

**THE NEW YORK STATE LAW REVISION COMMISSION**

**PRELIMINARY REPORT**

**on the**

**ALCOHOLIC BEVERAGE CONTROL LAW  
and its  
ADMINISTRATION**

**September 1, 2008**

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## **Introduction.**

The New York State Law Revision Commission<sup>1</sup> submits this Preliminary Report concerning the Alcoholic Beverage Control Law and its administration, called for by Chapter 37 and Chapter 73 of the Laws of 2007 and 2008, respectively.<sup>2</sup>

This Report provides a brief description of our approach to this study, the history of alcoholic beverage regulation and New York's system, then describes the policies at play in the regulation of alcoholic beverages, and finally, sets forth many of the concerns and issues thus far identified.

### **I. Preliminary Steps.**

Initially, the Commission familiarized itself with the Alcoholic Beverage Control (ABC) Law, the New York State Liquor Authority (SLA),<sup>3</sup> the goals and objectives of regulating alcoholic beverages generally, and current concerns. We also reviewed the ABC law and its history and regulations, as well as various studies of the law and investigations of its administration undertaken over the years.

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<sup>1</sup> The Law Revision Commission was created by Chapter 597 of the Laws of 1934, which enacted Article 4-A of the Legislative Law. It consists of the chairpersons of the Committees on the Judiciary and Codes of the Senate and Assembly, as members *ex officio*, and five members appointed by the Governor, each for a term of five years. In its 74 years of existence, the Commission has undertaken numerous studies, developed recommendations for change and crafted proposed legislation on a wide variety of subjects. The Commission's primary office is currently located at Albany Law School. Background information about the Commission can be viewed at its website: <http://www.lawrevision.state.ny.us>.

<sup>2</sup> Laws of 2007, c. 37; Laws of 2008, c. 73. Even as this Report was being prepared, the Legislature passed a number of bills relating to the ABC Law in this session, that have been signed by the Governor or are still under consideration. To the extent a bill is pertinent to an issue discussed in this Report, it will be noted.

<sup>3</sup> The State Liquor Authority is the head of the Alcoholic Beverage Control Division of the Executive Department. N.Y. ABC Law §10. The SLA's 2007-2008 budget was \$17,038,000. Its licensing revenues for the 2007 calendar year were \$52,938,277; its fees for processing new and renewed brand labels totaled \$1,416,900, and its civil penalties imposed were \$6,979,699.

Between November 2007 and May 2008, we held more than 50 interviews encompassing some 150 hours, with, among others, representatives of the SLA, the Department of Taxation, the Division of the Budget, the Office of Alcohol and Substance Abuse Services, beer, wine and liquor retailers, wholesalers, manufacturers, wineries, farm wineries, craft brewers, individual licensees, law enforcement agencies, substance abuse prevention and treatment organizations, other interested parties, and attorneys with a concentrated ABC Law practice. The interviews were held in Albany, New York City, Saratoga Springs, Syracuse, and Westchester County, and were attended by one or two Commissioners and the Commission's Executive Director and/or Counsel.

In addition, the Commission held a public meeting with the State Liquor Authority at Brooklyn Law School in September 2007.<sup>4</sup> Finally, in June 2008, we held two six-hour roundtable discussions, one at Brooklyn Law School, and one at Albany Law School,<sup>5</sup> at which parties with different interests expressed their ideas and concerns about the ABC Law, the SLA, and changes necessary to improve the law and its administration. The discussions were quite informative, and were marked at times by a lively interchange over a number of issues.

## **II. Historical Background.**

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

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<sup>4</sup> An archived webcast of this meeting can be viewed at the Commission's website at <http://www.lawrevision.state.ny.us>. A transcript of the webcast is on file at the office of the Commission at Albany Law School, 80 New Scotland Avenue, Albany, New York 12208.

<sup>5</sup> The agendas for each meeting can be found in Appendix A. Archived webcasts of these meetings can be viewed at the Commission's website at <http://www.lawrevision.state.ny.us>. Transcripts of the webcasts are on file at the office of the Commission at Albany Law School, 80 New Scotland Avenue, Albany, New York 12208.

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.<sup>6</sup> Indeed, excise taxes such as this one imposed by the British Crown on its colonies, lay at the heart of the American Revolution<sup>7</sup> as well as the early difficulties faced by the newborn states and the federal government they created.<sup>8</sup>

Notably, the first temperance society in the country was organized in Moreau, New York in 1808.<sup>9</sup> 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.<sup>10</sup> The law was “openly defied,”<sup>11</sup> including by the Mayor of New York City, who refused to enforce it.<sup>12</sup> One year later, it was held unconstitutional by the Court of Appeals,<sup>13</sup> because the law deprived

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<sup>6</sup> 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).

<sup>7</sup> ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789 63-64, 74-96 & 149 (Oxford University Press 2006).

<sup>8</sup> 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).

<sup>9</sup> THE ENCYCLOPEDIA OF NEW YORK STATE 1256 (Peter Eisenstadt, ed.-in-chief 2005).

<sup>10</sup> Laws of 1855, c. 231.

<sup>11</sup> ENCYCLOPEDIA, *supra* note 9, at 1543.

<sup>12</sup> EDWIN G. BURROWS & MIKE WALLACE, GOTHAM, A HISTORY OF NEW YORK CITY TO 1898 832 (Oxford University Press 1999).

<sup>13</sup> *Wynehamer v. People*, 13 N.Y. 378 (1856).

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.<sup>14</sup> 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).<sup>15</sup> In addition, the saloon applicants had to post a bond and provide at least three spare beds for guests,<sup>16</sup> and stables.<sup>17</sup> 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.<sup>18</sup>

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,<sup>19</sup> 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.<sup>20</sup> In addition, the State Commission controlled the electoral machinery in the two most populated downstate

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<sup>14</sup> Laws of 1857, c. 628 §2.

<sup>15</sup> Laws of 1857, c. 628 §6.

<sup>16</sup> Laws of 1857, c. 628 §8.

<sup>17</sup> Laws of 1857, c. 628 §8.

<sup>18</sup> See BURROWS & WALLACE, *supra* note 12, at 838.

<sup>19</sup> See *id.* at 838.

<sup>20</sup> Laws of 1857, c. 628 §21. BURROWS & WALLACE, *supra* note 12, at 838.

cities, New York and Brooklyn.<sup>21</sup> As a result, there were two police departments in Manhattan, the state Metropolitans and the Municipals, loyal to the Mayor.<sup>22</sup> The situation soon became quite serious, climaxing in three violent confrontations--in mid-June, and on July 4th and 5th, and on July 14<sup>th</sup> of 1857.<sup>23</sup>

In late August of 1857, as Mayor Wood took stock of his position and his reelection campaign,<sup>24</sup> 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,<sup>25</sup> and costing Fernando Wood the Mayoralty, which, however, he recaptured in 1859. By 1870, the state Metropolitan Police Commission was no more and control of the local police returned to elected city officials.<sup>26</sup>

By the late 1880s, there were 12,000 to 15,000 saloons in Manhattan;<sup>27</sup> thus, there was one saloon for every 150 inhabitants.<sup>28</sup> Efforts to ban alcohol had made limited progress.<sup>29</sup> In 1895, Theodore Roosevelt, after being appointed a Commissioner on the New York City Police

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<sup>21</sup> 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).

<sup>22</sup> BURROWS & WALLACE, *supra* note 12, at 838.

<sup>23</sup> *Id.* at 839-841. *See* RICHARDSON, *supra* note 21, at 104-105. The July 14<sup>th</sup> violence was a direct result of the Metropolitans' attempt to close saloons on Sundays. BURROWS & WALLACE, *supra* note 12, at 839.

<sup>24</sup> BURROWS & WALLACE, *supra* note 12, at 841.

<sup>25</sup> *Id.* at 842-51.

<sup>26</sup> RICHARDSON, *supra* note 21, at 108.

<sup>27</sup> EDMUND MORRIS, THE RISE OF THEODORE ROOSEVELT 516 (Random House 1979).

<sup>28</sup> BURROWS & WALLACE, *supra* note 12, at 1162.

<sup>29</sup> *Id.* at 1164.

