TABC

TEXAS ALCOHOLIC BEVERAGE COMMISSION

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COMMISSION MEETING

July 22, 2014

Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

José Cuevas, Jr., Presiding Officer
Midland

Steven M. Weinberg, MD, JD, Member
Colleyville

Ida Clement Steen, Member
San Antonio

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AGENDA

REGULAR COMMISSION MEETING

10:00 a.m. – July 22, 2014

5806 Mesa Drive
Austin, TX 78752

TABC

TEXAS ALCOHOLIC BEVERAGE COMMISSION

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José Cuevas, Jr. *Presiding Officer-Midland*
Steven M. Weinberg, MD, JD *Member-Colleyville*
Melinda S. Fredricks *Member-Conroe*
Sherry Cook *Executive Director*

Tuesday, July 22, 2014
10:00 a.m.
Agenda

1.	**Call to Order**		**José Cuevas, Jr.**
2.	**Approval of Commission Meeting Minutes of May 29, 2014**		**José Cuevas, Jr.**
3.	**New Commissioner Installation Ceremony - Oath of Office**		**José Cuevas, Jr.**
4	**Commission Report: Executive Director and Agency Activities, Budget Issues , Staff Achievements, Legislative Activities**		**Sherry Cook**
5.	**Promotional Recognition- Major Victor Kuykendoll, District 2, Regional Audit Supervisor Amanda Collins, Henry Guevara, Lead Investigator, Financial Crimes Unit & Carla Rios, Regional POE Supervisor**		**Earl Pearson** **Dexter Jones** **Karen Smithwick**
6.	**Approval of the Appointment of TABC Audit Committee**		**José Cuevas, Jr.**
7.	**Approval of the FY 2015 Operating Budget**		**Shelby Eskew**
8.	**Approval of the FY 2016-17 Legislative Appropriations Request**		**Sherry Cook** **Shelby Eskew**
9.	**Approve Publication of Proposed Amendments to Rule §36.1, Possession and Sale of Firearms on Licensed Premises**		**Martin Wilson**
10.	**Approve Adoption of Amendments to Rule §45.73, Label: General**		**Martin Wilson**
11.	**Approve Adoption of Amendments to Rule §45.82, Prohibited Practices**		**Martin Wilson**
12.	**Approve Adoption of New Rule §45.94, Verification Regarding Use of Facilities**		**Martin Wilson**

13.	**Approve Withdrawal of New Rule §45.95, Agreements Between Manufacturers or Brewers and Retailers**		**Martin Wilson**
14.	**Approve Adoption of New Rule §45.96, Brewpubs**		**Martin Wilson**
15.	**Approve Adoption of Amendments to §45.110, Inducements**		**Martin Wilson**
16.	**Public Comments**		**José Cuevas, Jr.**
17.	**Reception Honoring Commissioner Ida "Weisie" Clement Steen, Major Kuykendoll, Regional Audit Supervisor Collins, POE Supervisor Rios and Lead Investigator Guevara**		**José Cuevas, Jr.**
18.	**Executive Session to Consult with Legal Counsel Regarding Pending and Anticipated Litigation Against the Agency and to Deliberate the Appointment, Employment, Evaluation, Duties of the Position of Administrator (Govt. Code §551.071, §551.074)**		**José Cuevas, Jr.**
19.	**Next Meeting Date: September 23, 2014**		**José Cuevas, Jr.**
20.	**Adjourn**		**José Cuevas, Jr.**

Note: *Items may not necessarily be considered in the order they appear on the agenda. Executive session for advice of Counsel (pursuant to §551.071 of the Government Code) may be called regarding any agenda item. Action may be taken on any agenda item.*

NOTICE OF ASSISTANCE AT PUBLIC MEETINGS

Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services (such as interpreters for persons who are deaf, hearing impaired readers, large print, or Braille) are requested to contact Gloria Darden Reed at (512) 206-3221 (voice) (512) 206-3259 (fax) Relay Texas at 1-800-735-2989 (TTY/TDD), at least three (3) days prior to the meeting so that appropriate arrangements can be made.

MINUTES

REGULAR COMMISSION MEETING

10:00 a.m. – July 22, 2014

5806 Mesa Drive
Austin, TX 78752

TABC

TEXAS ALCOHOLIC BEVERAGE COMMISSION

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COMMISSION MEETING MINUTES

July 22, 2014

The Commissioners of the Texas Alcoholic Beverage Commission (TABC) met in Regular Session on Tuesday, July 22, 2014 at the Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Suite 185, Austin, Texas.

COMMISSIONERS PRESENT: José Cuevas, Jr.
Ida Clement Steen
Steven Weinberg, MD, JD

STAFF PRESENT: Sherry Cook, Executive Director

Joshua Alexander, Supervisor, Austin Audit District
Kathleen Allbright, Auditor, Houston Financial Crimes Unit
Carolyn Beck, Director, Communication & Governmental Relations
Gene Bowman, Director of Audit Investigations Administration
David Brandon, Director, Project Manager, Information Resources Division
Cecelia Brooks, Legal Assistant, Legal Division
Mindy Carroll, Director, Education & Prevention
Matthew Cherry, Legal Assistant, General Counsel
Amanda Collins, Regional Audit Supervisor
Danita Cotman, Legal Assistant, Legal Division
Julie Davis, Technical Writer, Education & Prevention Division
Marc Decatur, Major, North Texas Region
Luann Dickerson, Executive Assistant, Executive Division
Loretta Doty, Director, Human Resources Division

Shelby Eskew, Director, Business Services Division
Diana Figueroa, Executive Assistant, Executive Division
Joe K. Fralin, Regional Manager, Ports of Entry
Thomas Graham, Director, Tax & Marketing Practices
Bruce Harlan, Training Specialist, Training Division
Amy Harrison, Director, Licensing Division
Emily Helm, General Counsel, Legal Division
Joe Iagnemmo, Web Administrator, Information Resources Division
JoAnn Joseph, Assistant Director, Licensing Division
Dexter Jones, Assistant Chief, Audit & Investigations
Shaun Jordan, Regional Supervisor, Austin Licensing District
Brenda Kunco, Accountant, Business Services Division
Victor Kuykendoll, Major, Arlington Regional Enforcement Division
JoAnn Joseph, Assistant Director, Licensing Division Office
Ricardo Jauregui, Major, Enforcement Division, San Antonio
Domingo Lugo, Purchaser, Business Services Division
Vanessa Mayo, Assistant Director, Business Services Division
Stanley Muli, Budget Analyst, Business Services Division
Brenda Myers, Regional Supervisor, Austin Audit District Office
Merideth Munoz, Supervisor, Tax & Marketing Practices
Harry Nanos, Captain, Austin Enforcement District Office
Andy Pena, Director, Office of Professional Responsibility
Nicole Phillips, Supervisor, Houston Regional Audit Office
John Reney, Investigator, Office of Professional Responsibility
Gloria Darden Reed, Executive Assistant, Executive Division
Albert Rodriguez, Director, Training Division
Robert Saenz, Chief of Field Operations
Karen Smithwick, Director, Ports of Entry Division
A Streetman, Intern, General Counsel, Legal Division
Ron Swenson, Captain, Special Investigations Administration
Mario Villarreal, Lieutenant, McAllen Area Enforcement Office
Jay Webster, Director, Information Resources Division
Martin Wilson, Assistant General Counsel, Legal Division

GUESTS PRESENT:

Kergin Bedell, Burton & Hyde
RenEarl Bowie, Assistant Director, Texas Department of Public Safety

Dewey Brackin, Attorney
Vic Brooks, Vice President, Republic National Distributing Company
James Davis, Beer Alliance of Texas
Rick Donley, President, Beer Alliance of Texas
Jim Dow, Texas Craft Brewer's Guild/Texas Bar and Night Club Alliance
Doug DuBois, Director of Government Relations, Texas Food & Fuel Association
Scott Fisher, Vice President of Policy, Texas Food & Fuel Association
Steve Greinert, Wholesale Beer Distributors of Texas
Jay Howard, Hillco
Marc Hoskins
Robert Hunt, Director of Governmental Affairs, Miller Coors
Chelsy Hutchison, Republic National Distributing Company
Lance Lively, Executive Director, Texas Package Stores Association
Mignon McGarry, Consultant, Republic National Distributing Company
Jack Martin, Attorney, Jack Martin & Associates
Mary Martha Murphy, Law Clerk, Office of Attorney General
Robin Sanders, Assistant Attorney General, Office of Attorney General
Ken Simon, Partner, Locke Lord, Beer Alliance of Texas
Tom Spilman, Executive Vice President, Wholesale Beer Distributors of Texas
Keith Strama, Attorney, Wholesale Beer Distributors of Texas
Ralph Townes, Vice President, Governmental Affairs, Glazer's
J.P. Urrabazo, Beer Alliance of Texas
Karen Watkins, Assistant Attorney General, Office of Attorney General
Stacy Williams, Partner, Locke Lord, Beer Alliance of Texas
Randy Yarbrough, Consultant, Wholesale Beer Distributors of Texas

CALL TO ORDER

The meeting of the Texas Alcoholic Beverage Commission was called to order at 10:02 a.m. by Presiding Officer José Cuevas.

APPROVAL OF COMMISSION MINUTES OF MAY 29, 2014

Presiding Officer José Cuevas called for approval of the Commission meeting minutes of May 29, 2014. Commissioner Weinberg so moved to approve the minutes as written. Presiding Officer Cuevas seconded. The motion carried.

NEW COMMISSIONER INSTALLATION CEREMONY – OATH OF OFFICE

Presiding Officer Cuevas asked Mrs. Ida Clement Steen to come forward to be sworn in as a new Commissioner. After the Oath of Office was administered, Commissioner Ida Clement Steen thanked everyone for the honor in allowing her to serve on the Board. She stated that she was a "little nervous", but hopes to do a good job. Presiding Officer Cuevas congratulated her on the appointment and stated that he was glad to have her on the board. He stated that he is confident that she will do a great job.

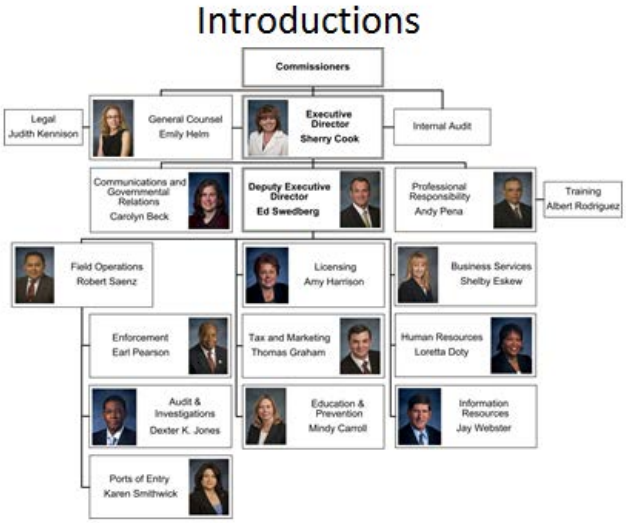
Presiding Officer José Cuevas swearing in Ida Clement Steen as Commissioner

EXECUTIVE DIRECTOR'S REPORT: EXECUTIVE DIRECTOR AND AGENCY ACTIVITIES, BUDGET ISSUES, STAFF ACHIEVEMENTS, LEGISLATIVE ACTIVITES

Presiding Officer Cuevas called upon Executive Director Sherry Cook to present the Executive Director's Report: Executive Director and Agency Activities, Budget Issues and Staff Achievements, and Legislative Activities.

After welcoming the Commissioners back to Austin, Executive Director Cook gave a special welcome to Commissioner Steen and stated that she looks forward to working with her at the Texas Alcoholic Beverage Commission, an agency she believes to be the "most interesting regulatory industry."

As part of Executive Director Cook's report, she took the opportunity to introduce TABC's Executive staff and a brief description of their job/position duties and responsibilities:



General Counsel Helm, Internal Auditor and Executive Director Cook report directly to the Commissioners. General Counsel Emily Helm oversees the Legal Division. Assistant General Counsel Martin Wilson and Deputy General Counsel report to General Counsel Helm in the Legal Division. Deputy Executive Director Ed Swedberg oversees daily Agency operations. Andy Pena introduced as the Director of the Office of Professional Responsibility (Internal Affairs) that currently oversees training that is headed by Captain Albert Rodriguez. Director Cook stated that changes will be announced in the training area very soon. Introducing Carolyn Beck, she stated that she has a dual role as Director of Communications and Governmental Relations. The Division of Field Operations is headed by Chief Robert Saenz and is separated into Enforcement, led by Assistant Chief Earl Pearson; Audit and Special Investigations Unit led by Assistant Chief Dexter Jones and Audit Director Gene Bowman; and Director Karen Smithwick responsible for the Ports of Entry.

Executive Director Cook's report continued with the introduction of the Licensing Division led by Director Amy Harrison and Assistant Director JoAnn Joseph. The Business Services/Fiscal Services Division Director Shelby Eskew and Assistant Director Vanessa Mayo were introduced. Director Thomas Graham leads the Tax and Marketing Practices Division. The Division of Human Resources is led by Director Loretta Doty. She concluded the introductions with the Division of Education and Prevention that is led by Director Mindy Carroll and the Information Resources Division led by Director Jay Webster. Executive Director Cook affirmed that each and every one of the fine men and women introduced bring a commitment as a public servant to uphold the laws of the State of Texas in regulating the alcoholic beverage industry.

Executive Director Cook gave a brief background and update on the status of the Ports of Entry (POE). The background information supported the hiring of personnel at the Ports of Entry bridge and border locations to monitor compliance for the

personal importation of alcohol and cigarettes along the Texas/Mexico border. At the bridge locations, Executive Director Cook explained that the uniformed Taxpayer Compliance Officers, who are not commissioned peace officers, verify that persons importing alcoholic beverages meet all legal requirements for importing and collecting the appropriate fees and taxes. She noted that through an agreement with the Comptroller of Public Accounts, POE personnel are responsible for compliance with the state laws in the importation of cigarettes and the collection the taxes. As a point of interest, Executive Director Cook commented that the land ports are staffed with full-time and temporary employees, however due to the fluctuating nature of scheduled cruises, a staffing model was developed to include both full-time and temporary employees.

Commissioner Weinberg quizzed Executive Director Cook on the staffing of personnel in Houston – are they the same people employed. Executive Director Cook stated that there will be new temporary personnel hired to avoid scheduling conflicts.

Presiding Officer Cuevas inquired if the change in fee increases passed during the last legislative session has helped boost revenue and start-up cost. Executive Director Cook answered in the affirmative. She stated that the fee increases during the last two legislative sessions helped tremendously.

Commissioner Weinberg, stated for record purposes, apologized for his reluctance to believe that the income generated would be higher than the start-up costs at the seaport. He stated that he was "wrong" and credited Director Smithwick for doing a "great job."

Executive Director Cook stated that since the seaports opened in January 2014, it has been performing well. She commented that an anticipated revenue gain by the year's end of $180,000. Executive Director Cook stated that a new seaport opening at the Houston-Bayport terminal in October 2014 with two new cruise ships. *Note: Increasing the number of ports monitored by TABC to 32.* She stated that this ingenuity has allowed the Agency to control its costs. Executive Director Cook reported that staffing is maintained through 30 port offices of which 28 are in the Texas and Mexico international border crossings and two of which are sea ports in Galveston. In addition to the seaports generating revenue, she reported that the border city of Laredo continues to show strong revenue increases.

Executive Director Cook reported that the effort in recruiting and filling the Agency's enforcement ranks has produced eight new agents that graduated in June. She stated that the First Attorney General Daniel Hodge was the keynote speaker. She expressed her appreciation and complimented his participation as he did an outstanding job in relating to shared partnerships with the efforts of his office and the Texas Alcoholic Beverage Commission in combating serious criminal behavior in licensed locations. Executive Director Cook gave "kudos" to Keon Flowers, Human Resources Recruiter, for doing a great job in getting out in the demographics and finding qualified applicants that will diversify the Agency's workforce. fulfilling the demographics early on has done an excellent job getting out there and finding qualified applicants that will diverse the Agency's workforce.

Commissioner Weinberg inquired on the number of prospective applicants in the next academy and the number that may be selected. Executive Director Cook stated that the next academy will be in October with an expectation of 12 to 15 agent trainees.

Presiding Officer Cuevas suggested having one of the TABC Commissioners to be the next agents' academy graduation keynote speaker. Executive Director Cook replied that she would love to have "him" as the next keynote speaker. She stated that there are two graduation ceremonies held each year, so she hopes each of the Commissioners will accept an invitation to speak. She commented that Director Albert Rodriguez has done an excellent and has brought a lot of professionalism to the academy, in so much as, the parents of the graduates were very impressed.

Executive Director Cook's report focused on "Success Stories" written and posted in articles describing innovative education programs untaken by the Education and Prevention Division. She stated that TABC's Education and Prevention Division continues to be a leader when it comes to developing programs to assist industry in driving compliant behavior.

Executive Director Cook commented that under the leadership of Director Mindy Carroll and her team and the assistance from other Divisions in the Agency, the development of several programs has been recognized nationally:

- False ID Campaign
  - Training Video

The video instructs employees on what to look for when checking IDs to ensure that customers are aged 21 or older and to assist stores in staying in compliance.

- Special Events Campaign
  - TABC Temporary Event

The Special Events Campaign includes an educational course as well as the "TABC Temporary Event" training video. The course and video focuses on the Marketing Practices regulations for temporary events as well as addressing alcoholic beverage laws such as selling or serving minors.

- Marketing Practices Campaign
  - Industry Guide

A training course for industry members with modules and videos for each subject area, an industry guide and other supporting materials.

  - Public Service Announcements (PSA)

Available resources include a 30-second PSA regarding the hours of sales and consumption related to Happy Hour.

Executive Director Cook stated that all of TABC videos and PSAs can be found on the TABC YouTube channel.

Executive Director Cook strongly emphasized that is in the area within the industry where the Agency is finding its greatest challenge because it is resource extensive and if left unaddressed, it can be extremely disruptive to the marketplace. She stated when competitive practices cross the bright line of inter-tier relationships, it forces competition in the wrong direction and ultimately, the results end up in the community we live in and that is a by-product of vertical integration. Executive Director Cook stated that her focus is on a centralized approach to these types of violations because the violations result in public safety and public health issues which are not specific to any one area of the state. However, she firmly commits to continue to take administrative action as appropriate.

Commissioner Weinberg quizzed Executive Director Cook if she intended to discuss articles on competitive marketing practices covered in some of the newspapers from around the state. Executive Director Cook responded that she would not discuss those articles at this meeting.

Executive Director Cook briefed the Commissioners on some of the accomplishment achieved in the past months:

- Agents and auditors have achieved or exceeded a number of agency cumulative performance goals (100 %+) for the year already – 3 months early. Goals exceeded include:
    - Priority Location Inspections (most notable at 153%)
    - Percent of licensed locations inspected (Enforcement)
    - Persons instructed
- This is the first time in recent years that the number of agency vacancies has dipped below the 50 mark.

- Key staff, Executive Director Sherry Cook, Field Operations Chief Robert Saenz, Field Operations Assistant Chief Dexter Jones and SIU Captain Ronald Swenson traveled to Houston on June 3rd to participate in the kick-off press conference for a multi-agency initiative to combat and help end Human Trafficking. Ms. Cook was one of the featured speakers at the press conference

Executive Director Cook reminded the Commissioners of two new performance measurements that were added during the last legislative session, specifically targeting organized criminal activity, which led her into the next topic – The Special Investigations Unit headed up by Assistant Chief Dexter Jones. She cited that SIU is continuing to increase operations at a sharp pace. SIU agents conducted 21 operations in April and another 24 operations in May, which represent an increase of 700 – 800 percent in operational volume since the opening months of the fiscal year. Executive Director Cook stated that the growth in SIU investigations has sparked additional public safety positions that will be included within the Agency's Legislative Appropriations Request (LAR).

