate occasions.[803]

> The notion that discriminatory state laws violated the unwritten prohibition against balkanizing the American economy . . . would have seemed strange indeed to the millions of Americans who condemned the use of 'demon rum' in the 1920's and 1930's. Indeed, they expressly authorized the 'balkanization' that today's decision condemns. Today's decision may represent sound economic policy and may be consistent with the policy choices of the contemporaries of Adam Smith who drafted our original Constitution; – it is not, however, consistent with the policy choices made by those who amended our Constitution in 1919 and 1933. My understanding (and recollection) of the historical context reinforces my conviction that the text of § 2 should be 'broadly and colloquially interpreted.' . . . Because the New York and Michigan laws regulate the 'transportation or importation' of 'intoxicating liquors' for 'delivery or use therein,' they are exempt from dormant Commerce Clause scrutiny. . . . [T]he text of the Twenty-first Amendment is a far more reliable guide to its meaning than the unwritten rules that the majority enforces.[804]

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800 *Id.* at 491.

801 *Id.* at 492-3.

802 *Id.* at 494.

803 *Id.* at 495.

804 *Id.* at 496-7.

Generally, under *Granholm,* state policies receive the protection of the 21st Amendment when they do not have a separate set of rules to favor local interests or penalize out of state interests.[805] If a state does seek to discriminate against out of state products, it has to produce solid evidence to justify the different treatment, lest it run afoul of the Commerce Clause.[806] There is some question post-*Granholm*, about the remaining power of the 21st Amendment in the face of Commerce Clause challenges.

Post *Granholm,* several state provisions have been struck down as being in violation of the Commerce Clause: allowing in-state wineries to open up to 6 additional salesrooms, while limiting out-of-state wineries to a warehouse and a salesroom (New Jersey);[807] a residency requirement for retail licensees (Massachusetts);[808] allowing in-state retailers to ship to consumers in the county in which the retailer is located, while banning shipment by out-of-state retailers to state residents (Texas);[809] allowing only in-state wineries to ship wine purchased at the winery (Kentucky);[810] allowing domestic wineries and breweries to self-distribute to retailers while out of

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805 *Id.* at 489.

806 *Id.* at 492-3.

807 Freeman v. Fisher, 563 F. Supp. 2d 493 (D.C. N.J. 2008)(finding that discriminatory treatment does not further the state interests of preventing illegal activity, but merely deprives out of state wineries of equal right of access to the market.)

808 People's Super Liquor Stores v. Jenkins, 432 F. Supp. 2d 200 (D.C. MA. 2006)(finding that the provision is discriminatory on its face; once the state opens the market, it may not open it only to in-state retailers.).

809 Siesta Village Market LLC v. Perry, 530 F. Supp. 2d 848 (N.D. Texas, 2008)(finding facial discrimination by giving in-state retailers access to markets, while denying it to out of state retailers).

810 Huber Winery v. Wilcher, 488 F. Supp. 2d 592 (W.D. KY 2006)(finding that the "statutory scheme discriminates based on where the wine originates, not upon where it ends up.") *Id.* at 597.

state wineries and breweries must go through a distributor (Washington);[811] and allowing in-state wineries to sell at retail, and customers to transport their purchases (Tennessee)[812] (although similar provisions have been upheld in Arkansas, *infra).*

Other provisions have survived Commerce Clause analysis: allowing residents to bring in no more than a gallon of alcoholic beverages for personal consumption (Virginia);[813] restricting state-owned liquor stores' wine sales to wines produced in-state (Virginia);[814] allowing farm wineries to sell directly to consumers but only in face-to-face transactions, while prohibiting direct shipping across the board for both in-state and out-of-state wineries (Maine); [815] barring chain store organizations, including franchise-type arrangements, from holding licenses to sell liquor at retail off-premises (Rhode Island);[816] permitting both in-state and out-of-state wineries to sell direct to consumers from in-state sales rooms (New Jersey);[817] permitting both in-state and out-of-

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811 Costco v. Hoen, 407 F. Supp. 2d 1247 (W.D. Wash 2005)(finding that the discriminatory effect is "obvious" and cannot be justified as an attempt to ensure orderly distribution). *Id.* at 1251.

812 Jelovsek v. Bredesen, 488 F.3d 431 (6th Cir., 2008)(rejecting the lower court's assertion that facial discrimination is allowable if it has only a *de minimis* effect on interstate commerce.).

813 Brooks v. Vassar, 462 F. 3d 341, 345 (4th Cir. 2006) (the provision *favored* out-of-state wineries because they could sell directly to consumers, whereas in-state wineries had to sell their products only through the three-tier system.).

814 *Id.* (When the state is a participant in the market, discrimination is permissible. "The prospect that States will use custom duties, exclusionary trade regulations, and other exercises of governmental power (as opposed to the expenditure of state resources) to favor their own citizens -- is entirely absent where the States are buying and selling in the market.) *Id.* at 355-6.

815 Cherry Hill Vineyard, LLC. V. Baldacci, 505 F3d 28 (1st Cir. 2007) (Both provisions are even-handed; licenses are available equally to in-state and out-of-state vineyards.).

816 Wine & Spirits Retailers, Inc. v. Rhode Island, 481 F.3d 1 (1st Cir., 2007) (There is no impact on out of state entities nor advantage to locals, and the burdens of less than optimal efficiency in distributing alcohol passing through interstate commerce, and loss of flexibility in arranging business affairs are not excessive relative to statutory goals.).

817 Freeman v. Fisher, 563 F. Supp. 2d 493 (D.C. N.J. 2008) (Provision does not favor in-state interest over out of state interest.).

state wineries to sell direct to retailers (New Jersey);[818] permitting consumers to purchase and transport unlimited amounts of wine for personal use from within the state, but requiring a permit to transport more than one gallon of wine into the state (New Jersey);[819] permitting both in-state and out-of-state wineries to sell direct to consumers from in-state sales rooms (Delaware);[820] disallowing direct shipments of wine to in-state residents (Delaware);[821] and allowing in-person sales at in-state wineries, while forbidding direct shipment and customers' bringing in purchases from out of state wineries (Arkansas).[822]

A New York provision survived challenge: requiring that all liquor sold, delivered, or shipped to an in-state consumer must pass through an entity licensed by the state, because both in-state and out of state liquor must pass through the same three-tier system before delivery to the consumer. In *Arnold,*[823] a wine retailer in Indiana and two would-be retail customers in New York challenged New York law that prohibits the retailer from shipping wine directly to the consumers. New York requires that all liquor bound for an in-state consumer must pass through an entity

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818 *Id.* (Provisions applicable to in-state and out-of-state wineries are identical.).

819 *Id.* (Discriminatory provision advances a legitimate local purpose, allowing the state to track interstate sales for purposes of taxation, while in-state sales are already subject to direct monitoring.).

820 Hurley v. Minner, 2006 U.S. Dist. Lexis 69090 (D.C. Del. 2006) (Provision does not favor in-state interest over out of state interest.).

821 *Id.* (Both in-state and out-of-state wineries are treated the same, with no preferential treatment for in-state wineries.).

822 Beau v. Moore, 2007 U.S. Dist. Lexis 83659 (E.D. Ark 2007) (Travel to a winery to purchase wine and ordering on the Internet for home delivery are different markets.).

823 Arnold's Wines v. Boyle, 571 F3d 185, 191 (2nd Cir. 2009).

licensed by the state,[824] and prohibits shipment to an unlicensed entity such as a consumer.[825] Unlike the laws in question in *Granholm,* these laws make no distinction as to where the wine is produced.[826] The Second Circuit concluded that the laws in question are evenhanded as to local and out-of-state products and producers, and therefore do not implicate concerns about discrimination under the Commerce Clause.[827] Rather, the laws "combat the perceived evils of an unrestricted traffic in liquor, rather than accomplishing mere economic protectionism."[828]

2. Wineries

Although the bulk of wine production in New York is carried by a few very large wineries,[829] the enactment in 1976 of the New York Farm Winery Act gave impetus to the growth of vineyards around the state by enabling wineries to sell directly to consumers rather than going through wholesalers as part of the three tier system.[830] The growth of wineries continues today, with approximately 86 wineries established between 2000 and 2009.[831] The current ABC Law attempts to create an regulatory environment that supports this growth by creating four "craft"

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824 ABC Law § 100(1).

825 ABC Law § 102(1)(a) and (b).

826 ABC Law § 102.

827 *Arnold's Wines*, 571 F3d at 191.

828 *Id.* [internal citations and quotation marks omitted].

829 Constellation Brands accounts for approximately 75% of all wine produced in New York. Constellation Brands owns Canadaigua, Taylor, Great Western, Gold Seal, and Manischewitz), Royal Kedem, and Mogen David.

830 Laws of 1976, c. 275.

831 *Winery Survey Results*, http://www.nass.usda.gov/Statistics_by_State/New_York/Publications/Statistical_Reports/03mar/Final%20Winery%20Survey%20Report%20March%2012.pdf.

winery licenses in addition to the commercial winery license.[832] These "craft" licenses are the farm winery license[833]; special winery license;[834] special farm winery license; [835] and micro-winery license.[836]

As noted in elsewhere in this Report, the sections governing these various licenses contain much unnecessary duplication and clearly can be streamlined. In other places, the law distinguishes the types of additional businesses in which different winery licensees can engage. For example, a winery licensee may sell wine at retail for consumption on the premises in *a restaurant in or adjacent to the winery*. The provision authorizing a farm winery licensee to sell wine at retail for consumption on the premises is much more expansive. Such sales can occur not only in a restaurant in or adjacent to the farm winery, but also "*in a conference center, inn, bed and breakfast or hotel business owned and operated* by the licensee in or adjacent to such farm winery. . . ."[837] These inconsistent provisions resulted from piecemeal amendments reflecting the circumstances of the winery and farm wineries in existence at the time the legislation was adopted, rather than a policy choice to limit a winery's business opportunities while expanding those of a farm winery. The ABC Law should be amended to make these business opportunities co-extensive.

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832 ABC Law § 76. In addition, the law authorizes the issuance of a temporary winery or farm winery permit which allows the applicant to take advantage of the harvest season while awaiting the SLA's decision on a pending license application. ABC Law § 76-f.

833 ABC Law § 76-a.

834 ABC Law § 76-c.

835 ABC Law § 76-d.

836 ABC Law § 76-f.

837 ABC Law § 76-a(3).

Nevertheless, the distinctions between the licenses are designed to encourage small businesses and should remain in effect.

A. Inconsistent interpretation of the ABC Law

i. Alternating proprietorship

The major distinctions between the winery license under section 76 and the farm winery license under section 76-a are that the farm winery licensee must use New York agricultural products grown or produced in New York[838] and its production is limited to 150,000 finished gallons of wine annually.[839] A micro winery license under section 76-f facilitates the ability to start a very small winery. The production of a micro-winery is limited to 1500 finished gallons of wine annually.[840] These licenses were enacted to allow a new or small winery or farm winery to take advantage of what is known as an "alternating proprietorship" by producing its wine at an existing winery or farm winery. An alternating proprietorship is "a relationship between a 'host' producer with excess capacity, and one or more smaller producers [guests] that share space and equipment within the host's facility."[841] This "shared premises" model is very common in the wine industry because it allows start-up businesses to make wine from their own grapes without having to make a capital investment in equipment early on.[842] Sharing of wine premises cannot

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838 ABC Law § 76-a(5)(a).

839 ABC Law § 76-a(7).

840 ABC Law § 76-f(8).

841 *Alternating Premises*, http://www.csa-compliance.com/html/Producers/ProducerAlternating.html.

842 *Id.*

occur without TTB approval.[843] Under the TTB regulations, both the host and the guest must obtain federal permits and their agreement to enter into an alternating proprietor relationship must be approved by the TTB.[844] The alternation may involve the entire premises or portions thereof.[845] Each proprietor must maintain separate records and submit separate reports to TTB.[846] Confusion over the requirements seems to cloud these types of arrangements. In 2003 and again in 2008, the TTB issued industry circulars regarding the subject. Its 2008 Circular was issued to "ensure that alternating proprietors on winery premises fully understand TTB's requirements for appropriate independence and segregation of operations regarding alternating proprietors."[847] It describes the alternating proprietorship as "an arrangement [which] consists of two or more persons or entities taking turns using the same space and equipment to produce wine."[848] One subject of particular confusion seems to be the segregation of space and equipment that must occur between the alternating proprietors. The 2003 Circular provided that "[t]he shared premises must be set up in such a way that the bonded areas of the host and tenant proprietors are clearly defined by partitions, signs, or other means while the alternating proprietors are active, and provide sufficient protection of the revenue."[849] The 2008 Circular reiterated the need for segregation of the

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843 *Alternating Proprietors At Bonded Wine Premises*, TTB Industry Circular 2008-4 (August 18, 2008), [hereinafter 2008 Circular] http://www.ttb.gov/industry_circulars/archives/2008/08-04.html.

844 27 CFR §24.136(a).

845 27 CFR §24.136(a)&(b).

846 27 CFR §24.136(d).

847 2008 Circular.

848 *Id.*

849 *Alternating Proprietors At Bonded Wine Premises*, TTB Industry Circular 2003-7 (December 10, 2003), http://www.ttb.gov/industry_circulars/archives/2003/03-07.html.

alternating proprietors, providing that "signage or other marks may be considered sufficient separation of one proprietor's wine from another's, but in other premises TTB may determine that physical segregation such as fencing is necessary to protect the revenue."[850]

Sections 76-c, 76-d and 76-f provide that the licensee "may operate a winery on the premises of another winery." Given the confusion surrounding alternative proprietorships at the federal level, and apparently differing interpretations of the requirements of the arrangement in other states, it is not surprising that confusion has existed as to the SLA's interpretation of the requirements as well. The SLA's current interpretation of alternating proprietorship requires the use of independent production processes, separate storage of wine, and separate retention of an office area at the host facility for maintaining its books and records. While the SLA's interpretation in general appears to be consistent with the TTB, the need to maintain *office space* at the host facility may be more stringent than necessary to address the TTB's concern that a proprietor maintain its records on its own computer system rather than on the system of another proprietor."[851] In order to eliminate the potential for confusion, the ABC Law should be amended to include requirements for alternating proprietorship that are consistent with federal law.

ii. Custom crush

Another option for facilitating the development of small wineries is to allow them to hold a wholesale license under federal law and enter into a custom crush arrangement with another winery.[852] "Custom crushing," means many different things, from one winery simply juicing

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850 2008 Circular.

851 *Id.*

852 *Id.*

grapes of another winery to one winery offering a broad range of services to another winery, including crushing, fermenting, mastering and then bottling the wine for the other winery. Custom crush is not considered to be an alternating proprietorship by the TTB because the wine producer retains all the responsibility for making the wine and all the related processing requirements and regulatory activities.[853]

Although there are commentators who interpret the current ABC Law to permit custom crush, this view is not universally held. The ABC Law should be clarified to identify custom crush as a permissible arrangement between two wineries and to permit custom crush in a manner consistent with federal law.[854]

iii. Tastings

Current law regarding wine tastings is a patchwork of rules inserted in the middle of section 76 (wineries) and explicitly made applicable to farm wineries (section 76-a). The applicability of the tasting provisions to special wineries, special farm wineries and micro wineries is not explicit; it has to be teased out of various other provisions of the ABC Law.[855] The authority of all wineries to conduct tastings should be straightforward rather than a puzzle.

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853 *Id.*

854 *See Report to New York State Commission of Agriculture and Markets* 11 (New York State Wine Grape Task Force December 2008).

855 A special winery license may apply for a license to sell wine off-premises; that license authorizes tastings. ABC Law § 76-c(4). Although section 76-d is silent as to the authority of a special farm winery licensee to conduct wine tastings, the section does provide that the holder of the license is authorized to exercise all the operating privileges accorded to a holder of a farm winery license (76)(a), and the holder of a special winery license, which include the privilege of holding tastings. ABC Law § 76-d(2). Although section 76-f is silent as to the authority of a miro-winery licensee to hold tastings, the section does authorize the micro-winery to sell wine by the bottle at retail for off-premises consumption. Because the micro-winery has that ability under section 76-f, it is covered by section 80 which authorizes "any person licensed to sell wine . . . to conduct wine tastings."

The locations at which various licensees can conduct tastings and whether wine can be sold by the bottle at such events also requires clarification.

A particularly irksome provision is section 76(2)(c)(ii), which governs the number of charitable events for which a winery can obtain a license to conduct tastings. The problem centers around the use of the number 5 in the section. Prior to its amendment in 2008,[856] the SLA interpreted the section to limit the number of charitable tasting events to 5 a year. The section was amended in 2008 to provide that a winery or farm winery can apply for an unlimited number of charitable event tasting licenses in any year, but that each license is limited to 5 events.[857] This limitation seems senseless. It is not clear to what end the wineries and SLA are being required to keep track of the number of tastings at charitable events. So long as the winery notifies the SLA of its intent to conduct a tasting, as is already required, the winery and the SLA would also be spared from the needless paperwork entailed in multiple applications – a result that will streamline a process for an agency desperately in need of streamlining.

The law should be clarified to allow any licensed winery to exercise the privilege to provide tastings at any licensed off-premises establishments, licensed on- premises restaurants, events sponsored by charitable organizations; the state fair, recognized county fairs and recognized farmers markets[858] upon notice to the SLA.