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.<sup>30</sup> Still, “Dry Sundays” led to a public outcry, and Roosevelt was dubbed the “Patron Saint of Dry Sundays.”<sup>31</sup> Roosevelt was supported in his efforts by the enactment of the Liquor Tax Law in 1896, which cracked down on Sunday drinking at hotels.<sup>32</sup> Because the saloons were central to city life for so many people, including the political establishment,<sup>33</sup> the public’s rage against “dry” Sundays created growing political pressure for Roosevelt to resign.<sup>34</sup> Roosevelt gracefully exited in 1897 after seeking and receiving a position in the McKinley Administration as Assistant Secretary of the Navy.<sup>35</sup>

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<sup>30</sup> PAUL GRONDAHL, I ROSE LIKE A ROCKET: THE POLITICAL EDUCATION OF THEODORE ROOSEVELT 224 (2004); BURROWS & WALLACE, *supra* note 12, at 1202. *See also* MORRIS, *supra* note 27, 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).

<sup>31</sup> GRONDAHL, *supra* note 30, at 224; MORRIS, *supra* note 27, at 561-84.

<sup>32</sup> 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. Kiene, *The Committee of Fourteen 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).

<sup>33</sup> K. AUSTIN KERR, ORGANIZED FOR PROHIBITION: A NEW HISTORY OF THE ANTI-SALOON LEAGUE 24 (1985).

<sup>34</sup> GRONDAHL, *supra* note 30, at 243.

<sup>35</sup> GRONDAHL, *supra* note 30, at 242; MORRIS, *supra* note 27, at 561-584. Despite the pressure, Roosevelt remained committed to the “Dry Sunday” efforts. *Id.* at 517-527.

The central role that saloons played in selling alcoholic beverages to multitudes of people<sup>36</sup> provided a perfect opportunity for competitors in the liquor and beer industry to create and maintain a competitive advantage. 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,<sup>37</sup> and through “tied house” arrangements in which an establishment was obligated to sell the brand of one distiller or brewer exclusively.<sup>38</sup> 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.<sup>39</sup> The saloons were also fertile ground for prostitution, police corruption, gangs, and political activity both benign and corrupt.<sup>40</sup>

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

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<sup>36</sup> See Carl H. Miller, *The Brewer And The Saloonkeeper* (1998), available at <http://www.beerhistory.com/library/holdings/saloon.shtml>.

<sup>37</sup> See *id.*

<sup>38</sup> M. Welch, *The Inevitability of the Brewpub: Legal Avenues for Expanding Distribution Capabilities*, 16 REV. LITIG. 173, 176 (Winter 1997).

<sup>39</sup> NORMAN H. CLARK, *THE DRY YEARS: PROHIBITION & SOCIAL CHANGE IN WASHINGTON* 58 (rev. ed. 1988).

<sup>40</sup> BURROWS & WALLACE, *supra* note 12, at 484, 635, 1192; KERR, *supra* note 33, at 24 ;MORRIS, *supra* note 27, 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.”).

transportation of alcoholic beverages within the United States and its territories.”<sup>41</sup>

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.<sup>42</sup> 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 criminal justice system.<sup>43</sup> Speakeasies were ubiquitous; by 1927, in New York alone, there were over 30,000 –“twice as many as all legal bars and restaurants and nightclubs *before* Prohibition.”<sup>44</sup> Enforcement of the law proved elusive,<sup>45</sup> and federal and state governments were losing excise tax revenue to the coffers of organized crime.<sup>46</sup>

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.<sup>47</sup> After the repeal of Prohibition, to regulate the liquor industry Congress passed the Alcohol Administration Act, which established a federal agency to supervise the industry,

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<sup>41</sup> EDWARD BEHR, PROHIBITION – THIRTEEN YEARS THAT CHANGED AMERICA 80 (1996).

<sup>42</sup> 41 Stat. 305 (1919).

<sup>43</sup> Carl H. Miller, *We Want Beer: Prohibition And The Will To Imbibe - Part 2*, available at [http://www.beerhistory.com/library/holdings/prohibition\\_2.shtml](http://www.beerhistory.com/library/holdings/prohibition_2.shtml).

<sup>44</sup> BEHR, *supra* note 41, at 87 (emphasis in the original).

<sup>45</sup> KERR, *supra* note 33, 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); BEHR, *supra* note 41, at 87.

<sup>46</sup> BURNS, *supra* note 45, at 217 - 225.

<sup>47</sup> U.S. Const., Amend. XXI.

created a permit system for manufacturers, wholesalers and importers of alcoholic beverages,<sup>48</sup> and prohibited certain industry practices, such as tied-houses, furnishing equipment and fixtures to a retailer, and commercial bribery.<sup>49</sup> The major objectives of the federal law were the protection of federal revenue,<sup>50</sup> prevention of “unscrupulous racketeers” from entering and remaining in the business,<sup>51</sup> and prevention of unfair trade practices in the industry.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup>

### **III. New York’s ABC Law.**

In developing the ABC Law that would govern the state after the repeal of Prohibition,

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<sup>48</sup> 27 U.S.C. §204. No permit was required for any state liquor control board.

<sup>49</sup> 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](http://www.archive.org/stream/legislativehisto00unit/legislativehisto00unit_djvu.txt).

<sup>50</sup> *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](http://www.archive.org/stream/legislativehisto00unit/legislativehisto00unit_djvu.txt).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> 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.”).

<sup>54</sup> *See Granholm v. Heald*, 544 U.S. 460, 466 (2005), 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](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](http://www.marininstitute.org/alcohol_policy/state_alcohol_control.htm).

New York could rely on a well-developed history of laws regulating alcohol.<sup>55</sup> New York had been licensing retailers of alcoholic beverages dating back at least as far as 1780.<sup>56</sup> 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,<sup>57</sup> and established the rule that licensed premises could not be within 200 feet of a school or place of worship.<sup>58</sup>

With the repeal of Prohibition, and Congress' passage of the Cullen-Harrison Act of 1933 making the manufacture and sale of beer with 3.25 percent of alcohol legal as of April 1, 1933,<sup>59</sup> New York's first major step was to enact a law regulating beer.<sup>60</sup> In no time at all, corruption began. Thus, in late December of 1933, a filing clerk and five of the twenty-one inspectors with the State Alcoholic Beverage Control Board were fired for accepting gratuities to expedite delivery of newly-issued licenses.<sup>61</sup> In addition, policemen were accepting money from applicants

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<sup>55</sup> See *Liquor Topic Rules Session at Albany*, NEW YORK TIMES, January 15, 1933, at 2.

<sup>56</sup> Laws of 1780, c. 40.

<sup>57</sup> 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).

<sup>58</sup> 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.

<sup>59</sup> 27 U.S.C.A. § 64a et seq. (1933), repealed by 49 Stat. 877 (1935). See also 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).

<sup>60</sup> Laws of 1993, c. 180.

<sup>61</sup> *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, at 1.

for help in securing licenses, through a middle man who was in contact with Board staff.<sup>62</sup> “Fixers” crowded the corridors of the Board, claiming to have influence with the Board and staff.<sup>63</sup> They were also conveying information about the issuance of licenses to third parties.<sup>64</sup> 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.”<sup>65</sup>

On May 10, 1934, New York adopted the law that is the essential framework of today’s ABC Law. The law created a three tier licensing system regulated by a State Liquor Authority.<sup>66</sup> The SLA was composed of five Commissioners appointed by the Governor, one of whom the Governor would designate as the Chair.<sup>67</sup>

Seeking to ensure a sense of direct responsibility to the community in the control of alcoholic beverages,<sup>68</sup> and drawing on the system of local control boards established in the 1933 law regulating beer, the law also created Local Alcoholic Control Boards (ABC Boards) in each

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<sup>62</sup> *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, at 16.

<sup>63</sup> See *Mulrooney Ousts 5 Aides for Graft*, *supra* note 61.

<sup>64</sup> *Id.*

<sup>65</sup> 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, at 6.

<sup>66</sup> Laws of 1934, c. 478.

<sup>67</sup> Laws of 1934, c. 478 §§ 10, 11.

<sup>68</sup> First Report of the New York State Commission on Alcoholic Beverage Control Legislation, February 15, 1933, on file at the office of the Commission.

county and in New York City.<sup>69</sup> Each ABC Board had two members, each one from a different political 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.<sup>70</sup> 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.<sup>71</sup>

From time to time during the next 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.

#### **A. The 1950s.**

In 1955, Governor Averell Harriman ordered the State Commission on Investigation<sup>72</sup> to look into the affairs of the SLA because of widespread “rumors of fraud and corruption in [its] activities.”<sup>73</sup> As a result of the investigation, substantial changes in the staff of the SLA

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<sup>69</sup> N.Y. ABC Law Art. 3, §§30 - 43, repealed L. 1995, c. 83, § 151.

<sup>70</sup> N.Y. ABC Law Art. 3, §30, repealed L. 1995, c. 83, § 151.

