



# TEXAS ALCOHOLIC BEVERAGE COMMISSION

*Texans Helping Businesses & Protecting Communities*

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November 14, 2018

Jennifer Jones  
Acting Director  
Sunset Advisory Commission  
P.O. Box 13066  
Austin, Texas 78711-3066

Dear Ms. Jones,

Thank you for the opportunity to provide the Texas Alcoholic Beverage Commission's (TABC) position on the issues presented in the Sunset staff report. TABC appreciates the Sunset staff's thorough and professional review, and looks forward to continuing to serve as a resource for the Sunset Commission members and staff as well as the full Legislature throughout this process. We appreciate the benefits of an independent review process, and are confident it will ultimately result in a more efficient agency that is better equipped to regulate a fast-growing industry that is extremely important to the Texas economy.

In response to the specific issues and recommendations in the staff report, TABC provides the following comments:

**Issue 1: Texas Has a Continuing Need for TABC, but a Weak Commission Limits Its Ability to Effectively Oversee and Regulate the Alcoholic Beverage Industry.**

TABC agrees with the recommendation to continue the agency for 12 years (1.1).

TABC does not take a position on whether to expand the Alcoholic Beverage Commission from three to five members, as we believe this is a broader agency governance question to be decided by the Legislature in concert with the Governor (1.2). Of course, we will work to implement any changes deemed appropriate by the state's elected leaders. If the commission does expand from three to five members, TABC suggests that at least one member be a former industry member and that two out of the five have legal and/or financial expertise.

TABC generally agrees with the concept of modernizing TABC's conflict-of-interest provisions (1.3). However, TABC believes the recommendation does not go far enough, and that the conflict-of-interest provision may need to be significantly more relaxed than the 1 percent standard recommended in the staff report. We also suggest consideration of specifically allowing spouses of TABC employees to work at regulated locations, because the current prohibition is nearly impossible for the agency to enforce.

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TABC believes the recommendation to use advisory committees to obtain stakeholder input and expertise is a promising concept (1.4 and 1.5). However, implementation could present practical challenges. First, finding individuals willing to participate could be difficult, particularly if TABC structures the committees to ensure broad-based industry and geographic representation, requiring significant travel by committee members without compensation or reimbursement for travel costs. Further, as stated in the staff report, TABC receives very few public comments at public meetings. We have had more success engaging stakeholders across the state using informal means, such as the series of roundtable events hosted by the agency over the last year.

TABC generally agrees with the idea of regularly reviewing and addressing gaps in our rules (1.6). We have a rules committee consisting of executive management and subject matter experts to identify and review the rules that should be modified. In the future, the process could be more structured and provide greater feedback to the commission, as recommended in the staff report. However, we do believe some of the examples of gaps in our rules provided by Sunset staff, in fact, are gaps in the Alcoholic Beverage Code that require resolution by the Legislature because they are significant policy issues, such as private labels and the definition of “an interest” for enforcing tied-house provisions.

TABC supports the recommendation to update our rules regarding the separation of duties between the commission and the executive director (1.7). TABC’s rule is currently up to date, but we will make any updates as directed by changes in statute.

TABC supports the recommendation to make our public meeting materials available online (1.8). We recently procured a system that will enable us to quickly and efficiently make audio available to the public, and automatically generate meeting minutes. We anticipate using this system for the first time at our November 27 commission meeting.

## **Issue 2: TABC Cannot Efficiently Regulate the Alcoholic Beverage Industry Without Modernizing the State’s Byzantine Licensing System.**

TABC does not take a position on the recommendations in Issue 2 regarding simplification of the state’s licensing structure (2.1, 2.2, and 2.3). We are still evaluating the potential impacts of the recommendations, and have not yet determined the full effect of the changes as recommended by Sunset staff. However, the agency does see benefit in and remains open to simplifying the licensing structure overall, and has recommended such changes as broad concepts in our Self-Evaluation Report submitted to the Sunset Commission and in our FY 2019-2023 Strategic Plan.

The Sunset staff report rightly points out the ever-growing complexity of the licensing structure. However, this complexity also means that any major simplification will require an ongoing, robust discussion among the agency, the Legislature, and the alcoholic beverage industry to ensure any changes avoid unintended consequences and accomplish the intended outcomes. TABC firmly believes the Sunset process and the legislative session will provide the necessary opportunities to facilitate this discussion, and the agency is committed to assisting the Sunset Commission and the full Legislature in accomplishing any changes they deem appropriate.

We are pleased with the staff report's acknowledgement of the need to replace our obsolete licensing system. The report recognizes that implementing a major overhaul of the state's licensing structure would also require significant changes to the IT infrastructure that supports our licensing function. Implementing Issue 2 recommendations using the current antiquated IT system would require time consuming and expensive change requests of our vendor, and would essentially mean the state would have to invest significant resources in an outdated IT system that should instead be replaced. In fact, we believe TABC could not implement the changes recommended in Issue 2 within the specified timeframe of September 1, 2021, without also replacing the licensing system. TABC welcomes the opportunity to provide information and discuss the agency's exceptional item request with members of the Sunset Commission.