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856 Prior to the amendment, section 76(2)(c)(ii) provided that the SLA " shall issue a license to authorize such winery or farm winery to participate in no more than five outdoor or indoor gatherings, functions, occasions or events sponsored by a charitable organization in one year for a single fee."

857 Laws of 2008, c. 613 ("Upon application, the liquor authority shall issue a license to authorize one or more licenses authorizing such winery or farm winery to participate in no more than five outdoor or indoor gatherings, functions, occasions or events sponsored by a charitable organization in one year for a single fee for each such license.").

858 Tastings of wine are not permitted but tastings of hard cider are. *Compare* ABC Law § 76(5) and §58(5).

If a winery is conducting a tasting at a charitable event, it does not need a permit to sell wine by the bottle;[859] a winery conducting a tasting at a restaurant, a farmers' market, or the state fair does.[860] The reason for the distinction is not clear from the statute. The provisions governing whether the sale is for on-premise or off-premise consumption and whether the wine must be New York labeled wine are inconsistent and confusing.

Many of these problems would be resolved by adopting the approach of jurisdictions such as Virginia which affords a farm winery a remote location sales privilege which the winery can exercise so long as it notifies the state's liquor authority of the specific date and location. " If the event is an established festival or event with security and an alcohol control plan, all the winery must do is give notice to Virginia's SLA. For other less established events, the SLA will request information on the event to determine whether there are adequate controls to prevent minors and intoxicated persons from consuming alcohol. The SLA may limit the privileges that may be exercised, such limiting the winery to off premise sales of sealed bottles."[861]

iv. Satellite stores

Rules governing satellite stores are a good example of unintended consequences that can sometimes result from loosening of traditional requirements for the sale of wine off-premises to

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859 ABC Law § 76(2)(c)(ii).

860 ABC Law § 76(2)(a-1). For example, a winery needs to obtain a Farmers' Market Sales Permit (Type 79) for each farmers' market at which it wishes to sell. Each permit is valid for only one day a week and only at the specific farmers' market designated, but the winery can hold multiple permits. Although section 76(2)(a-1) provides that the wine sold by the bottle at these tastings must be wine *produced by the farm winery or winery,* sales at charitable events does not include that limitation. *See* ABC Law § 76(c)(i). Section 76(2)(a-1) is silent regarding whether the sales are for consumption on or off the premises or both. Conceivably, the intent would be to limit the sales for on-premises consumption because that is what the establishment where the tasting is offered is licensed to do. Sales at a charitable event likely are for purposes of off premises consumption, because the charity is not a licensee for any purpose.

861 http://www.csa-compliance.com/html/Articles/WineriesOnTheGo.html.

promote New York State wines. Section 76 of the ABC Law permits a winery or a farm winery individually or jointly to operate up to five satellite stores for the sale of wine for off-premises consumption.[862] In addition to selling New York labeled wine and conducting wine tastings, operators of satellite stores can sell a broad range of other products including bottled water, fruit juice and soda, food items such as cheeses, fruits, vegetables, chocolates, breads and crackers, locally produced farm products, wine supplies and accessories, and souvenir items such as artwork, crafts, clothing, and agricultural products.[863] All the provisions relating to the sale of wine for off-premises consumption *at the winery or farm winery* apply to satellite stores and any SLA regulations must be consistent with applicable rules regarding the sale of wine at the winery for off-premises consumption.[864]

The satellite store legislation differs from the rules for the owner of a wine store that is not operated by a winery. While the winery can operate 5 stores,[865] the owner of an independent wine store can operate only one.[866] While the winery can sell non-alcoholic beverages, food and other products, the owner of an independent wine store is restricted in non-alcoholic items that can be sold, and certainly no food sales are permitted.

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862 ABC Law § 76(4).

863 ABC Law § 77(4).

864 ABC Law § 76(4).

865 The owner of a restaurant brewery can also operate 5 locations. *See* ABC Law §64-c.

866 ABC Law §§ 3(22), 63(5) & 79(2).

Wineries are advocating for further exemptions from the current rules governing hours of sale,[867] physical requirements of the premises,[868] and the prohibition against locating a store within 200 feet of a school or place of worship.[869] The hours of sale present a particularly anomalous situation. The statute does not set hours of operation of a winery,[870] a decision that is understandable given the nature of the operations involved. SLA regulations require that a winery observe the hours of sale set out in section 105(14) of the ABC Law for an off-premises wine or liquor store, as well as any local rules regarding the hours of operation.[871] The only exception to the general application of these rules is that a winery can be open for sales and tastings on Sunday from 10:00 a.m. to midnight."[872] If exempting wineries from the rules that govern independent off-premises wine stores would promote economic development, it can easily be said that the same would be true for wine and liquor stores which could keep longer hours and sell additional products to boost their income and profits. [873] While it is easy to understand a desire for treatment as a winery when the store is located adjacent to or near the winery, it becomes less easy to understand such treatment when the store is at a distance from the winery and is located in a municipality that has other off-premises liquor or wine stores. Although we have not been

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867 ABC Law § 105(14).

868 ABC Law § 105(2).

869 ABC Law § 105(3). Although a restaurant brew-pub is a statutory creation designed to promote economic development, it remains subject to the prohibition against locating an on-premises establishment within 200 feet of a school or place of worship. ABC Law §64-c(11).

870 *See* SLA regulations, 9 N.Y.C.R.R. § 63.3.

871 *See Provisions for County Closing Hours* http://www.abc.state.ny.us/provisions-for-county-closing-hours.

872 SLA regulations, 9 N.Y.C.R.R .§ 63.3.

873 ABC Law § 64-c(11).

persuaded that a case has been made to exempt satellite stores from the general off-premises requirements, we understand that legislation is being contemplated to make the exemption clear.

B. Other opportunities for economic development

i. Home wine making centers

A home wine making center is a place where, for a fee, a consumer can use the space to make wine for personal or family use. The TTB does not license home wine making centers because the production of such wines is exempt by federal law and its rules and regulations.[874] Any adult may produce up to 100 gallons of wine a year for personal use (200 gallons if there are two ore more adults in the household).[875] Allowing an existing farm winery to host a home winemaking center would add an additional business opportunity for the winery, not inconsistent with the provisions of section76-a(4) which allows the farm winery to conduct other businesses at the farm winery. Allowing an existing winery, micro winery and other entrepreneurs[876] to operate home winemaking centers licensed under the ABC Law would also promote economic development, so long as the commercial and home operations are segregated.[877] Assembly bill 3495 has been in introduced to permit such activity by a winery.

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874 *See* 27 CFR 24.75; www.ttb.gov/wine/faq.

875 http://www.ttb.gov/wine/faq.shtml#w4.

876 There is at least one home wine making center licensed in New York so any amendment to the ABC Law should include entrepreneurs who do not otherwise operate wineries.

877 This approach is similar to one proposed in S. 7246-B/A.10415-B which would authorize a winery, farm winery and a micro winery to also operate on the same or adjacent premises a licensed home winemaking center.

ii. Sale of wine equipment

There is already a proposal for farm wineries to sell wine equipment. [878] This proposal is consistent with the ability of farm wineries to conduct other businesses on their premises and should be added to the law.

iii. Sale of wine at farm stands

Under current law, a farm winery is precluded from selling its New York labeled wine at a farm stand, as distinguished from a recognized farmer's market, unless the farm stand is licensed as a premises that is authorized to sell wine for off-premise consumption or that is a retail satellite store controlled by the farm winery licensee. Legislative proposals have been made to allow, with proper regulatory supervision provided by the SLA, a farm winery licensee to be able to sell its product through a limited number designated roadside farm markets recorded in the offices of the SLA.[879]

The policy decision to allow sales at such locations would require careful consideration of the supervision that the winery would provide for the sales. If the sales were to be conducted upon notification to the SLA and in the same manner as the tastings and sales of bottles at other locations with oversight by the winery, then such sales would seem consistent with the purpose of showcasing New York products, which is often done for various types of foods at farm stands. If the sales were to be conducted as retail sales without this type of oversight, it would seem that the

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[878] S. 3495 (The proposal defines "wine-making equipment and supplies" as including, but not limited to, "grapes, grape juice, grape must, home wine-making kits, presses, pumps, bottling equipment, filters, yeasts, chemicals and other wine additives, wine storage or fermenting vessels, barrels, and books or other written material to assist wine-makers and home wine-makers to produce and bottle wine."

[879] A. 3454/S. 704 (2009).

farm stand would need to secure a retail license for off-premises sales, consistent with current provisions of the law regarding unlicensed sales of alcoholic beverages.

Recommendations

1. **The ABC Law should be amended to include requirements for alternating proprietorship that are consistent with federal law in order to eliminate the potential for confusion.**

2. **The ABC Law should be clarified to identify custom crush as a permissible arrangement between two wineries and to permit custom crush in a manner consistent with federal law.**

3. **The ABC Law should be clarified 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.**

4. **The ABC Law should be amended to allow an existing winery, micro winery and other entrepreneurs to operate home winemaking centers licensed under the ABC law, so long as the commercial and home operations are segregated.**

5. **The ABC Law should be amended to allow a licensed winery to sell wine making equipment.**

6. **The ABC Law should be amended to allow sales of New York State labeled wines at farm stands so long as the sales are conducted upon notification to the SLA and in the same manner as the tastings and sales of bottles at other approved sites with oversight by the winery, and so long as the liability stemming from the sales would accrue to the winery.**

3. Breweries

Craft beer is enjoying great popularity across the country. Craft beer sales in the United States grew nearly 6 percent in 2007 to nearly 8.6 million barrels.[880] Dollar sales increased 10.1

[880] *Craft brewing statistics,* www.brewersassociation.org/pages/business-tools/craft-brewing-statistics/facts.

percent to $6.3 billion, compared with more than $5.74 billion the year before, according to Brewers Association data.[881] In 2007, there were 73 breweries in New York.[882] The problem for craft brewers in New York, much as it is for craft wineries, is the inability to compete against large domestic and international breweries in marketing and market share. In 2005, the market share for craft beer in New York State was 3.7% of overall product consumed in state.[883] The market share in New York is less than the national average of 7%.[884] Other states that have larger percentages include Vermont and Washington, 11%, Colorado, 12%, and Oregon, 13%.[885] One area where economic development for craft breweries has been encouraged is the the brew pub license.[886] A brew pub license authorizes the owner to operate up to five restaurant breweries.[887]

An obstacle to economic development of small breweries appears to be the franchise agreement rules of section 55-c. Section 55-c, governing agreements between brewers and beer wholesalers, mandates written agreements, with specified uniform terms, between brewers and beer wholesalers. These agreements can be terminated or not renewed only for "good cause," which arises if the brewer consolidates its national or regional distribution system, or if the wholesaler breaches a material term of the contract with the brewer. The section was created to protect beer wholesalers from unfair dealing by beer suppliers. Prior to the enactment of 55-c, a

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881 *Id.*

882 Submission by the New York State Brewers Association, on file with the Commission.

883 *Id.*

884 *Id.*

885 *Id.*

886 ABC Law §64-c.

887 ABC Law §64-c(7).

wholesaler could expend considerable time, money, and effort in building equity in a brand it sold, only to have the supplier terminate its oral agreement with the wholesaler at will.

These laws have been implemented in almost every state for beer and in twenty states for wine and distilled spirits. "What qualifies as good cause differs from state to state, but often the term is taken to rule out economic considerations such as failure to meet contractual sales quotas. The laws also typically require advance notice of termination, give wholesalers a month or more to cure any supposed problems, and prevent any contractual waiver of the law's mandates. In addition, they often provide for exclusive wholesaler territories.[888]"

At the time of the adoption of section 55-c in 1996, the state's small brewers raised numerous concerns, prompting the Governor to seek close monitoring of the implementation of the legislation, so that it would "not inadvertently operate so as to impair the economic expansion of our State's brewers."[889] The Governor acknowledged the importance of the craft brewers, stating in his approval message of the bill: "I am mindful of the serious and real concerns raised by our State's brewers. They have played a significant and important role in the economic revitalization of New York."

During our study, craft brewers urged that the current statute should be amended to allow an exception to the good cause termination requirement for agreements between wholesalers and small brewers. They proposed that a brewer with annual volume of less than 300,000 barrels of beer, and whose sales to a wholesaler total 3% or less of the wholesaler's sales, should be able to terminate an agreement with the wholesaler even without "good cause" as defined in 55-c,

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888 DOUGLAS GLEN WHITMAN, STRANGE BREW: ALCOHOL AND GOVERNMENT MONOPOLY 2 (2003)

889 Approval Message, Laws of 1996, c. 679.

provided the brewer paid the wholesaler the fair market value of the distribution rights lost or diminished by the termination.[890] Last year, the governor vetoed a bill containing these provisions on the grounds that: nothing in the legislative history suggests the current process for termination is inadequate; the legislation would apply retroactively, impacting current and future agreements, unlike the legislation creating 55-c; the legislation could cause wholesalers to decline to distribute the products of small brewers who could terminate agreements without good cause; and termination of a contract without good cause, even if fair market value is provided, is rarely granted by statute, and should be supported by evidence that is stronger than that provided.[891]

A new bill was introduced this year which provided that a brewer with annual volume of 300,000 barrels[892] plus sales not in excess of 3% of a wholesaler's annual brand sales measured in case equivalency of 24 12oz. units may terminate without good cause and pay fair market value of the distribution rights lost or diminished by the termination.[893]

Although the texts of the vetoed legislation and the 2009 bill reflect only minor changes, the real change comes in the sponsor's memo for the 2009 bill. It notes that the justification for section 55-c to protect small wholesalers from arbitrary termination by large multinational

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890 A. 9055B of 2008 contained these provisions. Colorado, for example, exempts beer manufacturers that produce less than three hundred thousand gallons of malt beverages per calendar year from beer franchise agreements. Col. Rev .Stat .Ann. §12-47-406.8

891 Veto Memo 92, A. 9055B (2008).

892 Annual volume was defined as (1) the aggregate number of barrels of beer, under trademarks owned by that brewery and brewed, directly or indirectly, by or on behalf of the brewer during the measuring period, on a worldwide basis, plus (2) the aggregate number of barrels of beer brewed, during the measuring period, directly or indirectly, by or on behalf of any person or entity which, at any time during the measuring period, controlled, was controlled by or was under common control with the brewer, on a worldwide basis. Annual volume would not include beer brewed under contract for any other brewer. No double counting of the same barrels of beer under clauses one and two of this subparagraph could occur.

893 S.5614-A/A. 488-B (2009).

breweries has been turned on its head. As a result of consolidation, the state's wholesalers have grown in size and resources, and decreased in number to about 50% of the number when the franchise bill passed in 1996. It describes the concerns of the small brewers:

> Today the opportunity for growth for many small brewers is restricted because of contracts that require them to exclusively do business with a particular wholesaler that is not actively supporting or selling their brand. Yet they are not able to terminate the contract and appoint another wholesaler except through a lengthy and potentially costly legal process that has little assurance of success. Present remedies under the law do not work for small brewers. If the wholesaler does not want to be terminated they threaten expensive legal action knowing that the smaller brewer does not have the resources to afford the legal battle, thus many small brewers have to live with being 'locked in' with relationships that are not working. It was never the intention of the Law to be used by the wholesaler to lock small breweries into a relationship. Thus this bill provides a fair and appropriate amendment to the Beer Franchise Law. It does not disrupt the workforce; jobs will not be lost. On the contrary it will allow small brewers to accelerate the growth they are already achieving and thereby create more good job opportunities in New York. The bill allows the wholesaler, if they believe they have not been fairly compensated, to dispute the 'fair market value' paid by the brewer through binding arbitration. By requiring payment of fair market value and arbitration, this bill will promote a competitive and efficient system of distribution of the small brewers brands, and make such brands more available in New York State, creating jobs and helping a small but growing industry.

The new bill is still vulnerable on two of the points raised in the governor's veto message: the legislation affects current, as well as future agreements, and wholesalers may decline to market the products of small brewers merely because they can terminate the relationship without good cause.

Wholesalers currently enjoy the ability to decline to market craft beers; indeed, that is precisely the problem that the craft brewers urge a reason to allow the craft brewer to terminate a franchise agreement at will.

The issue of the legislation's applicability to existing contracts is more complex. The Contract Clause of the United States Constitution[894] provides that no state shall enact a law impairing the obligation of a contract. In the Supreme Court's view the framers of the Constitution viewed contracts as enabling "individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them."[895] In *Allied Structural Steel Co. v. Spannaus*,[896] the Court invalidated a state law which altered the manner in which an employer funded its employees's pension plans and created "a completely unexpected liability in potentially disabling amounts."[897]

The criteria for determining whether a state law violates the contract clause of the Constitution are threefold.[898] The state regulation must substantially impair a contractual relationship.[899] In determining the extent of impairment of a contractual relationship for the purposes of the contract clause, the court is to consider whether industry of which the complaining party is a part "has been regulated in the past."[900] But state regulation does not

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894 U.S. Const., Art. I § 10, cl 1.

895 Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978).

896 *Allied Structural Steel*, 438 U.S. 234.

897 *Id.* at 245.

898 General Motors Corp. v. Romein, 503 U.S. 181 (1992); Energy Reserves Group v. Kansas Power & Light, 459 U.S. 400 (1983).

899 *Allied Structural Steel,* 438 U.S. at 245.