<sup>71</sup> N.Y. ABC Law Art. 3, §43 repealed L. 1995, c. 83, § 151.

<sup>72</sup> 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).

<sup>73</sup> ERNEST HENRY BREUER, MORELAND ACT INVESTIGATIONS IN NEW YORK 1907 - 1965, 134, quoting page one of the Commission's Report.

occurred,<sup>74</sup> with resignations of three of the five commissioners, two deputy commissioners, an assistant counsel, eight investigators, and two auditors,<sup>75</sup> and the dismissal of an investigator.<sup>76</sup>

## B. 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 bribes ranging from \$3,000 to more than \$10,000 to obtain liquor licenses."<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup> The serious illness of the SLA Chairman led to the

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<sup>74</sup> BREUER, *supra* note 73, at 136. *See also O'Connell Leaves State Liquor Post*, NEW YORK TIMES, March 5, 1955.

<sup>75</sup> *See PUBLIC PAPERS OF AVERELL HARRIMAN, supra* note 72, 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, at 1; 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, at 1.

<sup>76</sup> *See PUBLIC PAPERS OF AVERELL HARRIMAN, supra* note 72, at 472. Feinberg, *supra* note 75. One deputy commissioner committed suicide. *See PUBLIC PAPERS OF AVERELL HARRIMAN, supra* note 72, 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, at 20.

<sup>77</sup> BREUER, *supra* note 73, at 138 .

<sup>78</sup> *Id.*

<sup>79</sup> *See id.* at 149; *People v. Morhouse*, 21 N.Y.2d 66 (1967); *In re Selig*, 32 A.D.2d 213 (1<sup>st</sup> Dept. 1969), stay granted, 25 N.Y.2d 735 (1969); and *Application of Licato*, 104 A.D.2d 20 (1<sup>st</sup> Dept. 1984).

abandonment of the case against him.<sup>80</sup>

As a consequence of the grand jury investigation, in February 1963, Governor Nelson A. Rockefeller appointed a Moreland Act Commission<sup>81</sup> 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.”<sup>82</sup> Although the Commission was created because of allegations of corruption, the Commission decided to examine the 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,<sup>83</sup> allowing the sale of alcoholic beverages in separate departments of grocery stores and supermarkets,<sup>84</sup> eliminating the distance requirements between package stores,<sup>85</sup> the one license per owner rule,<sup>86</sup> the policy of not licensing grocers and other

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<sup>80</sup> 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.

<sup>81</sup> 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.

<sup>82</sup> New York State Moreland Commission on the Alcoholic Beverage Control Law, Interim Report to the Governor, August 30, 1963, at 1.

<sup>83</sup> 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.

<sup>84</sup> *Id.* at 42-43.

<sup>85</sup> 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. *Id.* at 14, 44.

<sup>86</sup> *Id.* at 8-10.

merchants,<sup>87</sup> and food requirements for bars and grills,<sup>88</sup> and repealing mandatory resale price provisions on the grounds that they led to higher prices for New York consumers.<sup>89</sup>

The Legislature enacted the Commission's recommendations regarding eliminating the licensing moratorium,<sup>90</sup> the distance requirements of retail package stores,<sup>91</sup> and the food service requirements.<sup>92</sup> The Commission's recommendations to repeal the one license per owner rule, and to permit the sale of alcoholic beverages in grocery stores and supermarkets were not adopted and the rules remain in effect today.<sup>93</sup>

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<sup>94</sup> 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.<sup>95</sup>

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<sup>87</sup> *Id.* at 45.

<sup>88</sup> New York State Moreland Commission on the Alcoholic Beverage Control Law, Report and Recommendation No.2, 22-23, January 9, 1964.

<sup>89</sup> New York State Moreland Commission on the Alcoholic Beverage Control Law, Report and Recommendation No.3, 30, January 21, 1964.

<sup>90</sup> Laws of 1964, c. 531 §14.

<sup>91</sup> Laws of 1964, c. 531 §13, repealing §§4 and 4a of §105.

<sup>92</sup> Laws of 1964, c. 531 §4, adding §64-a(food available).

<sup>93</sup> 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, *supra* note 83, 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.

<sup>94</sup> L. 1990, c. 586.

<sup>95</sup> *324 Liquor Corp. v. Duffy*, 479 U.S.335 (1987).

### C. 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.<sup>96</sup> 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 a vis the other Commissioners, tightening administrative control of the local ABC boards, establishing priorities for types of investigations, and establishing clear and uniform investigatory procedures and standards.

The Office of Business Permits, a predecessor of the Governor's Office of Regulatory Reform, issued a Report in March 1981,<sup>97</sup> 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, credit rules, and eliminating the state's labeling requirements.

Allegations of corruption caused the Senate Committee on Investigations and Taxation to undertake a two-year investigation and to issue a Report in 1981.<sup>98</sup> That Report concluded that organized crime had infiltrated "bars, discotheques, nightclubs and restaurants."<sup>99</sup> 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

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<sup>96</sup> *Survey of the State Liquor Authority*, February 1980, on file at the Commission's office.

<sup>97</sup> *Streamlining Regulatory and Paperwork Process*, March 16, 1981, on file at the Commission's office.

<sup>98</sup> Report of the Senate Standing Committee on Investigations and Taxation into the Operations of the State Liquor Authority, May 1981, on file at the Commission's office.

<sup>99</sup> *Id.*

was revoked, move their operation elsewhere.<sup>100</sup>

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.<sup>101</sup> The Committee noted that undue delays in the licensing procedure caused hardship for applicants and invited the use of political influence or bribes.<sup>102</sup> The Committee also pointed to contradictory SLA interpretations of the 200 foot distance requirement between licensed premises and schools and places of worship.<sup>103</sup> 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,<sup>104</sup> as well as a major overhaul of the ABC Law.<sup>105</sup>

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,

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<sup>100</sup> *Id.* at 23-24.

<sup>101</sup> *Id.* at 32-37.

<sup>102</sup> *Id.* at 6.

<sup>103</sup> *Id.* at 34.

<sup>104</sup> Lena Williams, *Toxic Waste Bills Adopted in Albany*, NEW YORK TIMES, June 28, 1981 at 35.

<sup>105</sup> *Id.*

notorious for its connection to a highly publicized “preppie murder” case.<sup>106</sup>

#### **D. 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 the SLA.<sup>107</sup> The number of Commissioners was reduced from five to three,<sup>108</sup> and the local ABC Boards were abolished.<sup>109</sup> Eliminating the local ABC Boards was expected to expedite the review of retail license applications.<sup>110</sup> 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.<sup>111</sup>

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

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<sup>106</sup> 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.)

<sup>107</sup> Laws of 1995, c. 83.

<sup>108</sup> Laws of 1995, c. 83.

<sup>109</sup> 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.

<sup>110</sup> Sponsor’s Memorandum, A.8083, L. 1995, c. 83.

<sup>111</sup> *The ABCs of State Budget*, CRAIN’S NEW YORK BUSINESS, June 12, 1995.

the police.<sup>112</sup>

#### **E. The 21<sup>st</sup> 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.<sup>113</sup>

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 some 2000 SLA bulletins available on the SLA website.<sup>114</sup>

During the course of the audit there were management changes at the SLA and the appointment of a new Chairman.<sup>115</sup> The SLA also undertook to address the Comptroller's recommendations. When the SLA responded to the Comptroller in January 2008, the electronic

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<sup>112</sup> State of New York, Office of the New York Comptroller, Division of Audit Management Report 95-S-138 (February 1997), on file at the Commission's office.

<sup>113</sup> 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, on file at the Commission's office.

<sup>114</sup> 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, on file at the Commission's office.

<sup>115</sup> January 24, 2008 Letter of Daniel B. Boyle, SLA Chairman, to Hon. Thomas P. DiNapoli, NYS Comptroller, on file at the Commission's office.

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. SLA 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 day, a comprehensive list of the SLA bulletins and a large number of past bulletins are not readily available to the public.<sup>116</sup>

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.<sup>117</sup> In that same year, the Attorney General commenced an investigation of similar allegations. The investigation revealed that from 2003 through 2005,<sup>118</sup> 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.<sup>119</sup> The parties agreed to three Consent Orders and Judgments which

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<sup>116</sup> *Id.*

<sup>117</sup> 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.

<sup>118</sup> *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.

<sup>119</sup> *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.

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.<sup>120</sup>

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.<sup>121</sup>

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.<sup>122</sup> 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

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<sup>120</sup> *People v. 33 Union Square West, Inc., et al.*, *supra* note 119, at 10-11.

