

THE NEW YORK STATE LAW REVISION COMMISSION

REPORT

on the

**ALCOHOLIC BEVERAGE CONTROL LAW
and its
ADMINISTRATION**

September 30, 2009

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INTRODUCTION

Over the past two years, the New York State Law Revision Commission has been examining the Alcoholic Beverage Control Law and its administration by the State Liquor Authority.¹ The Commission has focused on the SLA's historical and present day role in regulating alcoholic beverages. We have also conducted a detailed study of New York's ABC Laws, including the need for, and scope of, any continued regulation. We are delivering our Final Report in two discrete components. Part One contained herein will address the problems with the administration of the ABC Law by the SLA. Part Two, to be completed no later than mid-December, will address the need for and scope of regulation, and substantive changes in the governing statutes and regulations, as well as the need for the law's reorganization and modernization.

In addition to reviewing the text of the law and other documents, we 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 privilege, special licensees, and bowling centers, and large and small wine, liquor and beer wholesalers and producers, including small in-state wineries, craft brewers and distillers. Finally, we solicited the views of concerned citizens and community leaders about quality of life in their neighborhoods, as well as public health professionals and

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.

advocates concerned about the deleterious impact and cost of alcohol on the health of our citizens generally, and on our children more specifically.

From our discussions with everyone it was apparent that on at least one point there was virtual unanimity – namely that alcoholic beverages are unlike other products in the stream of commerce. Alcoholic beverages demand a unique treatment. While sales of alcoholic beverages generate an enormous volume of tax revenue for the State,² improperly regulated sales and use of alcoholic beverages present dangers of abuse and over-consumption. Alcohol beverage regulation must ensure that the public’s health, safety and welfare are not jeopardized, while recognizing the significant state revenue received from the collection of associated sales and excise taxes. The dangers and hardships of alcohol abuse and over-consumption 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.³

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.⁴ Less advertised but of equal impact, are the effects on the social and economic health of the individual, families, community and the state.

² 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 collected 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.

³ 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 \$52 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; <http://www.oasas.state.ny.us/pio/documents/5YPInterimRpt2009.pdf>; http://www.iaaonline.org/pdf/NY_Underage.pdf; <http://www.niaaa.nih.gov/AboutNIAAA/NIAAASponsoredPrograms/underage.htm>

⁴ 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

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

As a consequence, 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."⁵

At the outset of our study, it was difficult to comprehend or to appreciate the magnitude of the task of reviewing how alcoholic beverages are regulated in New York. As the study progressed, the more we learned, the more we became aware of the enormity of our assignment and how much more there was to learn and to understand.

Initially we thought, and we still believe, our major responsibility is the ABC Law. The law is fraught with ambiguities and deficiencies that challenge the agency'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. Over the years the law has undergone piecemeal amendments, making it tortuous reading. Indeed, while the Commission was engaged in its study, several sections of the law were amended and many more legislative proposals were made to clarify certain provisions of the statute.

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.

⁵ ABC Law § 2.

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.

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 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.

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Between 2003 and 2008, this figure fluctuated between \$15,000,000 and \$20,000,000.

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. 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.

SUMMARY OF RECOMMENDATIONS

To address the most pressing problem, the backlog of retail license applications, vacant positions for licensing examiner should be filled, temporary examiners should be hired, legislation should be enacted permitting the issuance of temporary retail permits, and/or alternatively the SLA should extend a BYOB privilege to restaurant and similar applicants allowing customers to bring their own bottles of wine or beer. More generally, to address the administration of the agency, allow the SLA to manage its own administration, create a budget and management bureau to assume responsibility for budget and fiscal matters, create an audit and compliance bureau to evaluate, and enforce internal policies and procedures, and create and

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

fill two regional manager positions to oversee upstate and downstate offices, allow the agency to hire additional staff to enable it to carry out its mission, and adopt several measures to improve the culture of the agency. Review case procedures, review case decisions to evaluate current procedures, and interpret the law in concert with the statutory intent to avoid an absurd result. Replace the SLA's antiquated software systems, make underage drinking a priority, focus on serious violations with an impact on public safety, monitor price posting submissions, publish formal opinions, written agency decisions and all current bulletins, divisional orders on the SLA's website, and eliminate outdated and unnecessary regulations, bulletins, and divisional orders.

**FINDINGS AND RECOMMENDATIONS
REGARDING THE 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 “expeditors” 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.

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.⁹ 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 terminates when the license is issued. Moreover, if the BYOB privilege is implemented, the

⁹ <http://www.abc.state.ny.us/bring-your-own-bottle-byob-0>

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 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.¹⁰

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.

¹⁰ 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).

FINDING

THE SLA LACKS MANAGERS IN ITS REGIONAL OFFICES TO OVERSEE DAILY ADMINISTRATION OF THE OFFICES, AND COORDINATE THEIR ACTIVITIES.

THE LACK OF CLEAR CAREER ADVANCEMENT OPPORTUNITIES LIMITS THE AGENCY'S ABILITY TO RECRUIT STAFF.

NARRATIVE

To ensure the proper level of oversight in the regional offices requires the creation of a mid-level 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.¹¹

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

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,

¹¹ See 2008 Annual Report <http://www.abc.state.ny.us/system/files/2008annualreport.pdf>.

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 inspectors¹² 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.

¹² 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.

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.

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. *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).

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.

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 in our Preliminary Report, 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,”¹³ 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

¹³ *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).

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.

Enhanced enforcement programs are widely recognized as an effective means of reducing sales to minors.¹⁴ 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 officers¹⁵ 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.**

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.

¹⁴ <http://www.thecommunityguide.org/alcohol/lawsprohibitingsales.html>

¹⁵ These numbers are as of August 13, 2009.