900 *Energy Reserves Group*, 459 U.S. at 411.

guarantee that the impairment of a contract will be upheld. [901] *In Treigle v. Acme Homestead Ass'n*, the United States Supreme Court held that even though a building and loan association was a creature of state, the state could not reorganize the way members of the association who were entitled to withdraw from the association were paid back their investment "for no discernible public purpose.[902] What is of paramount importance is "the foreseeability of the law when the original contract was made; for what was foreseeable then will have been taken into account in the negotiations over the terms of the contract."[903]

Even if the legislation does impair a contractual relationship, the legislation is permissible if the legislation has a significant and legitimate purpose behind the regulation, such as the remedying of "a broad, generalized social or economic problem[904] and, it is reasonable and narrowly tailored for its intended purpose.[905] "The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests."[906] In *Allied Structural Steel Co. v. Spannaus*, the Supreme Court held that the state's legislation was improper because it was aimed at specific employers which were closing their

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901 Treigle v. Acme Homestead Ass'n, 297 U.S. 189 (1936).

902 *Id.*

903 Kendall-Jackson Winery, Ltd. v. Branson, 82 F. Supp.2d 844 (N.D.Ill.2000) appeal dismissed, Kendall-Jackson Winery, Ltd. v. Branson, 212 F.3d 995 (7th Cir. 2000)(citing Holiday Inns Franchising, Inc. v. Branstad, 29 F.3d 383, 384 (8th Cir.)("in determining whether an impairment is substantial, and thus unconstitutional, a court should take into account whether the kind of contract or relationship that furnishes the subject matter of the dispute had previously been the subject of regulation."), *cert. denied*, 513 U.S. 1032 (1994)).

904 *Allied Structural Steel*, 438 U.S. at 250 (citing a mortgage moratorium case, Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398 (1934).

905 Crane Neck Assn. v. New York City/Long Is. County Servs. Group, 61 N.Y.2d 154, 167 (1984), *cert. denied*, 469 U.S. 804 (1984). *See* 19th St. Assoc. v. State of New York, 79 N.Y.2d 434, 443, (1992).

906 *Energy Reserves Group*, 459 U.S. at 411.

offices in the state.[907] The Court also noted that the state was regulating an area that heretofore had not been regulated by the state.[908] The court summarized the failures of the legislation as follows: it did not address a broad, generalized economic or social problem; it did not operate in an area already subject to state regulation at the time the company's contractual obligations were undertaken; it did not effect simply a temporary alteration of the contractual relationships, but worked a severe, permanent, and immediate change in those relationships-irrevocably and retroactively, and it was aimed only at employers who had established pension plans.[909]

In *Kendall-Jackson Winery, Ltd. v. Branson*[910] wineries brought an action against the Illinois Liquor Control Commission challenging constitutionality of the Illinois Wine and Spirits Industry Fair Dealing Act on the ground that the statute violated the Contract Clause by retroactively imposing restrictions on wineries' rights to terminate at will their distribution agreements with wholesalers, a situation directly opposite to the concerns of the craft brewers in New York. The federal district court granted the petitioners' request for a preliminary injunction against enforcement of the act, reasoning that an Illinois state court could conclude that the legislation constituted an impairment of the current arrangements, and that the restriction on a winery of its ability to terminate an at-will agreement was substantial because:

> A manufacturer's lifeline to the consuming public is its distributor, and a distributor can, to a significant extent, make or break a manufacturer's success in the marketplace. Predictably, where termination of a distribution contract is not within the manufacturer's sole discretion but instead must be justified to a court or administrative agency, the parties

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907 *Allied Structural Steel*, 438 U.S. 234.

908 *Id.* at 249.

909 *Id.* at 250.

910 *Kendall-Jackson Winery*, 82 F. Supp.2d 844.

> at the time of contracting would be far more inclined to articulate rights, duties and expectations, than where termination is entirely discretionary and need not be justified.[911]

The court also noted that the good-faith restriction was not foreseeable to the regulated parties because the Illinois Liquor Control Act says nothing about franchise agreements for wine and the rules governing termination of beer franchise agreements were not retroactive when enacted.[912]

While wholesalers in New York can point to the fact that when the good cause provisions of section 55-c were enacted they were not retroactive, the fact that the rules could change was arguably foreseeable, given the Governor's concern for small brewers expressed in his Approval Message.[913] It also can be argued that these franchise agreements are creatures of statute and by virtue of the fact that the state regulates them under section 55-c, the provisions of the legislation can be altered without creating substantial impairment.

A. Opportunities for further economic development

i. Alternating proprietorships

The TTB recognizes alternating proprietorships and contract brewing arrangements as permissible relationships between brewers.[914] An alternating proprietorship is the same for breweries as it is for wineries – brewers share a premises.[915] A contract brewing arrangement is "a business relationship in which one person, such as a wholesale or retail dealer or a brewer, pays a

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911 *Id.* at 873.

912 *Id.*(finding that only the liquor commission had standing to appeal the injunction against it.).

913 Approval Message, Laws of 1996, c. 679.

914 *Alternating Proprietors at Brewery Premises,* Industry Circular 2005-2 (August 12, 2005), http://www.ttb.gov/industry_circulars/archives/2005/05-02.html.

915 *Id.*

brewing company, the 'contract brewer,' to produce beer for him or her."[916] Although the SLA has apparently issued licenses that permit it, it is not spelled out in the law. As with wineries, permitting an alternating proprietorship or a contract brewing arrangement is consistent with federal law and should be made part of the ABC Law.

ii. Brewing Festivals

Brewing festivals are a very important factor in the marketing of small brewers across New York State. It is an opportunity for small brewers to interact directly with a target market. Licensed brewers or their employees should be allowed to dispense and serve the brewer's product at brewing festivals, and be able to take back any portion of beer not consumed to the brewery or distributor. This can be accomplished as a tasting permit issued to a supplier who intends to participate in events hosted by other people where the SLA feels that it is consistent with the intention of the statute, and the nature of the event is not a gift or a service to a retailer.

Recommendations

1. **The Legislature should consider an exemption from section 55-c for craft brewers.**

2. **The ABC Law should be amended to permit alternating proprietorships in a manner consistent with federal law.**

3. **The ABC Law should be amended to clarify that contract brewing arrangements are permissible in a manner consistent with federal law.**

4. **The ABC Law should be amended to clarify that brewers participating in brewing festivals can supervise the tasting of their beer and take back left over product.**

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916 *Id.*

4. Distilleries

New York's craft distillery industry got its start in 2002 when the Legislature created a new class of distilling license, allowing a small producer to operate a distillery with a production capacity of no more than 35,000 gallons per year, at a license fee of $250. [917] Up until that time there was only one license for distillers, a Class A license with unlimited production capacity and a hefty license fee that was prohibitively expensive for an applicant interested in starting a craft distillery.[918] As the Sponsors' Memorandum in Support noted:

> Up until the time of Prohibition, New York State hosted a vibrant distilling industry. Over 200 brands of whiskey were trademarked and produced by New York distillers and the mostly rye-based whiskeys were well regarded and "exported" all over the United States. After Prohibition was repealed, [New York's] distilling industry never recovered . Prior to prohibition, the distillation of whiskey was an important part of the mix of options available to small farmers to preserve and enhance the value of crops they produced.[919]

The addition of the farm distiller's license in 2007 gave added impetus to a burgeoning industry.[920] This legislation allowed a farm distillery to carry out the same activities as a farm winery, by giving it the ability to operate a tasting room, a restaurant on the premises, and a shop,

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917 Laws of 2002, c. 580.

918 The three year fee for a Class A distillery license at that time was $39,575. *See* Memorandum in Support of S.6028-C/A.9600-C.

919 Memorandum in Support of S.6028-C/A.9600-C. *See also* Peter Jablonski, *The History of the Whiskey Business in Buffalo, New York*, http://www.buffaloah.com/h/whiskey/index.html.

920 Laws of 2007 c. 564.

and to sell its product to a larger number of outlets.[921] Today there are at least 12 farm distilleries in the state.[922]

Currently, there are six distinct distillers' licenses.[923] The licensing provisions are another example of the piecemeal amendment of the ABC Law to promote economic development. Taken as whole these amendments, in practice, have thwarted development of this burgeoning industry.[924] Generally, a distiller's license of any class does not authorize more than the licensed activity, namely that of a distillery, a rectifying plant or a fruit brandy distillery; a separate license is required for each activity. The only exception to that general rule is that a Class D farm distillery license can be issued to a Class A, A-1, B, B-1 or C distiller's licensee, a winery licensee or a farm winery licensee for use at such licensee's existing licensed premises.[925] These current distinctions and limitations appear no longer to have the meaning they once did. The number of licenses should be streamlined to reflect current practices consistent with federal law and to distinguish between craft distilleries and other commercial distilleries.[926]

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921 Memorandum in Support of A.8895-A/S.6012-A.

922 The Craft Distillers Guild has been formed under the auspices of the Hudson Valley Agribusiness Development Corporation to provide assistance to craft distillers.

923 ABC Law §§ 61(1)(Distiller's license, class A); 61(1-a)(Distiller's license, class A-1 with production capacity limited to 35, 000 gallons); 61(2) (Distiller's license, class B, to operate a rectifying plant); 61(2-a)(Distiller's license, class C, to operate a distillery for the manufacture only of fruit brandy); §61(2-b)(Distiller's license, class B-1, to operate a rectifying plant with production capacity limited to 35,000 gallons); and 61(2-c)(Distiller's license, class D (Farm distillery)).

924 The section is a statutory nightmare as well. Section 61 has subdivsions 1, 1-a, 2, 2-a, 2-b, and 2-c, each with component parts.

925 ABC Law § 61(2-c).

926 *See, e.g.*, S.2637/A. 6393 (authorizing "the issuance of a special class A-1 distiller's license for the operation of a distillery on the premises of another licensed distillery for the production of brandy or other liquors in an amount not to exceed 10,000 gallons per year. All liquor or brandy produced by such distillery shall be manufactured exclusively out of grapes, fruits or other agricultural products grown or produced in New York State.").

Even though the Class A-1 license was created to promote local economic development, a Class A-1 licensee may not sell to consumers from any location, and must sell through a wholesaler to retailers. It is not permitted to have a tasting room, store, or restaurant on the premises.[927] The reason for this limitation is not clear. A farm distillery (D licensee) may sell at the distillery direct to consumers but is limited to selling only goods made with New York raw materials.[928] A farm winery, on the other hand, may sell any New York branded distilled spirits,[929] even ones that are not made from New York agricultural products.

The ABC Law should be amended to clarify what products a craft distillery can sell and the locations for the sale of product.[930]

A. Opportunities for further economic development

i. Alternating Proprietorships

A Class A, A-1, B, B-1 or C distiller's licensee, a winery licensee or a farm winery licensee can obtain a Class D farm distillery license for use at such licensee's existing licensed premises.[931]

Just as with wineries and breweries, establishing a distillery with all of the requisite equipment can be capital intensive, so allowing an entrepreneur to share already existing distillery

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927 ABC Law § 61(The license "authorize[s] the sale from the licensed premises and from one other location in the state of New York of liquors manufactured by such licensee to a wholesale or retail liquor licensee . . . .").

928 ABC Law § 61(1-a).

929 *Compare* ABC Law § 61(2-c)(i),(ii) & (iii)("To manufacture liquor primarily from farm and food products;" "[t]o put such liquor into [sealed] containers;" and "[t]o sell at retail, for personal use, in such sealed containers.") *with* ABC Law § 76-a(6)("New York state labelled wine or liquors produced or manufactured by any other New York state winery or farm winery licensee or by the holder of a class A-1, B-1, or C distiller's license.").

930 *See, e.g,* S.2637/A.6393.

931 ABC Law § 61(2-c).

facilities would lower the costs to enter this business and it would also increase the demand for New York produced agricultural products.[932] However, unlike wineries and breweries, the law does not address even in a limited fashion the ability of distilleries with the same licenses to share premises in the manner of an alternating proprietorship.[933] The Legislature currently has under consideration a proposal to permit alternating proprietorship by farm distilleries.

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

Recommendations

1. **The ABC law should be amended to streamline the number of distillery licenses to reflect current practices consistent with federal law and to distinguish between craft distilleries and other commercial distilleries.**

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

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

5. Cider producers

The production of craft cider should be treated analogously to the production of wine and craft beer.

Recommendation

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[932] S.2637/A.6393 (This bill would "to authorize the issuance of a special class A-1 distiller's license for the operation of a distillery on the premises of another licensed distillery for the production of brandy or other liquors in an amount not to exceed 10,000 gallons per year. All liquor or brandy produced by such distillery shall be manufactured exclusively out of grapes, fruits or other agricultural products grown or produced in New York State.").

[933] ABC Law § 61(2-c)(d)(A D license can be issued to a Class A, A-1, B, B-1 or C distiller's license, a winery license or a farm winery license.

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.

Appendix A

Agendas of ABC Study Roundtable Meetings

New York State Law Revision Commission
Study of Alcoholic Beverage Control Law
Roundtable Meetings Agenda

Tuesday, June 10, 2008

Brooklyn Law School
Feil Hall
205 State Street
(Corner of State Street and Boerum Place)
Brooklyn, New York

8:45 am	**Welcome**	Robert M. Pitler, Chairman
9:00 am	**Licensing**	
	A. On - Premises	
	Public Convenience & Advantage and the Public Interest	ABC Law §64(6-a)
	Other Considerations	
	200 Foot Rule	ABC Law §§64(7)(a)
	500 Foot Rule	ABC Law §§64(7)(b)(f)
9:50 am	**B. Off-Premises**	
	General Considerations	ABC Law §64
	Other Considerations	
	4 nearest liquor stores	
	200 Foot Rule	ABC Law §105(3)
	Number of off-premises licenses	ABC Law §63
	Businesses authorized	ABC Law §§63, 76-a, 77
10:40 am	**Trade Practices**	
	Price Posting	ABC Law §101-b
	Gifts and Services to Retailers	ABC Law §101-b, 9 NYCRR §§83.4, 86.1 - 81.17
	Tastings	ABC Law passim
	Franchise Agreements	ABC Law §55-c
	Credit Rules	ABC Law §101-aa
	Catalogues	9 NYCRR §86.1
	House Accounts	ABC Law §100(5)
11:30 am	**Suspension and Revocation of Licenses**	
	Prohibited Sales	ABC Law §65
	Underage patron	ABC Law §65
	Unlawful possession with intent to consume	ABC Law §65-c
	"Suffer and permit"	ABC Law §106(6)
	Suspension & Revocation Provisions	ABC Law §118

Problem Premises

12:30 pm	**Lunch** (provided)	
1:00 pm	**Beer**	
	Brewing festivals	ABC Law §97(2)
	Keg registration	ABC Law §105-c
	Label approval	ABC Law §107-a
	180-day price hold	ABC Law §55-b(2)
1:50 pm	**Farm Wineries**	ABC Law §§76, 76-a - e, 77
	Direct shipment record keeping	ABC Law §79-c
	Custom Crush	
	Satellite stores	ABC Law§76(4)
2:40 pm	**Wholesalers**	
	Trade channel pricing	
	Family discounts	ABC Law §101-b
	Restocking and rotating	ABC Law §101(1)(c)
3:30 pm	**Revenue Generation**	
	Collection of Taxes/Electronic Reporting	
	Licensing Fees	
4:00 pm	**Other**	
	Returns of unopened product	ABC Law §100(1)
	Single license to encompass multiple permits	
	Inconsistencies in the ABC Law	
4:30 pm	**Concluding Remarks**	Robert M. Pitler, Chairman

The topics on the Agenda are not intended as an exclusive list of the issues that the Commission will consider in the coming months.

While we encourage you to submit written statements on the topics on the Agenda as well as other topics related to the ABC Law, we will dispense with the reading of any statements at the Roundtable Meetings and focus on informal discussion with and among the participants on the Agenda topics.

New York State Law Revision Commission
Study of Alcoholic Beverage Control Law
Roundtable Meetings Agenda

Thursday, June 12, 2008

Albany Law School
80 New Scotland Avenue
(2000 Building, Room 300)
Albany, New York

8:45 am	**Welcome**	Robert M. Pitler, Chairman
9:00 am	**Licensing**	
	A. On -Premises	
	Public Convenience & Advantage and the Public Interest	ABC Law §64(6-a)
	Other Considerations	
	200 Foot Rule	ABC Law §§64(7)(a)
	500 Foot Rule	ABC Law §§64(7)(b)(f)
9:50 am	**B. Off-Premises**	
	General Considerations	ABC Law §64
	Other Considerations	
	4 nearest liquor stores	
	200 Foot Rule	ABC Law §105(3)
	Number of off-premises licenses	ABC Law §63
	Businesses authorized	ABC Law §§63, 76-a, 77
10:40 am	**Trade Practices**	
	Price Posting	ABC Law §101-b
	Gifts and Services to Retailers	ABC Law §101-b, 9 NYCRR §§83.4, 86.1 - 81.17
	Tastings	ABC Law passim
	Franchise Agreements	ABC Law §55-c
	Credit Rules	ABC Law §101-aa
	Catalogues	9 NYCRR §86.1
	House Accounts	ABC Law §100(5)
11:30 am	**Suspension and Revocation of Licenses**	
	Prohibited Sales	ABC Law §65
	Underage patron	ABC Law §65
	Unlawful possession with intent to consume	ABC Law §65-c
	"Suffer and permit"	ABC Law §106(6)
	Suspension & Revocation Provisions	ABC Law §118
	Problem Premises	

12:30 pm	**Lunch** (provided)	
1:00 pm	**Beer**	
	Brewing festivals	ABC Law §97(2)
	Keg registration	ABC Law §105-c
	Label approval	ABC Law §107-a
	180-day price hold	ABC Law §55-b(2)
1:50 pm	**Farm Wineries**	ABC Law §§76, 76-a - e, 77
	Direct shipment record keeping	ABC Law §79-c
	Custom Crush	
	Satellite stores	ABC Law§76(4)
2:40 pm	**Wholesalers**	
	Trade channel pricing	
	Family discounts	ABC Law §101-b
	Restocking and rotating	ABC Law §101(1)(c)
3:30 pm	**Revenue Generation**	
	Collection of Taxes/Electronic Reporting	
	Licensing Fees	
4:00 pm	**Other**	
	Returns of unopened product	ABC Law §100(1)
	Single license to encompass multiple permits	
	Inconsistencies in the ABC Law	
4:30 pm	**Concluding Remarks**	Robert M. Pitler, Chairman

The topics on the Agenda are not intended as an exclusive list of the issues that the Commission will consider in the coming months.