<sup>121</sup> Alex Mindlin, *In Party Central, a Clamor to Keep Tabs on the Tap*, NEW YORK TIMES, February 12, 2006.

<sup>122</sup> 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 [http://assembly.state.ny.us/member\\_files/064/20070425/](http://assembly.state.ny.us/member_files/064/20070425/).

located.<sup>123</sup> 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.

#### **IV. Policies Shaping Regulation of Alcoholic Beverages.**

As seen in part from the discussion above, a number of policies underlie the regulation of alcoholic beverages. The policies listed below reflect those that have become apparent so far. As we continue our work and prepare our recommendations, they may be refined, and others may be added:

1. Assure the integrity of the three-tier system;
2. Exclude criminal elements from all aspects of the three-tier system and prevent the use of such elements by those in the system;
3. Promote competition;
4. Assure the objective, fair and equitable nature of the regulatory system;
5. Protect against impure or adulterated products;
6. Protect state revenue streams of excise and sales taxes;
7. Protect the health, safety and welfare of patrons of on-premises establishments;
8. Vouchsafe the health, safety, welfare, and repose of the inhabitants of residential areas where on-premises establishments are located;
9. Use the licensing and enforcement process to restrict the consumption of alcoholic beverages by underage individuals;
10. Use the licensing and enforcement process to insure that licensees are not selling to visibly intoxicated patrons;
11. Reduce alcohol abuse and limit consumption to temperate use; and

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<sup>123</sup> New York State Liquor Authority Taskforce for the Review of On-premises Licensure, *Report*, December 8, 2006.

12. Encourage economic development of craft breweries and distilleries, farm wineries, wineries, and other developing alcoholic beverage industries in New York.<sup>124</sup>

As we examine these policies and the statutes and regulations, we will endeavor to ensure that the resulting scheme neither over or under regulates the industry, and that the proposed regulations, in fact, promote their underlying policies. Before we recommend any substantial changes in the existing system, we will endeavor to ensure that the parties affected are treated fairly.

We are also mindful that today, the manner in which alcoholic beverages are manufactured and sold differs markedly from either before or even shortly after Prohibition. The industry is changing, with mergers and acquisitions of manufacturers and of wholesalers, internet sales, and exceptions to the three-tier system designed to stimulate economic development for craft breweries, local distilleries, and farm wineries. In New York as elsewhere, moderate consumption of alcoholic beverages enjoys widespread acceptability, and indeed, is often associated with healthy living, particularly, with the benefits of reduced risk of heart disease.<sup>125</sup> Nevertheless, alcohol consumed during pregnancy increases the risk of fetal alcohol syndrome.<sup>126</sup> Moreover, heavy consumption of alcoholic beverages carries certain health risks such as heart and liver

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<sup>124</sup> Many sources discuss the various policies. They are described in the Model Alcoholic Beverage Control Act, June 12, 1981, on file at the Office of the Commission, 80 New Scotland Avenue, Albany, New York 12208.

<sup>125</sup> See, e.g., Ben Lieberman, *The Power of Positive Drinking: Are Alcoholic Beverage Health Claims Constitutionally Protected?*, 58 FOOD & DRUG L.J. 511, 512 (2003)(Noting that the health effects of moderate alcohol consumption in reducing the risk of heart disease “are now accepted so widely that they are mentioned routinely in cardiology textbooks.”).

<sup>126</sup> National Center on Birth Defects and Developmental Disabilities, Centers for Disease Control and Prevention, Department of Health and Human Services, *Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis* 1 (July 2004). The characteristics of fetal alcohol syndrome include abnormal facial features, and growth and central nervous system problems. <http://www.cdc.gov/ncbddd/fas/fasask.htm#character>.

damage.<sup>127</sup> It is estimated that the total yearly cost to deal with alcohol abuse in the United States is in excess of \$148 billion.<sup>128</sup>

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Perhaps the most troubling concern 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,”<sup>129</sup> 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 simply do not appear to be 21 years of age. While it is difficult to assign a dollar amount to the cost associated with the problem, at least one national entity has estimated that in New York alone, underage drinking costs in excess of \$3.2 billion.<sup>130</sup>

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<sup>127</sup> Alcohol & Public Policy Group, *Alcohol: No Ordinary Commodity*, 98 ADDICTION 1343-1350 (2003). Notably, alcoholic products carry required warning labels that consumption of alcoholic beverages during pregnancy may result in birth defects. The federal government requires the following statement to be included on the brand label, or back or side label: “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.” 27 CFR 16.21.

<sup>128</sup> This information was obtained from the National Institutes of Health, at [www.nih.gov/news/pr/may98/nida-13.htm](http://www.nih.gov/news/pr/may98/nida-13.htm). The Commission is currently investigating the costs to New York.

<sup>129</sup> *Underage Drinking in New York, The Facts*, Underage Drinking Enforcement Training Center, at [www.unetc.org/underagedrinkingcosts.asp](http://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);

<sup>130</sup> *Underage Drinking in New York, supra* note 129. The methodology for establishing this cost is available at the same website. They include costs for alcohol treatment, youth violence, high-risk sex, traffic crashes, injury, fetal alcohol syndrome, poverty, crime, poisonings and psychoses. The Commission is currently investigating numerous funding sources within the state that address the consequences of underage drinking, including general state funds, Medicaid, and local government, and many public and private entities, including the Office of Alcoholism and Substance Abuse Services, Division of Criminal Justice Services, Office of Children and Family

On the plus side, many retailers work hard to avoid serving underage customers by using various methods and devices to screen them, but the fraudulent IDs can best many of their systems.

The matter is best left to law enforcement agencies, many of whom are beefing up enforcement of the laws. Many communities are addressing one aspect of underage drinking through the enactment of social host laws, which make it a misdemeanor for an adult to knowingly allow a party or event at which minors are present and consuming alcoholic beverages.<sup>131</sup>

The New York State Advisory Council on Underage Alcohol Consumption<sup>132</sup> has been charged by the Legislature and the Governor with making recommendations on underage drinking. Unless there is a compelling reason not to, we will defer to them on this subject.

## **V. Current Issues.**

Over the next nine months, guided by these policies and purposes, and others that come to our attention, we will review the ABC Law and its administration, and offer specific recommendations in our Final Report. We recognize that, in particular situations, policies may pull in different directions. Ultimately, these thrusts and counter-thrusts will require a

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Services, and state and local law enforcement, among others.

<sup>131</sup> Dutchess County: *see* [http://www.zwire.com/site/news.cfm?newsid=19838897&BRD=1769&PAG=461&dept\\_id=74958&rfi=6](http://www.zwire.com/site/news.cfm?newsid=19838897&BRD=1769&PAG=461&dept_id=74958&rfi=6); Montgomery County: <http://www.topix.com/city/st-johnsville-ny/2007/10/two-adults-charged-under-countys-new-social-host-law>; Nassau County: [http://longisland.about.com/od/government/a/social\\_host.htm](http://longisland.about.com/od/government/a/social_host.htm); Suffolk County: Resolution 1261 – 2007, available at <http://www.co.suffolk.ny.us/legis/Resos2007/i1797-07.htm>; <http://www.newsday.com/ny-lihost0615,0,6752902.story>. Westchester County: <http://www.westchesterlegislators.com/mediacenter/articleDetail.asp?artid=342>; and Amityville, Carmel, Cohoes, Glen Cove, Gloversville, Hoosick Falls, Johnstown Village, Johnstown Town, Little Falls, Long Beach, Mamaroneck, Mayfield Town, Mayfield Village, Niskuana, Northville, Patterson, Scotia, Southeast, Stillwater and Troy: <http://www3.madd.org/socialhost/index.aspx>.

<sup>132</sup> The Advisory Council was created by c. 275 of the Laws of 2008.

fundamental choice to be made by the lawmakers, i.e., the Legislature and the Executive. Nonetheless, in our Final Report, we expect to make concrete recommendations, although with respect to a couple of those truly nettlesome issues, we may simply present the information gathered and marshal arguments on each side. What follows are many, but not all, of the general and specific issues identified thus far. As we continue to study the law and its administration, we expect to further refine them and fully expect that additional issues may present themselves.

#### **A. The Statutory Scheme Generally.**

We will examine a number of issues regarding the statutory scheme, including:

- 1) How to articulate the modern day concerns, purposes and policies underlying the ABC Law to better guide administrative and judicial interpretation.
- 2) Whether all provisions dealing with a particular subject can be meaningfully placed in a single article or section.
- 3) How to redraft ambiguous and vague provisions, and whether to eliminate provisions that result in unnecessarily burdensome or absurd interpretations.
- 4) Identifying provisions that no longer serve a legitimate purpose, or the purpose served is no longer an appropriate subject for the ABC Law.