Presiding Officer Cuevas inquired if the Agency's involvement is strictly because of liquor license violations that would give cause for TABC agents to be involved and that they are not involved in any other law enforcement agency's issues. Executive

Director Cook answered in the affirmative. She stated that Presiding Officer Cuevas' question and assumption raised an "excellent point" because it does have a nexus to alcohol where alcohol is being served and/or an establishment that has a permit or license and criminal activity, human trafficking or alcohol over-served to a patron is occurring should be the only reason for TABC's agents to become involved.

Presiding Officer Cuevas inquired into the BYOB issue in relation to TABC agents' ability to conduct inspections. Executive Director Cook answered if a BYOB establishment has a license, TABC has the authority to conduct inspections and regulate.

Executive Director Cook discussed a "snapshot view" into the June 2014 staffing vacancies. She stated that the Agency maintained vacancies under 50 with 21 l/2 of the Agency's positions being advertised, in the interview process or offers extended. In her explanation, she stated that the majority of the Agency's vacancies are within the civilian ranks.

As Executive Director Cook progressed into the report, her discussion advanced to the reporting on "Trends." She spoke on the change in direction shifting the Agency's focus away from individual behavior to the root of the problem and/or cause in determining where public safety violations were occurring. She stated that this not only assisted in the ability of the Agency to meet its performance goals, but it became a driving compliant behavior as well. She credits this was accomplished by focusing the Agency's efforts on priority locations.

Executive Director Cook offered her definition of a priority retailer as being a licensed business that is authorized to sell or serve alcoholic beverages to consumers, whose premises have been the site of a public safety violation in the past 12 months or the subject of a complaint received during the past 12 months alleging that public violations have occurred. She stated that this priority status results in a higher frequency of inspection for the designated licensed business with the frequency of inspection dependent upon the time since the qualifying event and the nature of the qualifying event. Executive Director Cook emphasized that the Agency has sound justification for inspecting priority retailers with greater frequency, in a possible effort to deter the retailer's problems. She pointed out in the chart illustration that an agent inspecting a priority retailer is almost twice as likely to find new public safety violations as an agent inspecting a licensed retailer that does not have priority status.

Executive Director Cook believes that while part of the drop in the number of priority retailers is attributable to a decline in the number of public safety complaints received by the Agency, she cited an increase in compliance on the part of the retailers already in priority status is also a factor. She stated that this is a positive correlation between our public safety efforts and a response of compliant behavior. Also in Trends, Executive Director stated that as the inspection volume increased, the number of priority retailers has decreased.

The discussion and background information of Local Option Elections was Executive Director Cook's next topic. She stated that local option elections are held twice a year

in the months of November and May in Texas. In May 2014, (28) local option elections were held with (24) issues passing – (4) failed to win voter approval. She presented information stating of the jurisdictions holding elections, (10) became "wet" for the first time, (8) expanded alcoholic beverage sales and (3) retained their previous wet/dry status. Executive Director Cook stated that "footprint" of the dry areas in the State of Texas is shrinking dramatically.

Executive Director Cook announced that the Agency is in the planning stages to gearing up for the 84th Legislative Session. She stated that Director Shelby Eskew's presentation will be requesting the Commissioners' approval for the Fiscal Year 2015 Operating Budget later in the meeting. However, she would like to highlight some areas that are considered driving factors behind the FY 2016-2017 LAR:

- #1 Exceptional Item is a Career/Retention package
- Civilian employees lag 14-20% behind other state agency
- Statutorily employees cannot supplement income with secondary employment that hold a permit
- Facility lease increases (-7 Public Safety Positions-PSP)
- Fuel Cost increases (-4 Public Safety Positions-PSP)
- Personnel Operating Costs – Lump Sum (-6 Public Safety Positions-PSP)
- Personnel Operating Costs – Insurance (-12 Public Safety Positions-PSP)
- State's population is expected to grow at an average rate of 1.5% to 2.0% annually
- Comptroller projects the Texas economy to grown by 3.7% annually
- TABC projects the demand for alcoholic beverages to grow at roughly 1.5% (from roughly 696 million gallons during the current year to just under 728 million gallons per year by the end of the next biennium)
- 47,825 licensed locations in Texas, 46,914 are licensed retailers
- 455 licenses breweries, distilleries, or wineries
- Despite a small decline in the number of licensed business in FY 2014, TABC expects the number of licenses retailers to continue to grow by an average of 1.5% --2.0% annually

Presiding Officer Cuevas asked about the amount of growth in wineries during the past five years. Executive Director Cook replied that the wineries growth totaled from 184 in 2009 to 311 in 2014.

- Wineries grew from 291 to 311 in the past 12 months
- Distilleries grew from 47 to 61 in the past 12 months
- The number of breweries and brewpubs increased from 127 to 153 in the past 12 months

Executive Director Cook report statistics showed that wineries grew from 291 to 311 in the past 12 months, or by approximately 6.9%. Distilleries grew from 47 to 61 in the past 12 months or just under 30%. She stated that the number of breweries and brewpubs increased from 127 to 153 in the past 12 months, or by about 20%.

To conclude this segment of her report, Executive Director Cook emphasized the importance in hiring and retaining well-qualified employees that can support the growth occurring in the population and industry in the State of Texas.

Executive Director Cook reiterated how the 3-tier system continues to add additional layers of complexity in the industry. She stated that in this ever-changing environment, it is easier to regulate and understand the rules and the law when it is flat lined across the 3-tier system. However when vertical integration allows certain segments of industry to conduct activities in other tiers, it becomes complex. It becomes complex in corporate structures, as Director Harrison can attest and complex as to the limits in the other tiers. She cited that after the 83rd Legislative Session, some segments of activities were granted to some industries and caused a different structure of complexity within the industry. Executive Director Cook stated that the requests in the LAR are important to hire well-qualified employees, retain them in order to support the industry to work within the new established complex systems.

Commissioner Weinberg requested for Executive Director Cook and Director Eskew to prepare a slide with a comparison 10 years ago and current year of the State of Texas' population, the number of full-time employees and budget factor in inflation to figure dollar amount it costs spent per citizen to conduct business. Commissioner Weinberg believes 10 years ago, more money was spent than is spent currently.

Administrator Cook's report is supported by a PowerPoint presentation. (Attachment 1)

PROMOTIONAL RECOGNITION – MAJOR VICTOR KUYKENDOLL, DISTRICT 2; AMANDA COLLINS, REGIONAL AUDIT SUPERVISOR; HENRY GUEVARA, LEAD INVESTIGATOR, FINANCIAL CRIMES UNIT; CARLA RIOS, REGIONAL PORTS OF ENTRY SUPERVISOR

Presiding Officer Cuevas called for the presentation of next agenda item, Promotional Recognition – Major Victor Kuykendoll, District 2; Amanda Collins, Regional Audit Supervisor; Henry Guevara, Lead Investigator, Financial Crimes Unit; Carla Rios, Regional Ports of Entry Supervisor. Each recipient's biography information was read and photographs taken.

Major Victor Kuykendoll, District 2

Victor started his career with TABC in 2001 and was originally stationed in El Paso. Later, he transferred to the Belton Office and then the Bryan Office as an agent before promoting to sergeant at the Waco Area Office. In 2012, he was promoted to the rank of Lieutenant in Arlington assigned to the Waco Area Office. Victor graduated from Huntsville High School and attended Sam Houston State University and the University of Texas in El Paso. He served in the United States Coast Guard Reserves stationed at the Marine Safety Office in Galveston. Victor holds a TCOLE Master Peace Officers License. Victor is married to Jaime Kuykendoll, his wife of 19 years. They have two daughters, Nicole and Kaci.

Commissioner Steven Weinberg, Commissioner Ida Clement Steen, Major Victor Kuykendoll
Presiding Officer José Cuevas, Chief Robert Saenz

Amanda Collins, Regional Supervisor, Districts 1 and 2

Amanda earned a BBA in Marketing from Prairie View A & M. She began her career with the TABC in the summer of 2008 as an intern with the Compliance Division at TABC Headquarters. Upon completing her degree, Amanda worked in the private sector as an Assistant Manager before returning to the Commission in November 2009 as an Auditor stationed at the Houston Regional Office with the Compliance Division, which later became the Audit & Investigations Division. As an Auditor for the Audit and Investigations Division, Amanda obtained her Certified Fraud Examiners Certification and was the Marketing Practices Coordinator/Liaison for the Houston Regional Office. During her tenure as an auditor, Amanda progressed through the rank of Auditor IV and gained invaluable experience in excise tax audits and complex marketing practices issues. She is a member of the Commission's Tri Region Work Group. Amanda enjoys playing soccer, traveling and being a volunteer coach for her niece's club soccer team.

Assistant Chief Dexter Jones, Commissioner Steven Weinberg, Commissioner Ida Clement Steen
Regional Audit Supervisor Amanda Collins, Presiding Officer José Cuevas
Chief Robert Saenz

Henry Guevara, Financial Crimes Unit Lead Investigator

Henry was born in Houston and raised in Austin where he attended David Crockett High School. After graduating high school he attended the University of Texas at San Antonio where he obtained a BA in Criminal Justice. Henry was subsequently hired by the University of Texas at San Antonio Police Department where he worked for approximately three years. While employed at UTSA, Henry attended and graduated from St. Mary's University with a Master's degree in International Relations. In 2005 Henry began employment with the Texas Attorney General's Office Law Enforcement Division as an investigator where he served various rolls during his 9 years there. Henry, while employed at the Texas Attorney General's Office investigated Financial Crimes such as money laundering and white collar crimes and a variety of other offenses to include public corruption cases, and crimes against persons. Additionally he was involved in several long term investigations to include the Warren Jeffs polygamist ranch. He also was part of the training cadre as a firearms instructor and defensive tactics instructor.
Henry has two young daughters and enjoys cycling, running and martial arts in his spare time.

Assistant Chief Dexter Jones, Commissioner Steven Weinberg, Commissioner Ida Clement Steen Lead Investigator Henry Guevara, Presiding Officer José Cuevas, Executive Director Sherry Cook Chief Robert Saenz, Deputy Executive Director Ed Swedberg

Carla Rios, Ports Of Entry Regional Manager
(POE Manager Rios unable to attend meeting due to illness)

Carla has a BA in International Business and a MBA in Healthcare Management. Her previous experience includes working with the Texas Department of Aging and Disability Services Guardianship Program in quality assurance. Previous employment includes contract monitoring and training for the Texas Department of Transportation, budgets, contracts, and staff supervision for Travis County and the Juvenile Probation Department, trainer in the private sector, and Marketing Representative for the Texas Association of School Boards responsible for sales, account management, audits, and Medicaid compliance for school districts statewide. Carla is an Austin native and a Texas Certified Guardian, and in her free time volunteers for South Austin Caregivers and Friends for Life as a visiting guardian for elderly and disabled individuals. Carla is also a proud mother of two sons Joey and Miguel Vasquez.

RECEPTION HONORING COMMISSIONER IDA "Weise" CLEMENT STEEN, MAJOR VICTOR KUYDENDOLL, REGIONAL AUDIT SUPERVISOR AMANDA COLLINS, PORTS OF ENTRY SUPERVISOR CARLA RIOS, LEAD INVESTIGATOR HENRY GUEVARA

Presiding Officer Cuevas announced that a reception honoring Commissioner Ida Clement Steen, Major Kuykendoll, Regional Audit Supervisor Collins, POE Supervisor Rios, in her absence, and Lead Investigator Guevara would take place in the foyer.

The Commission meeting was recessed at 11:05 a.m. for the reception.

Presiding Officer Cuevas called the Commission meeting back to regular session at 11:31 a.m.

APPROVAL OF THE APPOINTMENT TO TABC AUDIT COMMITTEE

Presiding Officer Cuevas called for a motion in the approval of the appointment to the Texas Alcoholic Beverage Commission Audit Committee. Commissioner Steen moved to approve the appointment of Commissioner Steven Weinberg to the Texas Alcoholic Beverage Commission's Audit Committee. Presiding Officer Cuevas seconded the motion. Presiding Officer Cuevas stated that a motion was made and seconded. All those in favor say "Aye." All those opposed say "No." The motion passes.

APPROVAL OF THE FY 2015 OPERATING BUDGET

Presiding Officer Cuevas called upon Director Shelby Eskew to come forward to present the next agenda item, "Approval of the FY 2015 Operating Budget."

Director Eskew stated that her presentation will be for the Commissioners approval on the FY 2015 Operating and Capital budget. She stated that there is not any significant change between the FY 2014 and FY 2015 budget other than the salary increases that were appropriated for the civilian staff effective September 1 and a capital budget line item appropriated in FY 2014 that was not appropriated in FY 2015. Director Eskew stated that the net change of those two items is reflected in FY 2015.

Commissioner Weinberg commented that Director Eskew did a lot of work on the report. He stated that he does not feel any of the Commissioners would have been appointed if they were not "fiscal conservative." Commissioner Weinberg commented that he does not feel bad in asking the legislature to appropriate the funds requested. He stated that the Agency is required by law to make money for the state. He commented that he does not know of any other agency in Texas or the federal government that makes money for the state.

Presiding Officer Cuevas inquired to the number of vehicles that are to be replaced. Director Eskew replied that 30 vehicles will be replaced in 2014 and the LAR request is for an additional 20.

Commissioner Weinberg made a motion to approve the Texas Alcoholic Beverage Commission's FY 2015 Operating and Capital Budget as presented as set out in the General Appropriations Act; and authorize the Executive Director, or her designee, to make transfers between appropriation line items and capital budget items in accordance with the General Appropriations Act as appropriate and necessary to implement the budget. Commissioner Steen seconded the motion. Presiding Officer Cuevas stated that a motion was made and seconded. All those in favor say "Aye." All those opposed say "No." The motion passes.

Director Eskew's report is supported by PowerPoint presentation.
(Attachment 2)

APPROVAL OF THE FY 2016-17 LEGISLATIVE APPROPRIATIONS

Presiding Officer Cuevas calls for the next agenda item, "Approval of the FY 2016-2017 Legislative Appropriations." Director Eskew presented her report.

Presiding Officer Cuevas asked Director Eskew in preparation for the Legislative Appropriations Request, what directions she received. Director Eskew replied no directions were given. She stated that the General Revenue Reconciliation was due in June 2014 and it is reviewed at the Governor's Office in order to receive the general revenue base number that the Agency is authorized to request in the baseline LAR. She stated that the number was different than anticipated.

Presiding Officer Cuevas inquired in what way it was different. Director Eskew stated that the Agency received $900,000 more than anticipated which is listed as the capital budget line item.

Presiding Officer Cuevas quizzed Director Eskew about what is meant by staff augmentation. Director Eskew responded that it means it would be a contract employee to develop a professional services contract.

Director Eskew stated that the Agency feels that it is very important that the appropriations request is approved as submitted to avoid interruptions in the daily operational Agency services that may result in the lapse of FTEs for public safety employees or to the day to day Agency business costs for fuel, rent leases and other daily operational costs.

Director Eskew briefed the Commissioners on a request that will be part of the appropriations request that will not involve any funding or listed as an exceptional item. The Texas Alcoholic Beverage Commission is requesting inclusion in Article IX, Section 3.04 of the General Appropriations Act. She stated that by adding the Agency to this Appropriations Act, the Commissioners will be authorized to set the Executive Director's pay at $159,018 with the approval from the Legislative Budget Board and the Governor's Office. Director Eskew stated that this dollar amount was identified

from a report compiled in August 2012 by the State Auditor's Report on Executive Compensation at State Agencies and based on comparable positions across the country.

Director Eskew referring to the Legislative Appropriations Request report of finance stated that the Agency is 99.99% general revenue funded. She stated that line item, Appropriated Receipts, for $40,000 is revenue that the Agency received from the processing of the on-line applications. She anticipates an increase in that amount as more on-line applications are processed.

Of special interest to Commissioner Weinberg, Director Eskew briefed the Commission of the statute that requires TABC to fund both direct and in-direct costs appropriated to the Agency. She reviewed, using her slide presentation, the revenue collected and compared it to the general revenue appropriated levels and stated that this information is part of the TABC success dialogue used when meeting with the legislators before the legislation session convenes.

Director Eskew's report concluded with an exercise scenario of the 10% biennial base reduction options schedule that has been completed and submitted to the LBB. She stated that based on the current economic status in Texas, the information is not expected to be implemented.

Commissioner Weinberg complimented Director Eskew for an excellent job on her report. He stated that her report was well organized and well prioritized. Commissioner Weinberg stated that the Agency is not performing its duties when the budget calls for cutting public safety positions. He stated that he will plan to accompany members of the Executive Staff to visit the LBB, Governor's Office, and legislative members and encouraged his fellow Commissioners to be available as well.

Presiding Officer Cuevas stated that Director Eskew gave a "well thought out" presentation. He stated that the constant increase and growth in the alcohol business and the money collected does not match – you bring in more and get less back.

Commissioner Weinberg moved to approve the Texas Alcoholic Beverage Commission's FY 2016-2017 Legislative Appropriations Request as presented. I authorize the Executive Director, or her designee, to make transfers between appropriation line items and capital budget items in accordance with the Legislative Appropriations Request directives that appropriate and necessary to submit the request to leadership by August 11, 2014. Commissioner Steen seconded the motion. Presiding Officer Cuevas stated that a motion was made and seconded. All those in favor say "Aye." All those opposed say "No." The motion passes.

Director Eskew's report is supported by PowerPoint presentation.
(Attachment 3)

APPROVE PUBLICATION OF PROPOSED AMENDMENTS TO RULE §36.1, POSSESSION AND SALE OF FIREARMS ON LICENSED PREMISES

Presiding Officer Cuevas called upon Assistant General Counsel Martin Wilson for the agenda item entitled, "Approve Publication of Proposed Amendments to Rule §36.1, Possession and Sale of Firearms on Licensed Premises."

Assistant General Counsel Wilson discussed the proposed amendments to §36.1, relating to Possession and Sale of Firearms on Licensed Premises to cite statutory authority, to provide definitions and to revise standards both for off-premises and on-premises locations generally, and for gun shows, historical re-enactments and ceremonial display specifically.

Assistant General Counsel Wilson announced that a public hearing to receive oral comments on the proposed amendments will be held on Tuesday, August 19, 2014 at 1:30 p.m. in the Commission meeting room at TABC Headquarters located at 5806 Mesa Drive, Austin, Texas.

Presiding Officer Cuevas calls for a motion. Commissioner Weinberg abstained from participating in the vote as he is a member of one of the organizations.
(Attachment 4)

Presiding Officer Cuevas calls for a motion. Commissioner Steen moved to authorize publication in the *Texas Register* of Proposed Amendments to Rule §36.1 for a 30-day comment period." Presiding Officer Cuevas seconded the motion. Presiding Officer Cuevas stated that a motion has been made and seconded. All those in favor say "Aye". All those opposed say "No".

Presiding Officer Cuevas calls up and groups agenda items #10-15

APPROVE ADOPTION OF AMENDMENTS TO RULE §45.73, LABEL GENERAL

Assistant General Counsel Wilson stated comments on the proposed amendments were received in writing and oral comments were received at a public hearing on April 30, 2014. *(Attachment 5)*

APPROVE ADOPTION OF AMENDMENTS TO RULE §45.82, PROHIBITED PRACTICES

Assistant General Counsel Wilson stated comments on the proposed amendments were received in writing and oral comments were received at a public hearing on April 30, 2014. *(Attachment 6)*

APPROVE ADOPTION OF AMENDMENTS TO §45.110, INDUCEMENTS

Assistant General Counsel Wilson stated comments on the proposed amendments were received in writing and oral comments were received at a public hearing on April 30, 2014. *(Attachment 7)*

Presiding Officer Cuevas called for a motion. Commissioner Weinberg moved to adopt the Amendments to Rule §§45.73, 45.82 and 45.110. Commissioner Steen seconded the motion. Presiding Officer Cuevas stated that the motion has been made and seconded. All those in favor say "Aye." All those opposed say "No." The "Ayes" have it and the Amendments are adopted.