While we encourage you to submit written statements on the topics on the Agenda as well as other topics related to the ABC Law, we will dispense with the reading of any statements at the Roundtable Meetings and focus on informal discussion with and among the participants on the Agenda topics.

AGENDA

New York State Law Revision Commission
Study of Alcoholic Beverage Control Law
Roundtable Meeting

Wednesday, June 24, 2009

Albany Law School
80 New Scotland Avenue
(2000 Building, Room 300)
Albany, New York 12208
518 - 472 - 5858

A webcast of this meeting is available at http://totalwebcasting.com/live/nyslr

10:30 am **Welcome** — Robert M. Pitler, Chairman

TOPICS FOR DISCUSSION

The focus of this meeting will be Commission members and staff questions about winery, brewery and distillery licenses to assist the Commission in formulating its final recommendations. This discussion will be informal and hopefully interactive.

10:35 am **Wineries**

12:15 pm **Lunch** (provided)

12:45 pm **Breweries**

2:00 pm **Distilleries**

3:30 pm **Concluding Remarks** — Robert M. Pitler, Chairman

New York State Law Revision Commission
Study of Alcoholic Beverage Control Law
Roundtable Meeting Agenda

Tuesday, July 14, 2009

Brooklyn Law School
Feil Hall
205 State Street
(Corner of State Street and Boerum Place)
Brooklyn, New York

Webcast at www.totalwebcasting.com/live/nyslr

9:00 am	**Welcome**	**Robert M. Pitler, Chairman**

TOPICS FOR DISCUSSION

The focus of this meeting will be Commission members and staff questions about the topics listed below to assist the Commission in formulating its final recommendations. This discussion will be informal and hopefully interactive.

9:05 am - 10:00 am	**NYS Policy and Purpose of ABC Law**
10:00 am - 11:15 am	**Primary Source, Price Posting, Brand Ownership and Label Approval**
11:15 pm - 12: 00 pm	**C licenses and Convenience Stores**
12:00 pm - 1:00 pm	**Lunch (provided)**
1:00 pm - 1:30 pm	**Off-Premises Licenses**
1:30 pm - 2:00 pm	**621 Events LLC. v. State Liquor Authority (attached copy)**
2:00 pm - 3:00 pm	**Trade Practices**
3:00 pm	**Other Issues and Closing Remarks**

Appendix B

New York State Advisory Council on Underage Alcohol Consumption

New York State Advisory Council on Underage Alcohol Consumption

New York State Law Revision Commission
80 New Scotland Avenue
Albany, NY 12208

May 14, 2009

Re: Recommendations for the NYS Law Revision Commission on Underage Drinking

Gentlemen:

In the "*Surgeon General's Call to Action to Prevent and Reduce Underage Drinking 2007*" (U.S. Department of Health and Human Services), it was stated that "underage alcohol consumption in the United States is a widespread and persistent public health and safety problem that creates serious personal, social, and economic consequences for adolescents, their families, communities, and the Nation as a whole. Alcohol is the drug of choice among America's adolescents, used by more young people than tobacco or illicit drugs (Substance Abuse and Mental Health Services Administration - SAMHSA, 2006.) The prevention and reduction of underage drinking and treatment of underage youth with alcohol use disorders are therefore important public health and safety goals. The *Surgeon General's Call to Action To Prevent and Reduce Underage Drinking* seeks to engage all levels of government as well as individuals and private sector institutions and organizations in a coordinated, multifaceted effort to prevent and reduce underage drinking and its adverse consequences.

While New York State youth have a lower percentage of youth ages 12-17 who meet the DSM-IV criteria for alcohol dependence, they report similar alcohol use with national trends: heavy drinking is reported by 12% of eighth graders, 22% of tenth graders, 29% of 12th graders, and 40% of college students. A 2003 study, however, shows that since 1998 all measures of underage alcohol use have significantly declined: past year use dropped from 58% to 51%, past month use dropped from 42% to 34%, and binge drinking from 34% to 29%.

In the revision of the ABC Laws, it is paramount to address the following to further achieve health goals for adolescents and young adults:

(1) Deregulation will increase accessibility and availability and increase sales to youth. Public health research over the past few decades has demonstrated conclusively that increases in per capita alcohol consumption are associated with increases in alcohol problems. This is as true for the youth population as for the adult population. Therefore, any liberalization/deregulation of Alcohol Beverage Control law which has the effect of boosting overall sales will necessarily result in increases in underage alcohol-related problems (and their consequences) in New York State.

Furthermore, compliance checks show that as many as 50% of on-site and off-site premises serve or sell alcohol to minors, and any expansion of alcohol sales - wine, beer or spirits, will ultimately translate into increases in underage drinking. Furthermore, expansions in non-traditional marketplace opportunities such as internet sales, will also see increases in adolescent drinking.

(2) Youth are more susceptible to media pressure, and any expansion of the alcohol industry carries with it an aggressive advertising and marketing campaign often targeting youth and young adults. Research has well documented targeted advertising to both youth, and especially to young adults on the college campus. According to an OASAS fact sheet, youth ages 12-20 are exposed to 8% more beer and ale advertising than adults, 14% more advertising for distilled spirits, and 12% more advertising for flavored malt beverages. In addition, such new industry items such as "alcopops", "wine ice cream", Alcohol Without Liquid (AWOL) machines, powdered alcohol, fortified beer and wine, the sale of "40 ouncers", or the sale of single cans of beer by the front door, only furthers the appeal to youth and young adults.

(3) Another key factor impacted by ABC Law is the availability of alcohol as measured by alcohol outlet density. Alcohol outlet density is the number of alcohol outlets per population, per area, or per roadway mile. Research has found that higher alcohol outlet density has been associated with higher quantities of alcohol consumed by teenage drinkers, adolescent binge drinking, adolescent drinking and driving, riding with a drinking driver, and Latino youth arrest rates for violent crimes. Accordingly, reductions in alcohol outlet density have been deemed a "recommended intervention" by the U.S. Public Task Force on Community Interventions of the Centers for Disease Control and Prevention. The Commission should also consider closing the "public interest" loophole in the 500 foot rule as mentioned in the LRC Preliminary Report, (which, has, at times, been too liberally applied) and eliminate the exemption for municipalities under 20,000, and expanding the 200 foot rule for schools and churches to at least 500 feet (for new licenses). Measurements should be strict, i.e. from all building entrances/exits.

(4) Enforcement: While the Minimum Legal Drinking Age has been shown to be very effective as a public health policy measure, its enforcement nationally has been inconsistent, at best. A 1994 study found that there were, on average, only five actions taken against an alcohol outlet for every one hundred thousands incidences of underage drinking.

Furthermore, while family and social sources of alcohol are the most common for underage drinking, commercial sources are still a considerable factor. According to the U.S. Substance Abuse & Mental Health Administration (SAMHSA), 30.6% of underage drinkers ages 12-20 purchased the last alcohol they used. One survey of several studies found a range of 45% to 88% successful underage "sting" purchases of alcohol. Moreover, the rate of illegal merchant sales in communities has been linked to youth drinking frequency, binge drinking, drinking at school, and drinking and driving.

Reverse the trend of decreasing ABC Enforcement staff levels. A 2005 National Highway Traffic Safety Administration report found that New York State has the second worst ratio of ABC enforcement staff to outlets in the nation.

Step up enforcement of underage drinking laws through increased state/local partnerships.

(4) Other revisions such as mixing professional sports betting at on-premise sites or increasing gambling venues at off-premise sites, selling beer at farmer's markets or sponsoring brewing festivals, and increasing the number of micro-breweries, distilleries and wineries will only further blur the boundaries in keeping youth and young adults alcohol free.

The Prevention of Underage Drinking is also a necessary component recommended for integration into President Obama's National Health Care Reform Act. Similarly, as New York State has made great progress in reducing underage drinking, any revisions of the ABC laws must adhere to and safeguard the original intent of public health, safety and welfare, rather than to increase sales and marketing opportunities. Our children's lives depend upon it.

Sincerely,

Nelson Acquilano, Chairperson
NYS OASAS Advisory Council on Underage Alcohol Consumption

Appendix C

Maps of neighborhoods in New York City and Buffalo showing locations of saloons, 1894

SUBSTITUTES FOR THE SALOON

BY

RAYMOND CALKINS

AN INVESTIGATION MADE FOR

THE COMMITTEE OF FIFTY

UNDER THE DIRECTION OF

FRANCIS G. PEABODY, ELGIN R. L. GOULD

AND WILLIAM M. SLOANE

SUB-COMMITTEE ON SUBSTITUTES FOR THE SALOON

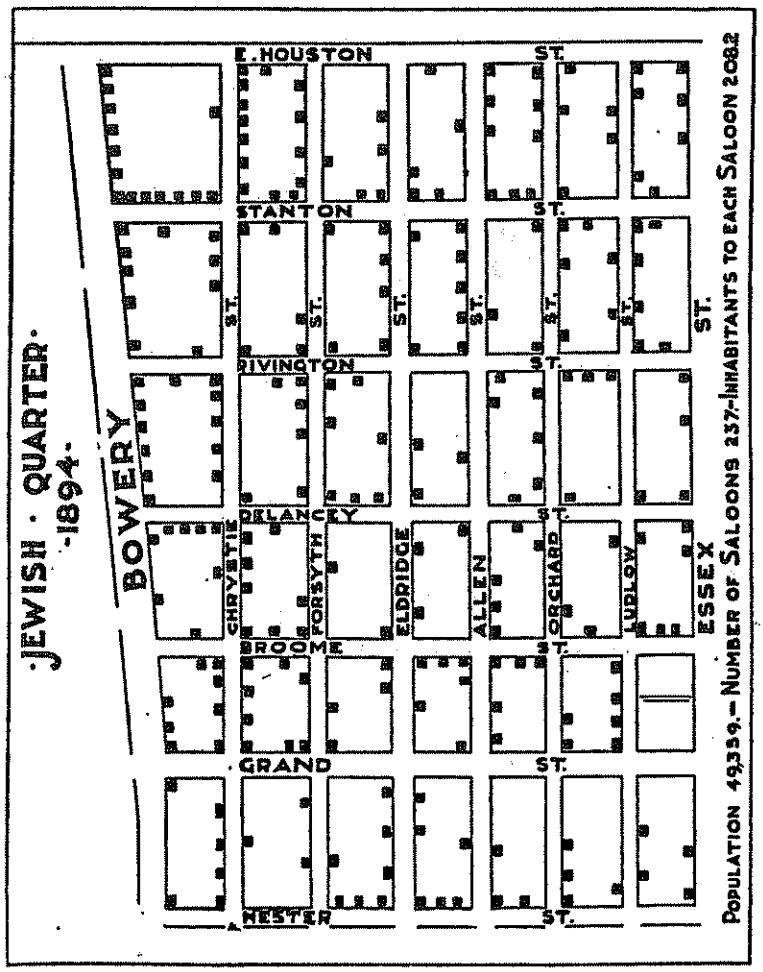
BOSTON AND NEW YORK
HOUGHTON, MIFFLIN AND COMPANY
The Riverside Press, Cambridge

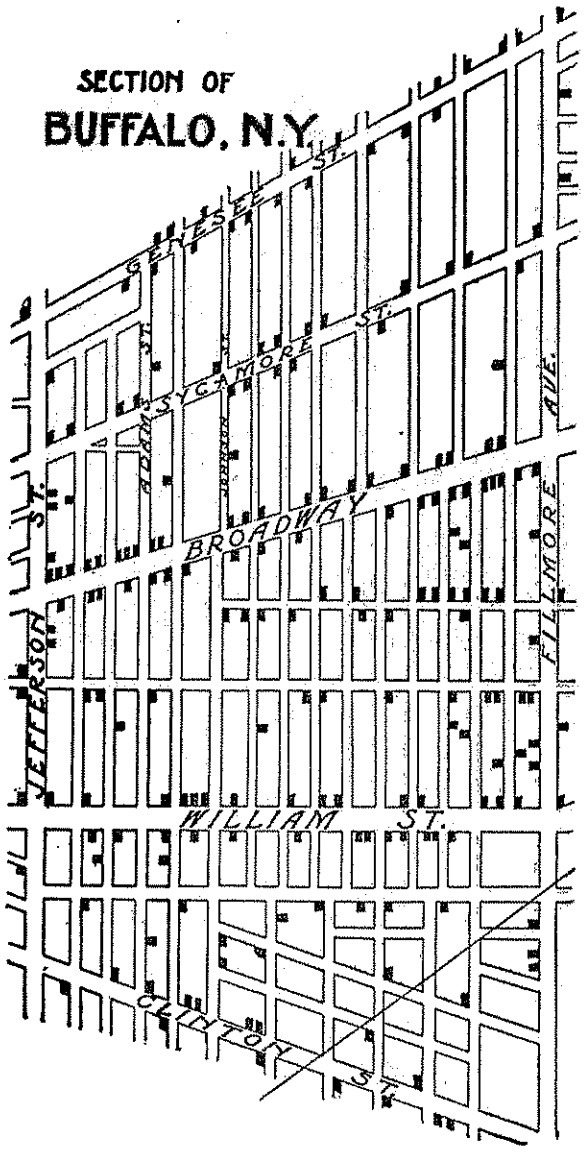
page 386

V.

DIAGRAMS ILLUSTRATING DISTRIBUTION OF SALOONS.

THE following diagrams show the number and location of saloons in thickly populated quarters of New York, San Francisco, and Buffalo.





Appendix D

Deed descriptions included in the ABC Law

ABC Law § 101(1)(a)(Manufacturers and wholesales not to be interested in retail places)("It shall be unlawful for a manufacturer or wholesaler licensed under this chapter to(a) Be interested directly or indirectly in any premises where any alcoholic beverage is sold at retail; or in any business devoted wholly or partially to the sale of any alcoholic beverage at retail by stock ownership, interlocking directors, mortgage or lien or any personal or real property, or by any other means. The provisions of this paragraph shall not apply to (i) any such premises or business constituting the overnight lodging and resort facility located wholly within the boundaries of the town of North Elba, county of Essex, township eleven, Richard's survey, great lot numbers two hundred seventy-eight, two hundred seventy-nine, two hundred eighty, two hundred ninety-eight, two hundred ninety-nine, three hundred, three hundred eighteen, three hundred nineteen, three hundred twenty, three hundred thirty-five and three hundred thirty-six, and township twelve, Thorn's survey, great lot numbers one hundred six and one hundred thirteen, as shown on the Adirondack map, compiled by the conservation department of the state of New York - nineteen hundred sixty-four edition, in the Essex county atlas at page twenty-seven in the Essex county clerk's office, Elizabethtown, New York, provided that such facility maintains not less than two hundred fifty rooms and suites for overnight lodging, (ii) any such premises or business constituting the overnight lodging and resort facility located wholly within the boundaries of that tract or parcel of land situate in the city of Canandaigua, county of Ontario, beginning at a point in the northerly line of village lot nine where it meets with South Main Street, thence south sixty-nine degrees fifty-four minutes west a distance of nine hundred sixteen and twenty-three hundredths feet to an iron pin; thence in the same course a distance of fourteen feet to an iron pin; thence in the same course a distance of fourteen and four-tenths feet to a point; thence south fifteen degrees thirty-eight minutes and forty seconds east a distance of four hundred forty-six and eighty-seven hundredths feet to a point; thence south twenty-eight degrees thirty-seven minutes and fifty seconds east a distance of one hundred thirteen and eighty-four hundredths feet to a point; thence south eighty-five degrees and forty-seven minutes east a distance of forty-seven and sixty-one hundredths feet to an iron pin; thence on the same course a distance of three hundred and sixty-five feet to an iron pin; thence north seventeen degrees twenty-one minutes and ten seconds east a distance of four hundred fifty-seven and thirty-two hundredths feet to an iron pin; thence north nineteen degrees and thirty minutes west a distance of two hundred and forty-eight feet to a point; thence north sixty-nine degrees and fifty-four minutes east a distance of two hundred eighty-four and twenty-six hundredths feet to a point; thence north nineteen degrees and thirty minutes west a distance of sixty feet to the point and place of beginning, provided that such facility maintains not less than one hundred twenty rooms and suites for overnight lodging, (iii) any such premises or business constituting the overnight lodging facility located wholly within the boundaries of that tract or parcel of land situated in the borough of Manhattan, city and county of New York, beginning at a point on the northerly side of west fifty-fourth street at a point one hundred feet easterly from the intersection of the said northerly side of west fifty-fourth street and the easterly side of seventh avenue; running thence northerly and parallel with the easterly side of seventh avenue one hundred feet five inches to the center line of the block; running thence easterly and parallel with the northerly side of west fifty-fourth street and along the center line of the block fifty feet to a point; running thence northerly and parallel with the easterly side of seventh avenue one hundred feet five inches to the southerly side