#### **B. Process.**

- 1) **Licensing, Investigatory, Enforcement and Adjudicatory Processes.** We plan to examine how to ensure that the SLA remains free from improper political influence, and that all SLA processes are thorough, expeditious, equitable, fair, and guided by principles that are consistently applied.

- 2) **Appellate Review of SLA Determinations.** We will consider whether to provide

for an expedited appellate review of SLA determinations as well as for a realistic provision governing the granting and the length of a stay.

**C. Organization of the SLA.**

**1) Structure and Organization.** We will examine the structure, organization, staffing and funding of the SLA to assure effective and efficient management, and prompt decisionmaking that best serves the public and the regulated industry. This includes, but is not limited to, guaranteeing on-line access to all past, present and future decisions, opinions, regulations, administrative orders and directions.

**2) Functions.** We will examine whether functions of the SLA could be eliminated, modified or transferred to other state or local agencies.

**3) Administrative Law Judges.** We will explore whether there is a more effective use to which the SLA's Administrative Law Judges can be put, including, but not limited to, making findings of fact, making credibility determinations regarding witnesses who testify, and determining the reliability and relevance of the evidence presented to them, as well as making or recommending decisions.

**4) SLA Rule Making.** We will examine a number of issues regarding rule making, including:

**a)** Whether existing regulations are outdated, unnecessary, or overly burdensome; and  
**b)** Whether there is a need and it is desirable for the SLA to have general rule making authority.

**5) Securing Criminal Information.** We will explore the need and desirability of the SLA to have access to criminal record information of people who are employed in licensed

premises.

**6) Information Sharing.** We have been advised by the Tax Department that fully reciprocal sharing of information between the SLA and the Tax Department is not possible because of tax secrecy requirements,<sup>133</sup> limiting the SLA's ability to look at excise tax returns. However, there may be areas in which non-tax information may be shared, to better coordinate related ABC licenses and tax registrations. To this end, we will explore the desirability of requiring the SLA to notify the Tax Department when certain licenses are cancelled, revoked, allowed to expire, or transferred, or when there is a corporate change, and of requiring first time and renewal applicants to obtain clearance from the Tax Department regarding delinquent sales or income taxes before the license may be issued or renewed.

**D. Licensing.**

**1) Licenses Generally.**

**a)** We will consider whether the license and permit structure can or should be streamlined, and if so, in what manner.

**2) Other Licensing Issues.**

**a) Temporary Licensing.** We will look at whether off-premise establishments, manufacturers or importers should be able to obtain a temporary license during the pendency of a license transfer application, in the same way as a temporary license is currently available for on-premises establishments under ABC Law § 97-a.

**b) Change in Operation.** ABC Law § 110 (4) requires that the applicant or licensee notify the SLA if any changes in facts required to be disclosed on the application occur while the

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<sup>133</sup> NY Tax Law §437. The Tax Department is currently studying information clearance programs in Kansas and Pennsylvania.

license application is pending or after it is granted. A willful and deliberate failure to do so is cause for revocation of the license.<sup>134</sup> We were advised in the course of our interviews, that unreported 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. We will examine a number of issues that this problem raises including:

**i)** Whether procedures should be put in place, in addition to notice, to ensure that operational changes are brought to the attention of the SLA, and that the SLA has an opportunity to determine whether the licensee misrepresented the business plan which is the basis for the application, or upon which the license was granted, and to review the plans for the new operation.

**ii)** Whether the community board should be notified at the same time the SLA receives notification of changes, and have an opportunity to participate in any process.

**c) Corporate change.** ABC Law § 110 (4) requires that a license applicant or licensee notify the SLA if a transfer of stock occurs or there is a change in officers or directors of a corporation.<sup>135</sup> ABC Law § 120-a provides that an applicant seeking approval of a corporate change is entitled to a hearing if the SLA disapproves of the change.<sup>136</sup>

We will consider whether a community board or local municipality should be given a more formal role when there is a corporate change, such as receiving notice and having an opportunity to participate in a hearing regarding any application for corporate change.

**d) Renewals.** ABC Law §§ 109 and 64(2-a) require an on-premises licensee to notify the

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<sup>134</sup> See also ABC LAW 1991-1992 HANDBOOK FOR RETAILERS 177 (Metropolitan Package Association 1991)(citing SLA Advisory, Cir. 3, March 29, 1937).

<sup>135</sup> See *id.*

<sup>136</sup> N.Y. ABC Law §120-a.

clerk of the village, town, city or community board in New York City at least 30 days before submitting the application for renewal.<sup>137</sup>

We will consider whether a community board or municipality be given a more formal role in the renewal process, for example, participation in a hearing.

**e) Public Convenience and Advantage and Public Interest.**

The terms “public convenience and advantage” and “public interest” are the guiding principles on which licenses for on-premises and off-premises licenses are to be granted. An attempt at defining these terms appears in ABC §§ 64 and 64-d, dealing with full on-premises liquor licenses and cabarets.<sup>138</sup>

During our interviews, we were told that much confusion surrounds the application of the terms “public convenience and advantage” and “public interest.”

We plan to explore whether the law should be amended to define these terms more meaningfully.

**f) 200 Foot Rule.** ABC Law § 64 (c) currently requires that there be a distance of 200 feet between a licensed premises and any premises used exclusively as a school or place of worship.<sup>139</sup>

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<sup>137</sup> The same procedure applies for renewals under N.Y. ABC Law §§ 55(on-premises beer); 55-a(on-premises beer at sporting venues at which admission fees are charged); 64-a(tavern license); 64-b (bottle club); 81(restaurant wine); and 81-a(wine bar).

<sup>138</sup> N.Y. ABC law §§ 64(6-a) (full liquor license) and 64-d(7) (cabaret). “(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.”

<sup>139</sup> N.Y. ABC Law §§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); N.Y. ABC Law §105(3)(off-premises license). N.Y. ABC Law §64-d(cabarets) cross-references § 64(7) for purposes of calculating the distances.

The 200 feet must be measured “in straight lines from the center of the nearest entrance of the premises sought to be licensed to the center of the nearest entrance of such school, church, synagogue or other place of worship . . .”<sup>140</sup> The application of the law is mandatory, although certain types of establishments, such as wine bars<sup>141</sup> and beer-only taverns<sup>142</sup> are exempt.

During our interviews, we were advised that the SLA’s interpretation of exclusivity with respect to the operation of a church is not always congruent with how other authorities interpret the idea of exclusivity. In addition, we were advised that confusion exists about how the current measurement should be applied to roof top restaurants. These restaurants present particular problems regarding noise that affects the surrounding buildings in a residential neighborhood.

We plan to consider:

- i)** Whether there should be further statutory clarification of what constitutes a church for purposes of its application; and
- ii )** Whether there should be further statutory clarification as to how the 200 foot rule is measured.<sup>143</sup>

**g) 500 Foot Rule.**

The general rule under ABC Law § 64 prohibits the issuance of an on-premises license for a restaurant “*within five hundred feet of three or more existing premises*” licensed under ABC Law § 64, in a city, town or village with a population of twenty thousand or more. However, the

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<sup>140</sup> N.Y. ABC Law §§ 64(7)(c).

<sup>141</sup> N.Y. ABC Law § 81-a.

<sup>142</sup> N.Y. ABC Law § 55.

<sup>143</sup> S. 8362, which is presently before the Governor, would amend the 200 foot rule to measure the distance from the property line of the proposed licensed premises closest to the property line of the school or place of worship.

statute allows the SLA to issue a license at its discretion after holding a hearing.<sup>144</sup>

During our interviews, concerns were expressed that the exception allowing the SLA to exercise its discretion to grant a license within 500 feet of 3 other licensed premises may have swallowed the general prohibition. Concerns were expressed, on the part of some, that the community board's views about a given license application are not afforded sufficient weight and, by others, that the community board concerns are given too much weight. During the course of our study, we will consider both arguments, as well as a number of other issues, including:

- i)** Whether the 500 foot rule should apply to bottle clubs, wine restaurants, wine bars, and on-premises beer licensees.
- ii)** Whether "three or more existing premises" within 500 feet of the proposed premises should include all types of on-premises establishments.
- iii)** Whether an applicant should have the right to challenge the information that the community board presents at an SLA 500 foot hearing, and whether the hearing officer should function as a decision-maker or a recommendation-maker.
- iv)** Whether the exemption from the 500 foot rule for municipalities of 20,000 or less should be eliminated.