APPROVE ADOPTION OF NEW RULE §45.94, VERIFICATION REGARDING USE OF FACILITIES

Assistant General Counsel Wilson stated comments on the proposed amendments were received in writing and oral comments were received at a public hearing on April 30, 2014. *(Attachment 8)*

APPROVE ADOPTION OF NEW RULE §45.96, BREWPUBS

Assistant General Counsel Wilson stated comments on the proposed new section were received in writing and oral comments were received at a public hearing on April 30, 2014. *(Attachment 9)*

Presiding Officer Cuevas called for a motion. Commissioner Weinberg moved to adopt New Rules §§45.94 and 45.96. Commissioner Steen seconded the motion. Presiding Officer Cuevas stated that the motion has been made and seconded. All those in favor say "Aye." All those opposed say "No." The "Ayes' have it and the New Rules are adopted.

APPROVE WITHDRAWAL OF NEW RULE §45.95, AGREEMENTS BETWEEN MANUFACTURERS OR BREWERS AND RETAILERS

Assistant General Counsel Wilson stated that this proposal allows manufacturers or brewers with certain exceptions to file an agreement with retailers. He stated that a considerable number of comments were received, ranging from the rule is unnecessary and the common already has the jurisdiction to get the agreements. The Commission agrees and recommends withdrawing the rule.

Presiding Officer Cuevas called for a motion. Commissioner Weinberg moved to Withdraw Proposed New Rule §45.95, Agreements Between Manufacturers or Brewers and Retailers. Commissioner Steen seconded the motion. Presiding Officer Cuevas stated that the motion has been made and seconded. All those in favor say "Aye." All those opposed say "No." The "Ayes" have it and the recommendation to withdraw the New Rule §45.95 is approved.

PUBLIC COMMENT

Presiding Officer Cuevas opened the floor for public comment on agenda items #10-15.

Mr. Jim Dow, Partner, Cross Oak Group, Texas Craft Brewers Guild proposes to change to Amendment to Rule §45.110(c)(3) to read: providing or purchasing, in

whole or in part, any type of advertising benefitting any specific retailer, if the advertising is the result of unauthorized activity. *(Attached document)*

Commissioner Weinberg inquired if the Commission was to adopt the rule, would it have to be republished, or is it a minor change that it could be adopted. Assistant General Counsel Wilson answered that the change is minor as a result of comments and is not bringing any new parties, so it could be adopted without any complications.

Dewey Brackin, Attorney, Gardere, Wynne, Sewell, LLP spoke representing his clients Texas Retailers Association and Walgreen's Company, specifically on Rules §§45.73 (b)(2), 45.82(b)(7)(D), 45.110(c)(7)(AB), prohibiting the use of a trademark for a retailer. Mr. Brackin stated that the Commission is in danger of setting up a discriminatory system between two or three different segments of the alcoholic beverage industry. He stated that there are numerous examples in the beer and spirits industry where retailers own directly or through their affiliates the trademarks that are wine, spirits, ales, and other alcoholic beverages. Mr. Brackin stated that the danger is that it will fall with the current litigation with *Mark Anthony* is that the Agency is setting up a discriminatory case to further fuel to challenge the existing rules and now there are new rules to challenge on the basis of equal protection. He commented that the rational basis is treating beer one way and treating wine and spirits another way. Mr. Brackin stated he agrees with Mr. Dow that these rules are a vast improvement at the start from the beginning of this process. He commented that the other members of the industry and staff have been helpful and these specific provisions as they relate to trademark are a property right. He stated that the Commission is restricting people's property rights when a rule states that a manufacturer cannot use a retailer's trademark. He believes a manufacturer can use a retailer's trademark when that product goes to an independent wholesaler and is made available on the market by a wholesaler to other retailers. Mr. Brackin stated that his concern is that manufacturers does not sell to retailers -- manufacturers sell to their wholesalers and wholesalers can choose to market that product to other retailers or not. He stated from a basic 3-tier tenant, the subsection of the rule does not make any sense because manufacturers do not sell to retailers. He stated his main concern is that TABC is setting itself up for further litigation with further losses and the fact that the Commission is restricting people's property rights which is separate and apart from the TABC permits.

Commissioner Weinberg asked Assistant General Counsel Wilson for comments after Mr. Brackin addressed the Commission.

Assistant General Counsel Wilson commented on §§45.73(e), 45.82, 45.110 and the provisions that deals with trade names and trademarks language that is stirring the discussion. He stated that §45.73 and §45.82 were not open during the rulemaking procedures, therefore there is no authority to do anything with them in the proceedings and would not require republication because it was not initially published and would require a separate rulemaking proceeding. He stated that Mr. Brackin's comments about the core of the litigation in this matter and the court's decision will decide what the Commission's authority is and if the Commission has to revisit the issue. Assistant General Counsel Wilson commented that he understands the policy issue that is involved in Mr. Brackin's concerns however from the rulemaking prospective

and under the Administrative Procedures Act; the Commission does not have the authority to render a decision to make the change.

Assistant General Counsel Wilson agreed with Mr. Brackin that §45.110(c)(7) has new language, however the unlawful inducements in the subsection deals with the use of a retailer trade names and trademarks on malt beverage labels. He stated that if the court decides §45.73 and §45.82 are unconstitutional and will require change, §45.110 will change as well. Assistant General Counsel Wilson added that he does not think it would affect the lawsuit.

Presiding Officer Cuevas asked Assistant General Counsel Wilson for the staff's recommendation. Assistant General Counsel Wilson recommended that the Commission adopt §45.110(c) (7) as requested.

Commissioner Weinberg quizzed Mr. Brackin if he had any problem with the Commission's adoption of §45.110(c) (3). Mr. Brackin answered in the affirmative.

Mr. James Davis came forward to address the Commission on behalf Beer Alliance of Texas on agenda items #10-15. Mr. Davis commented that the Beer Alliance of Texas supports the adoption of the rules.

Commissioner Weinberg asked Mr. Davis if he had any problems with the Commission's adoption of §45.110(c) (3). Mr. Davis answered in the affirmative. Presiding Officer Cuevas thanked Mr. Davis for his comments.

Mr. Keith Strama, General Counsel representing the Wholesale Beer Distributors of Texas (WBDT) addressed the Commission. Mr. Strama praised the General Counsel and staff for the work done on the rule issues. He stated that Texas is clearly a beckon model to other states on how to deal to rule issues. He commented that Executive Director Cook's report was a fantastic analysis of the import of the tied house position in how they can quickly degenerate into a cheap retailer coming into the market which complicates the structure that the state has tried to establish in policy. As he is speaking on behalf of the WBDT, thinks that TABC has it absolutely right on the rules, although there are refined modifications proposed by the craft brewers. Mr. Strama noted as referenced to the ordinary business transactions in 639 as TABC has stated repeatedly and publicly does not offer a basis for every type of agreement listed. He recognizes that several of those agreements may be legal and are not impacted by those rules, however under the umbrella are examples of many useful guides. He stated that the authority of TABC is present; WBDT is a product of the broader of the modifications. He stated that WBDT has the confidence in TABC's authority, focus and ability to find those improper agreements. Mr. Strama's opinion is that TABC has to verify the odds that they are not making it bad for the retailer. He posed a question if there is an issue with an agreement without reaching it or, are you connected properly without reaching it or are you following the 3-tier system. Mr. Strama answered stating that they are not following the 3-tier system and are not playing by the rules as everyone else, thus causing a huge disadvantage to everyone else in the market and an incredible disadvantage to craft brewers who will not have the connection with the retailer to get the shelf space unless you are a manufacturer who has a relationship with the retailer. He commented that this is the "heart" of the

3-tier system. The question he posed is does an agreement exist to manufacture for a retailer and the answer is “yes” because their trademark is being used. In concluding his comments, Mr. Strama stated that TABC and its staff does a great job, verification process is workable and WBDT is looking forward to a continued working relationship.

Jack Martin, Attorney, Jack Martin & Associates, stated that he had filed comments on behalf of HEB, addressed the Commission stating that he agrees with the comments previously made by Mr. Dewey Brackin. He stated that this issue has been filed in the courts that the Commission is treating products differentially than wine and distilled spirits. He commented that the Commission should not adopt a rule in contradiction to this until the legislature spoke to it, however he stated that is what the Commission did in 1994. Mr. Martin cited another issue in which he had a client with a malt beverage product that is no longer manufactured in the state based upon a rule, which inferred that a cheap product upon the marketplace and that was not the case. He stated that his client was making a product that fit the marketplace to sell. Mr. Martin commented that this “fear mongering”” really gets in his craw.

EXECUTIVE SESSION TO CONSULT WITH LEGAL COUNSEL REGARDING PENDING AND ANTICIPATED LITIGATION AGAINST THE AGENCY AND TO DELIBERATE THE APPOINTMENT, EMPLOYMENT, EVALUATION, DUTIES OF THE POSITION OF ADMINISTRATOR (Govt. Code §551.071, §551.074)

Presiding Officer Cuevas announced the regular open session of the Texas Alcoholic Beverage Commission will be recessed at this time, 11:31 a.m., July 22, 2014 and an executive session will be held to consult with Legal Counsel regarding pending and anticipated litigation against the Agency and to discuss the duties, responsibilities, and evaluation of the Administrator (Govt. Code §551.071, §551.074)

Presiding Officer Cuevas announced that the Texas Alcoholic Beverage Commission has concluded its Executive session and is now in open regular session. The date is July 22, 2014 and the time is 12:13 p.m. No final action, decision or vote was made in Executive session.

NEXT MEETING DATE: Tuesday, September 23, 2014

ADJOURN

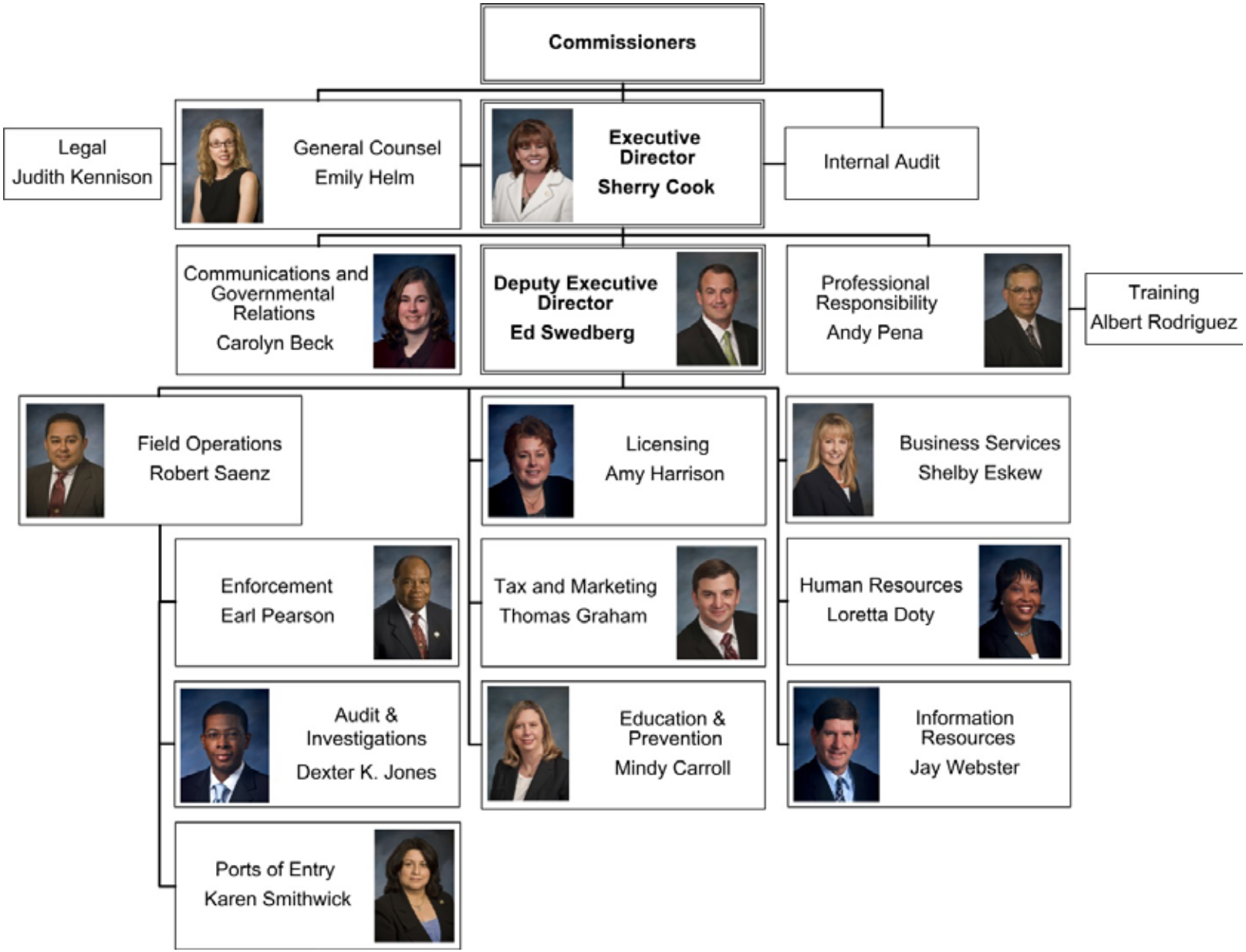
Presiding Officer Cuevas called for a motion to adjourn. Commissioner Steen made a motion. Commissioner Weinberg seconded. Presiding Officer Cuevas stated that the motion was made and seconded. The motion passes. Presiding Officer Cuevas announced that the meeting was adjourned at 1:35 p.m.

Attachment 1

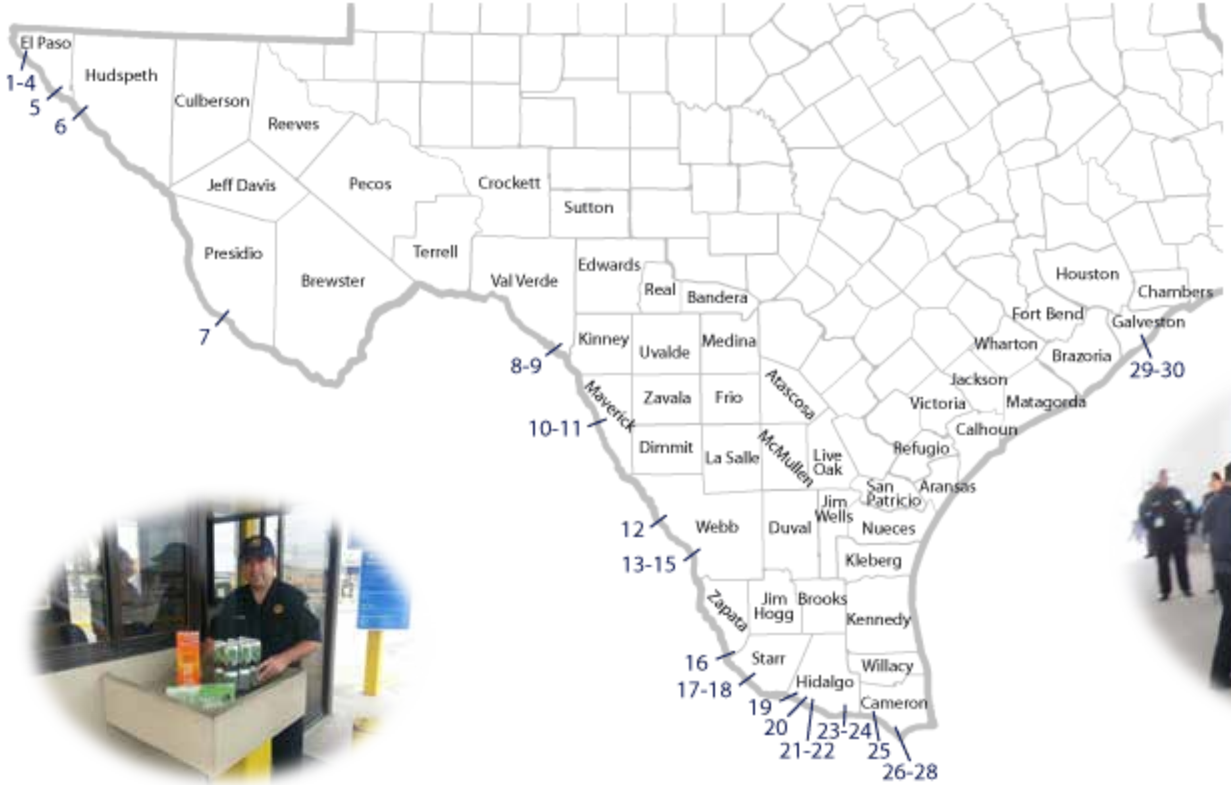
Commission Report: Administrator and Agency Activities, Budget Issues, Staff Achievements, Legislative Activities

Commission Meeting July 22, 2014
Executive Director's Report
Sherry Cook

Introductions



Follow-Up Seaports



Seaport: Update

Revenue
Actual January 2014 - June 2014
Estimates July - December

	Cigarette Tax	A/B Tax	Total
January	$ 5,019.00	$ 22,209.00	$ 27,228.00
February	$6,951.00	$ 24,184.00	$ 31,135.00
March	$6,702.00	$ 25,774.00	$ 32,476.00
April	$12,312.00	$ 37,109.00	$ 49,421.00
May	$11,970.00	$ 39,545.00	$ 51,515.00
June	$9,820.00	$ 38,456.00	$ 48,276.00
July	$8,328.00	$ 29,560.00	$ 37,888.00
August	$10,128.00	$ 35,950.00	$ 46,078.00
September	$8,328.00	$ 29,560.00	$ 37,888.00
October	$8,891.00	$ 31,561.00	$ 40,452.00
November	$9,564.00	$ 33,949.00	$ 43,513.00
December	$8,891.00	$ 31,561.00	$ 40,452.00
Total	$ 106,904.00	$ 379,418.00	$ 486,322.00

Less 2014 Costs	$ 306,062.00
Revenue Generated	$ 180,260.00

Texas Government Insider®
a publication of Strategic Partnerships, Inc.

Eight recent graduates commissioned as new TABC agents

The Texas Alcoholic Beverage Commission (TABC) recently commissioned eight new training academy graduates as TABC agents. The new graduates had previously attended law enforcement academies and are certified Texas peace officers.

Their eight weeks of training includes law enforcement and subjects such as organized crime on TABC-licensed premises, the Alcoholic Beverage Code and the Texas Penal Code. They also received training on the use of force, firearms, arrest and control tactics, driving procedures, communication skills and physical fitness.

Keynote speaker for the event was First Attorney General Daniel Hodge (pictured). Hodge spoke of the successful collaborative efforts between TABC and the Attorney General's Enforcement Division regarding major cases dealing with human trafficking, money laundering and narcotics.

These new agents will report to locations throughout the state in the coming weeks and work extensively with Field Training Officers to complete on-the-job training.