### **Issue 3: Over-Regulation of Certain Business Practices Creates Burdens on TABC and the Alcoholic Beverage Industry With Little Public Benefit.**

We partially agree and partially disagree with the various elements of the recommendation to streamline TABC's process for approving alcoholic beverages for sale in Texas (3.1).

- TABC is unopposed to using the federal Certificate of Label Approval (COLA) to approve malt beverage labels. However, the Sunset Commission may want to consider allowing in-state manufacturers that only sell to the Texas market to continue using TABC's current label approval process, since they do not currently use the federal COLA process, unlike other manufacturers.
- We agree with adopting rules governing label and registration requirements for products ineligible to receive a federal COLA. This change would help provide clarity in regulation and allow TABC to more effectively set standards for an evolving part of the industry.
- We disagree with discontinuing required content testing for malt beverages because content testing ensures truth in labeling. Further, testing malt beverage alcohol content is more important for truth in labeling, since malt beverages often vary considerably in alcohol content from product to product. Wine and spirits typically fall within a more narrow alcohol content range—13-15 percent for wine and slight variations in proof for distilled spirits.
- We agree with authorizing TABC to deny label approval and product registration for any product that violates the law. This authority would better help TABC ensure public safety and enforce Texas law.

TABC takes no position on the staff recommendation to make cash payments optional by applying credit law restrictions to beer transactions (3.2). This recommendation would have an impact on the industry, but its impact on TABC would be negligible. The agency does not agree with the staff report's conclusion that enforcing the cash law is an administrative burden on the agency. In 2009, TABC automated our process for sending warning letters for cash law violations, reducing the amount of staff time spent on cash law enforcement. Overall, auditors spend a very small percentage of their time conducting inspections related to cash law violations, and shifting to the credit law for beer transactions would simply shift workload from one area to another.

We agree with the recommendation to eliminate overly restrictive outdoor advertising requirements (3.3). This change would make compliance with the law simpler for industry and make the law easier to enforce for TABC.

We take no position on the recommendation to update agency rules to strengthen enforcement of the credit law, since this recommendation is closely tied to the recommendation to apply credit law restrictions to beer transactions (3.4).

**Issue 4: TABC’s Protest Process Needs A Complete Overhaul to Meet Basic Transparency, Accountability, and Fairness Standards.**

We generally agree with the recommendation to restructure the protest process (4.1). The current statute makes the process hard to understand and hard to administer as described in the staff report. A clearer, simpler process would benefit the agency, the industry, and the public. However, TABC is concerned that the proposed process depicted on page 49 of the report could allow for an applicant to appeal an application denial to district court without exhausting all administrative remedies. TABC instead suggests that if an applicant chooses not to appeal and goes to a hearing at the State Office of Administrative Hearings, the denial decision would be final. Also, TABC disagrees with the part of the recommendation requiring the commission to make final decisions, including proposals for decision from the State Office of Administrative Hearings and final license denial decisions. The commission has the authority to approve these decisions now, but has elected to delegate these duties to the staff. TABC is concerned about the potential for delays in licensing and protest decisions caused by the need to wait for the next commission meeting to obtain a decision. Similarly, we are concerned about the need for the commission to meet more often to ensure expeditious decision making, and believe the recommendations would create unnecessary bureaucracy.

TABC agrees with the recommendation to clearly inform applicants of their due process rights (4.2). While TABC employees discuss due process rights with applicants, ensuring applicants consistently receive comprehensive information is an area in which the agency has room to improve.

**Issue 5: Several TABC Enforcement Practices Do Not Follow Common Standards, Limiting Regulatory Efficiency and Effectiveness.**

We disagree in part with the recommendation to require TABC to regularly inspect every regulated location in the state within a reasonable period (5.1). The language in the recommendation requiring *physical* inspection of all locations in the state is at odds with the agency’s current direction in trying to make most efficient use of limited resources and focus primarily on high-risk locations. The Legislative Budget Board has approved a TABC request to change our performance measure definition for inspections to allow for a “compliance reporting” process in which TABC could require locations to submit documentation on a regular basis rather than require the agency to physically inspect these locations. Using this documentation, TABC will use a risk analysis process to determine which locations need physical inspection. Prioritizing inspections and allocating resources based on risk, as suggested in the recommendation, is precisely TABC’s direction. However, allowing the agency to use its

compliance reporting process, and not requiring TABC be physically present for these inspections, would greatly facilitate TABC's ability to best use its limited resources across the state. Furthermore, all locations are still subject to random undercover operations, such as minor stings. TABC also suggests consideration of the agency's regulation of thousands of out-of-state locations and foreign entities that manufacture and export products to the Texas market. Currently TABC only inspects businesses located within Texas, and we suggest that whatever inspection standard the Legislature adopts for alcoholic beverage businesses be applied across the board to ensure a fair and equitable regulatory approach.