**h) Four nearest liquor stores.**

All applicants for an off-premises license must identify the four liquor stores nearest to the proposed location of the off-premises license. Those stores receive a notice from the SLA requesting information regarding their gross sales for 4 years. This rule appears only on the

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<sup>144</sup> N.Y. ABC Law §64(7)(b)(emphasis added). This exemption raises questions about bars in college towns which have a population of less than 20,000.

application, not in the statute or regulations.<sup>145</sup>

The 1964 Moreland Commission criticized this rule as one designed, not to promote temperance and respect for law, but rather to protect “the economic position of entrenched package stores” because its purpose is “to invite those four licensees to protest any effort to encroach on their commercial territory.”<sup>146</sup>

We will consider whether the rule of the four nearest stores should be continued, and, if so, what should be the nature of the inquiry into the claims of any objecting stores.

### C. Enforcement.

**1) Suffer and Permit.** ABC Law § 106 provides that no on-premises licensee “shall suffer or permit any gambling on the licensed premises, or suffer or permit such premises to become disorderly.”<sup>147</sup> ABC Law §118 provides that a license may be revoked, for among other reasons, if, on or about the licensed premises, there is a sustained and continuing pattern of noise, disturbance, misconduct, or disorder.<sup>148</sup> Notably, there is no mention that the licensee must “suffer and permit” the offending, sustained, and continuing conduct. SLA Rule 53.1(q) provides that a license can be revoked when the premises becomes a focal point for police attention.<sup>149</sup> The

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<sup>145</sup> This rule can be found in 1955 SLA Bulletin 279. *See* Moreland Commission Report and Recommendations No. 1, *supra* note 83, at 16-17.

<sup>146</sup> *Id.*

<sup>147</sup> N.Y. ABC Law §106(6).

<sup>148</sup> N.Y. ABC Law §118(3).

<sup>149</sup> 9 N.Y.C.R.R. 53.1(q)(“When any noise, disturbance, misconduct, disorder, act or activity occurs in the licensed premises, or in the area in front of or adjacent to the licensed premises, or in any parking lot provided by the licensee for use by licensee's patrons, which, in the judgment of the Authority, adversely affects or tends to affect the protection, health, welfare, safety or repose of the inhabitants of the area in which the licensed premises are located, or results in the licensed premises becoming a focal point for police attention or is offensive to public decency.”).

rule does not include the requirement of “suffer and permit.” Nevertheless, in examining the SLA’s interpretation of Rule 53.1(q), the Court of Appeals in *Beer Garden, Inc. v. New York State Liquor Authority*,<sup>150</sup> held that in order to suspend or revoke a license under section 118, the SLA must show that the licensee “suffered and permitted” the disorderly conduct as required by section 106. Although the SLA argued that Rule 53.1(q) was authorized by section 118, which does not contain a requirement of “suffer and permit,” the Court declined to adopt its interpretation.

During our interviews, we were told that the standard of “suffer and permit” in section 106(6) is a very difficult one to satisfy; and consequently, it is very difficult to shut down a premises even when the police have been there numerous times because of violence or drug trafficking.

One question we will consider is whether the requirement of “suffer and permit” should continue to apply when a premises has become a focal point of police attention.

Separate and apart from that issue, is whether ABC Law § 106 should be amended to add the specific terms of “violence, drug trafficking and excessive noise.” We have been advised that the addition of these terms would clarify the types of conduct that constitute “disorderly conduct” under section 106.

#### **F. Limitations on Industry Practices.**

**1) Off-premises licenses.** We will consider whether the rule that no more than one off-premises liquor or wine license to a “person” (e.g. individual, corporation, partnership, etc.), currently in ABC Law §§ 3(22), 63(5) & 79(2), should continue. If so, we will consider when and under what circumstances a family member of a licensee can be granted or denied a license.

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<sup>150</sup> 79 N.Y.2d 266 (1992).

**2) Engaging in other businesses.** Under ABC Law §§63(4) & 79(3), liquor store and wine stores are currently prohibited from conducting any other businesses on the premises, including ATM machines, which are considered the business of banking. However, ATMs are not barred at off-premises beer licensed establishments such as grocery and convenience stores.

We will consider whether a modification or elimination of this prohibition is appropriate. We will also consider a somewhat related issue of whether off-premises liquor and wine stores should be permitted to sell beer and other items as well.

**3) Wine in Grocery and/or Other Stores.** Under ABC Law § 63, if an owner of a present grocery or drug store were to obtain an off-premises wine or liquor license, it would be limited to a single location, and the licensed premises would have to be separate from the rest of the store, with a separate entrance, a requirement that appears to have existed since 1909.<sup>151</sup> Many other states do not limit the sale of wine in grocery stores in this way.<sup>152</sup>

We will consider whether grocery and other stores, such as drug stores, be permitted to obtain off-premises liquor and wine licenses.

**4) C Licensees.** A “C license” is a beer wholesaler’s license issued under ABC Law § 53 before July 1, 1960, which allows the licensee to operate as an off-premise beer retailer and to sell soft drinks, juice drinks, ice, and tobacco products,<sup>153</sup> snack foods,<sup>154</sup> and lottery tickets.<sup>155</sup>

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<sup>151</sup> Laws of 1909, c. 39.

<sup>152</sup> The sale of wine in grocery stores is permitted in some other states. See National Alcoholic Beverage Control Association, 2006-2007 Survey at 209.

<sup>153</sup> N.Y. ABC Law § 104(1)(a).

<sup>154</sup> N.Y. ABC Law § 104(1)(b).

<sup>155</sup> N.Y. ABC Law §105(22).

We will consider whether the “C licensees” should be permitted to sell groceries, pure fruit juice drinks, milk or milk products, or any paper products, including newspapers.

**5) House Accounts.** ABC Law § 100(5) specifically prohibits off-premises retail licensees from selling on credit other than by accepting third-party credit cards. There is no equivalent limitation with respect to on-premises licensees.

We will examine whether off-premises liquor and wine stores should be permitted to offer “house accounts” to their customers.

**6) Gambling Exception.** ABC Law § 106(6) prohibits licensees from suffering or permitting gambling on the licensed premises.

We will review whether there should be an exception for special events pools, such as NCAA March Madness, the Super Bowl, the World Series and the like, in which the house takes no cut, there is a modest entry fee, and all the money collected is distributed to the pool participants.

#### **G. Relationships among various parts of the industry.**

**1) Cooperative Purchasing.** We will consider whether small, off-premises wine and liquor licensees should be permitted to participate in cooperatives that could legally purchase wine and liquor, and, if so, under what circumstances wholesalers should be required to sell to such cooperatives.

**2) Gifts and Services.** ABC Law § 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.”<sup>156</sup> SLA regulations elaborate on the permissible and impermissible gifts and services.<sup>157</sup> The 2006-2007 Consent Orders<sup>158</sup> prohibit manufacturers, suppliers and wholesalers from providing cash, cash equivalents, trips, travel, consumer items, free products, payments to third parties as an inducement to the retailer, money to advertise in a retailer's catalogue, discounts, rebates, free goods, allowances or other inducements except for discounts based on quantity, or up to one percent for payment in under ten days, selling product at a price other than that in the price schedule filed with the SLA, and requiring retailers to buy one item in order to purchase another item. Retailers are prohibited from receiving these items.

During our interviews, the 2006-2007 Consent Orders were described by some as unduly harsh in light of past SLA interpretations of the relevant statutory provisions, everyday lawful merchandising practices of other businesses, and the apparently more liberal federal rule

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<sup>156</sup> N.Y. ABC Law §101(1)(c). *See also* 9 N.Y. C.R.R. §86.1 This law was recently amended to permit manufacturers to participate in, and contribute to retailer associations by 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. *See also* Laws of 2008, c. 440.

<sup>157</sup> 9 N.Y.C.R.R. §§86.1 – 86.17. For example, 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. 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.

<sup>158</sup> A description of the Attorney General's investigation of industry practices and the resulting Consent Orders can be found *supra*, at pp.22-23.

governing trade practices.<sup>159</sup> Under that rule, a violation is based on activities which result in the exclusion, in whole or in part, of product sold or offered for sale by other persons. Federal “exclusion” has been interpreted to be something more than the retailer purchasing less of a competitor’s brand than it would otherwise have; “[f]or a violation to occur there must also be a tie or link between a supplier and retailer that at least threatens the retailer’s independence (that is, in addition to affecting the retailer’s purchasing pattern).”<sup>160</sup>

On the other hand, concerns were also expressed that a liberalizing of the gifts and services prohibition would result in discriminatory practices. We will re-examine the gifts and services rule to assess its necessity and desirability, and whether there is a need for its refinement. We will also examine how the rule can be harmonized throughout the wine, liquor, and beer trades.