OJJDP

TEXAS

Enforcing the Underage Drinking Laws Program

Success Stories

NEWS FROM THE FIELD

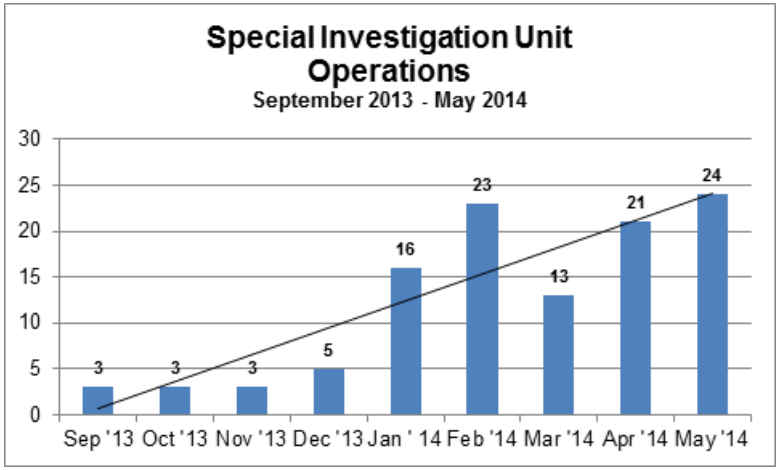
www.udetc.org

In April an article was posted on the Underage Drinking Enforcement Training Center's website (www.udetc.org) as a national success story. It describes innovative education programs untaken by the TABC's Education and Prevention Division.

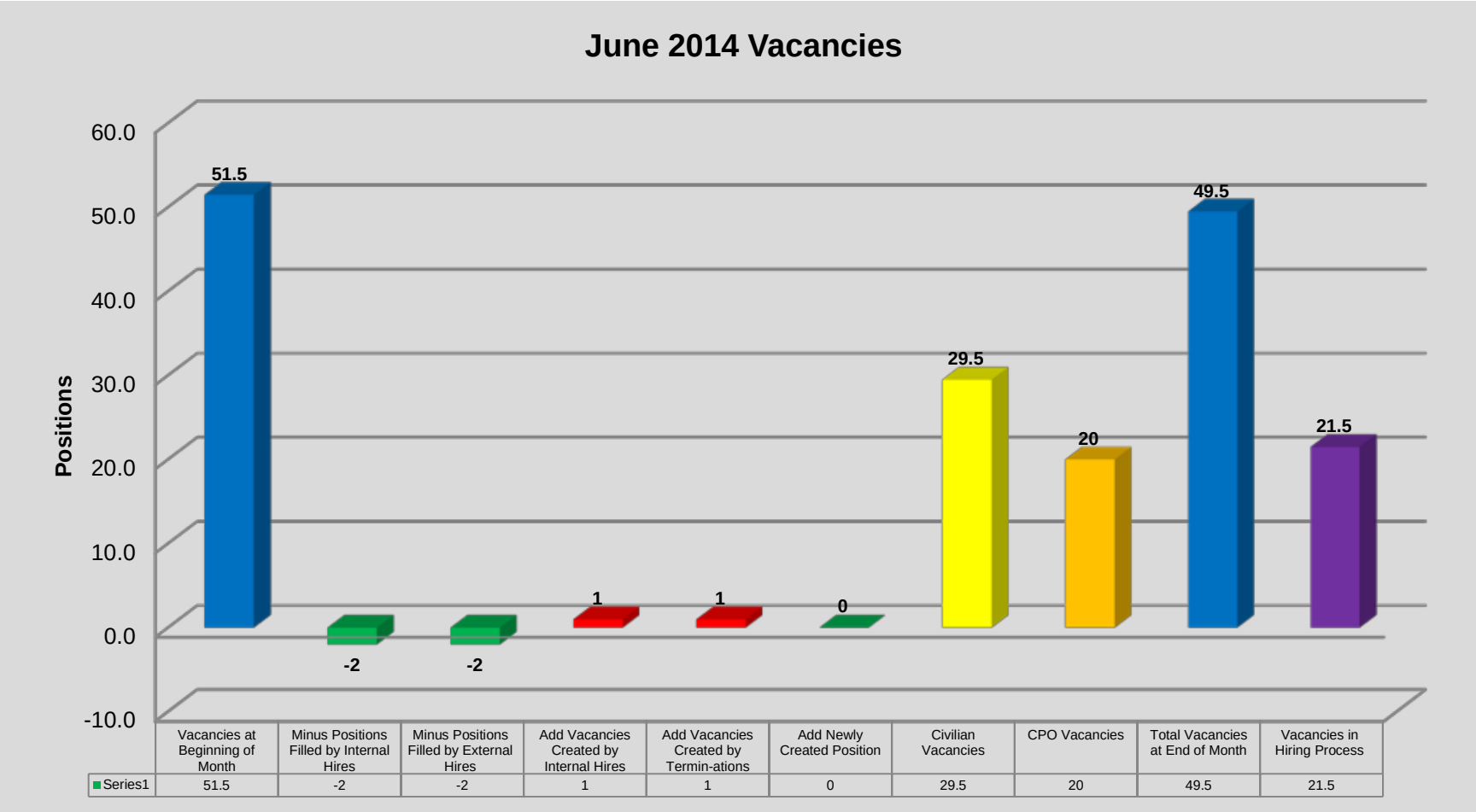
- False ID Campaign
  - Training Video
- Special Events Campaign
  - TABC Temporary Event
- Marketing Practices Campaign
  - Industry Guide
  - Public Service Announcements (PSA)

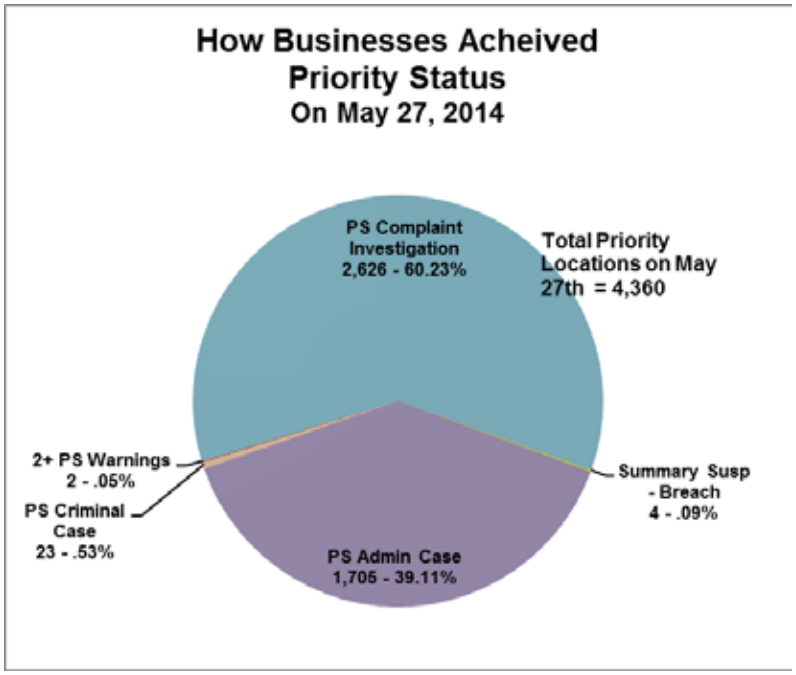
Accomplishments

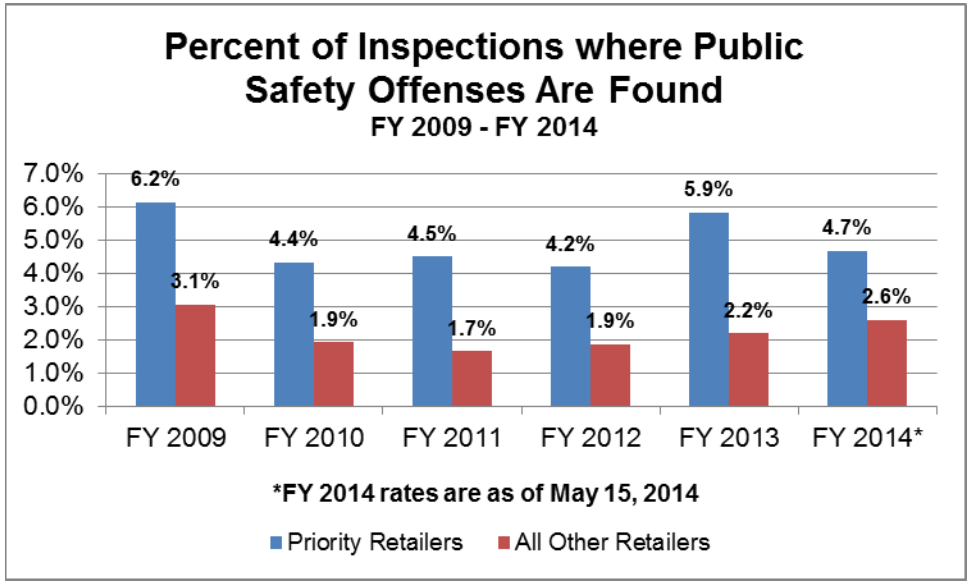
- Agents and auditors have achieved or exceeded a number of agency cumulative performance goals (100%+) for the year already – 3 months early. Goals exceeded include:
  - Priority Location Inspections (most notable at 153%)
  - Percent of licensed locations inspected (Enforcement)
  - Persons instructed
- This is the first time in recent years that the number of agency vacancies has dipped below the 50 mark.
- Key staff traveled to Houston on June 3rd to participate in the kick-off press conference for a multi-agency initiative to combat and help end Human Trafficking.
- SIU is continuing to increase operations at a sharp pace. SIU agents conducted 21 operations in April and another 24 operations in May, which represent an increase of 700 – 800 percent in operational volume since the opening months of the fiscal year.

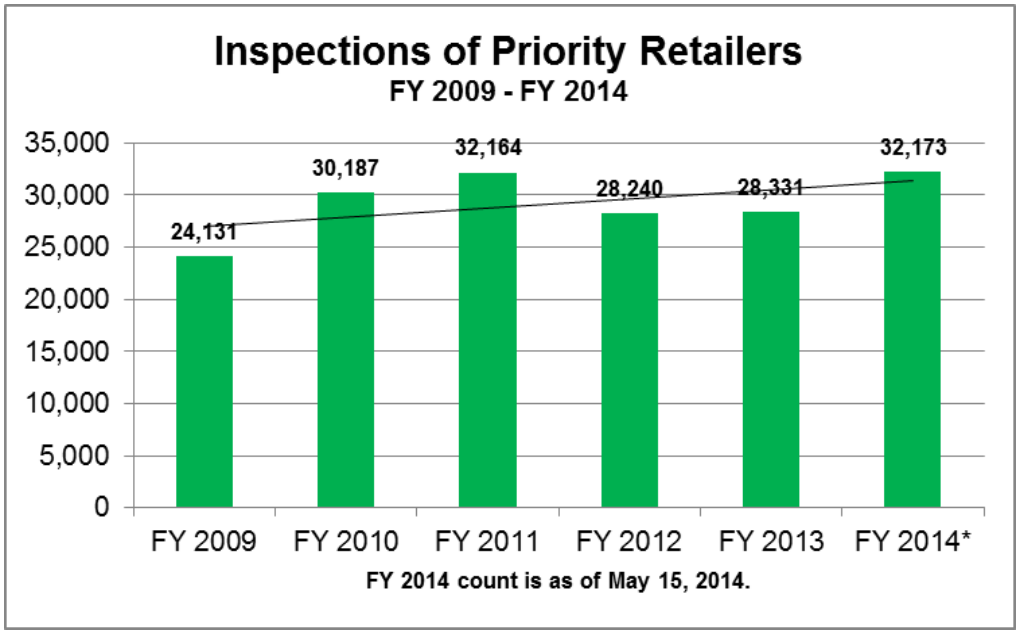


Staffing


June 2014 Vacancies
Positions
60.0
50.0
40.0
30.0
20.0
10.0
0.0
-10.0
51.5
-2
-2
1
1
0
29.5
20
49.5
21.5
Vacancies at Beginning of Month
Minus Positions Filled by Internal Hires
Minus Positions Filled by External Hires
Add Vacancies Created by Internal Hires
Add Vacancies Created by Termin-ations
Add Newly Created Position
Civilian Vacancies
CPO Vacancies
Total Vacancies at End of Month
Vacancies in Hiring Process
Series1
51.5
-2
-2
1
1
0
29.5
20
49.5
21.5


How Businesses Acheived
Priority Status
On May 27, 2014
PS Complaint Investigation 2,626 - 60.23%
Total Priority Locations on May 27th = 4,360
2+ PS Warnings 2 - .05%
PS Criminal Case 23 - .53%
Summary Susp - Breach 4 - .09%
PS Admin Case 1,705 - 39.11%

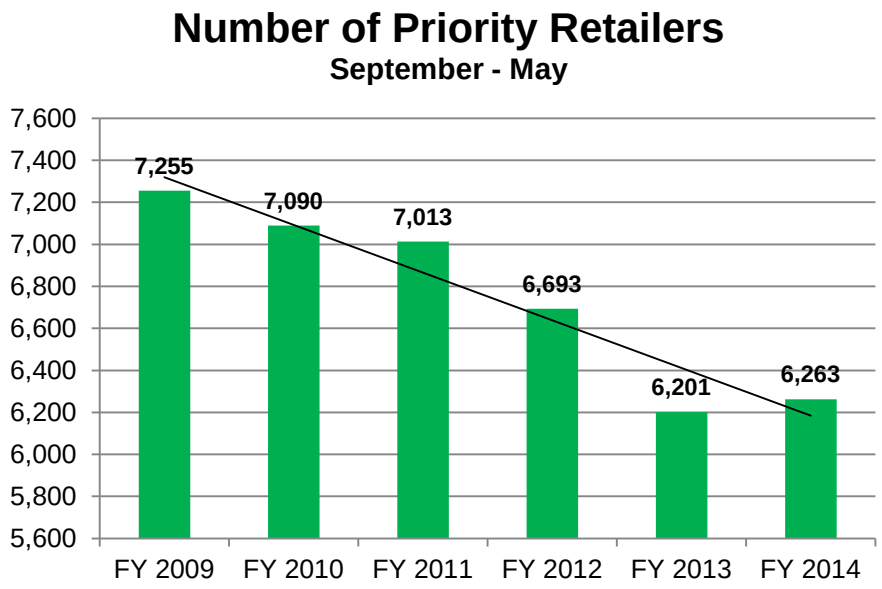

Percent of Inspections where Public Safety Offenses Are Found
FY 2009 - FY 2014
7.0%
6.0%
5.0%
4.0%
3.0%
2.0%
1.0%
0.0%
6.2%
3.1%
4.4%
1.9%
4.5%
1.7%
4.2%
1.9%
5.9%
2.2%
4.7%
2.6%
FY 2009
FY 2010
FY 2011
FY 2012
FY 2013
FY 2014*
*FY 2014 rates are as of May 15, 2014
Priority Retailers
All Other Retailers

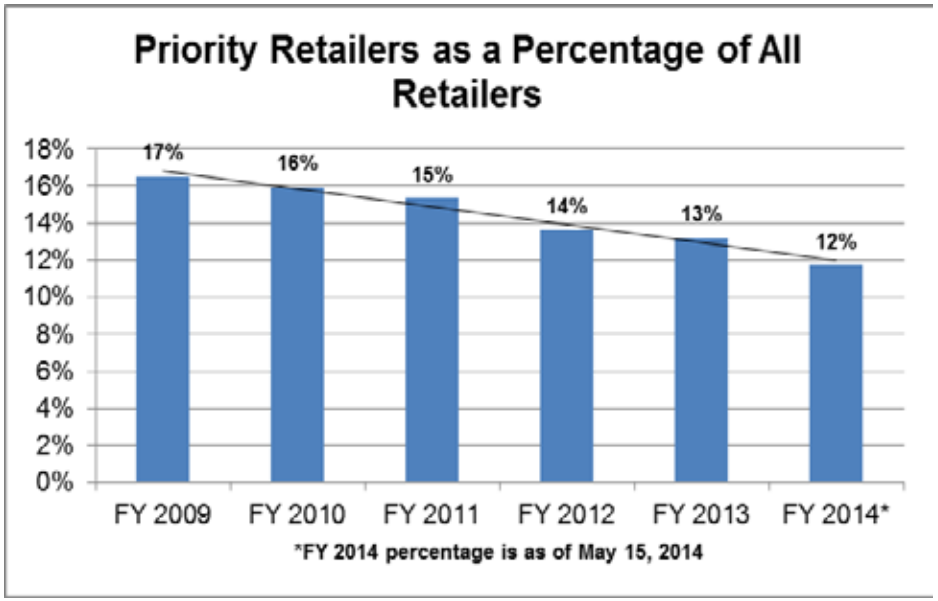

Inspections of Priority Retailers
FY 2009 - FY 2014
35,000
30,000
25,000
20,000
15,000
10,000
5,000
0
24,131
30,187
32,164
28,240
28,331
32,173
FY 2009
FY 2010
FY 2011
FY 2012
FY 2013
FY 2014*
FY 2014 count is as of May 15, 2014.

Trends

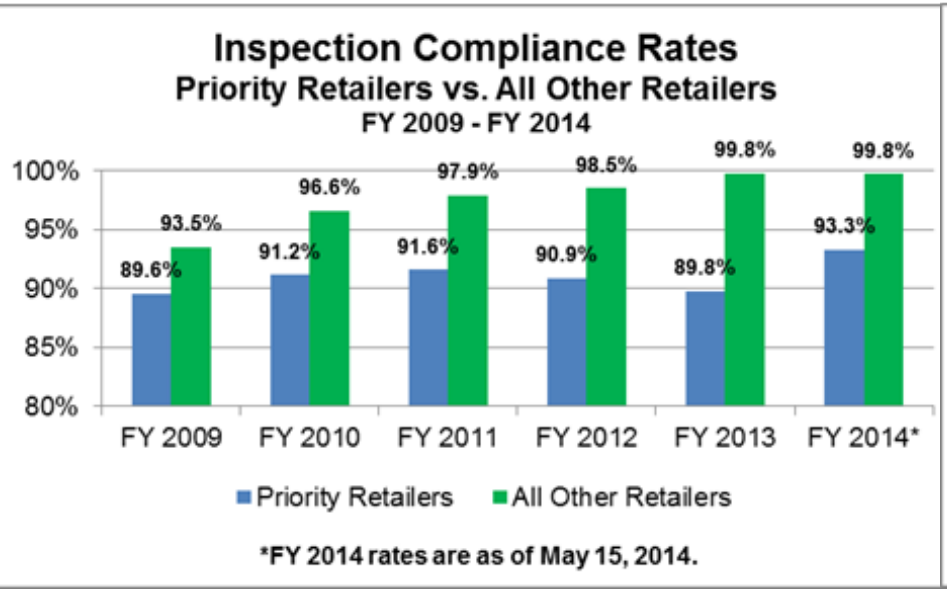
Trends

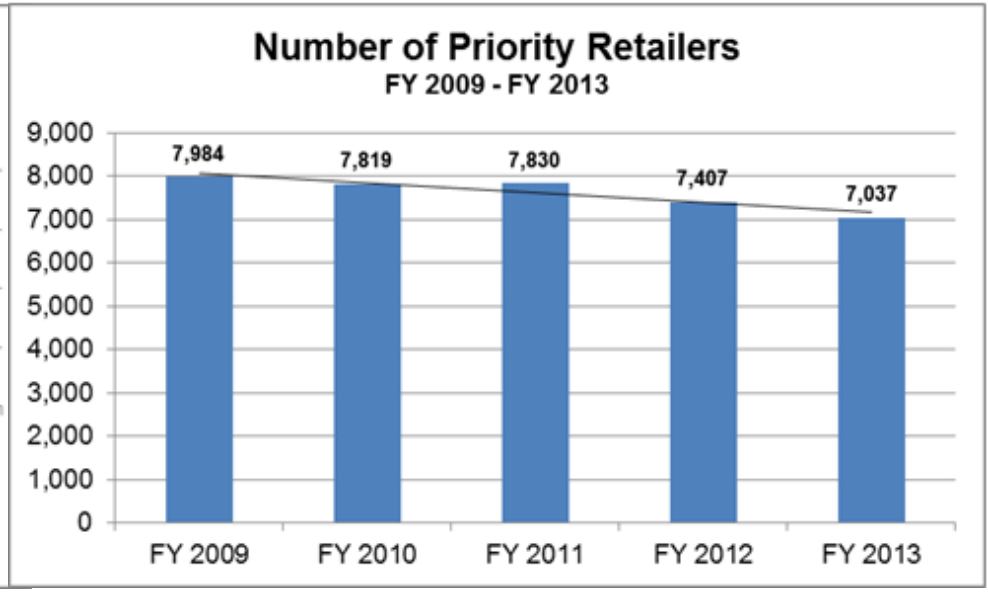
Priority Inspections as a Percentage of All Retail Inspections
60%
50%
40%
30%
20%
10%
0%
27%
35%
36%
41%
40%
49%
FY 2009
FY 2010
FY 2011
FY 2012
FY 2013
FY 2014