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.¹⁶ In that same year, the Attorney General commenced an investigation of similar allegations. The investigation revealed that from 2003 through 2005,¹⁷ 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

¹⁶ 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.

¹⁷ *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.

retailers.¹⁸ 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.¹⁹

D. FAILURE TO ANALYZE PRICE POSTING DATA SUBMITTED BY WHOLESALERS MAKES IT DIFFICULT TO EVALUATE WHETHER THE INDUSTRY IS ENGAGING IN UNLAWFUL PRICE DISCRIMINATION.

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.

¹⁸ *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.

¹⁹ *People v. 33 Union Square West, Inc., et al.*, *supra* note 18, at 10-11.

- 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.²⁰ 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, 2009.²¹ 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

²⁰ *Id.*

²¹ 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.”

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,²² 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.**

²² *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.**

FINDING

THE ORGANIZATION OF THE STATE LIQUOR AUTHORITY NEEDS TO BE EVALUATED IN LIGHT OF CURRENT PRINCIPLES OF ADMINISTRATIVE ORGANIZATION.

NARRATIVE

The State Liquor Authority is the head of the Alcoholic Beverage Control Division within the executive department.²³ Currently, the Authority consists of 3 Commissioners who must be citizens and residents of the state.²⁴ The Commissioners are appointed by the Governor and confirmed by the Senate, and serve for a term of 3 years and until their successors have been appointed and qualified.²⁵ No more than 2 of the Commissioners can belong to the same political party. The Chairman is designated by the Governor.

Pursuant to section 17 of the ABC Law, the Authority has numerous powers, among them, the power to:

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

The Authority may delegate any of its powers contained in section 17 to the Chairman.²⁶

The statute authorizes the Chairman to:

²³ ABC Law §10.

²⁴ *Id.*

²⁵ ABC Law §11.

²⁶ ABC Law §17(9).

- exercise the powers and perform the duties in relation to the administration of the division of alcoholic beverage control not specifically vested in the Authority;
- preside at all meetings of the authority and perform the administrative functions of the Authority;
- prescribe forms of applications for licenses, permits and of all reports and maintain records of all licenses and permits issued and revoked within the state;
- inspect or provide for the inspection of any premises where alcoholic beverages are manufactured or sold; and
- delegate to the officers and employees of the division the Chairman's powers and duties.²⁷

Historically, the Authority was comprised of five Commissioners.²⁸ It was considered “vital” that the personnel dealing with control be “of the highest character and judgment” and free from the effects of any alliance between liquor interests and political interests. As far as possible, all appointments to the state and local boards were to be removed from the influence of political parties and politics, and a sense of direct responsibility to the community engendered. Nominations to the SLA were to be forwarded to the governor by the Medical Society, the Bar Association, the Chamber of Commerce, and the Federation of Labor.²⁹

The 1981 Report of the Senate Standing Committee on Investigations and Taxation into the operations of the SLA concluded that the Authority's structure of five Commissioners having equal power diluted the Chairman's administrative power. Despite the Committee's recommendation that a single commissioner, appointed by the Governor and approved by the Senate, head the agency,³⁰ the number of Commissioners was only reduced to three.

²⁷ ABC Law §18.

²⁸ C. 478 of the Laws of 1934.

²⁹ First Report of the New York State Commission on Alcoholic Beverage Control Legislation 7-9, February 15, 1933.

³⁰ Lena Williams, *Toxic Waste Bills Adopted in Albany*, NEW YORK TIMES, June 28, 1981 at 35.

Recent events at the SLA suggest that an agency headed by multiple Commissioners creates the potential for problems. The lack of a full complement of Commissioners could lead to a deadlocked Authority. For example, 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, requiring licensees and license applicants to return again and again for new hearings in the hopes that one of the two Commissioners had reversed a previous position. Disagreements could also arise over who should be exercising administrative control. If the members of the Authority were unable to agree as to what authority can be delegated to the Chairman under section 17 or to the terms and interpretation of a prior delegation, these disagreements undermine the agency's ability to function efficiently. Furthermore these delegations of authority are not published anywhere, leaving the public with an unclear picture the chain of command as to decisionmaking within the Authority. For example, from watching the webcasts of the SLA meetings, we learned that the Deputy Commissioner can approve certain licenses; however, all liquor license applications, all wholesale license applications, and all license applicants from Spring Valley must go the three Commissioners. The delegation to the Deputy Commissioner is not publicly disseminated. Nor for that matter have we yet to discover the criteria employed in determining whether a certain type of decision should be delegated by the Authority.

The requirement that the members' term is fixed at three years creates another potential problem. Under this fixed term requirement, it is possible for the head of the SLA to be serving his or her term under a Governor who did not appoint him or her, and quite possibly a Governor who is of a different political party. The agency in that event is not well served.

Because the overall organization of the Authority and the Division of Alcoholic Beverage Control is dictated by statute, the Commission will make its final recommendation in part two of its Final Report. In making its recommendation, the Commission will consider the historical reasons that led to a multiple member Authority, examine the delegations of authority in place, and evaluate other administrative models both in and outside of New York and whether change in the organization of the SLA would be beneficial in furthering the goal of protection of health safety and welfare.

RECOMMENDATION

THE COMMISSION WILL EVALUATE THE CURRENT STRUCTURE OF THE SLA IN PART TWO OF ITS REPORT.

CONCLUSION

This report seeks to paint an accurate and complete picture of the problems and challenges facing the State Liquor Authority in the 21st century. The purpose is neither to blame nor dwell on the past, but rather the objective is to learn, understand and propose solutions. To fail only serves to undermine, perhaps permanently, the important and core mission of the SLA. The new SLA administration has taken the first significant steps in the right direction. Hopefully, this report can serve as a guide to a successful completion of that journey.