**3) Prohibited Retail Sales.** When read together ABC Law §§ 3(25), which defines a “retail sale” as a sale to a consumer for a purpose other than resale, and ABC Law § 102(3-b), which prohibits a retail licensee from purchasing any alcoholic beverage from anyone except a person duly licensed to sell the product, prohibit a retailer from purchasing wine or liquor from another retailer. So, for example, a bar which runs out of a particular brand of vodka on a given

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<sup>159</sup> See 27 U.S.C. § 205(b) (prohibiting, among others, producers or wholesalers to furnish, give, rent, lend, 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 uses 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)(emphasis supplied).

<sup>160</sup> *Unfair Trade Practices Under the Federal Alcohol Administration Act* (93F-003P), 60 Fed. Reg. 20402 (1995)(citing *Fedway Associates, Inc. v. United States Treasury, Bureau of Alcohol, Tobacco and Firearms*, 976 F.2d 1416, 1420 (D.C. Cir. 1992)(holding that a wholesaler’s promotional campaign to induce retailers to buy more of his vodka and rum by offering the retailers electronic goods did not push a rival out of the market; it merely led the retailer to make a “free economic choice not to purchase the rival.” According to the court, the title of the provision, “tied house” suggested that Congress intended to prohibit activities that placed the retailer’s independence in jeopardy.) See 27 C.F.R. §6.151 *et. seq.*

night could not buy it from an off-premises store across the street.

We will consider whether there should be circumstances when a retailer can purchase wine or liquor from another retailer without violating the ABC Law §§ 3(25) & 102(3-b).

**4) Consumer Exchanges as Sales.** During the course of our interviews, we were advised that a retailer is barred by the ABC Law from exchanging a bottle of wine for a customer who mistakenly purchases a bottle of Merlot wine instead of a desired Cabernet.<sup>161</sup>

We will review whether there is such a prohibition because the exchange is a sale and the customer is not licensed to sell, and, if so, whether the prohibition should continue.

**5) Labels.** The SLA is authorized to promulgate rules and regulations governing the labeling and offering of alcoholic beverages bottled, packaged, sold or possessed for sale in New York.<sup>162</sup> The purpose of these rules is to “prohibit deception, afford the consumer adequate information [about the product] and to achieve national uniformity in this field as far as possible.”<sup>163</sup> State regulations require that the brand label conform to the requirements of the federal alcohol administration act.<sup>164</sup> Thus, if the federal government approves a label, it is automatically approved for use in New York; however, the state statute reserves the SLA's right to

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<sup>161</sup> When read together, ABC Law § 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 § 100(1) which provides that a person cannot sell any alcoholic beverage within the state without an appropriate license, appear to prohibit such exchanges and returns.

<sup>162</sup> N.Y. ABC Law §107-a.

<sup>163</sup> N.Y. ABC Law §107-a(2). *See Integrated Beverage Group Ltd. v. New York State Liquor Authority*, 27 A.D.3d 159, 807 N.Y.S.2d 74 (1st Dept. 2006)(Authority 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).

<sup>164</sup> 9 N.Y.C.R.R. § 84.1(a).

disapprove the label for use in New York.<sup>165</sup> Moreover, to the extent state and federal rules are in conflict, the state regulations are deemed to prevail.<sup>166</sup>

We will consider two questions raised by the current language of the statute:

**i)** Whether the existence of both federal and state rules regarding labeling lead to unnecessary duplication of effort and result in a lack of uniformity; and

**ii)** What criteria should be followed in disapproving a label. Case law interpreting New York's rules has held that the state may decline to approve a label that "tends to deceive" such as the label of a frozen alcoholic beverage that could be perceived by children to be ice cream.<sup>167</sup> However, judicial doubt has been cast on the use of criteria other than that involving "a tendency to deceive."<sup>168</sup>

**6) Credit Delinquency.** ABC Law § 101-aa(3) provides that the name of any retailer who defaults in paying during a credit period must be placed in a delinquency list maintained by the SLA.<sup>169</sup> A "listed" retailer may not purchase alcoholic beverages on credit from any wholesalers, even ones with whom the retailer is not delinquent. The retailer must pay cash to all

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<sup>165</sup> N.Y. ABC Law §107-a(4)(a).

<sup>166</sup> 9 N.Y.C.R.R. § 84.1(h).

<sup>167</sup> *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).

<sup>168</sup> *Bad Frog Brewery, Inc. v. New York State Liquor Authority*, 134 F.3d 87 (2d Cir. 1998)(the court noted that the SLA's disapproval of a "bad frog" label raised an issue of whether state law authorized the agency to prohibit labels for any reason other than their tendency to deceive consumers, although it lifted the agency's prohibition of the label on the grounds that the state had failed to show that its ban on the bad frog label materially advanced the state's interest in protecting children from vulgarity as required by the protections accorded commercial speech.).

<sup>169</sup> See 9 N.Y.C.R.R. § 68.7-9.

of them.<sup>170</sup> This is also true if the retailer had a perfectly good reason for not paying the wholesaler who regards the retailer as delinquent, e.g., the product was not what had been ordered, the bottles were cracked, or the wine had oxidized.

We will consider whether the statute should be modified to take into account retailers who have not paid a wholesaler because of a good faith dispute, and retailers who are not delinquent with other wholesalers.

**8) Price Posting and Holding.** Under ABC Law §101-b, manufacturers and wholesalers must file a schedule of prices for wine and liquor with the SLA every 30 days, identifying the bottle and case prices for individual items, quantity discounts and up to one percent discount for payment in under ten days if any. The posted price must be fixed (“held”) for 30 days. ABC Law § 55-b requires price posting for beer every 180 days and those prices cannot be increased (“held”) for that same time period.<sup>171</sup> To facilitate transparency, posting is on line at the SLA website.

Price posting is designed to address the fear that without it price discrimination and discriminatory trade practices would occur. For example, the gifts and services prohibited under ABC § 101-b are viewed as a form of price discrimination because the retailer is paying less for the product, by virtue of receiving the gift or service.

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<sup>170</sup> Sections 101-aa (terms of sale) and 101-aaa (terms of sale - beer or wine products). Subdivision (3) of both sections provides: “Each such manufacturer and wholesaler is hereby required, on or before the respective notification dates for each retail license, to give written notice of default, by first class mail, to all such licensees therein who have failed to make payment to him or her on or before their final payment date for alcoholic beverages sold or delivered to them during a credit period ending in the preceding week. Any such retail licensee receiving such notice shall not thereafter purchase alcoholic beverages except for cash until such time as the authority determines that his or her name shall not be published on the delinquent list as provided in subdivision four of this section, or until such time as the authority permits sales or deliveries to him or her as provided in subdivision five of this section.”

<sup>171</sup> There are special annual price postings for wineries, farm wineries, and micro-wineries.

The restrictions of price posting prohibit family discounts and trade channel pricing, types of pricing that are permitted in other states. “Family discounting” is a practice whereby a discount is offered for purchasing quantities of different brands available from the same supplier or wholesaler. Trade channel pricing refers to offering different discounts based on the type of retail operation, or “channel.” A channel can refer to a broad category such as all off-premises establishments, or to a narrower category of off-premises establishments, such as convenience stores. Channel pricing is said to be an efficient model when a distributor serves a chain of establishments, particularly in multiple states.

Notably, the continued viability of New York’s price posting requirements is called into question by the decision of the United States Court of Appeals for the Ninth Circuit in *Costco v. Maleng*.<sup>172</sup> The Court held that Washington State’s requirement that wholesalers post beer and wine wholesale prices and adhere to those prices for at least 30 days is a restraint of trade subject to preemption by the Sherman Antitrust Act, and is not saved by the state regulatory power under the 21st Amendment because Washington failed to demonstrate that the “post and hold” is effective in promoting the temperance purpose of its regulatory statute.<sup>173</sup> As part of our review, we will consider whether price posting is still desirable. We will also consider the implications of this decision for New York and whether the “post and hold” requirement should be eliminated, retained or restructured to meet the antitrust argument.