Number of Priority Retailers
September - May
7,600
7,400
7,200
7,000
6,800
6,600
6,400
6,200
6,000
5,800
5,600
7,255
7,090
7,013
6,693
6,201
6,263
FY 2009
FY 2010
FY 2011
FY 2012
FY 2013
FY 2014

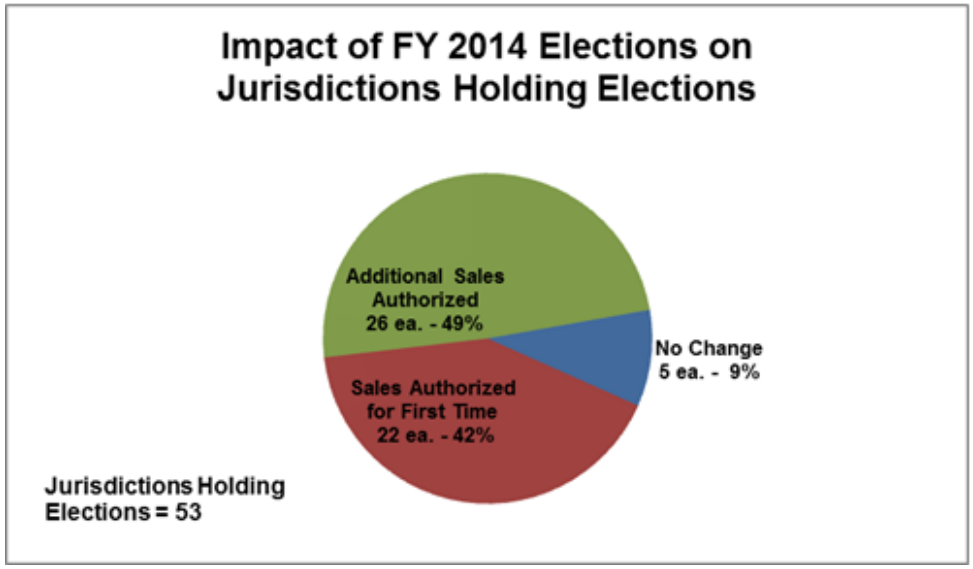

Priority Retailers as a Percentage of All Retailers
18%
16%
14%
12%
10%
8%
6%
4%
2%
0%
17%
16%
15%
14%
13%
12%
FY 2009
FY 2010
FY 2011
FY 2012
FY 2013
FY 2014*
*FY 2014 percentage is as of May 15, 2014

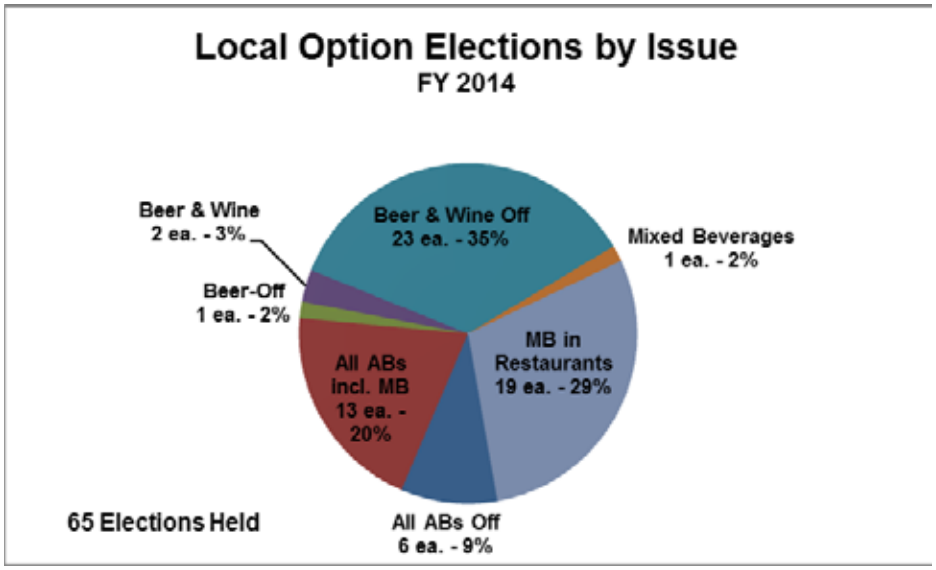
Trends


Inspection Compliance Rates
Priority Retailers vs. All Other Retailers
FY 2009 - FY 2014
100%
95%
90%
85%
80%
89.6%
93.5%
91.2%
96.6%
91.6%
97.9%
90.9%
98.5%
89.8%
99.8%
93.3%
99.8%
FY 2009
FY 2010
FY 2011
FY 2012
FY 2013
FY 2014*
Priority Retailers
All Other Retailers
*FY 2014 rates are as of May 15, 2014.


Number of Priority Retailers
FY 2009 - FY 2013
9,000
8,000
7,000
6,000
5,000
4,000
3,000
2,000
1,000
0
7,984
7,819
7,830
7,407
7,037
FY 2009
FY 2010
FY 2011
FY 2012
FY 2013

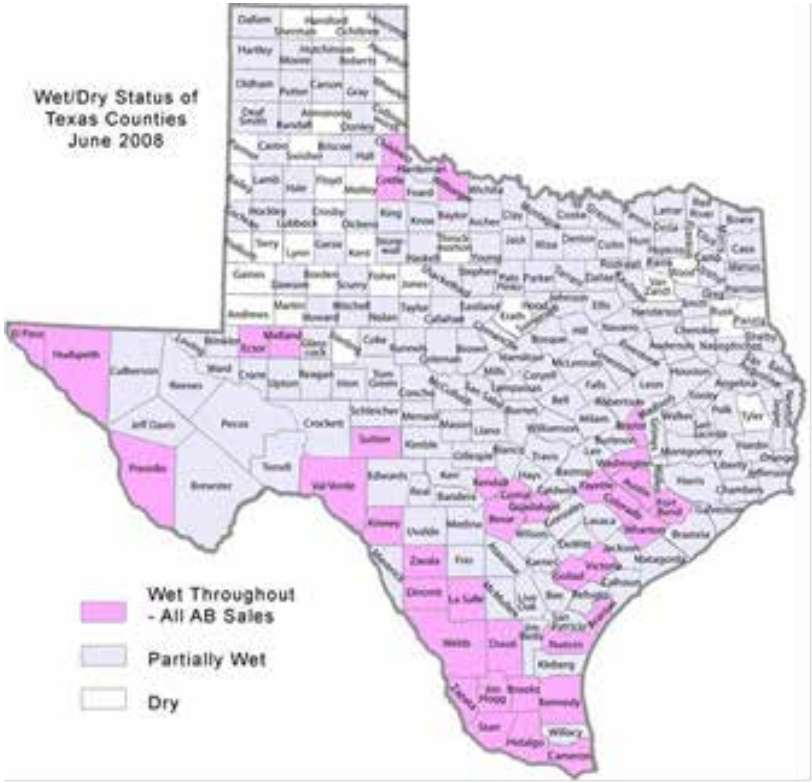
Local Option Elections



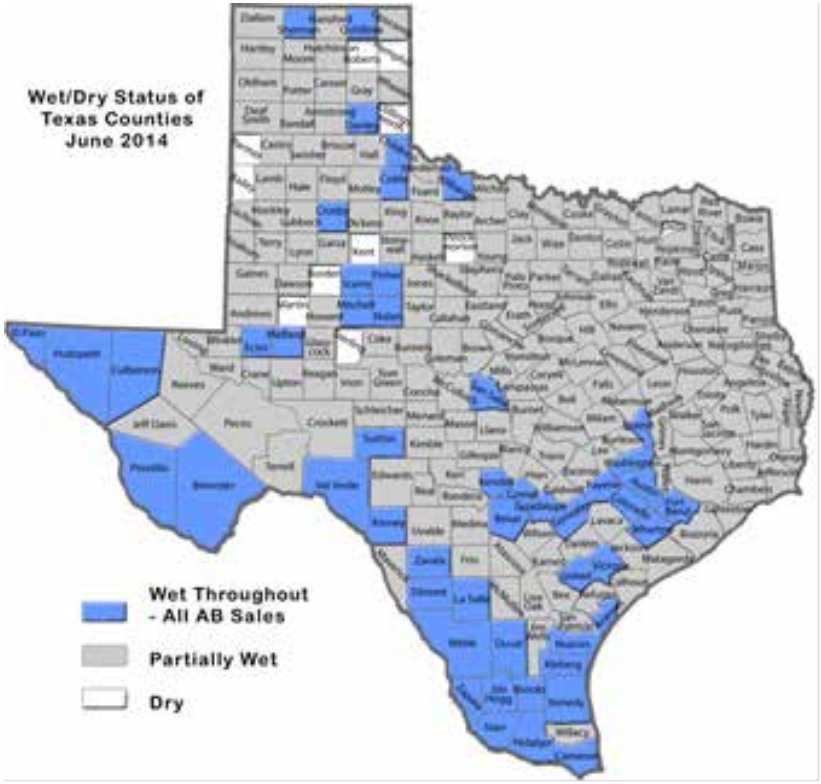


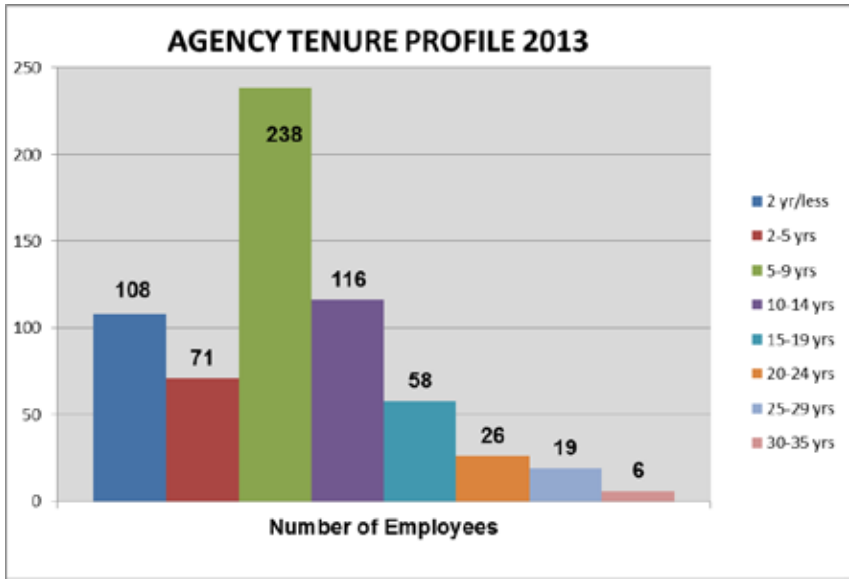
Local Option Elections

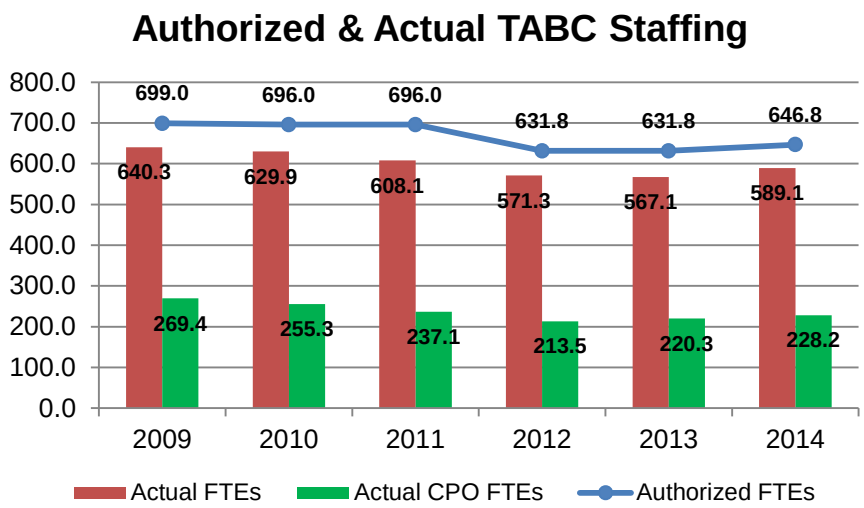
June 2008
38 Counties Totally Wet for All Sales
35 Totally Dry Counties



June 2014
51 Counties Totally Wet for All Sales
11 Totally Dry Counties





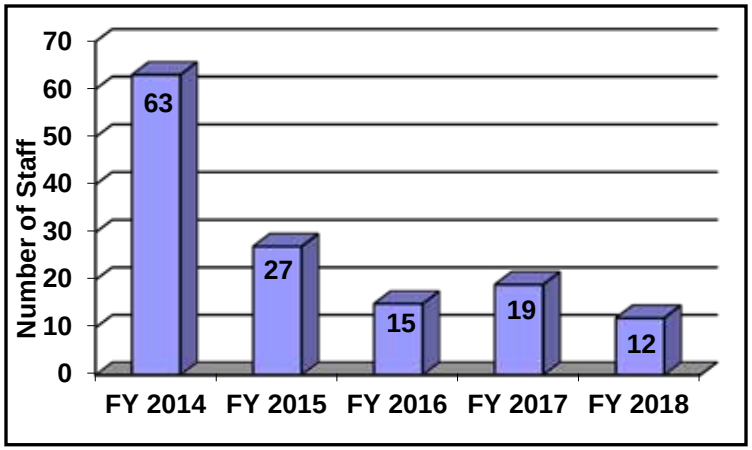


*PSP Public Safety Positions

Driving Factors Behind 2016-2017 LAR

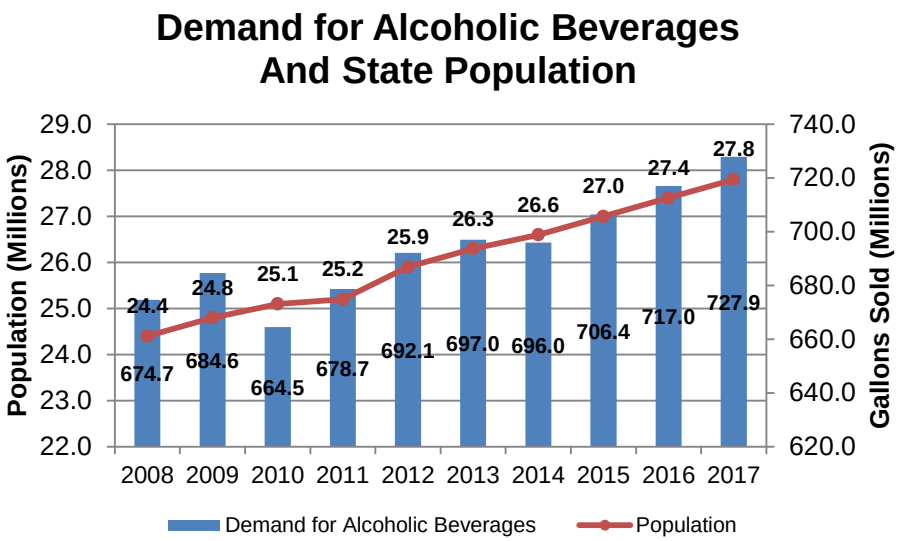
- Civilian employees lag 14-20% behind other state agency employees.
- Statutorily employees cannot supplement income with secondary employment who hold a permit.
- Facility Lease Increases (-7 PSP)*
- Fuel Cost Increases (-4 PSP)
- Personnel Operating Costs - Lump Sum (-6 PSP)
- Personnel Operating Costs – Insurance (-12 PSP)

-29 PSP FY16 – FY17 vs. -18 FY14 – FY15



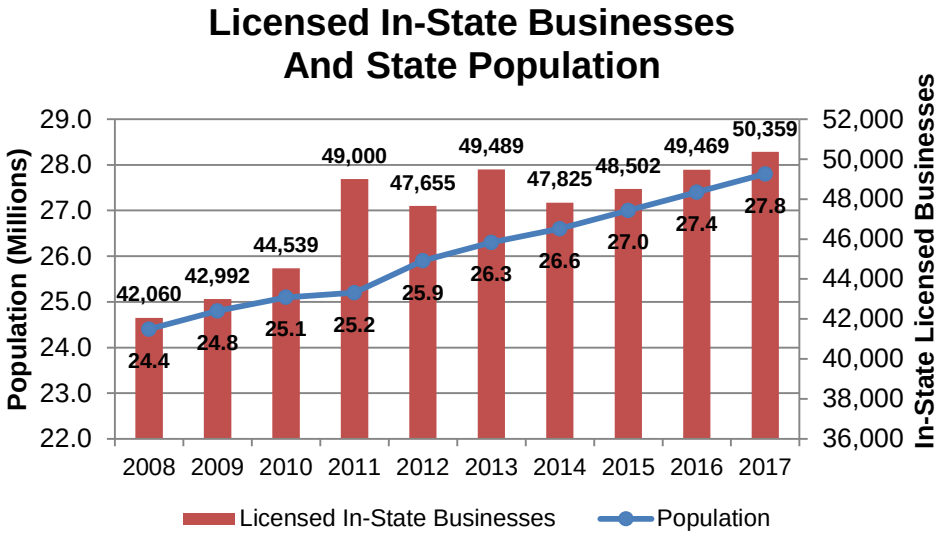
Driving Factors Behind 2016-2017 LAR

- The state's population is expected to grow at an average rate of 1.5 – 2.0% annually.
- The comptroller projects the Texas economy to grow by 3.7% annually.
- TABC projects the demand for alcoholic beverages to grow at roughly 1.5% annually.



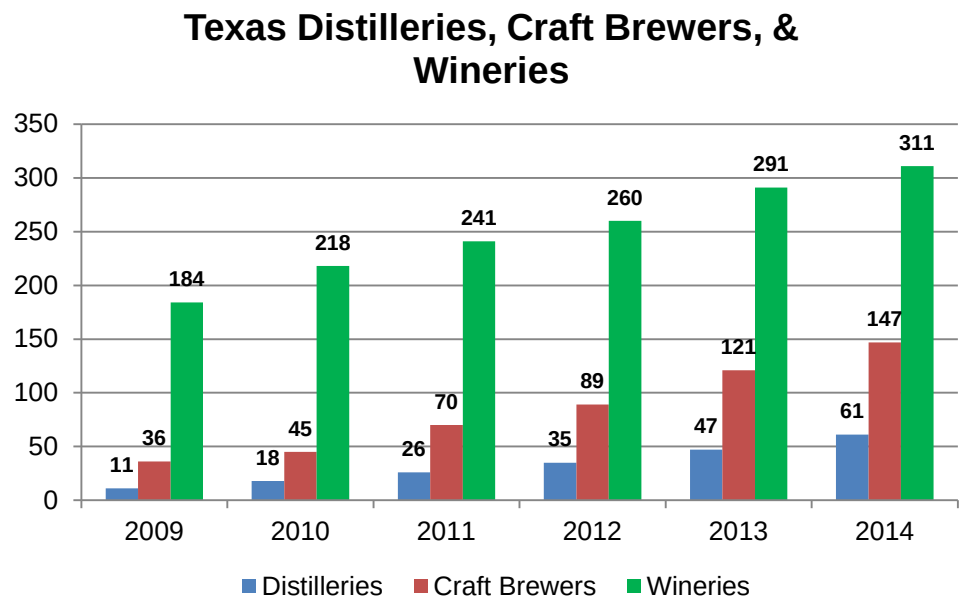
Driving Factors Behind 2016-2017 LAR

- 47,825 licensed locations in Texas, 46,914 are licensed retailers.
- 455 licensed breweries, distilleries, or wineries.
- Despite a small decline in number of licensed business in FY14, TABC expects the number of licensed retailers to continue to grow by an average of 1.5 – 2.0% annually.