of west fifty-fifth street at a point distant one hundred fifty feet easterly from the intersection of the said southerly side of west fifty-fifth street and the easterly side of seventh avenue; running thence easterly along the southerly side of west fifty-fifth street thirty-one feet three inches to a point; running thence southerly and parallel with the easterly side of the seventh avenue one hundred feet five inches to the center line of the block; running thence easterly along the center line of the block and parallel with the southerly side of west fifty-fifth street, one hundred feet; running thence northerly and parallel with the easterly side of seventh avenue one hundred feet five inches to the southerly side of west fifty-fifth street; running thence easterly along the southerly side of west fifty-fifth street twenty-one feet ten and one-half inches to a point; running thence southerly and parallel with the easterly side of seventh avenue one hundred feet five inches to the center line of the block; running thence westerly along the center line of the block and parallel with the northerly side of west fifty-fourth street three feet one and one-half inches; running thence southerly and parallel with the easterly side of seventh avenue one hundred feet five inches to the northerly side of west fifty-fourth street at a point distant three hundred feet easterly from the intersection of the said northerly side of west fifty-fourth street and the easterly side of seventh avenue; running thence westerly and along the northerly side of west fifty-fourth street two hundred feet to the point or place of beginning, provided that such facility maintains not less than four hundred guest rooms and suites for overnight lodging, (iv) any such premises or business located on that tract or parcel of land, or any subdivision thereof, situate in the Village of Lake Placid, Town of North Elba, Essex County, New York; it being also a part of Lot No. 279, Township No. 11, Old Military Tract, Richard's Survey; it being also all of Lot No. 23 and part of Lot No. 22 as shown and designated on a certain map entitled "Map of Building Sites for Sale by B.R. Brewster" made by G.T. Chellis C.E. in 1892; also being PARCEL No. 1 on a certain map of lands of Robert J. Mahoney and wife made by G.C. Sylvester, P.E. & L.S. #21300, dated August 4, 1964, and filed in the Essex County Clerk's Office on August 27, 1964, and more particularly bounded and described as follows; BEGINNING at the intersection of the northerly bounds of Shore Drive (formerly Mirror Street) with the westerly bounds of Park Place (formerly Rider Street) which point is also the northeast corner of Lot No. 23, from thence South 21 degrees50' East in the westerly bounds of Park Place a distance of 119 feet, more or less, to a lead plug in the edge of the sidewalk marking the southeast corner of Lot No. 23 and the northeast corner of Lot No. 24; from thence South 68 degrees00'50"West a distance of 50.05 feet to an iron pipe set in concrete at the corner of Lots 23 and 22; from thence South 65 degrees10'50"West a distance of 7.94 feet along the south line of Lot No. 22 to an iron pipe for a corner; from thence North 23 degrees21'40"West and at 17.84 feet along said line passing over a drill hole in a concrete sidewalk, and at 68.04 feet further along said line passing over an iron pipe at the southerly edge of another sidewalk, and at 1.22 feet further along said line passing over another drill hole in a sidewalk, a total distance of 119 feet, more or less, to the northerly line of Lot. No. 22; from thence easterly in the northerly line of Lot 22 and 23 to the northeast corner of Lot No. 23 and the point of beginning. Also including the lands to the center of Shore Drive included between the northerly straight line continuation of the side lines of the above described parcel, and to the center of Park Place, where they abut the above described premises SUBJECT to the use thereof for street purposes. Being the same premises conveyed by Morestuff, Inc. to Madeline Sellers by deed dated June 30, 1992, recorded in the Essex County

Clerk's Office on July 10, 1992 in Book 1017 of Deeds at Page 318; (v) any such premises or business located on that certain piece or parcel of land, or any subdivision thereof, situate, lying and being in the Town of Plattsburgh, County of Clinton, State of New York and being more particularly bounded and described as follows: Starting at an iron pipe found in the easterly bounds of the highway known as the Old Military Turnpike, said iron pipe being located 910.39 feet southeasterly, as measured along the easterly bounds of said highway, from the southerly bounds of the roadway known as Industrial Parkway West, THENCE running S 31 degrees 54' 33"E along the easterly bounds of said Old Military Turnpike Extension, 239.88 feet to a point marking the beginning of a curve concave to the west; thence southerly along said curve, having a radius of 987.99 feet, 248.12 feet to an iron pipe found marking the point of beginning for the parcel herein being described, said point also marked the southerly corner of lands of Larry Garrow, et al, as described in Book 938 of Deeds at page 224; thence N 07 degrees 45' 4"E along the easterly bounds of said Garrow, 748.16 feet to a 3" x 4"concrete monument marking the northeasterly corner of said Garrow, the northwesterly corner of the parcel herein being described and said monument also marking the southerly bounds of lands of Salerno Plastic Corp. as described in Book 926 of Deeds at Page 186; thence S 81 degrees 45' 28"E along a portion of the southerly bounds of said Salerno Plastic Corp., 441.32 feet to an iron pin found marking the northeasterly corner of the parcel herein being described and also marking the northwest corner of the remaining lands now or formerly owned by said Marx and Delaura; thence S 07 degrees 45' 40"W along the Westerly bounds of lands now of formerly of said Marx and DeLaura and along the easterly bounds of the parcel herein being described, 560.49 feet to an iron pin; thence N 83 degrees 43' 21"W along a portion of the remaining lands of said Marx and DeLaura, 41.51 feet to an iron pin; thence S 08 degrees 31' 30"W, along a portion of the remaining lands of said Marx and Delaura, 75.01 feet to an iron pin marking northeasterly corner of lands currently owned by the Joint Council for Economic Opportunity of Plattsburgh and Clinton County, Inc. as described in Book 963 of Deeds at Page 313; thence N 82 degrees 20' 32"W along a portion of the northerly bounds of said J.C.E.O., 173.50 feet to an iron pin; thence 61 degrees 21' 12"W, continuing along a portion of the northerly bounds of said J.C.E.O., 134.14 feet to an iron pin; thence S 07 degrees 45' 42"W along the westerly bounds of said J.C.E.O., 50 feet to an iron pin; thence S 66 degrees 48' 56"W along a portion of the northerly bounds of remaining lands of said Marx and DeLaura, 100.00 feet to an iron pipe found on the easterly bounds of the aforesaid highway, said from pipe also being located on a curve concave to the west; thence running and running northerly along the easterly bounds of the aforesaid highway and being along said curve, with the curve having a radius of 987.93 feet, 60.00 feet to the point of beginning and containing 6.905 acres of land. Being the same premises as conveyed to Ronald Marx and Alice Marx by deed of CIT Small Business Lending Corp., as agent of the administrator, U.S.Small Business Administration, an agency of the United States Government dated September 10, 2001 and recorded in the office of the Clinton County Clerk on September 21, 2001 as Instrument #135020; or (vi) any such premises or business located on the west side of New York state route 414 in military lots 64 and 75 located wholly within the boundaries of that tract or parcel of land situated in the town of Lodi, county of Seneca beginning at an iron pin on the assumed west line of New York State Route 414 on the apparent north line of lands reputedly of White (lib. 420, page 155); said iron pin also being northerly a distance of 1200 feet more or less from the

centerline of South Miller Road; Thence leaving the point of beginning north 85-17'-44"west along said lands of White a distance of 2915.90 feet to an iron pin Thence north 03-52'-48"east along said lands of White, passing through an iron pin 338.36 feet distant, and continuing further along that same course a distance of 13.64 feet farther, the total distance being 352.00 feet to a point in the assumed centerline of Nellie Neal Creek; Thence in generally a north westerly direction the following courses and distances along the assumed centerline of Nellie Neal Creek; north 69-25'-11"west a distance of 189.56 feet to a point; north 63-40'-00"west a distance of 156.00 feet to a point; north 49-25'-00"west a distance of 80.00 feet to a point; south 80-21'-00"west a distance of 90.00 feet to a point; north 72-03'-00"west a distance of 566.00 feet to a point; north 68-15'-00"west a distance of 506.00 feet to a point; north 55-16'-00"west a distance of 135.00 feet to a point; south 69-18'-00"west a distance of 200.00 feet to a point; south 88-00'-00"west a distance of 170.00 feet to a point on a tie line at or near the high water line of Seneca Lake; Thence north 25-17'-00"east along said tie line a distance of 238.00 feet to an iron pipe; Thence south 82-04'-15"east along lands reputedly of M. Wagner (lib. 464, page 133) a distance of 100.00 feet to an iron pin; Thence north 06-56'-47"east along said lands of M. Wagner a distance of 100.00 feet to an iron pipe; Thence north 09-34'-28"east along lands reputedly of Schneider (lib. 429, page 37) a distance of 50.10 feet to an iron pipe; Thence north 07-49'-11"east along lands reputedly of Oney (lib. 484, page 24) a distance of 50.00 feet to an iron pipe; Thence north 82-29'-40"west along said lands of Oney a distance of 95.30 feet to an iron pipe on a tie line at or near the highwater line of Seneca Lake; Thence north 08-15'-22"east along said tie line a distance of 25.00 feet to an iron pin; Thence south 82-28'-00"east along lands reputedly of Yu (lib. 405, page 420) a distance of 96.53 feet to an iron pipe; Thence north 34-36'-59"east along said lands of Yu a distance of 95.00 feet to a point in the assumed centerline of Van Liew Creek; Thence in generally an easterly direction the following courses and distances along the assumed centerline of Van Liew Creek; north 72-46'-37"east a distance of 159.98 feet to a point; north 87-53'-00"east a distance of 94.00 feet to a point; south 71-12'-00"east a distance of 52.00 feet to a point; south 84-10'-00"east a distance of 158.00 feet to a point; south 59-51'-00"east a distance of 160.00 feet to a point; south 83-29'-00"east a distance of 187.00 feet to a point; Thence north 01-33'-40"east along lands reputedly of Hansen (lib. 515, page 205) passing through an iron pipe 32.62 feet distant, and continuing further along that same course passing through an iron pin 205.38 feet farther, and continuing still further along that same course a distance of 21.45 feet farther, the total distance being 259.45 feet to the assumed remains of a White Oak stump; Thence north 69-16'-11"east along lands reputedly of Schwartz (lib. 374, page 733) being tie lines along the top of the south bank of Campbell Creek a distance of 338.00 feet to a point; Thence south 57-17'32"east along said tie line a distance of 136.60 feet to a point; Thence south 74-45'-00"east along said tie line a distance of 100.00 feet to an iron pin; Thence north 04-46'-00"east along said lands of Schwartz a distance of 100.00 feet to a point in the assumed centerline of Campbell Creek; Thence in generally an easterly direction the following courses and distances along the assumed centerline of Campbell Creek; south 71-34'-00"east a distance of 330.00 feet to a point; north 76-53'-00"east a distance of 180.00 feet to a point; north 83-05'00"east a distance of 230.00 feet to a point; south 66-44'-00"east a distance of 90.00 feet to a point; south 81-10'-00"east a distance of 240.00 feet to a point; south 45-29'-15"east a distance of 73.18 feet to a point; Thence south 05-25'-50"west along lands

reputedly of Stanley Wagner (lib. 450, page 276) a distance of 135.00 feet to a point on the assumed north line of Military Lot 75; Thence south 84-34'-10"east along said lands of Wagner and the assumed north line of Military Lot 75 a distance of 1195.06 feet to an iron pin; Thence south O6-57'52"west along said lands of M. Wagner (lib. 414, page 267) passing through an iron pin 215.58 feet distant, and continuing further along that same course a distance of 20.59 feet farther, the total distance being 236.17 feet to a point in the assumed centerline of Campbell Creek; Thence in generally a south easterly direction the following course and distances along the assumed centerline of Campbell Creek; north 78-23'-09"east a distance of 29.99 feet to a point; south 46-09'-15"east a distance of 65.24 feet to a point; north 85-55'-09"east a distance of 60.10 feet to a point; south 61-59'-50"east a distance of 206.91 feet to a point; north 63-58'-27"east a distance of 43.12 feet to a point; south 28-51'-21"east a distance of 47.72 feet to a point; south 15-14'-08"west a distance of 33.42 feet to a point; south 79-16'-32"east a distance of 255.15 feet to a point; south 62-19'-46"east a distance of 75.82 feet to a point; north 76-10'-42"east a distance of 99.60 feet to a point; north 82-12'55"east a distance of 86.00 feet to a point; south 44-13'53" east a distance of 64.08 feet to a point; north 67-52'-46"east a distance of 73.98 feet to a point; north 88-13'-13"east a distance of 34.64 feet to a point on the assumed west line of New York State Route 414; Thence south 20-13'-30"east along the assumed west line of New York State Route 414 a distance of 248.04 feet to a concrete monument; Thence south 02-10'-30"west along said road line a distance of 322.90 feet to an iron pin; Thence 13-14'-50"west along said road line a distance of 487.41 feet to an iron pin, said iron pin being the point and place of beginning;Comprising an area of 126.807 acres of land according to a survey completed by Michael D. Karlsen entitled "Plan Owned by Stanley A. Wagner" known as Parcel A of Job number 98-505.This survey is subject to all utility easements and easements and right-of-ways of record which may affect the parcel of land.This survey is also subject to the rights of the public in and to lands herein referred to as New York State Route 414.This survey intends to describe a portion of the premises as conveyed by Ruth V. Wagner to Stanley A. Wagner by deed recorded February 10, 1989 in Liber 450 of deeds, at Page 286.This survey also intends to describe a portion of the premises as conveyed by Stanley W. VanVleet to Stanley A. Wagner by deed recorded April 30, 1980 in Liber 385 of Deeds, at Page 203.ALSO ALL THAT OTHER TRACT OR PARCEL OF LAND SITUATE on the east side of New York State Route 414 in Military Lot 75 in the Town of Lodi, County of Seneca, State of New York bounded and described as follows: Beginning at an iron pin on the assumed east line of New York State Route 414, said iron pin being north 50-44'-57"east a distance of 274.92 feet from the south east corner of the parcel of land herein above described; Thence leaving the point of beginning north 00-26'01"east along a mathematical tie line a distance of 504.91 feet to an iron pin; Thence south 37-00'-20"east along lands reputedly of Tomberelli (lib. 419, page 243) passing through an iron pin 176.00 feet distant, and continuing further along that same course a distance of 2.01 feet farther, the total distance being 178.01 feet to a point; Thence south 09-03'-55"west along lands reputedly of M. Wagner (lib. 491, page 181) a distance of 68.19 feet to an iron pipe; Thence south 15-36'-04"west along said lands of M. Wagner a distance of 300.15 feet to an iron pipe; Thence south 72-04'-59"west along said lands of M. Wagner a distance of 20.49 feet to an iron pin, said iron pin being the point and place of beginning.Comprising an area of 0.727 acre of lands according to a survey completed by Michael D. Karlsen entitled "Plan of Land Owned by