**9) Primary Source.** During our interviews, we were told that any effort to eliminate the price posting requirement must take into account the “primary source rule.” The primary

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<sup>172</sup> 522 F.3d 874 (9<sup>th</sup> Cir. 2008); *see also* *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 208-09 (4<sup>th</sup> Cir. 2001).

<sup>173</sup> *Costco*, 522 F.3d at 903.

source rule is created under ABC Law § 101-b, which provides that the brand owners of liquor or wine can limit the distribution or resale of their brands to certain wholesalers. Thus, the primary source rule designates the wholesaler from whom goods are to be purchased.<sup>174</sup> That same section provides that only wholesalers listed by the brand owner may post prices for such brand.<sup>175</sup> We were advised during our interviews that “primary source” rules serve several purposes, including: identifying licensees subject to taxation, providing a degree of stability within the market place, creating an audit trail, and protecting product integrity. Others took issue with whether any of these purposes are accomplished through the rule. As part of our review, we will consider these points of view, in evaluating the primary source rule.

## **H. Economic Development of Micro and Craft Breweries, Distilleries and Wineries.**

While micro and craft breweries, distilleries and wineries share a common goal of showcasing New York products, and enjoy virtual unanimous support as engines for promoting economic development, in some respects the law governing them is unclear, may prove burdensome, promotes inefficiency, and impedes development.

### **1) Wineries.**

#### **a) Satellite stores.<sup>176</sup>**

**i) We will consider whether these stores should be allowed to operate under the same conditions as the winery tasting room, including hours of operation, allowable items for sale,**

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<sup>174</sup> See N.Y. ABC Law §§101-b(4-a) and 107a (labeling for spirits also contains a primary source requirement).

<sup>175</sup> N.Y. ABC Law §101-b(4-a)(b).

<sup>176</sup> A satellite store is a separate location that functions as an extension of a winery’s tasting room.

sampling, and purchasing privileges, or should they be solely “wine stores” as interpreted by the SLA.

**ii)** We will consider whether satellite stores should be subject to the 200 foot distance requirement between the store and a school or place of worship.

**b) Custom crush.** “Custom crushing,” or custom processing, means many different things, from one winery simply juicing grapes of another winery to one winery offering a complete service package to another winery, including crushing, fermenting, mastering and then bottling the wine for the other winery. Federal rules treat them as an “alternating proprietorship”<sup>177</sup> and have created certain procedures for their operation.<sup>178</sup>

During our interviews, we were told that the SLA and the wineries have been working to develop rules to govern custom crushing in New York.

We will consider whether the statute should be amended to adopt the federal approach.

**c) Tastings.** In addition to being able to hold tastings at their premises and at farmers’ markets, we will consider whether tastings by farm wineries and commercial wineries can be conducted an unlimited number of times and at a wide variety of locations.<sup>179</sup>

**d) Sales of product between wineries and through wholesalers.**

**i)** We will consider whether one New York winery should be able to carry and sell other New York wineries’ products.

**ii)** If so, we will consider whether there should be an exception to the three-tier system for

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<sup>177</sup> 27 C.F.R. §19.930.

<sup>178</sup> 27 C.F.R. §§19.930, 24.136.

<sup>179</sup> S. 6955, which is before the Governor, would eliminate the 5 tastings limit per year for farm wine and winery licenses, allow 5 tastings per permit, and an unlimited number of permits.

this arrangement.

**2) Breweries.**

**a) Internet Sales of Beer.** We will consider whether craft beer producers and beer wholesalers licensed by the State of New York should be allowed to ship beer and other malt beverages to individual consumers in other states that have reciprocal direct shipping statutes.

**b) Beer at Farmers' Markets.** We will consider whether micro-breweries should be permitted to conduct tastings and sell product at farmers' markets.

**c) Brewing Festivals.** We will consider whether the licensed brewer and his or her employees should be allowed to dispense and serve the brewer's product at brewing festivals, and whether leftover product should be allowed to be returned to the brewery or distributor.

**d) Keg Registration.** We will consider whether the record keeping requirements for keg registration should be simplified to make it less burdensome for small craft brewers to comply with the keg registration law.<sup>180</sup>

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<sup>180</sup> S. 8165-A would amend the ABC Law to reduce the deposits for kegs from \$75 to \$50 and extend the keg registration for 1 year to November 22, 2009. The bill is before the Governor for his consideration.

## **APPENDIX A**

**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**

<b>8:45 am</b>	<b>Welcome</b>	Robert M. Pitler, Chairman
<b>9:00 am</b>	<b>Licensing</b>	
	<b>A. On - Premises</b>	
	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)
<b>9:50 am</b>	<b>B. Off-Premises</b>	
	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
<b>10:40 am</b>	<b>Trade Practices</b>	
	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 <i>passim</i>
	Franchise Agreements	ABC Law §55-c
	Credit Rules	ABC Law §101-aa
	Catalogues	9 NYCRR §86.1
	House Accounts	ABC Law §100(5)
<b>11:30 am</b>	<b>Suspension and Revocation of Licenses</b>	
	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 Problem Premises	ABC Law §118
<b>12:30 pm</b>	<b>Lunch</b> (provided)	
<b>1:00 pm</b>	<b>Beer</b> Brewing festivals Keg registration Label approval 180-day price hold	ABC Law §97(2) ABC Law §105-c ABC Law §107-a ABC Law §55-b(2)
<b>1:50 pm</b>	<b>Farm Wineries</b> Direct shipment record keeping Custom Crush Satellite stores	ABC Law §§76, 76-a - e, 77 ABC Law §79-c ABC Law §76(4)
<b>2:40 pm</b>	<b>Wholesalers</b> Trade channel pricing Family discounts Restocking and rotating	ABC Law §101-b ABC Law §101(1)(c)
<b>3:30 pm</b>	<b>Revenue Generation</b> Collection of Taxes/Electronic Reporting Licensing Fees	
<b>4:00 pm</b>	<b>Other</b> Returns of unopened product Single license to encompass multiple permits Inconsistencies in the ABC Law	ABC Law §100(1)
<b>4:30 pm</b>	<b>Concluding Remarks</b>	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**

<b>8:45 am</b>	<b>Welcome</b>	Robert M. Pitler, Chairman
<b>9:00 am</b>	<b>Licensing</b> <b>A. On -Premises</b> Public Convenience & Advantage and the Public Interest Other Considerations 200 Foot Rule 500 Foot Rule	ABC Law §64(6-a)  ABC Law §§64(7)(a) ABC Law §§64(7)(b)(f)
<b>9:50 am</b>	<b>B. Off-Premises</b> General Considerations Other Considerations 4 nearest liquor stores 200 Foot Rule Number of off-premises licenses Businesses authorized	ABC Law §64  ABC Law §105(3) ABC Law §63 ABC Law §§63, 76-a, 77
<b>10:40 am</b>	<b>Trade Practices</b> Price Posting Gifts and Services to Retailers  Tastings Franchise Agreements Credit Rules Catalogues House Accounts	ABC Law §101-b ABC Law §101-b, 9 NYCRR §§83.4, 86.1 - 81.17 ABC Law <i>passim</i> ABC Law §55-c ABC Law §101-aa 9 NYCRR §86.1 ABC Law §100(5)
<b>11:30 am</b>	<b>Suspension and Revocation of Licenses</b> Prohibited Sales Underage patron Unlawful possession with intent to consume “Suffer and permit”	ABC Law §65 ABC Law §65 ABC Law §65-c ABC Law §106(6)

	Suspension & Revocation Provisions Problem Premises	ABC Law §118
<b>12:30 pm</b>	<b>Lunch</b> (provided)	
<b>1:00 pm</b>	<b>Beer</b> Brewing festivals Keg registration Label approval 180-day price hold	ABC Law §97(2) ABC Law §105-c ABC Law §107-a ABC Law §55-b(2)
<b>1:50 pm</b>	<b>Farm Wineries</b> Direct shipment record keeping Custom Crush Satellite stores	ABC Law §§76, 76-a - e, 77 ABC Law §79-c ABC Law §76(4)
<b>2:40 pm</b>	<b>Wholesalers</b> Trade channel pricing Family discounts Restocking and rotating	ABC Law §101-b ABC Law §101(1)(c)
<b>3:30 pm</b>	<b>Revenue Generation</b> Collection of Taxes/Electronic Reporting Licensing Fees	
<b>4:00 pm</b>	<b>Other</b> Returns of unopened product Single license to encompass multiple permits Inconsistencies in the ABC Law	ABC Law §100(1)
<b>4:30 pm</b>	<b>Concluding Remarks</b>	Robert M. Pitler, Chairman

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