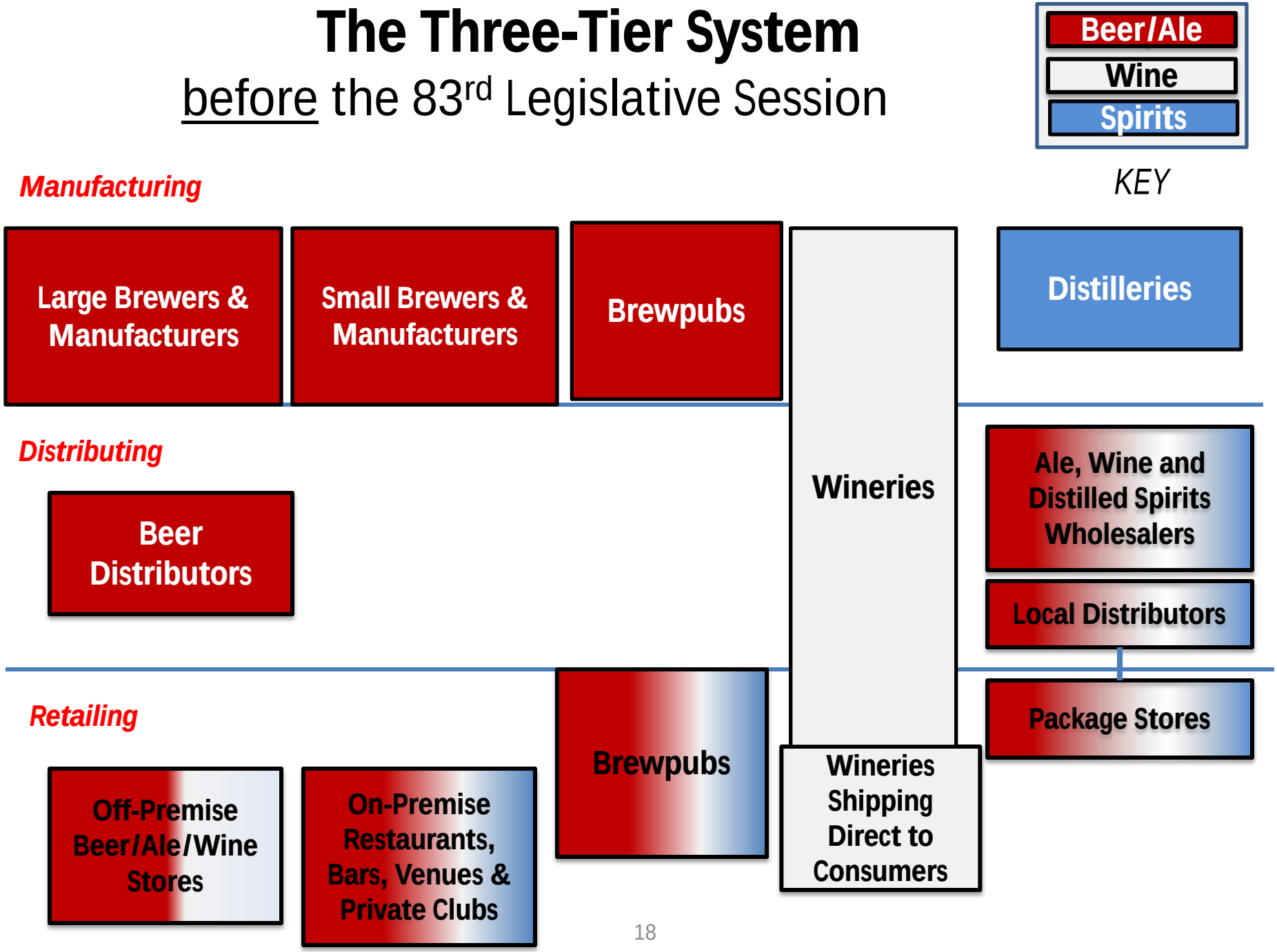
Driving Factors Behind 2016-2017 LAR

- Wineries grew from 291 to 311 in the past 12 months.
- Distilleries grew from 47 to 61 in the past 12 months.
- The number of breweries and brewpubs increased from 127 to 153 in the past 12 months.
- **Note:** Only 6 Texas breweries produce more than 125,000 barrels per year.



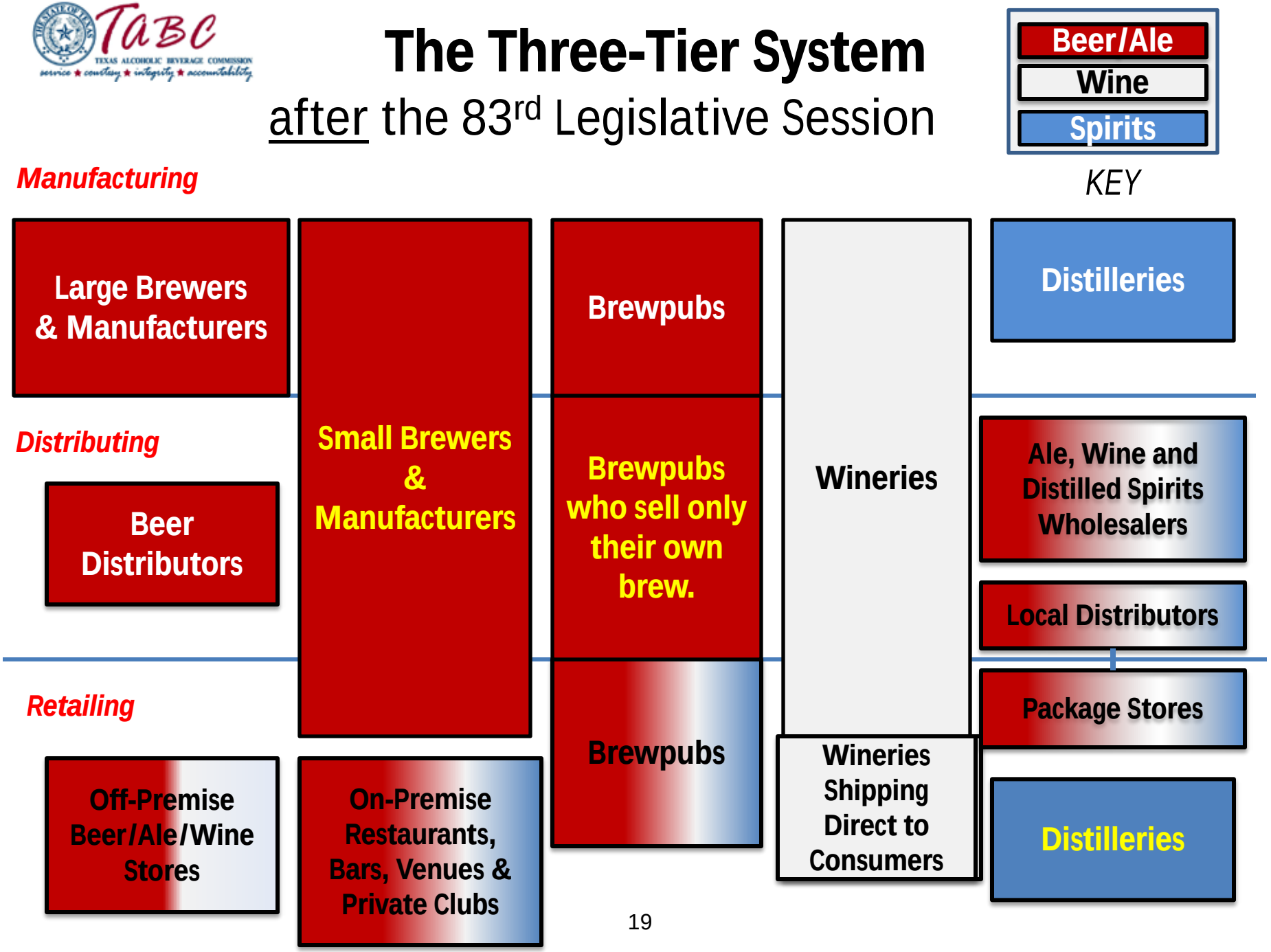
The Three-Tier System

before the 83rd Legislative Session



The Three-Tier System

after the 83rd Legislative Session



TABC
TEXAS ALCOHOLIC BEVERAGE COMMISSION
service ★ courtesy ★ integrity ★ accountability
COMMISSIONER
STEVEN WEINBERG, MD, JD
CHAIRMAN
JOSE CUEVAS, JR.
COMMISSIONER
IDA CLEMENT STEEN

Questions?

Attachment 2

Approval of the FY 2015 Operating Budget

TEXAS ALCOHOLIC BEVERAGE COMMISSION

Approval of FY 2015 Operating and Capital Budget

FY 2015 Operating and Capital Budget

Budget by Strategy	**FY 2015**
A.1.1. Enforcement	$25,218,711
B.1.1. Licensing and Investigation	4,550,407
C.1.1. Compliance Monitoring	6,178,307
C.2.1. Ports of Entry	5,226,015
D.1.1. Central Administration	2,592,267
D.1.2. Information Resources	2,634,068
D.1.3. Other Support Services	554,907
Total, TABC Budget	**$46,954,682**

Budget By Method of Finance	
General Revenue – Regular Appropriations	$43,361,135
General Revenue – Data Center Consolidation	455,503
General Revenue – Schedule A & B Salary Increase	541,418
General Revenue – Schedule C Salary Increase	2,542,348
General Revenue – UB Capital	199,300
General Revenue – Lapse DCC	(165,022)
Appropriated Receipts	20,000
Total, TABC Budget	**$46,954,682**

FY 2015 Operating Budget

Budget by Object of Expense	FY 2015	
1001 Salaries and Wages	$33,760,473	71.90%
1002 Other Personnel Costs	1,311,220	2.79%
2001 Professional Fees	1,307,890	2.79%
2002 Fuels and Lubricants	1,008,560	2.15%
2003 Consumables Supplies	280,474	0.60%
2004 Utilities	431,371	0.92%
2005 Travel	674,179	1.44%
2006 Rent – Building	2,172,125	4.63%
2007 Rent – Machine and Other	795,725	1.69%
2009 Other Operating Expense	4,513,140	9.60%
5000 Capital Expenditures	699,525	1.49%
Total, TABC Budget by Object of Expense	**$46,954,682**	**100.00%**

FY 2015 Capital Budget

TABC Capital Budget	
Acquisition of Information Resource Technologies	
PC Replacement/Mobile Data Computers - Leased	$646,190
Hardware/Software Acquisitions	427,148
Case Management	259,984
Total, Acquisition of Information Resource Technologies	$1,333,322
Fleet Acquisition - Replacement	699,525
Public Safety Equipment - Replacement	179,419
Data Center Consolidation	615,089
Total, TABC Capital Budget	**$2,827,355**

Questions?

Attachment 3

Approval of the FY 2016-17 Legislative Appropriations Request

TEXAS ALCOHOLIC BEVERAGE COMMISSION

Legislative Appropriations Request FY 2016-2017

Legislative Appropriations Request
FY 2016 – FY 2017

General Revenue Biennial Base Request $94,262,596

General Revenue Base Request	FY 2016	FY 2017	Biennial Total
A.1.1. Enforcement	$25,614,543	$24,988,221	$50,602,764
B.1.1. Licensing and Investigation	4,506,170	4,566,788	9,072,958
C.1.1. Compliance Monitoring	6,420,978	6,484,343	12,905,321
C.2.1. Ports of Entry	5,314,094	5,360,406	10,674,500
D.1.1. Central Administration	2,321,407	2,323,862	4,645,269
D.1.2. Information Resources	2,612,055	2,642,213	5,254,268
D.1.3. Other Support Services	551.943	555,573	1,107,516
Total, TABC GR Base Request	$47,341,190	$46,921,406	$94,262,596

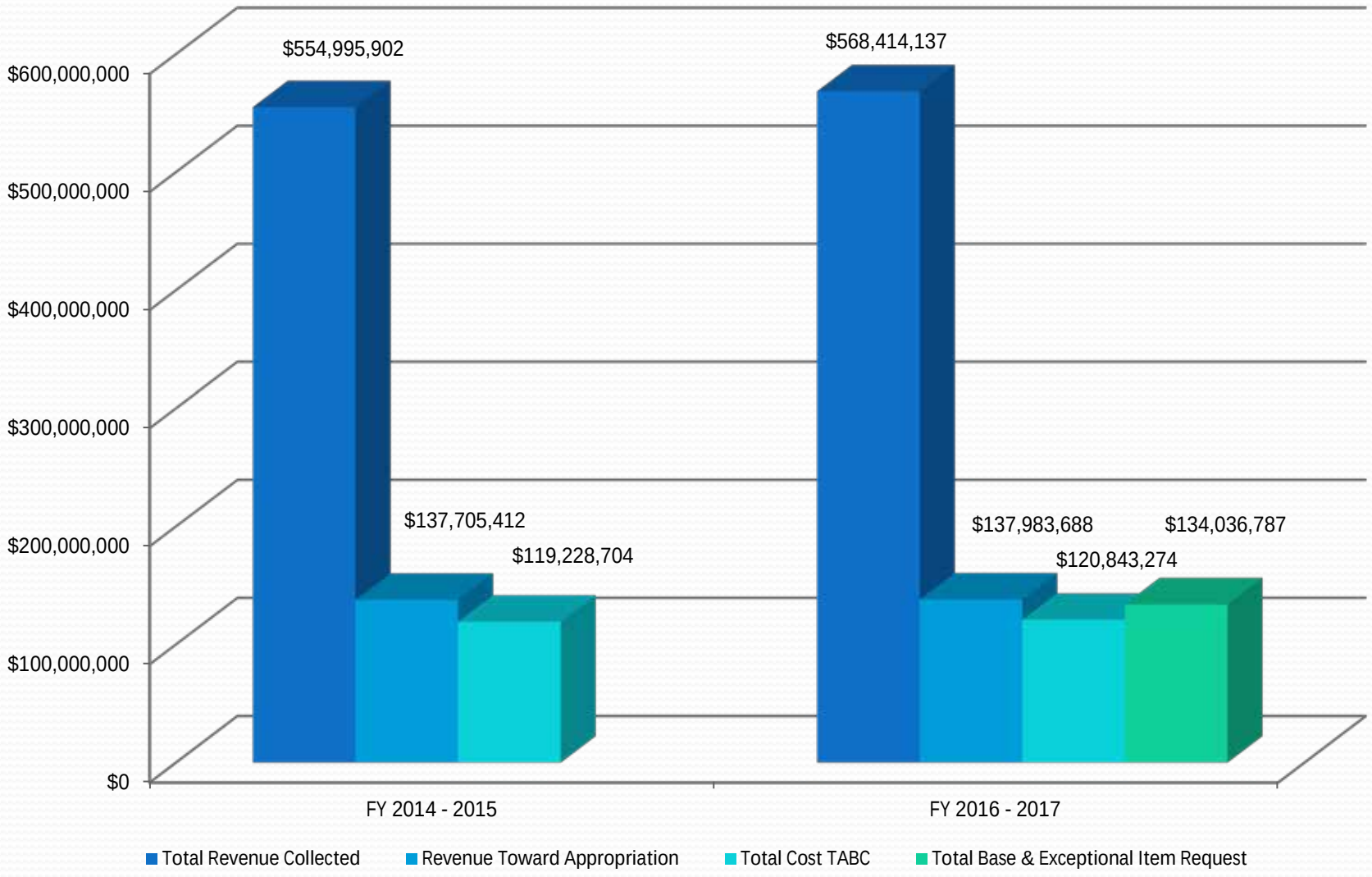
Legislative Appropriations Request
FY 2016 – FY 2017

	FY 2016	FY 2017	Biennial Total
Total, TABC GR Base Request	$47,341,190	$46,921,406	$94,262,596
GR Exceptional Item Request			
1. Career Ladder / Retention Plan	1,749,561	1,753,671	3,503.232
2. Facility Lease Increases	317,833	354,640	672,473
3. Fuel Cost Increases	196,342	196,342	392,684
4. Public Safety Programs	1,995,618	1,609,327	3,604,945
5. Public Safety Equipment - Radios	470,382	1,018,750	1,489,132
6. Public Safety Equipment - Vehicles	240,000	240,000	480,000
7. IT Improvements	722,000	352,000	1,074,000
8. CAPPS	105,967	132,277	238,244
9. Personnel Costs: Long/Haz/Lump	280,290	300,019	580,309
10. Personnel Costs: Insurance/Retirement	525,123	533,371	1,058,494
11. Grayson College Reduction	50,000	50,000	100,000
Total, GR Exceptional Item Request	**$6,653,116**	**$6,540,397**	**$13,193,513**
Total, TABC GR Request	**$53,994,306**	**$53,461,803**	**$107,456,109**

Legislative Appropriations Request
FY 2016 – FY 2017

	FY 2016	FY 2017	Biennial Total
General Revenue Base Request	**$47,341,190**	**$46,921,406**	**$94,262,596**
General Revenue Exceptional Request	**6,653,116**	**6,540,397**	**13,193,513**
Other Funds (Base Request)			
Federal Funds	0	0	0
Criminal Justice Grants	0	0	0
Appropriated Receipts	20,000	20,000	40,000
Total, Other Funds in Base Request	**$20,000**	**$20,000**	**$40,000**
Total, TABC Request	**$54,014,306**	**$53,461,803**	**$107,496,109**

Texas Alcoholic Beverage Commission
Revenue Collections Compared to General Revenue Appropriated Levels



10% Biennial Base Reduction Options Schedule

10% Biennial Base Reduction Options Schedule Item #1

5% Reduction of Staff and Offices	$4,404,753
– 39 FTE's	
– Strategies Affected:	
– A.1.1. Enforcement	$2,443,449
– B.1.1. Licensing and Investigation	376,621
– C.1.1. Compliance and Monitoring	1,303,243
– C.2.1. Ports of Entry	281,440
	$4,404,753

10% Biennial Base Reduction Options Schedule Item #2

2.5% Reduction of Staff	$2,202,376
– 24 FTE's	
– Strategies Affected:	
– A.1.1. Enforcement	$1,291,418
– B.1.1. Licensing and Investigation	197,548
– C.1.1. Compliance and Monitoring	544,546
– C.2.1. Ports of Entry	168,864
	$2,202,376

10% Biennial Base Reduction Options Schedule Item #3

2.5% Reduction of Staffing	$2,202,376
– 25 FTE's	
– Strategies Affected:	
– A.1.1. Enforcement	$795,610
– B.1.1. Licensing and Investigation	192,058
– C.1.1. Compliance and Monitoring	1,102,132
– C.2.1. Ports of Entry	112,576
	$2,202,376

10% Biennial Base Reduction Options Schedule Totals

Total of Base Reduction Options Schedule	$8,809,506

- 88 FTE's
- Strategies Affected:

– A.1.1. Enforcement	$4,530,478
– B.1.1. Licensing and Investigation	766,227
– C.1.1. Compliance and Monitoring	2,949,921
– C.2.1. Ports of Entry	562,880
	$8,809,506

Questions?

Attachment 4

Approve Publication of Proposed Amendments to Rule §36.1, Possession and Sale of Firearms on Licensed Premises

July 22, 2014 Agenda Item 9.
Approve Publication of Proposed Amendments to Rule §36.1, Possession and Sale of Firearms on Licensed Premises.

The Texas Alcoholic Beverage Commission (commission) proposes amendments to §36.1, relating to Possession and Sale of Firearms on Licensed Premises, to cite statutory authority, to provide definitions, and to revise standards both for off-premises and on-premises locations generally, and for gun shows, historical reenactments and ceremonial display specifically.