Stanley A. Wagner" known as Parcel B of job number 98-505.This survey is subject to all utility easements and easements and right-of-ways of record which may affect this parcel of land.This survey is also subject to the rights of the public in and to lands herein referred to as New York State Route 414.This survey intends to describe the same premises as conveyed by Henry W. Eighmey as executor of the Last Will and Testament of Mary C. Eighmey to Stanley A. Wagner by deed recorded July 2, 1996 in liber 542, page 92.This survey also intends to describe a portion of the premises as conveyed by Ruth V. Wagner to Stanley A. Wagner by deed recorded February 10, 1989 in Liber 450 of deeds, at Page 286. The provisions of this paragraph shall not apply to any premises or business located wholly within the following described parcel: ALL THAT TRACT OR PARCEL OF LAND situate in the City of Corning, County of Steuben and State of New York bounded and described as follows: Beginning at an iron pin situate at the terminus of the westerly line of Townley Avenue at its intersection with the southwesterly line of New York State Route 17; thence S 00 degrees 45' 18"E along the westerly line of Townley Avenue, a distance of 256.09 feet to a point; thence S 89 degrees 02' 07"W through an iron pin placed at a distance of 200.00 feet, a total distance of 300.00 feet to an iron pin; thence N 00 degrees 59' 17"W a distance of 47.13 feet to an iron pin; thence S 89 degrees 02' 07"W a distance of 114.56 feet to a point situate in the southeast corner of Parcel A-2 as set forth on a survey map hereinafter described; thence N 14 degrees 18' 49"E a distance of 124.40 feet to an iron pin situate at the southeast corner of lands now or formerly of Cicci (Liber 923, Page 771); thence N 14 degrees 18' 49"E a distance of 76.46 feet to an iron pin; thence N 00 degrees 57' 53"W a distance of 26.25 feet to an iron pin marking the southeast corner of parcel A-1 as set forth on the hereinafter described survey map; thence N 00 degrees 58' 01"W a distance of 166.00 to an iron pin situate at the northeast corner of said Parcel A-1, which pin also marks the southeast corner of lands now or formerly of Becraft (Liber 1048, Page 1086); thence N 00 degrees 57' 53"W a distance of 106.00 feet to an iron pin situate in the southerly line of lands now or formerly of the United States Postal Service; thence N 89 degrees 02' 07"E along the southerly line of said United States Postal Service a distance of 81.47 feet to a point; thence N 14 degrees 18' 49"E along the easterly line of said United States Postal Service a distance of 114.29 feet to an iron pin situate in the southwesterly line of New York State Route 17; thence S 32 degrees 00' 31"E along the southwesterly line of New York State Route 17, a distance of 358.93 feet to an iron pin; thence continuing along the southwesterly line of New York state Route 17, S 38 degrees30' 04"E a distance of 108.18 feet to the iron pin marking the place of beginning. Said premises are set forth and shown as approximately 4.026 acres of land designated as Parcel A (excluding Parcels A-1 and A-2) on a survey map entitled "As-Built Survey of Lands of New York Inn, LLC, City of Corning, Steuben County, New York" by Weiler Associates, dated December 27, 2001, designated Job No. 12462. The provisions of this paragraph shall not apply to any premises licensed under section sixty-four of this chapter in which a manufacturer or wholesaler holds a direct or indirect interest, provided that: (I) said premises consist of an interactive entertainment facility which predominantly offers interactive computer and video entertainment attractions, and other games and also offers themed merchandise and food and beverages, (II) the sale of alcoholic beverages within the premises shall be restricted to an area consisting of not more than twenty-five percent of the total interior floor area of the premises, (III) the retail licenses shall derive not less than sixty-five percent of the total revenue generated by the facility from

interactive video entertainment activities and other games, including related attractions and sales of merchandise other than food and alcoholic beverages, (IV) the interested manufacturer or wholesaler, or its parent company, shall be listed on a national securities exchange and its direct or indirect equity interest in the retail licensee shall not exceed twenty-five percent, (V) no more than fifteen percent of said licensee's purchases of alcoholic beverages for sale in the premises shall be products produced or distributed by the manufacturer or wholesaler, (VI) neither the name of the manufacturer or wholesaler nor the name of any brand of alcoholic beverage produced or distributed by said manufacturer or wholesaler shall be part of the name of the premises, (VII) the name of the manufacturer or wholesaler or the name of products sold or distributed by such manufacturer or wholesaler shall not be identified on signage affixed to either the interior or the exterior of the premises in any fashion, (VIII) promotions involving alcoholic beverages produced or distributed by the manufacturer or wholesaler are not held in such premises and further, retail and consumer advertising specialties bearing the name of the manufacturer or wholesaler or the name of alcoholic beverages produced or distributed by the manufacturer or wholesaler are not utilized in any fashion, given away or sold in said premises, and (IX) except to the extent provided in this paragraph, the licensing of each premises covered by this exception is subject to all provisions of section sixty-four of this chapter, including but not limited to liquor authority approval of the specific location thereof. The provisions of this paragraph shall not prohibit (1) a manufacturer or wholesaler, if an individual, or a partner, of a partnership, or, if a corporation, an officer or director thereof, from being an officer or director of a duly licensed charitable organization which is the holder of a license for on-premises consumption under this chapter, nor (2) a manufacturer from acquiring any such premises if the liquor authority first consents thereto after determining, upon such proofs as it shall deem sufficient, that such premises is contiguous to the licensed premises of such manufacturer, and is reasonably necessary for the expansion of the facilities of such manufacturer. After any such acquisition, it shall be illegal for a manufacturer acquiring any such premises to sell or deliver alcoholic beverages manufactured by him to any licensee occupying such premises.").

Appendix E
2006-2007 Consent Decrees

At a Special Term of the Supreme Court, held in and for the County of Erie at the Erie County Courthouse, in the City of Buffalo, New York, on the 3rd day of January, 2007

PRESENT: Hon. John M. Curran, J.S.C.
Justice Presiding

STATE OF NEW YORK : SUPREME COURT
COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK, by the Attorney General of the State of New York, ELIOT SPITZER, and THE NEW YORK STATE LIQUOR AUTHORITY,

Petitioners,

-vs-

33 UNION SQUARE WEST, INC., BECKENDORF LIQUORS, INC. d/b/a HOLBROOK LIQUORS, EAST RIVER LIQUORS, INC. d/b/a BROOKLYN LIQUORS, WESTBURY LIQUORS INC., CENTURY LIQUORS, INC. a/k/a CENTURY LIQUOR STORE, INC., ECONO ENTERPRISES, INC. d/b/a LIQUOR CITY, EXIT 9 WINE & LIQUOR WAREHOUSE, INC., FIVE TOWNS WINES & LIQUORS, INC., GARNET WINES & LIQUORS INC., GLOBAL WINE & SPIRITS, INC., COLONIAL WINE & SPIRITS, INC., MCKINLEY LIQUOR, INC., HENRY STREET LIQUORS, INC., LISA'S LIQUOR BARN, INC. a/k/a LISAS LIQUOR BARN, INC., P & G TOBIN, INC. d/b/a WHITEHOUSE LIQUORS, MORRELL & COMPANY THE WINE EMPORIUM LTD., NCP LIQUORS, INC. d/b/a PASCALE'S LIQUOR SQUARE, MICHAEL PALMERI, JR. d/b/a MARKETVIEW LIQUORS, PJ WINE, INC. a/k/a PJ'S LIQUORS, INC., PRIME WINES CORP. d/b/a PRIME WINE & SPIRITS a/k/a PREMIER CENTER, JONMARK CORPORATION d/b/a PREMIUM WINE & SPIRITS, PRESTIGE WINES CORP. d/b/a PRESTIGE WINE & SPIRITS, QUARTER HORSE LLC d/b/a STEW LEONARD'S OF YONKERS, VINEYARDS OF FARMINGDALE LLC d/b/a STEW

CONSENT ORDER AND JUDGMENT

Index No. I 2006012745

LEONARD'S OF FARMINGDALE, R & V, INC. d/b/a ARLINGTON WINE & LIQUOR, SHERRY-LEHMANN, INC. a/k/a SHERRY LEHMANN INC., SUPERMARKET LIQUORS & WINES, INC., THE 67 LIQUOR SHOP, INC., VISCOUNT LIQUOR CORP., WAREHOUSE WINES & SPIRITS, INC., ZACHYS WINE & LIQUOR, INC. a/k/a ZACHY'S WINE & LIQUOR STORE, INC.,

Respondents,

Pursuant to Section 63, Subdivision 12 of the Executive Law.

Upon reading and filing the Verified Petition sworn to on November 27, 2006, by Dennis Rosen, Assistant Attorney General, and the Affirmation of Thomas J. Donohue, Esq., Counsel to the New York State Liquor Authority, dated December 4, 2006, and upon the Stipulation and Consent of each respondent, all of which are attached hereto, in which each respondent acknowledges service of the Notice of Verified Petition and Verified Petition, consents to the entry of this Consent Order and Judgment ("Judgment"), and waives notice of entry thereof,

NOW, on motion of Eliot Spitzer, Attorney General of the State of New York ("Attorney General"), attorney for petitioner, The People of the State of New York, Assistant Attorney General Dennis Rosen, of counsel, it is

PARTIES SUBJECT TO JUDGMENT

1. ORDERED, ADJUDGED AND DECREED that this Judgment shall extend to respondents, their officers, directors, employees, agents, successors and assigns, and any other entities under

respondents' ownership or control; and it is further

INJUNCTIVE RELIEF

Soliciting or Receiving Gifts Prohibited

2. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, soliciting or receiving cash, cash equivalents, or gifts such as credit card swipes or AMEX checks, trips or reimbursement of travel expenses, consumer items, or any other inducement to purchase wine or liquor from wholesalers or suppliers, except as explicitly permitted by Title 9, Subtitle B of the Official Compilation of Codes, Rules and Regulations of the State of New York ("SLA Rules"), or a Bulletin issued by the New York State Liquor Authority ("SLA"); and it is further

Discriminating Among Retailers Prohibited

3. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, purchasing wine or liquor at prices other than prices respondents have a good faith belief have been filed, by wholesalers, in price schedules with the SLA; and it is further

Tie-Ins Prohibited

4. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, requiring a wholesaler to sell them an item that has been filed in a price schedule with the SLA as one of limited availability, or

specific quantities of such an item, in order for the wholesaler to be able to sell them another item, or specific quantities of another item; and it is further

Credits and Rebates Prohibited

5. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, soliciting or receiving any form of rebate or discount that has not been filed in a price schedule with the SLA, such as a credit against future purchases, except that nothing herein shall prohibit requesting or receiving lawful credits in the regular course of business, including but not limited to reimbursement for breakage, spoilage, failure to deliver, or delivery of the wrong items; and it is further

Soliciting Payments to Certain Persons or Entities Prohibited

6. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, soliciting, receiving, or in any manner benefitting from, any payment by a wholesaler or supplier, or a person or entity acting on their behalf, to another person or entity if:

(a) Such payment constitutes, in effect, an incentive, reward, or rebate for purchasing or featuring wine or liquor products; or

(b) The entity is, directly or indirectly, owned or controlled by a respondent or a group of retailers including

a respondent, or services a respondent or a group of retailers including a respondent; or

(c) A principal, officer, or employee of a respondent or relative of a principal, officer, or employee of a respondent, is an officer or employee of the entity;

Nothing herein shall prohibit a respondent from receiving a benefit, where explicitly permitted by SLA Rule or Bulletin, from a person or entity that is not related to such respondent as described in (b) or (c) above; and it is further

Soliciting or Receiving Free Products Prohibited

7. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, soliciting or receiving free wine or liquor, except that nothing herein shall prohibit a respondent from soliciting or receiving free wine or liquor:

(a) In reasonably limited quantities to sample; or

(b) For consumer tastings on a respondent's premises where the respondent receives none of the wine or liquor; and it is further

No Advertising Funds from Wholesalers or Suppliers Except for Out-of-State Catalogues

8. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from directly, or indirectly through an advertising company, printing company or any other entity or person, accepting payment from a wholesaler or supplier,

or a person or entity acting on behalf of a wholesaler or supplier, for all or a portion of any advertisement produced by or on behalf a respondent, regardless of the medium in which the advertisement may appear, except where explicitly permitted by Paragraph 9 below, SLA Rule or Bulletin; provided nothing herein shall prohibit a respondent from soliciting or receiving product or brand imagery and artwork for use in an advertisement; and it is further

9. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from directly, or indirectly through an advertising company, printing company or any other entity or person, accepting payment from a wholesaler or supplier to participate, in any manner, in a catalogue published by, or on behalf of a respondent, unless the following conditions are met:

(a) None of the catalogues are distributed within New York State; and

(b) All payments are made to a *bona fide* printing company, that is independent of the respondent, for the reasonable cost of printing an advertisement in the catalogue;

and it is further

FINES AND COSTS

10. ORDERED, ADJUDGED AND DECREED that respondents shall, contemporaneously with the filing of this Judgment, pay to petitioner, The People of the State of New York, civil penalties,

pursuant to ABCL § 17(3) and New York General Business Law Art. 22-A, in the following amounts:

33 Union Square West, Inc.	$35,000.00
Beckendorf Liquors, Inc. d/b/a Holbrook Liquors	$35,000.00
East River Liquors, Inc. d/b/a Brooklyn Liquors	$35,000.00
Westbury Liquors, Inc.	$40,000.00
Century Liquors, Inc. a/k/a Century Liquor Store, Inc.	$10,000.00
Econo Enterprises, Inc. d/b/a Liquor City	$20,000.00
Exit 9 Wine & Liquor Warehouse, Inc.	$10,000.00
Five Towns Wines & Liquors, Inc.	$20,000.00
Garnet Wines & Liquors Inc.	$20,000.00
Global Wine & Spirits. Inc.	$10,000.00
Colonial Wine & Spirits, Inc.	$10,000.00
McKinley Liquor, Inc.	$10,000.00
Henry Street Liquors, Inc.	$20,000.00
Lisa's Liquor Barn, Inc. a/k/a Lisas[sic] Liquor Barn, Inc.	$10,000.00
P & G Tobin, Inc. d/b/a Whitehouse Liquors	$10,000.00
Morrell & Company The Wine Emporium LTD.	$10,000.00
NCP Liquors, Inc. d/b/a Pascale's Liquor Square	$20,000.00
Michael Palmeri, Jr. d/b/a Marketview Liquors	$10,000.00

PJ Wine, Inc. a/k/a PJ's Liquors, Inc.	$40,000.00
Prime Wines Corp. d/b/a Prime Wine & Spirits a/k/a Premier Center	$50,000.00
Prestige Wines Corp. d/b/a Prestige Wine & Spirits	$30,000.00
Jonmark Corporation d/b/a Premium Wine & Spirits	$30,000.00
Quarter Horse LLC d/b/a Stew Leonard's of Yonkers	$20,000.00
Vineyards of Farmingdale LLC d/b/a Stew Leonard's of Farmingdale	$20,000.00
R & V, Inc. d/b/a Arlington Wine & Liquor	$10,000.00
Sherry-Lehmann, Inc. a/k/a Sherry Lehmann Inc.	$10,000.00
Supermarket Liquors & Wines, Inc.	$10,000.00
The 67 Liquor Shop, Inc.	$20,000.00
Viscount Liquor Corp.	$20,000.00
Warehouse Wines & Spirits, Inc.	$50,000.00
Zachy's Wine & Liquor Store, Inc. a/k/a Zachys Wine & Liquor, Inc.	$10,000.00

and it is further

11. ORDERED, ADJUDGED AND DECREED that each respondent shall, contemporaneously with the filing of this Judgment, pay $2,000.00 costs to petitioner, The People of the State of New York; and it is further

12. ORDERED, ADJUDGED AND DECREED that each respondent

shall make the payments ordered in Paragraphs 10 and 11 by certified check or bank check payable to the Attorney General of the State of New York; and it is further

PROSPECTIVE PENALTIES

13. ORDERED, ADJUDGED AND DECREED that, upon a finding by the Court that a respondent has committed any violation(s) of this Judgment, the Court may impose upon that respondent: (a) any injunctive relief it deems appropriate, and (b) any penalty set forth in the ABCL for violations of its provisions, including but not limited to a fine not to exceed $10,000.00 per violation, and/or the revocation, cancellation or suspension of any licenses issued to that respondent pursuant to the ABCL; and it is further

14. ORDERED, ADJUDGED AND DECREED that nothing herein shall limit or prohibit any party's right to appeal an adverse determination by the Court pursuant to Paragraph 13; and it is further

ENFORCEMENT

15. ORDERED, ADJUDGED AND DECREED that either or both petitioners may apply to the Court, upon 10 days notice to all parties, for relief pursuant to Paragraph 13, or for any further relief as may be necessary to effectuate the terms of this Judgment; or, in the alternative and to the exclusion of either petitioner applying to the Court for relief, the SLA may pursue violations of this Judgment or the corresponding ABCL violations by

administratively imposing any penalty contained herein, or contained in the ABCL independent of the terms of this Judgment, pursuant to its functions, powers and duties as set forth in ABCL § 17 *et al.*; however, petitioners shall not commence separate proceedings regarding alleged violations of this Judgment or the ABCL for the same conduct; and it is further

16. ORDERED, ADJUDGED AND DECREED that, for any of the conduct alleged in the Verified Petition or prohibited by the Judgment, which occurred prior to the date of each of the respondents agreeing in a Stipulation and Consent to the entry of this Judgment, there shall be no administrative, civil, criminal, regulatory, or other action taken by either or both petitioners adverse to the respondents, their officers, directors, employees, agents, successors and assigns, and any other entities under respondents' ownership or control, pursuant to the ABCL, and they shall not be liable to petitioners in any manner other than as set forth in this Judgment; and it is further

17. ORDERED, ADJUDGED AND DECREED that any party may apply to the Court, upon 10 days notice to all parties, for a modification or termination of this Judgment as a result of any change in the ABCL, or SLA Rules, or any other material change in circumstances, and this Judgment with any such modifications shall be enforceable against all parties; and it is further

18. ORDERED, ADJUDGED AND DECREED that petitioners shall,

within 90 days of entry of this Judgment, provide a copy of this order through any method they deem reasonable, to all holders of a license issued pursuant to the ABCL to sell wine or liquor to consumers for off-premise consumption, with notice that any conduct which violates this Judgment shall be considered a violation of the ABCL which will subject the violator to the penalties set forth in Paragraph 13 above; and it is further

VENUE

19. ORDERED, ADJUDGED AND DECREED that all applications under this Judgment shall be made in Erie County before this Court, except that any application by the SLA may instead be brought in New York State Supreme Court in Albany County; and it is further

NO ADMISSION

20. ORDERED, ADJUDGED AND DECREED that this Judgment, or any provision thereof, shall not be construed as an admission by any respondent of any violation of law, or of the truth of any fact alleged in the Verified Petition or that it has engaged in the conduct prohibited by this Judgment; and it is further

PRIVATE RIGHT OF ACTION

21. ORDERED, ADJUDGED, AND DECREED that nothing herein shall be construed to deprive any person, corporation, association or other entity of an existing private right or remedy under law,

or to create any private right or remedy.

John M. Curran, J.S.C.