TABC agrees with the recommendation to remove the requirement that TABC offer licensees a choice between a suspension and a fine (5.2). This flexibility would allow TABC to determine penalties based on each circumstance and would ultimately allow TABC to better protect the public.

We generally agree with the recommendation to allow TABC to consider profits earned from violating the law when determining penalties (5.3). However, the recommendation as written may not go far enough to effectively deter illegal behavior. TABC would prefer to have the ability to determine fines also based on a permittee's overall revenues and size, not just the profits earned on the violation itself.

We agree with the recommendation to allow TABC to temporarily suspend licenses and permits in cases of a threat to public welfare (5.4). This authority would equip TABC with an additional tool to further our public safety mission, particularly in cases of serious criminal activity such as human trafficking at a licensed location.

We agree with the recommendation to make noncompliance with a commission order a statutory violation (5.5). This tool would assist TABC in strengthening our public safety mission by incentivizing compliance.

We agree with the recommendation to remove nonstandard language allowing the public to testify at TABC disciplinary hearings (5.6), because public participation in these hearings rarely occurs. TABC always welcomes public participation in other formats, such as commission meetings and stakeholder meetings, just as the public would participate at any other state agency.

TABC disagrees with the recommendation to require the commission to make final determinations on all enforcement and disciplinary actions (5.7). Under the current statute and rule, the commission could choose to reserve the right to make these final determinations, but has instead chosen to delegate this duty to staff. Requiring the commission to make these decisions would delay agency business and create unnecessary bureaucracy while allowing unnecessary public safety risks.

We agree with the concept of including all regulatory violations in our schedule of sanctions (5.8), but believe implementation will present challenges. In Issue 1, the report acknowledges TABC's previous attempts to adopt penalties in rule that included regulatory violations, including marketing violations, were unsuccessful after significant industry pushback. Because

of this history, TABC believes adopting rules to include all regulatory violations could take significantly longer than allowed for by the proposed deadline of December 31, 2020.

**Issue 6: The High Cost of Collecting Alcohol Import Taxes at the Border Outweighs the Negligible Public Safety Benefit.**

TABC strongly disagrees with Sunset staff's overall assessment of the ports of entry program and the recommendation to eliminate the program. The Legislature created the ports of entry program as a regulatory operation to enforce Texas' alcoholic beverage importation laws, rather than as simply a tax collection program. TABC's enforcement of alcohol importation laws furthers the state's border security priorities, and the presence of our staff at the border provides a second set of eyes for U.S. Customs and Border Protection.

TABC's ports of entry program provides a vital public health and safety function for the state. Our personnel are Texas' only bulwark against illicit alcoholic beverages entering the state. They protect the public from untested, poor quality products coming in from Mexico and the Caribbean. U.S. tourists have become ill from consuming tainted alcohol while abroad, and the same dangerous products could more easily come into the country without the ports of entry program. Our seasoned personnel are highly trained in rooting out suspicious-looking products for seizure and destruction. Eliminating the program would allow these products unfettered access to the U.S. market and could harm consumers.

Having trained ports of entry personnel also helps deter minors and intoxicated persons from bringing alcohol into the country, benefiting the public safety of our border communities. Removing ports of entry staff from the border would in turn eliminate this deterrent effect and increase the likelihood that persons entering the country will break Texas law. Furthermore, an increase in dangerous criminal behavior along the border would further strain TABC and other law enforcement resources. This important consideration is simply not calculable using data.

The Alcoholic Beverage Code provides that the agency's primary legal duty is to protect public safety by deterring and detecting violations of the code. Continuing the ports of entry program would allow TABC to meet this obligation into the future.

**Issue 7: TABC's Statute Does Not Reflect Standard Elements of Sunset Reviews.**

TABC agrees with the recommendation to update requirements related to commission member training (7.1). We are currently working on revising our training, and will incorporate these additional elements into the revised materials.

TABC agrees with the recommendation to discontinue the after-hours violations report, but would certainly provide this type of information to anyone requesting it (7.2).

TABC agrees with the recommendation to update the Alcoholic Beverage Code to reflect requirements of the person-first respectful language initiative (7.3).

## Conclusion

In closing, we again wish to thank you for this opportunity to respond to the staff report. We look forward to continuing to work with the Sunset Commission and the full Legislature as we move through this process.

Sincerely,

A handwritten signature in blue ink, appearing to read 'K. Lilly'.

Kevin J. Lilly  
Chairman

A handwritten signature in blue ink, appearing to read 'A. Bentley Nettles'.

A. Bentley Nettles  
Executive Director