The proposed amendments introduce new subsections and therefore the proposed subsections do not match existing subsections covering the same general topics.

Proposed subsection (a) is new and cites statutory authority, states the general prohibition on a permittee or licensee knowingly allowing a person to possess a firearm in a building on a licensed premises, and references the exceptions to that general prohibition.

Proposed subsection (b) is new and defines "firearm" and "licensed premises".

Proposed subsection (c) is new and cites the specific provisions of the Alcoholic Beverage Code that provide exceptions to the general prohibition referenced in proposed subsection (a) of this section, and references the proposed subsections dealing with certain firearms sales, firing ranges and gun shows at on-premises locations.

Proposed subsections (d) – (f) address on-premises locations that are currently addressed in subsection (c). Proposed subsection (f) specifically addresses gun shows, which are currently addressed in subsection (a).

Proposed subsection (d) provides the requirements for a location that has a license or permit authorizing the on-premises consumption of alcoholic beverages and that allows the routine sale of firearms as part of its daily business operations. It requires that the location has a firearms license and secures the firearms. It allows for the sale or possession of firearms only in a portion of the location that has been excluded from the licensed premises.

Proposed subsection (e) provides the requirements for a location that has a license or permit authorizing the on-premises consumption of alcoholic beverages and that allows the operation of a firing range at the location. It requires that the location meet all applicable federal, state and local requirements for the operation of a firing range, and that it establishes and enforces safety guidelines regarding the use of firearms. The areas

where firearms are possessed or discharged and where alcoholic beverages are sold or possessed must be separate.

Proposed subsection (f) provides the requirements for a location that has a license or permit authorizing the on-premises consumption of alcoholic beverages and that allows a gun or firearms show or display. The location must be owned or leased by a governmental entity or a nonprofit civic, religious, charitable, fraternal or veterans organization. The location may be used for a gun or firearms display or show only on an occasional basis, and a written agreement between the permittee and the operator of the show or display containing certain provisions must be approved by the commission 30 days prior to the event.

Proposed subsection (g) addresses off-premises locations that are currently addressed in subsection (b). It requires the license or permit holder to have a federal firearms license, provides that the firearms be secured, and does not allow the sale of alcoholic beverages in an area where the firearms for sale are readily accessible.

Proposed subsection (h) contains the same conditions for historical reenactments that are currently addressed in subsection (d).

Proposed subsection (i) addresses ceremonial displays, which are currently addressed in subsection (c). The proposal provides that a firearm may be ceremonially displayed on a licensed premises only if it is in the possession of the permittee or licensee, the firearm is disabled, and there is no live ammunition for the firearm on the licensed premises.

Section 36.1 was also reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for readoption each of its rules. The commission has determined that the need for the section continues to exist but that it should be amended to provide clearer guidance about prohibited activities.

Martin Wilson, Assistant General Counsel, has determined that for each year of the first five years that the proposed amendments will be in effect, there will be no fiscal impact on state or local government attributable to the amendments.

It is unclear if the proposed amendments will have any fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission. It is possible that some locations that are required to segregate firearms and alcohol, but do not already do so, may incur some costs to come into compliance. However, segregating alcohol and firearms in those situations is actually required by Alcoholic Beverage Code §11.61(e) and §61.71(f), which require the commission to cancel the permit or license if

the permittee or licensee knowingly allows a person to possess a firearm on the licensed premises.

There is no anticipated negative impact on local employment.

Mr. Wilson has determined that for each year of the first five years that the proposed amendments will be in effect, the public will benefit because the section will provide clearer up-front guidance to the regulated community, thereby reducing uncertainty.

Comments on the proposed amendments may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, or by facsimile transmission to (512) 206-3280. They may also be submitted electronically through the commission's public website at http://www.tabc.state.tx.us/laws/proposed_rules.asp. Comments will be accepted for 30 days following publication in the Texas Register.

The staff of the commission will hold a public hearing to receive oral comments on the proposed amendments on Tuesday, August 19, 2014 at 1:30 p.m. in the commission meeting room at the commission's headquarters, which is located at 5806 Mesa Drive in Austin, Texas.

The proposed amendments are authorized by Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and by Government Code §2001.039, which requires the agency to periodically review its rules to determine whether the need for them continues to exist.

The proposed amendments affect Alcoholic Beverage Code §§5.31, 11.61 and 61.715.38, and Government Code §2001.039.

§36.1 Possession and Sale of Firearms on Licensed Premises.

(a) This section relates to Alcoholic Beverage Code §§5.31, 11.61(e), (f) and (i), and 61.71(f), (g) and (j). Pursuant to Alcoholic Beverage Code §§11.61(e) and 61.71(f) and except as allowed by those sections of the Code or by this section, a permittee or licensee may not knowingly allow a person to possess a firearm in a building on a licensed premises.

(b) As used in this section, "firearm" has the meaning given in Penal Code §46.01(3) , and "licensed premises" means a premises that has a permit or license authorizing the sale, service or consumption of alcoholic beverages.

(c) Except as allowed under the exemptions in Alcoholic Beverage Code §11.61(e)(1)–(4) or 61.71(f)(1)-(4), the possession or sale of firearms at a location that has a license or permit authorizing the on-premises consumption of alcoholic beverages is allowed only under the conditions prescribed in subsections (d), (e) or (f) of this section. Firearms sales at such locations are addressed in subsection (d), firing ranges are addressed in subsection (e), and gun or firearms shows are addressed in subsection (f).

~~[(a) Gun Shows. A permittee/licensee may use or allow a portion of the grounds, buildings, vehicles and appurtenances of the licensed premises for the use of gun shows if the permittee/licensee:~~

~~(1) suspends all sales, complimentary offers and consumption of all alcoholic beverages during the gun show including time required for preparation or set-up and dismantling of the gun show; and~~

~~(2) operates its licensed premises at a facility regularly used for special functions, directly or indirectly, under a lease, concession or similar agreement from a governmental entity or legally formed and duly recognized civic, religious, charitable, fraternal or veterans organization.]~~

(d) A location that has a license or permit authorizing the on-premises consumption of alcoholic beverages may only allow the routine sale of firearms as part of its daily business operations if:

(1) the location has a federal firearms license;

(2) the firearms for sale are possessed and sold only on or in a portion of the grounds, buildings or appurtenances of the location that have been excluded from the licensed premises by designation in a diagram that has been approved by the commission under Alcoholic Beverage Code §11.49(b); and

(3) the firearms for sale are either:

(A) disabled and not readily convertible for use; or

(B) are secure from the general public and **are** only accessible by employees of the person or entity offering the firearms for sale.

~~[(b) Off-Premise Retailers and Gun Sales. The holder of a retail dealer's off-premise license, a wine and beer retail dealer's off-premise permit, a wine only package store or package store permit may allow the sale or offer for sale firearms at the licensed location if:~~

~~(1) alcoholic beverages are not being displayed or sold in any area where firearms are readily accessible or can be viewed; and~~

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~~(2) the firearms are secure from the general public and are only accessible by employees of the person or entity offering the firearms for sale.]~~

(e) A location that has a license or permit authorizing the on-premises consumption of alcoholic beverages may only allow the operation of a firing range at the location if:

(1) the location meets all applicable federal, state orand local requirements for the operation of a firing range;

(2) firearms are possessed or discharged only in a portion of the grounds, buildings or appurtenances of the location that have been excluded from the licensed premises by designation in a diagram that has been approved by the commission under Alcoholic Beverage Code §11.49(b);

(3) alcoholic beverages are not sold or possessed in any area where firearms are readily accessible; and

(4) the owner or operator of the location establishes and enforces safety guidelines involving the use of firearms, including but not limited to a requirement that firearms may not be possessed or discharged at the location after the consumption of alcoholic beverages on the licensed premises.

~~[(c) On Premise Possession of Firearms. Firearms may be possessed on premises licensed for on premise consumption if:~~

~~(1) the firearm is in the possession of the permittee/licensee; or~~

~~(2) the firearm is:~~

~~(A) possessed for ceremonial and/or display purposes;~~

~~(B) disabled from use as a firearm while on the licensed premises;~~

~~(C) is possessed on the licensed premises in connection with charitable fundraising; and~~

~~(D) remains in the possession, control or supervision of person or persons acting on behalf of the charitable organization sponsoring the fundraising activity.]~~

(f) A location that has a license or permit authorizing the on-premises consumption of alcoholic beverages may only allow a gun or firearms show or display at the location if:

(1) the location is owned or leased by a governmental entity or nonprofit civic, religious, charitable, fraternal, or veterans' organization;

(2) the location is used for a gun or firearms show or display only on an occasional basis; and

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(3) a the written agreement between the operator of the show or display and the permittee or licenseeis filed at the commission's district office and approved by the commission 30 days prior to the gun or firearms show or display and the agreement includes the following:

(A) a requirement that prohibits live ammunition in the building or the facility where the licensed premises is located;

(B) a requirement that firearms be disabled and not readily convertible for use as a firearm; and

(C) a requirement that prohibits the delivery of any firearm inside the building or facility where the licensed premises is located.

[(d) Historical Reenactments. Pursuant to §11.61(i) of the Texas Alcoholic Beverage Code, a historical reenactment utilizing firearms maybe conducted on the premises of a permit or license if:

(1) the firearms are of the type, caliber, or gauge common to the era and event being reenacted;

(2) such firearms remain in the possession of members of the cast, production company, employees of the permit holder, or others directly involved in the reenactment and are not left unattended or accessible to unauthorized persons at all times such firearms are on the licensed premises;

(3) such firearms remain unloaded at all times while on the licensed premises except that the firearms may be loaded with blank ammunition firing no projectile;

(4) such firearms shall be handled in a safe manner so as to present no threat of injury to audience members or others because of discharge or other use;

(5) persons engaged in reenactments shall maintain a minimum of 15 feet intervals between those armed with pistols and all others, and 40 feet between those armed with shotguns and all others;

(6) the permittee shall adopt safety rules to be employed during the reenactment and such rules shall be read and signed by all employees of the permit holder involved in the reenactment prior to the beginning of the event; and

(7) the permittee provides the relevant Commission District Office or outpost notice of the reenactment at least three business days before the event.]

(g) The holder of a retail dealer's off-premise license, a wine and beer retail dealer's off-premise permit, a wine only package store permit or a package store permit may only allow the sale or offer for sale of firearms at the licensed location if:

(1) the license or permit holder also holds a federal firearms license;

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(2) alcoholic beverages are not being sold in any area where **the** firearms for sale are readily accessible; and

(3) the firearms for sale are either:

(A) disabled and not readily convertible for use as a firearm; or

(B) secure from the general public and only accessible by employees of the person or entity offering the firearms for sale.

(h) Pursuant to Alcoholic Beverage Code §§11.61(i) and 61.71(j), a historical reenactment utilizing firearms may only be conducted on a licensed premises if:

(1) the firearms are of the type, caliber, or gauge common to the era and event being reenacted;

(2) such firearms remain in the possession of members of the cast, production company, employees of the permit holder, or others directly involved in the reenactment and are not left unattended or accessible to unauthorized persons at all times such firearms are on the licensed premises;

(3) such firearms remain unloaded at all times while on the licensed premises except that the firearms may be loaded only with blank ammunition firing no projectile;

(4) such firearms are handled in a safe manner so as to present no threat of injury to audience members or others because of discharge or other use;

(5) persons engaged in reenactments maintain a minimum of 15 feet intervals between those armed with pistols and all others, and 40 feet between those armed with shotguns and all others;

(6) the permittee adopts safety rules to be employed during the reenactment and such rules are read and signed by all employees of the permit holder involved in the reenactment prior to the beginning of the event; and

(7) the permittee provides notice of the reenactment to the relevant commission office at least three business days before the event.

(i) Pursuant to Alcoholic Beverage Code §§11.61(f) and 61.71(g), a firearm may be ceremonially displayed on a licensed premises only if:

(1) the firearm is in the possession of the permittee or licensee;

(2) the firearm is disabled and not readily convertible for use as a firearm while on the premises; and

(3) there is no live ammunition for the firearm on the premises.

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Attachment 5

Approve Adoption of Amendments to Rule §45.73, Label: General

July 22, 2014 Agenda Item 10.
Approve Adoption of Amendments to Rule §45.73, Label: General.

The Texas Alcoholic Beverage Commission (commission) adopts amendments to §45.73, relating to Label: General, with changes to the proposed text published in the April 11, 2014, issue of the *Texas Register* (39 TexReg 2727).

The amendments state the purpose of and authority for the section, clarify that a brewpub licensee may apply for label approval of malt beverages and delete references to special or private brands.

The amendments clarify that the commission interprets Alcoholic Beverage Code §102.07 and §102.15 to prevent the use of a malt beverage label that is identified with a specific retailer (under the circumstances outlined in paragraphs (e)(1) and (e)(2) of the section) because it would constitute a form of advertising for the retailer. Brewers and manufacturers generally cannot provide advertising for a specific retailer because it would be providing a thing of value to the retailer that is prohibited by Alcoholic Beverage Code §102.07(a)(2) and §102.15(a)(1). Although some forms of advertising are specifically excepted from such prohibition by other provisions of the Alcoholic Beverage Code, labels do not fall under any such exceptions.

Section 45.73 was also reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for readoption each of its rules. The commission has determined that the need for the section continues to exist but that it should be amended to provide a clear statement regarding its statutory basis and to reflect recently-authorized activities for brewpubs.

Comments on the proposed amendments were received in writing, and oral comments were received at a public hearing on April 30, 2014.

Comments in support of the proposal were filed by the Beer Alliance of Texas and the Wholesale Beer Distributors of Texas. Comments opposed were received from Mark Anthony Brewing, the Texas Craft Brewers Guild, and H.E. Butt Grocery Company, and in joint comments from the Texas Retailers Association and Walgreens.

No one opposed the change to proposed subsection (d), adding brewpub licensees to the list of those eligible to apply for and receive label approvals for malt beverages, which is appropriate for the reasons expressed in the preamble to proposed new §45.96 of this chapter. Similarly, no one opposed the addition of language to proposed subsection (e) limiting the applicability of that subsection to brewers and manufacturers. The commission adopts these proposed changes.

In support of the proposed changes to this section, the Beer Alliance submitted an expert report by Dr. Wayne D. Hoyer, Chairman of the Department of Marketing in the McCombs School of Business at the University of Texas at Austin. Dr. Hoyer concludes that there "are significant benefits provided to a retailer ... when its trademark appears on a new brand". Dr. Hoyer's report supports the commission's conclusion that the label prohibitions in subsection (e) are appropriate applications of the language in Alcoholic Beverage Code §102.07(a)(2) and §102.15(a)(1) that forbid a brewer or manufacturer from furnishing a "thing of value" to a retailer.

Mark Anthony Brewing opposes the proposed amendments because, it alleges: they constitute an unconstitutional restriction on the rights of free speech enjoyed by members of the industry; they exceed the agency's legitimate rulemaking authority; they would impose a regime of regulatory restriction that is in direct and arbitrary conflict with both the law and longstanding and unquestioned applications of that law by the commission; they are unnecessary and even counter-productive in light of the legitimate policy purposes of the commission; and they are supported by no experience, evidence or data within the possession of the commission.

Mark Anthony Brewing also argues that there are "enormous amounts of value that flow from the upper tiers to the retail tier" in ways both authorized by the Alcoholic Beverage Code and otherwise allowed by the commission. The suggestion appears to be that that, in light of this, the commission would be acting arbitrarily to enforce Alcoholic Beverage Code §102.07(a)(2) and §102.15(a)(1) if it does not cut off such flow altogether.

Mark Anthony Brewing also asserts that the proposed rule was driven by the commission's desire to protect the profit margins of distributors, which is no part of the commission's legitimate business.

The commission disagrees with all of Mark Anthony Brewing's assertions. The commission is engaged in litigation with Mark Anthony Brewing in the Travis County District Court regarding the effects of this section on the company's free speech rights and believes the section as amended is both lawful and consistent with the commission's position in the litigation.

The Texas Craft Brewers Guild supports the amendment of subsection (d) to allow brewpubs to apply for and receive label approval but believes the other proposed changes should at least be deferred pending guidance from the court in the Mark Anthony Brewing litigation and possibly the 84th Legislature.

H.E. Butt Grocery Company asserts that the San Antonio Court of Appeals decision in the 1985 *TABC v. Pearl Brewing Company* case forecloses the commission's proposals. It also asserts that the use of a trademark constitutes commercial free speech. It questions both the wisdom of and the authority for existing subsection (f) and proposed amendments thereto, as well as proposed subsection (g).

The Texas Retailers Association and Walgreen Co. submitted joint comments. They assert that the San Antonio Court of Appeals decision in the 1985 *TABC v. Pearl Brewing Company* case forecloses the commission's proposals. They also believe the pending Mark Anthony Brewing litigation will likely clarify the law. They allege that proposed paragraph (e)(3) would result in insurmountable difficulties related to its interpretation and application. They state that the proposed amendments to subsection (f) seem to misinterpret the basic three-tier system and sales of beer. They also point to alleged difficulties applying proposed subsection (g).

Although the commission believes the proposed amendments would be legitimate exercises of its authority and are not foreclosed by the *Pearl Brewing Company* decision, it acknowledges the opposition to certain of its proposals. Since the proposals were an attempt to provide statutory clarification, and since some of the underlying issues are currently being litigated in the Mark Anthony Brewing case, the commission is persuaded that it is appropriate to await judicial guidance on certain issues before proceeding.

With that in mind, the commission adopts the amendments to subsections (d) and (e) previously discussed. While the commission adopts the proposed deletion of the term "special or private brand" in subsections (e)(1) and (f), in order to preserve the status quo regarding the underlying policy the commission modifies the proposed amendment to subsection (f) in order to retain the remedy of label cancellation for violating the restriction on exclusive sale of a brand. Finally, also to preserve the status quo as regards policy, the commission does not adopt proposed paragraph (e)(3) or subsection (g).

The amendments are adopted under the authority of Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and of Government Code §2001.039, which requires the agency to periodically review its rules to determine whether the need for them continues to exist.

§45.73. Label: General.

(a) The purpose of this section is to implement Alcoholic Beverage Code §101.67 (Prior Approval of Malt Beverages) and §101.41 (Containers, Packaging, and Dispensing Equipment of Beer: Labels), pursuant to the requirements of Alcoholic Beverage Code §5.38 (Quality and Purity of Beverages) and the authority of

Alcoholic Beverage Code §5.31 (General Powers and Duties). The section applies the prohibitions in Alcoholic Beverage Code §102.07(a)(2) and §102.15(a)(1) in the labelling context.

(b) It shall be unlawful for any person to transport, sell, or possess for the purpose of sale in this state any malt beverage, directly or indirectly, or through an affiliate, or remove from customs custody any malt beverage in containers unless such malt beverages are packaged, and such packages are marked, branded, and labeled in conformity with this subchapter.

(c) Alteration of labels.

(1) It shall be unlawful for any person to alter, mutilate, destroy, obliterate, or remove any mark, brand, or label upon malt beverages held for sale, except as authorized by law; provided, that the administrator may, upon written application, permit additional labeling or relabeling of malt beverages in containers if, in his judgment, the facts show that such additional labeling or relabeling is for the purpose of compliance with the requirements of this subchapter or of law.

(2) Application for permission to relabel shall be accompanied by two complete sets of the old labels and two complete sets of any proposed labels, together with a statement of the reasons for relabeling, the quantity and the location of the malt beverages, and the name and address of the person by whom they will be relabeled.

(d) Only a brewer's or non-resident brewer's permittee, a manufacturer's or non-resident manufacturer's licensee, or a brewpub licensee under §45.96 of this chapter may apply for and receive label approval on beer, ale, or malt liquor.