GRANTED

JAN 02 2007

BY _____
PATRICIA A. AIELLO
COURT CLERK

At a Special Term of the Supreme Court, held in and for the County of Erie at the Erie County Courthouse, in the City of Buffalo, New York, on the __ day of September, 2006

PRESENT: Hon. Eugene M. Fahey, J.S.C.
Justice Presiding

STATE OF NEW YORK : SUPREME COURT
COUNTY OF ERIE

FILED
2006 SEP 12 AM 11:22
ERIE COUNTY
CLERK'S OFFICE

THE PEOPLE OF THE STATE OF NEW YORK, by the Attorney General of the State of New York, ELIOT SPITZER, and THE NEW YORK STATE LIQUOR AUTHORITY,

Petitioners,

-vs-

CHARMER INDUSTRIES, INC., SERVICE UNIVERSAL DISTRIBUTORS, INC., EBER BROS. WINE AND LIQUOR CORPORATION, EBER-NDC, LLC, PEERLESS IMPORTERS, INC., COLONY LIQUOR AND WINE DISTRIBUTORS, LLC, SOUTHERN WINE & SPIRITS OF NEW YORK, INC., SOUTHERN WINE & SPIRITS OF UPSTATE NEW YORK, INC.,

Respondents,

Pursuant to Section 63, Subdivision 12 of the Executive Law.

CONSENT ORDER AND JUDGMENT

Index No. I 2006-7562

FILED
ACTIONS & PROCEEDINGS
SEP 12 2006
ERIE COUNTY
CLERK'S OFFICE

Upon reading and filing the Verified Petition sworn to on August 25, 2006, by Dennis Rosen, Assistant Attorney General, and the Affirmation of Thomas J. Donohue, Esq., Counsel to the New York State Liquor Authority, dated August 29, 2006, and upon the

Stipulation and Consent of each respondent, all of which are dated August 29, 2006, in which each respondent acknowledges service of the Notice of Verified Petition and Verified Petition, consents to the entry of this Consent Order and Judgment ("Judgment"), and waives notice of entry thereof,

NOW, on motion of Eliot Spitzer, Attorney General of the State of New York ("Attorney General"), attorney for petitioner, The People of the State of New York, Assistant Attorney General Dennis Rosen, of counsel, it is

PARTIES SUBJECT TO JUDGMENT

1. ORDERED, ADJUDGED AND DECREED that this Judgment shall extend to respondents, their officers, directors, employees, agents, successors and assigns, and respondents' parents, subsidiaries, affiliates, and any other entities under common ownership or control; and it is further

INJUNCTIVE RELIEF

Payments or Gifts to Retailers Prohibited

2. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, providing any person or entity which is licensed, pursuant to the New York Alcoholic Beverage Control Law ("ABCL"), to sell wine or liquor to consumers or to any other person for any purpose other than resale ("retailers"), with cash, cash equivalents, or gifts such as credit card swipes or AMEX checks, trips or reimbursement

of travel expenses, restaurant equipment, consumer items, or any other inducement to purchase wine or liquor from respondents, except as explicitly permitted by Title 9, Subtitle B of the Official Compilation of Codes, Rules and Regulations of the State of New York ("SLA Rules"), or a Bulletin issued by the New York State Liquor Authority ("SLA"); and it is further

Discriminating Among Retailers Prohibited

3. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, discriminating among retailers when selling, or offering to sell, wine or liquor for purposes of resale, except as explicitly permitted by the ABCL, or SLA Rule or Bulletin; and it is further

Full Disclosure of Pricing Information; Internet Posting

4. ORDERED, ADJUDGED AND DECREED that, to better effectuate full and fair disclosure by respondents to all retailers, each respondent shall:

(a) Post on its Internet website the same monthly price schedule that it files with the SLA pursuant to ABCL Art. 8, on the fifth day prior to the date for which such price schedule is effective;

(b) Post all similar brands and sizes together, and post all information pertaining to the same item together;

(c) Provide unlimited access to Internet postings to all holders of any New York license, pursuant to the ABCL, to

purchase or sell wine or liquor; and

(d) Include in any price book or advertising material disseminated for review by retailers, information sufficient to direct retailers to the website where the price schedules are posted;

except that the obligations of this paragraph shall be considered satisfied if the SLA or its designee places such information on the SLA's Internet website; and it is further

Restrictions on Posting Items as Limited Availability

5. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from filing a price schedule with the SLA denoting an item as one of limited availability, where the respondent has a sufficient amount of the item in its inventory to satisfy the reasonable customer demands of retailers within the State of New York; and it is further

Discriminatory Distribution of Limited Items Prohibited

6. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, discriminating among retailers when limiting the distribution of any item that is of genuinely limited availability; provided that nothing herein shall prohibit a respondent from reasonably considering the nature of, and the consumer market for, a genuinely limited item when choosing a method of allocation; and it is further

Posting Special Packs As Limited Items Prohibited

7. ORDERED, ADJUDGED AND DECREED that respondents are permanently barred and enjoined from posting an item as one of limited availability when the respondent, or a manufacturer or supplier, has artificially limited the item by creating a limited number of "special packs," which are defined, for purposes of this Judgment, as cases comprised of an unusual number of bottles, *e.g.*, 7 or 14, of the same brand; and it is further

Certain Promotional Packs May be Limited

8. ORDERED, ADJUDGED AND DECREED that nothing herein shall prohibit a respondent from filing a price schedule with the SLA denoting an item as one of limited availability where it consists of (a) a holiday-type package which combines wine or liquor products with non-alcoholic consumer items, or (b) a combination package as described in SLA Bulletin 583 (Exhibit A), provided that the price per bottle for each brand in such packages is not lower than the lowest price per bottle (for bottles of the same brand and size) for items that are not of limited availability in the same schedule; and it is further

Restriction on Price Posting Special Packs

9. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from filing a price schedule for a special pack where, in the same schedule, the price per bottle in a special pack is less than the price per bottle (for

bottles of the same brand and size) of a volume of product equal to or greater than that contained in the special pack; and it is further

Tie-Ins Prohibited

10. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, requiring or compelling retailers to purchase a particular brand in order to be able to purchase another brand; and it is further

Credits and Rebates Prohibited

11. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, providing retailers with any form of rebate or discount that has not been filed in a price schedule with the SLA, such as a credit against future purchases, except that nothing herein shall prohibit issuing lawful credits to a retailer in the regular course of business, including but not limited to reimbursement for breakage, spoilage, failure to deliver, or delivery of the wrong items; and it is further

Payments to Certain Persons or Entities Prohibited

12. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, making any payment to a person or entity that performs services for a retailer if:

(a) Such payment constitutes, in effect, an

incentive, reward, or rebate for purchasing or featuring products from a respondent; provided that nothing herein shall prohibit a respondent from making such a payment, where explicitly permitted by SLA Rule or Bulletin, to a person or entity that is not related to a retailer as described in (b) or (c) below; or

(b) The entity is, directly or indirectly, owned or controlled by a single retailer or group of retailers, or services a single retailer or group of retailers; or

(c) A principal, officer, or employee of the retailer, or a relative of a principal, officer, or employee of the retailer, is an officer or employee of the entity;

provided that the requirements of (b) and (c) herein shall be deemed to have been met where a respondent has obtained an affidavit from a retailer (unless the respondent knew or, in the exercise of reasonable diligence, should have known the affidavit was false) stating that the person or entity paid: (i) is not, directly or indirectly, controlled by a single retailer or group of retailers, or does not service a single retailer or group of retailers, and (ii) no principal, officer, or employee of the retailer, or relative of a principal, officer, or employee of the retailer, is an officer or employee of the entity; and it is further

Restrictions on Payments for Wine and Drink Menus

13. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, paying for an on-premise licensee's wine or drink menus, or a portion thereof, unless all of the following conditions are met:

(a) The payment is not for any portion of a menu which consists of food items;

(b) The payment is not for menu jackets, covers, binders or similar items; except where such an item is made of paper, cardboard, or similar material, and is of *de minimis* value;

(c) All payments are made to a *bona fide* printing company, that is independent of the licensee, pursuant to an invoice from the printing company for the reasonable cost of printing the menus, or respondent's pro rated portion thereof;

Nothing herein shall prohibit respondents from actually printing menus for licensees themselves, provided that the conditions set forth in (a) and (b) above are met; and it is further

Restrictions on Buy-Back (Bar Spend) Events

14. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, purchasing wine or liquor for consumers from a retailer, except for purchases from on-premise licensees for:

(a) A consumer(s) on an individual or incidental basis;

(b) Wine or liquor actually consumed by respondents' employees, private guests or licensees' employees during the following activities conducted by respondents: *bona fide* business meetings or business entertainment, or private invitation-only events closed to the general public at locations of on-premise licensees or holders of a New York caterer's permit pursuant to ABCL § 98;

(c) Promotional events open to the general public, where a respondent spends no more than $500.00 (excluding a wait staff gratuity of not more than 20%) per licensed premises per event, and conducts no more than six events per calendar year per licensed premises; provided that, within 20 days after each event, respondent shall file a statement with the SLA which includes (i) its date, time, location, and estimated duration; (ii) the brand(s) that were offered; and (iii) the name of the entity, and the name(s) of the persons who conducted the event on behalf of the respondent;

All purchases by a respondent from a licensee permitted pursuant to (a) - (c) shall be at no more than the licensee's regular retail price; and it is further

Gifts of Products Prohibited

15. ORDERED, ADJUDGED AND DECREED that each respondent is

permanently barred and enjoined from, directly or indirectly, providing free wine or liquor to retailers, except that nothing herein shall prohibit a respondent from providing wine or liquor to:

(a) A retailer to sample reasonably limited quantities;

(b) Consumers to sample on a retailer's premises where the retailer does not conduct the sampling and receives none of the wine or liquor;

(c) A charitable event to be conducted on a retailer's premises, or at any location designated by the charity, for which a respondent has donated products, where the retailer takes possession of the products on behalf of a charitable organization which is organized and registered under the provisions of the United States Internal Revenue Code, provided that the respondent does not leave any product with the licensee; or

(d) Holders of charitable permits pursuant to ABCL § 33.15;

and it is further

Restrictions on Payments for Participation in Retailer Advertising

16. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, paying for all or a portion of any advertisement produced by or for a retailer, regardless of the medium in which the

advertisement may appear, except where explicitly permitted by Paragraph 17 below, SLA Rule or Bulletin and nothing herein shall prohibit a respondent from providing to a retailer product or brand imagery and artwork for use in the advertisement; and it is further

17. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, paying to participate, in any manner, in a catalogue produced by or for a retailer, unless all of the following conditions are met:

(a) None of the catalogues are distributed within New York State;

(b) All payments are made to a *bona fide* printing company, that is independent of the retailer, for the reasonable cost of printing the advertisement in the catalogue;

and it is further

FINES AND COSTS

18. ORDERED, ADJUDGED AND DECREED that respondents shall, contemporaneously with the filing of this Judgment, pay to petitioner, The People of the State of New York, a civil penalty, pursuant to ABCL § 17(3) and New York General Business Law Art. 22-A, in the following amounts:

Charmer Industries, Inc.	$350,000.00
Service-Universal Distributors, Inc.	$200,000.00

Eber Bros. Wine and Liquor Corporation	$175,000.00
Eber-NDC, LLC	$200,000.00
Peerless Importers, Inc.	$250,000.00
Colony Liquor and Wine Distributors, LLC	$125,000.00
Southern Wine & Spirits of New York, Inc.	$175,000.00
Southern Wine & Spirits of Upstate New York	$100,000.00

and it is further

19. ORDERED, ADJUDGED AND DECREED that each respondent shall, contemporaneously with the filing of this Judgment, pay $10,000.00 costs to petitioner, The People of the State of New York; and it is further

20. ORDERED, ADJUDGED AND DECREED that each respondent shall make the payments ordered in Paragraphs 18 and 19 by certified check or bank check payable to the Attorney General of the State of New York; and it is further

PROSPECTIVE PENALTIES

21. ORDERED, ADJUDGED AND DECREED that, upon a finding by the Court that a respondent has committed any violation(s) of this Judgment, the Court may impose upon that respondent: (a) any injunctive relief it deems appropriate, and (b) any penalty set forth in the ABCL for violations of its provisions, including but not limited to a fine not to exceed $100,000.00 per violation, and/or the revocation, cancellation or suspension of any licenses issued to that respondent pursuant to the ABCL; and it is further

22. ORDERED, ADJUDGED AND DECREED that nothing herein shall limit or prohibit any party's right to appeal an adverse determination by the Court pursuant to Paragraph 21; and it is further

ENFORCEMENT

23. ORDERED, ADJUDGED AND DECREED that either or both petitioners may apply to the Court, upon 10 days notice to all parties, for relief pursuant to Paragraph 21, or for any further relief as may be necessary to effectuate the terms of this Judgment; or, in the alternative and to the exclusion of either petitioner applying to the Court for relief, the SLA may pursue violations of this Judgment or the corresponding ABCL violations by administratively imposing any penalty contained herein, or contained in the ABCL independent of the terms of this Judgment, pursuant to its functions, powers and duties as set forth in ABCL § 17 *et al.*; however, petitioners shall not commence separate proceedings regarding alleged violations of this Judgment or the ABCL for the same conduct; and it is further

24. ORDERED, ADJUDGED AND DECREED that, for any of the conduct alleged in the Verified Petition or prohibited by the Judgment, which occurred prior to the date of each of the respondents agreeing in a Stipulation and Consent to the entry of this Judgment, there shall be no administrative, civil, criminal, regulatory, or other action taken by either or both petitioners

adverse to the respondents, their officers, directors, employees, agents, successors and assigns, or respondents' parents, subsidiaries and affiliates, pursuant to the ABCL, and they shall not be liable to petitioners in any manner other than as set forth in this Judgment; and it is further

25. ORDERED, ADJUDGED AND DECREED that any party may apply to the Court, upon 10 days notice to all parties, for a modification or termination of this Judgment as a result of any change in the ABCL, or SLA Rules, or any other material change in circumstances, and this Judgment with any such modifications shall be enforceable against all parties; and it is further

26. ORDERED, ADJUDGED AND DECREED that petitioners shall, within 90 days of entry of this Judgment, provide a copy of this order through any method they deem reasonable, to all holders of a license issued pursuant to the ABCL for the wholesale distribution and sale of wine and liquor, with notice that any conduct which violates this Judgment shall be considered a violation of the ABCL which will subject the violator to the penalties set forth in Paragraph 21 above; and it is further

AFFIDAVIT OF COMPLIANCE

27. ORDERED, ADJUDGED AND DECREED that each respondent shall file with the Attorney General, no later than 60 days after being served with notice of entry of this Judgment, an affidavit, sworn to by a knowledgeable employee, demonstrating that it has

devised policies and procedures to effectuate compliance with the terms of this judgment; and it is further

VENUE

28. ORDERED, ADJUDGED AND DECREED that all applications under this Judgment shall be made in Erie County before this Court, except that any application by the SLA may instead be brought in New York State Supreme Court in Albany County; and it is further

NO ADMISSION

29. ORDERED, ADJUDGED AND DECREED that this Judgment, or any provision thereof, shall not be construed as an admission by any respondent of any violation of law, or of the truth of any fact alleged in the Verified Petition or that it has engaged in the conduct prohibited by this Judgment; and it is further

PRIVATE RIGHT OF ACTION

30. ORDERED, ADJUDGED, AND DECREED that nothing herein shall be construed to deprive any person, corporation, association or other entity of an existing private right or remedy under law, or to create any private right or remedy.

Eugene M. Fahey, J.S.C.

GRANTED

SEP 12 2006

BY Carol M. Williams
CAROL M. WILLIAMS
COURT CLERK

New York State
Division of Alcoholic Beverage Control
State Liquor Authority

BULLETIN NO. 583

EFFECTIVE: NOVEMBER 1, 1999

To: Distillers and Liquor Wholesalers; Wineries and Wine Wholesalers

Subject: Sealed pre-wrapped combination packages of different kinds of scheduled alcoholic beverages

Sealed pre-wrapped combination packages of an individual bottle of a scheduled alcoholic beverage and other merchandise

Sealed pre-wrapped packages which combine different scheduled alcoholic beverage products are allowed, with certain limitations.

A licensed distiller or liquor wholesaler who is the exclusive brand owner[1] of more than one brand of liquor and/or wine may combine two or more containers[2] of different brands which he exclusively owns into a single sealed pre-wrapped combination package, subject to the limitations set forth below.

A licensed winery or wine wholesaler who is the exclusive brand owner[1] of more than one brand of wine may combine two or more containers of different brands which he exclusively owns into a single combination package, subject to the limitations set forth below. References to liquor in the discussion which follows are inapplicable to licensed wineries and wine wholesalers.

Permissible Types of Sealed Pre-Wrapped Combination Packages

Only three types of sealed pre-wrapped combination packages are permissible:

1. a sealed pre-wrapped combination package which includes only containers of liquor and/or wine.

2. a sealed pre-wrapped combination package which contains only one bottle of liquor or wine together with other non-potable and non-edible merchandise reasonably used in connection with the preparation, storage or service of liquor or wine.

   Prior approval by the Authority's Director of Wholesale Services must be obtained before a sealed pre-wrapped combination package containing non-potable and non-edible merchandise may be posted as an item on the required schedules. A request for approval must be submitted on an Application for Registration of Standard Brand Labeling (Form 652 09/93). The brand owner must write "Supplemental" on the form and submit a color copy of the combination package. No fee is required.

[1] A brand owner who is not licensed by the Authority may designate an appropriately licensed wholesaler to act as his exclusive brand agent for the purpose of filing the required schedules. The licensed wholesaler thus designated as brand agent must be a true agent of the brand owner, and the licensed wholesaler acting as agent may not pay the brand owner for the right to exercise control over the brand. Where the brand owner or the brand owner's exclusive agent does not register the brand, the brand must be registered, and schedules must be filed, by one of the persons listed in ABCL §107-a.4(b).

[2] A container of liquor or wine is, in most cases, an individual bottle. Because an individual container of wine may be a box, as well as a bottle, the term container is used in order to include both a bottle and an individual box. Illustrative examples in this bulletin which use the word "bottle" apply with equal force to an individual box of wine.

3. Applicable to sparkling wine only: It is permissible to post as an item a sealed pre-wrapped combination package which contains only one container of sparkling wine together with one sample of a confection, pastry, or biscuit, which sample has no greater net weight than three ounces. Please note: The provisions of this paragraph expire on January 31, 2000. Commencing on January 31, 2000, no sealed pre-wrapped combination package containing one bottle of sparkling wine and one three-ounce sample of a confection, pastry, or biscuit may be posted as an item on a schedule or sold.

Price Posting of Sealed Pre-wrapped Combination Packages

A sealed pre-wrapped combination package containing one or more bottles of liquor and/or one or more bottles of wine must be posted as an item on the schedule of prices to wholesalers, and must be posted as an item on the schedule of prices to retailers. Before a sealed pre-wrapped combination package can be entered as an item on any schedule, the following conditions must be met:

1. The sealed pre-wrapped combination package must contain only brands of liquor and/or wine which have been registered or authorized in accordance with the provisions of ABCL §107-a. Where a label has been issued a brand label registration number, that number must be set forth in the schedule listing pertaining to such sealed pre-wrapped combination package.

2. Each bottle contained in such sealed pre-wrapped combination package must be separately available to retailers in accordance with the bottle and case price posted in the schedule.

3. The scheduled item price which is posted for a sealed pre-wrapped combination package which includes only containers of liquor and/or wine must be no greater than the sum of the individual bottle prices for each bottle contained in the sealed pre-wrapped combination package. No charge may be imposed for the packaging itself by any distiller, winery, wholesaler or retailer selling or offering for sale any combination package.

4. The scheduled item price which is posted for a sealed pre-wrapped combination package which contains only one bottle of liquor or wine together with other non-potable and non-edible merchandise reasonably used in connection with the preparation, storage or service of liquor or wine may include an upcharge for the non-potable and non-edible merchandise.

5. The scheduled item price which is posted for a sealed pre-wrapped combination package which contains only one container of sparkling wine together with one sample of a confection, pastry, or biscuit, which sample has no greater net weight than three ounces, may include an upcharge for the confection, pastry, or biscuit sample.

6. An item price for a case of sealed pre-wrapped combination packages may be posted only if the total number of packages required to be purchased to obtain the case price would result in the purchase of a full case of each item contained in the sealed pre-wrapped combination package.

7. Where one or more bottles of liquor are packaged with one or more bottles of wine in a sealed pre-wrapped combination package, the item price for the sealed pre-wrapped combination package must be listed on both the schedules of liquor prices and the schedules of wine prices.

At a Special Term of the Supreme Court, held in and for the County of Erie at the Erie County Courthouse, in the City of Buffalo, New York, on the 26th day of October, 2006

PRESENT: Hon. Eugene M. Fahey, J.S.C.
Justice Presiding

STATE OF NEW YORK : SUPREME COURT
COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK, by the Attorney General of the State of New York, ELIOT SPITZER, and THE NEW YORK STATE LIQUOR AUTHORITY,

Petitioners,

-vs-

BACARDI U.S.A., INC., BANFI PRODUCTS CORPORATION, BROWN-FORMAN CORPORATION, CONSTELLATION BRANDS, INC., DIAGEO NORTH AMERICA, INC., E & J GALLO WINERY, FUTURE BRANDS LLC, THE ABSOLUT SPIRITS COMPANY, INC., JIM BEAM BRANDS CO., KOBRAND CORPORATION, MOET HENNESSEY USA, INC., PERNOD RICARD USA, LLC, REMY COINTREAU USA, INC., SIDNEY FRANK IMPORTING CO., INC., AND SKYY SPIRITS, LLC,

Respondents,

Pursuant to Section 63, Subdivision 12 of the Executive Law.

CONSENT ORDER AND JUDGMENT

Index No. I. 2006-9782

Hon. Eugene M. Fahey

Upon reading and filing the Verified Petition sworn to on September 25, 2006, by Dennis Rosen, Assistant Attorney General, and the Affirmation of Thomas J. Donohue, Esq., Counsel to the New

York State Liquor Authority, dated September 29, 2006, and upon the Stipulation and Consent of each respondent, all of which are attached hereto, in which each respondent acknowledges service of the Notice of Verified Petition and Verified Petition, consents to the entry of this Consent Order and Judgment ("Judgment"), and waives notice of entry thereof,

NOW, on motion of Eliot Spitzer, Attorney General of the State of New York ("Attorney General"), attorney for petitioner, The People of the State of New York, Assistant Attorney General Dennis Rosen, of counsel, it is

PARTIES SUBJECT TO JUDGMENT

1. ORDERED, ADJUDGED AND DECREED that this Judgment shall extend to respondents, their officers, directors, employees, agents, successors and assigns, and any other entities located in the United States which respondents own or control; and it is further

INJUNCTIVE RELIEF

Definition of "Indirectly"

2. ORDERED, ADJUDGED AND DECREED that, where this Judgment prohibits respondents from "directly or indirectly" engaging in certain conduct, "indirectly" for purposes of this Judgment includes, but is not limited to, a respondent soliciting, aiding or encouraging another person or entity to engage in the proscribed conduct; and it is further

Payments or Gifts to Retailers Prohibited

3. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, providing any person or entity which is licensed, pursuant to the New York Alcoholic Beverage Control Law ("ABCL"), to sell wine or liquor to consumers or to any other person for any purpose other than resale ("retailers"), with cash, cash equivalents, or gifts such as credit card swipes or AMEX checks, trips or reimbursement of travel expenses, restaurant equipment, consumer items, or any other inducement to purchase wine or liquor from respondents, except as explicitly permitted by Title 9, Subtitle B of the Official Compilation of Codes, Rules and Regulations of the State of New York ("SLA Rules"), or a Bulletin issued by the New York State Liquor Authority ("SLA"); and it is further

Discriminating Among Retailers Prohibited

4. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, discriminating among retailers when selling, or offering to sell, wine or liquor for purposes of resale, except as explicitly permitted by the ABCL, or SLA Rule or Bulletin; and it is further

Discriminatory Distribution of Limited Items Prohibited

5. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, discriminating among retailers when limiting the distribution of

any item that is of genuinely limited availability; provided that nothing herein shall prohibit a respondent from reasonably considering the nature of, and the consumer market for, a genuinely limited item when choosing a method of allocation; and it is further

Tie-Ins Prohibited

6. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, requiring or compelling retailers to purchase a particular brand in order to be able to purchase another brand; and it is further

Credits and Rebates Prohibited

7. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, providing retailers with any form of rebate or discount that has not been filed in a price schedule with the SLA, such as a credit against future purchases, except that nothing herein shall prohibit issuing lawful credits to a retailer in the regular course of business, including but not limited to reimbursement for breakage, spoilage, failure to deliver, or delivery of the wrong items; and it is further

Payments to Certain Persons or Entities Prohibited

8. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, making any payment to a person or entity that performs services

for a retailer if:

(a) Such payment constitutes, in effect, an incentive, reward, or rebate for purchasing or featuring products from a respondent; provided that nothing herein shall prohibit a respondent from making such a payment, where explicitly permitted by SLA Rule or Bulletin, to a person or entity that is not related to a retailer as described in (b) or (c) below; or

(b) The entity is, directly or indirectly, owned or controlled by a single retailer or group of retailers, or services a single retailer or group of retailers; or

(c) A principal, officer, or employee of the retailer, or a relative of a principal, officer, or employee of the retailer, is an officer or employee of the entity;

provided that the requirements of (b) and (c) herein shall be deemed to have been met where a respondent, or a distributor of a respondent, has obtained an affidavit from a retailer (unless the respondent knew or, in the exercise of reasonable diligence, should have known the affidavit was false) stating that the person or entity paid: (i) is not, directly or indirectly, controlled by a single retailer or group of retailers, or does not service a single retailer or group of retailers, and (ii) no principal, officer, or employee of the retailer, or relative of

a principal, officer, or employee of the retailer, is an officer or employee of the entity; and it is further

Restrictions on Payments for Wine and Drink Menus

9. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, paying for an on-premise licensee's wine or drink menus, or a portion thereof, unless all of the following conditions are met:

(a) The payment is not for any portion of a menu that consists of food items;

(b) The payment is not for menu jackets, covers, binders or similar items; except where such an item is made of paper, cardboard, or similar material, and is of *de minimis* value;

(c) All payments are made to a *bona fide* printing company, that is independent of the licensee, pursuant to an invoice from the printing company for the reasonable cost of printing the menus, or respondent's pro rated portion thereof;

Nothing herein shall prohibit respondents from actually printing menus for licensees themselves, provided that the conditions set forth in (a) and (b) above are met; and it is further

Restrictions on Buy-Back (Bar Spend) Events

10. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly,

purchasing wine or liquor for consumers from a retailer, except for purchases from on-premise licensees for:

(a) A consumer(s) on an individual or incidental basis;

(b) Wine or liquor actually consumed by respondents' employees, private guests or licensees' employees during the following activities conducted by respondents: *bona fide* business meetings or business entertainment, or private invitation-only events closed to the general public at locations of on-premise licensees or holders of a New York caterer's permit pursuant to ABCL § 98;

(c) Promotional events open to the general public, where a respondent spends no more than $500.00 (excluding a wait staff gratuity of not more than 20%) per licensed premises per event, and conducts no more than six events per calendar year per licensed premises; provided that, within 20 days after each event, respondent shall file a statement with the SLA which includes (i) its date, time, location, and estimated duration; (ii) the brand(s) that were offered; and (iii) the name of the entity, and the name(s) of the persons who conducted the event on behalf of the respondent;

All purchases by a respondent from a licensee permitted pursuant to (a) - (c) shall be at no more than the licensee's regular retail price; and it is further

Gifts of Products Prohibited

11. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, providing free wine or liquor to retailers, except that nothing herein shall prohibit a respondent from providing wine or liquor to:

(a) A retailer to sample reasonably limited quantities;

(b) Consumers to sample on a retailer's premises where the retailer does not conduct the sampling and receives none of the wine or liquor;

(c) A charitable event to be conducted on a retailer's premises, or at any location designated by the charity, for which a respondent has donated products, where the retailer takes possession of the products on behalf of a charitable organization which is organized and registered under the provisions of the United States Internal Revenue Code, provided that the respondent does not leave any product with the licensee; or

(d) Holders of charitable permits pursuant to ABCL § 33.15;

and it is further

Restrictions on Payments for Participation in Retailer Advertising

12. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly,

paying for all or a portion of any advertisement produced by or for a retailer, regardless of the medium in which the advertisement may appear, except where explicitly permitted by Paragraph 13 below, SLA Rule or Bulletin, and nothing herein shall prohibit a respondent from providing to a retailer product or brand imagery and artwork for use in the advertisement; and it is further

13. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, paying to participate, in any manner, in a catalogue produced by or for a retailer, unless all of the following conditions are met:

(a) None of the catalogues are distributed within New York State;

(b) All payments are made to a *bona fide* printing company, that is independent of the retailer, for the reasonable cost of printing the advertisement in the catalogue;

and it is further

FINES AND COSTS

14. ORDERED, ADJUDGED AND DECREED that respondents shall, contemporaneously with the filing of this Judgment, pay to petitioner, The People of the State of New York, a civil penalty, pursuant to ABCL § 17(3) and New York General Business Law Art. 22-A, in the following amounts:

Bacardi U.S.A., Inc.	$175,000.00
Banfi Products Corporation	$100,000.00
Brown-Forman Corporation	$200,000.00
Constellation Brands, Inc.	$200,000.00
Diageo North America, Inc.	$225,000.00
E & J Gallo Winery	$200,000.00
Future Brands LLC (also includes The Absolut Spirits Company, Inc.; Jim Beam Brands Co.)	$175,000.00
Kobrand Corporation	$100,000.00
Moet Hennessey USA, Inc.	$175,000.00
Pernod Ricard USA, LLC	$175,000.00
Remy Cointreau USA, Inc.	$175,000.00
Sidney Frank Importing Co., Inc.	$125,000.00
Skyy Spirits, LLC	$175,000.00

and it is further

15. ORDERED, ADJUDGED AND DECREED that each respondent shall, contemporaneously with the filing of this Judgment, pay $10,000.00 costs to petitioner, The People of the State of New York; and it is further

16. ORDERED, ADJUDGED AND DECREED that each respondent shall make the payments ordered in Paragraphs 14 and 15 by certified check or bank check payable to the Attorney General of the State of New York; and it is further

PROSPECTIVE PENALTIES

17. ORDERED, ADJUDGED AND DECREED that, upon a finding by the Court that a respondent has committed any violation(s) of this Judgment, the Court may impose upon that respondent: (a) any injunctive relief it deems appropriate, including but not limited to enjoining permanently, or for a specified period of time, that respondent, or any person or entity acting on their behalf, from including in any filing with the SLA, pursuant to ABCL § 101-b, brands or items owned or controlled by that respondent; and (b) any penalty set forth in the ABCL for violations of its provisions, including but not limited to a fine not to exceed $100,000.00 per violation, and/or the revocation, cancellation or suspension of any licenses issued to that respondent pursuant to the ABCL; and it is further

18. ORDERED, ADJUDGED AND DECREED that nothing herein shall limit or prohibit any party's right to appeal an adverse determination by the Court pursuant to Paragraph 17; and it is further

ENFORCEMENT

19. ORDERED, ADJUDGED AND DECREED that either or both petitioners may apply to the Court, upon 10 days notice to all parties, for relief pursuant to Paragraph 17, or for any further relief as may be necessary to effectuate the terms of this Judgment; or, in the alternative and to the exclusion of either petitioner applying to the Court for relief, the SLA may pursue

violations of this Judgment or the corresponding ABCL violations by administratively imposing any penalty contained in the ABCL independent of the terms of this Judgment, pursuant to its functions, powers and duties as set forth in ABCL § 17 *et al.*, including but not limited to a fine not to exceed $100,000.00 per violation, and/or the revocation, cancellation or suspension of any licenses issued to a respondent pursuant to the ABCL; however, petitioners shall not commence separate proceedings regarding alleged violations of this Judgment or the ABCL for the same conduct; and it is further

20. ORDERED, ADJUDGED AND DECREED that, for any of the conduct alleged in the Verified Petition or prohibited by the Judgment, which occurred prior to the date of each of the respondents agreeing in a Stipulation and Consent to the entry of this Judgment, there shall be no administrative, civil, criminal, regulatory, or other action taken by either or both petitioners adverse to the respondents, their officers, directors, employees, agents, successors and assigns, or any other entities that respondents own or control, pursuant to the ABCL, and they shall not be liable to petitioners in any manner other than as set forth in this Judgment; and it is further

21. ORDERED, ADJUDGED AND DECREED that any party may apply to the Court, upon 10 days notice to all parties, for a modification or termination of this Judgment as a result of any

change in the ABCL, or SLA Rules, or any other material change in circumstances, and this Judgment with any such modifications shall be enforceable against all parties; and it is further

AFFIDAVIT OF COMPLIANCE

22. ORDERED, ADJUDGED AND DECREED that each respondent shall file with the Attorney General, no later than 60 days after being served with notice of entry of this Judgment, an affidavit, sworn to by a knowledgeable employee, demonstrating that it has devised policies and procedures to effectuate compliance with the terms of this judgment; and it is further

VENUE

23. ORDERED, ADJUDGED AND DECREED that all applications under this Judgment shall be made in Erie County before this Court, except that any application by the SLA may instead be brought in New York State Supreme Court in Albany County; and it is further

NO ADMISSION

24. ORDERED, ADJUDGED AND DECREED that this Judgment, or any provision thereof, shall not be construed as an admission by any respondent of any violation of law, or of the truth of any fact alleged in the Verified Petition or that it has engaged in the conduct prohibited by this Judgment; and it is further

PRIVATE RIGHT OF ACTION

25. ORDERED, ADJUDGED, AND DECREED that nothing herein

shall be construed to deprive any person, corporation, association or other entity of an existing private right or remedy under law, or to create any private right or remedy.

Eugene M. Fahey, J.S.C.

GRANTED

OCT 26 2006

BY Carol M. Williams
CAROL M. WILLIAMS
COURT CLERK

Appendix F
Table for price posting

Product	Price Posted by brand owner or primary source	Label Registration
Wine with an alcohol content between 7% - 14% ABV & TTB COLA	NO	NO
Wine with an alcohol content under 7% abv	YES	YES
Wine products (ABC §3-36a)	NO	YES
Liquor (ABC §3-19)	YES	YES
Beer & Malt beverages (ABC §3-3.)	NO	YES
Cider (ABC 3-7b)	NO	YES
Wine purchased at auction/ secondary markets and labeled as private collection (ABC §85.)	NO	NO