(e) No application for a label filed by a brewer's or non-resident brewer's permittee or a manufacturer's or non-resident manufacturer's licensee shall be approved which:

(1) indicates by any statement, design, device, or representation that the malt beverage is brewed or bottled for any retailer permittee or licensee or any private club registration permittee; or

(2) includes the name, tradename, or trademark of any retailer permittee or licensee or any private club registration permittee.

(f) The sale of a brand of malt beverages by a brewer's or non-resident brewer's permittee or a manufacturer's or non-resident manufacturer's licensee exclusively to the holder of a license or permit authorizing the retail sale or service of malt beverages, or exclusively to retail licensees or permittees under common ownership, control, or management, to the exclusion of other retail licensees or permittees is specifically prohibited and the label approval for any such label shall be cancelled and withdrawn.

Attachment 6

Approve Adoption of Amendments to Rule §45.82, Prohibited Practices

July 22, 2014 Agenda Item 11.
Approve Adoption of Amendments to Rule §45.82, Prohibited Practices.

The Texas Alcoholic Beverage Commission (commission) adopts amendments to §45.82, relating to Prohibited Practices, with changes to the proposed text published in the April 11, 2014, issue of the *Texas Register* (39 TexReg 2728).

The amendments add a statement of statutory authority, delete a reference to special or private brands, and re-format paragraph (a)(7) of the section.

The amendments clarify that the commission interprets Alcoholic Beverage Code §102.07 and §102.15 to prevent the use of any statement, design, device or representation on a malt beverage label that the beverage is identified with a specific retailer (under the circumstances outlined in paragraph (a)(7) of the section) because it would constitute a form of advertising for the retailer. Brewers and manufacturers generally cannot provide advertising for a specific retailer because it would be providing a thing of value to the retailer that is prohibited by Alcoholic Beverage Code §102.07(a)(2) and §102.15(a)(1). Although some forms of advertising are specifically excepted from such prohibition by other provisions of the Alcoholic Beverage Code, labels do not fall under any such exceptions.

Section 45.82 was also reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for readoption each of its rules. The commission has determined that the need for the section continues to exist but that it should be amended to provide a clear statement regarding its statutory basis and to conform to changes in §45.73 of this chapter that being adopted simultaneously with this section.

Comments on the proposed amendments were received in writing, and oral comments were received at a public hearing on April 30, 2014.

Comments in support of the proposed amendments were filed by the Beer Alliance of Texas and the Wholesale Beer Distributors of Texas. Comments opposed were received from Mark Anthony Brewing, the Texas Craft Brewers Guild, H.E. Butt Grocery Company, and WFM Beverage Corp. and in joint comments from the Texas Retailers Association and Walgreens

In support of the proposed changes to this section, the Beer Alliance submitted an expert report by Dr. Wayne D. Hoyer, Chairman of the Department of Marketing in the McCombs School of Business at the University of Texas at Austin. Dr. Hoyer concludes that there "are significant benefits provided to a retailer ... when its trademark appears on

a new brand". Dr. Hoyer's report supports the commission's conclusion that the prohibitions in paragraph (a)(7) are appropriate applications of the language in Alcoholic Beverage Code §102.07(a)(2) and §102.15(a)(1) that forbid a brewer or manufacturer from furnishing a "thing of value" to a retailer.

Mark Anthony Brewing opposes the proposed amendments because, it alleges: they constitute an unconstitutional restriction on the rights of free speech enjoyed by members of the industry; they exceed the agency's legitimate rulemaking authority; they would impose a regime of regulatory restriction that is in direct and arbitrary conflict with both the law and longstanding and unquestioned applications of that law by the commission; they are unnecessary and even counter-productive in light of the legitimate policy purposes of the commission; and they are supported by no experience, evidence or data within the possession of the commission.

Mark Anthony Brewing also argues that there are "enormous amounts of value that flow from the upper tiers to the retail tier" in ways both authorized by the Alcoholic Beverage Code and otherwise allowed by the commission. The suggestion appears to be that that, in light of this, the commission would be acting arbitrarily to enforce Alcoholic Beverage Code §102.07(a)(2) and §102.15(a)(1) if it does not cut off such flow altogether.

Mark Anthony Brewing also asserts that the proposed rule was driven by the commission's desire to protect the profit margins of distributors, which is no part of the commission's legitimate business.

The commission disagrees with all of Mark Anthony Brewing's assertions. The commission is engaged in litigation with Mark Anthony Brewing in the Travis County District Court regarding the effects of this section on the company's free speech rights and believes the section as amended is both lawful and consistent with the commission's position in the litigation.

The Texas Craft Brewers Guild believes the proposed amendments are unnecessary and fear that, as proposed, they could create confusion regarding the ability of brewpubs to use their own trademarks on their products. The commission believes it is necessary and appropriate to amend this section to remain consistent with the changes to §45.73 of this chapter that are being adopted simultaneously. In response to the comment about brewpubs, the commission adds language referencing §45.96 of this chapter, which addresses this issue and is also being adopted simultaneously.

H.E. Butt Grocery Company ("HEB") asserts that the San Antonio Court of Appeals decision in the 1985 *TABC v. Pearl Brewing Company* case forecloses the commission's

proposals. It also asserts that the use of a trademark constitutes commercial free speech. Specifically, it believes proposed subparagraph (a)(7)(C) would be void for vagueness.

The Texas Retailers Association and Walgreen Co. ("TRA/Walgreen") submitted joint comments. They assert that the San Antonio Court of Appeals decision in the 1985 *TABC v. Pearl Brewing Company* case forecloses the commission's proposals. They also believe the pending Mark Anthony Brewing litigation will likely clarify the law. Specifically, they assert that the proposed amendments would impact brewpubs by creating a conflict with §45.96 of this chapter, which is being adopted simultaneously. As noted in response to this same concern expressed by the Texas Craft Brewers Guild, the commission adds language referencing §45.96 of this chapter.

WFM Beverage Corp. ("WFM") shares the concern expressed by the Texas Craft Brewers Guild and by TRA/Walgreen regarding the impact on brewpubs of a conflict between the proposed amendments and §45.96 of this chapter, which is being adopted simultaneously. Again, the commission addresses this concern by adding language referencing §45.96 of this chapter. WFM also shares HEB's concern that proposed subparagraph (a)(7)(C) would be void for vagueness.

Although the commission believes the proposed amendments would be legitimate exercises of its authority and are not foreclosed by the *Pearl Brewing Company* decision, it acknowledges the opposition to certain of its proposals. Since the proposals were an attempt to provide statutory clarification, and since some of the underlying issues are currently being litigated in the Mark Anthony Brewing case, the commission is persuaded that it is appropriate to await judicial guidance on certain issues before proceeding.

With that in mind and in response to comments, the commission modifies proposed paragraph (a)(7) to add specific statutory references and, as previously mentioned, to reference §45.96 of this chapter regarding brewpubs. To be consistent with amendments to §45.73 of this chapter that are being adopted simultaneously, the commission adopts the proposed deletion of the term "special or private brand", but does not adopt proposed subparagraph (a)(7)(C).

The amendments are adopted under the authority of Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and of Government Code §2001.039, which requires the agency to periodically review its rules to determine whether the need for them continues to exist.

§45.82 Prohibited Practices.

(a) Statements on labels. Containers of malt beverages or any labels on such containers, or any carton, case, or individual covering of such containers, used for sale at retail, or any written, printed, graphic or other matter accompanying such containers to the consumer shall not contain the following:

(1) any statement that is false or untrue in any particular, or that, irrespective of falsity, directly or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific, or technical matter tends to create a misleading impression;

(2) any statement that is disparaging of a competitor's products;

(3) any statement, design, device, or representation which is obscene or indecent;

(4) any statement, design, device, or representation of or relating to analyses, standards, or tests, irrespective of falsity, which the administrator finds to be likely to mislead the consumer;

(5) any statement, design, device or representation of or relating to any guaranty, irrespective of falsity, which the administrator finds to be likely to mislead the consumer;

(6) a trade name or brand name that is the name of any living individual of public prominence, or existing private or public organization, or is a name that is in simulation or is an abbreviation thereof, or any graphic, pictorial, or emblematic representation of any such individual or organization, if the use of such name or representation is likely to falsely lead the consumer to believe that the product has been endorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of, such individual or organization; provided, that this subsection shall not apply to the use of the name of any person engaged in business as a producer, importer, bottler, wholesaler, distributor, retailer, or warehouseman, of malt beverages, nor to the use by any person of a trade or brand name that is the name of any living individual of public prominence, or existing private or public organization, provided such trade or brand name was used by him or his predecessors in interest prior to August 29, 1935;

(7) pursuant to Alcoholic Beverage Code §102.07(a)(2) and §102.15(a)(1), and except as authorized by §45.96 of this chapter, any statement, design, device, or representation that:

(A) the malt beverage is brewed or bottled for any retail licensee or permittee or private club registration permittee; or

(B) includes the name, tradename or trademark of any retail licensee or permittee or private club registration permittee.

(b) Simulation of government stamps. No label shall be of such design as to resemble or simulate a stamp of the United States government or of any state or foreign government. No label, other than stamps authorized or required by the United States government or any state or foreign government, shall state or indicate that the malt beverage contained in the labeled container is brewed, made, bottled, labeled, sold under, or in accordance with any municipal, state, federal, or foreign

government authorization, law, or regulation, unless such statement is required or specifically authorized by federal or state law or regulations of the foreign country in which such malt beverages were produced. If the foreign municipal or state government permit number is stated upon a label, it shall not be accompanied by an additional statement relating thereto, unless required by the law of that state or foreign municipality.

(c) Use of word "bonded," etc. The words "bonded," "bottled in bond," "aged in bond," "bonded age," "bottled under customs supervision," or phrases containing these or synonymous terms which imply governmental supervision over production, bottling, or packaging, shall not be used on any label for malt beverages.

(d) Statements, seals, flags, coats of arms, crests, and other insignia. Statements, seals, flags, coats of arms, crests, or other insignia, or graphic, or pictorial or emblematic representations thereof, likely to mislead the consumer to believe that the product has been endorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of, the government, organization, family, or individual with whom such statement, seal, flag, coat of arms, crest, or insignia is associated, are prohibited on any label of malt beverages.

(e) Curative and therapeutic effects. Labels shall not contain any statement, design, or device representing that the use of any malt beverage has curative or therapeutic effects, if such statement is untrue in any particular or tends to create a misleading impression.

(f) Coverings, cartons, cases. Individual coverings, cartons, cases, or other wrappers of containers of malt beverages, used for sale at retail, or any written, printed, graphic, or other matter accompanying the container shall not contain any statement, or any graphic, pictorial, or emblematic representation, or other matter, which is prohibited from appearing on any label or container of malt beverage. It shall be unlawful for any retailer to affix to any carton or case any paper or sticker bearing any painted, printed, or other graphic matter whatsoever; and it shall be unlawful for any retailer to paint, imprint, or otherwise impose any wording, lettering, picture, or design of any character whatsoever on any carton or case.

Attachment 7

Approve Adoption of New Rule §45.94, Verification Regarding Use of Facilities

July 22, 2014 Agenda Item 12:

Approve Adoption of New Rule §45.94, Verification Regarding Use of Facilities.

The Texas Alcoholic Beverage Commission (commission) adopts new §45.94, relating to Verification Regarding Use of Facilities, without changes to the proposed text published in the April 11, 2014, issue of the *Texas Register* (39 TexReg 2730).

The section implements the requirements of Alcoholic Beverage Code §102.22, relating to Verification of Use of Facilities.

Alcoholic Beverage Code §102.22(a) requires that a person who holds a Chapter 12 or 13 permit or a Chapter 62 or 63 license must annually verify to the commission that a brewing or manufacturing facility owned or controlled by that person "is not used to produce malt beverages primarily for a specific retailer or the retailer's affiliates". Alcoholic Beverage Code §102.22(b) requires the commission to adopt a form for the verification.

This section requires that the Alcoholic Beverage Code §102.22 verification be filed on or before September 1 of each year by each permittee and licensee required to do so by that section of the Alcoholic Beverage Code. The section also provides that the commission will promulgate a form requiring the verification as stated in Alcoholic Beverage Code §102.22.

Comments on the proposed new section were received in writing, and oral comments were received at a public hearing on April 30, 2014.

Comments in support of the proposal were received from the Texas Craft Brewers Guild, the Beer Alliance of Texas and the Wholesale Beer Distributors of Texas. The Beer Institute filed comments suggesting a modification. The Texas Retailers Association and Walgreen Co. ("TRA/Walgreen") commented that "while the tracking of the language in the statute in this rule is appreciated, there still remain a number of issues as to how this rule will be interpreted and enforced".

Both the Beer Institute and TRA/Walgreen believe that the use of the word "primarily" is problematic. The Beer Institute would essentially substitute the term "all or substantially all of a brand". TRA/Walgreen suggests that "primarily" should be interpreted as 51%.

The commission notes that, as mentioned by TRA/Walgreen, the language tracks the language used in Alcoholic Beverage Code §102.22. The commission believes that changing the language of the section as suggested by the Beer Institute would require re-publication of the section, as would formally interpreting the language used in the statute. The commission already tried providing guidance by publishing a proposal that differed from the statutory language. That proposal was withdrawn in the face of significant disagreement among stakeholders. To the

extent clarification is necessary or appropriate, the legislature is obviously in the best position to clarify its intent.

The section is adopted under the authority of Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and §102.22, which requires the commission to adopt a form.

§ 45.94. Verification Regarding Use of Facilities.

On or before September 1 of each year, each holder of a permit issued under Alcoholic Beverage Code Chapter 12 or 13 or a license issued under Alcoholic Beverage Code Chapter 62 or 63 shall verify to the commission, on a form promulgated by the commission, that no brewing or manufacturing facility owned or controlled by the permit or license holder is used to produce malt beverages primarily for a specific Texas retailer or the retailer's Texas affiliates.

Attachment 8

Approve Adoption of New Rule §45.96, Brewpubs

July 22, 2014 Agenda Item 14:

Approve Adoption of New Rule §45.96, Brewpubs.

The Texas Alcoholic Beverage Commission (commission) adopts new §45.96, relating to Brewpubs, with changes to the proposed text published in the April 11, 2014, *Texas Register* (39 TexReg 2732).

The section clarifies that a brewpub can apply for and receive label approval on malt beverages. Before recent amendments to Alcoholic Beverage Code Chapter 74, the commission did not require brewpubs to receive label approval for their products, which could only be sold on their own premises. However, since Alcoholic Beverage Code §§ 74.08 – 74.10 now authorize brewpubs to sell their products under certain conditions to retailers, distributors and wholesalers, it is incumbent upon the commission under Alcoholic Beverage Code §74.01(a)(1) and §74.06 to apply appropriate labelling requirements.

The section clarifies that a brewpub can indicate on the label of a malt beverage that the product is brewed or bottled for itself, an entity under common ownership with it, or an entity that has the same name or tradename it has. Likewise, a brewpub can use its own name, tradename or trademark, or that of an entity under common ownership with it, or an entity that has the same name or tradename it has.

However, a brewpub may not indicate on the label of a malt beverage that the product is brewed or bottled for, nor use the name, tradename or trademark of, another retailer that is neither under common ownership with it nor shares its name or tradename.

The section clarifies that a brewpub is not authorized to provide contract brewing or alternating brewery proprietorship arrangements or engage in such activities, because the Alcoholic Beverage Code provides such authority only to holders of permits under Alcoholic Beverage Code Chapters 12 or 13 and of licenses under Alcoholic Beverage Code Chapters 62 and 63.

Comments on the proposed new section were received in writing, and oral comments were received at a public hearing on April 30, 2014.

The Wholesale Beer Distributors of Texas filed comments supporting the proposed section. The Texas Craft Brewers Guild filed comments supporting proposed paragraphs (b)(1) – (b)(4), but opposing paragraph (b)(5), and subsection (c). A joint comment opposing the section was filed by the Texas Retail Association and Walgreen Co. WFM Beverage Corp. also filed comments opposing the section.

The Texas Craft Brewers Guild ("Guild") states that proposed paragraphs (b)(1) – (b)(4) are necessary and in line with the intent of the legislature. It asserts that proposed paragraph (b)(5) "starts into the territory of the private label dispute, though that fight centers around relationships between retailers and manufacturers whereas this language seeks to govern relationships between members of the same tier". For this reason, the Guild considers proposed paragraph (b)(5) as far-over-reaching. It characterizes proposed paragraph (c)(1) as "a pointless clarification of the law" and "needless" because the issue (i.e., the inability of brewpubs to provide contract brewing or engage in alternating brewery proprietorships) is not in doubt. The Guild contends that proposed paragraph (c)(2) "would appear to have the effect of precluding sales of product" by and between members of the retail tier" and that it is "highly inappropriate to make this sort of change through regulatory edict".

The Texas Retailer Association and Walgreen Co. contend that there is a conflict between proposed paragraph (b)(4) and both proposed subparagraphs (b)(5)(A) and (b)(5)(B). They assert that proposed paragraph (c)(2) is contrary to Alcoholic Beverage Code §102.75(7)(c) and that the use of the term "substantially all" in proposed paragraph (c)(3) is vague.

WFM Beverage Corp. ("WFM") objects specifically to proposed paragraphs (c)(2) and (c)(3) as lacking a statutory basis and, in the case of paragraph (c)(3), being too vague. WFM at least seeks assurance that it will not be prohibited by those paragraphs from selling the product produced at its brewpub to distributors and wholesalers and then having its other retail locations purchase the product from them.

While not agreeing with all of the reasons asserted by the commenters, the commission does agree that the proposed section should be modified to eliminate inconsistencies and to restrict its scope. Language is added in both subparagraphs (b)(5)(A) and (b)(5)(B) to clarify that a brewpub can use its own name, tradename or trademark on a label, or use the name, tradename or trademark of an entity that either shares common ownership with the brewpub, or has the same name or tradename as the brewpub. Similarly the label can indicate that it is brewed or bottled for the brewpub itself or for one of those entities. The commission does not adopt proposed subparagraph (b)(5)(C) or paragraphs (c)(2) or (c)(3). The commission does adopt proposed paragraph (c)(1) as subsection (c). It is included because the commission has been questioned about the topic outside of the formal comment process in this rulemaking. None of the commenters disagree that it is an accurate statement of the law.

The section is adopted under the authority of Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

§ 45.96. Brewpubs.

(a) The purpose of this section is to implement Alcoholic Beverage Code §§5.39 (Regulation of Liquor Containers), 74.01 (Authorized Activities), 74.06 (Quality Standards), and 101.67 (Prior Approval of Malt Beverages), pursuant to the requirements of Alcoholic Beverage Code §5.38 (Quality and Purity of Beverages) and the authority of Alcoholic Beverage Code §5.31 (General Powers and Duties).

(b) Labels.

(1) It shall be unlawful for any person to transport, sell, or possess for the purpose of sale in this state any malt beverage, directly or indirectly, or through an affiliate, or to remove from customs custody any malt beverage in containers unless such malt beverages are packaged, and such packages are marked, branded, and labeled in conformity with this subchapter.

(2) It shall be unlawful for any person to alter, mutilate, destroy, obliterate, or remove any mark, brand, or label upon malt beverages held for sale, except as authorized by law; provided, that the administrator may, upon written application, permit additional labeling or relabeling of malt beverages in containers if, in his judgment, the facts show that such additional labeling or relabeling is for the purpose of compliance with the requirements of this subchapter or of law.

(3) Application for permission to relabel shall be accompanied by two complete sets of the old labels and two complete sets of any proposed labels, together with a statement of the reasons for relabeling, the quantity and the location of the malt beverages, and the name and address of the person by whom they will be relabeled.

(4) A brewpub licensee may apply for and receive label approval on beer, ale, or malt liquor. The label may contain the brewpub licensee's name, tradename or trademark.

(5) No application for a label filed by a brewpub licensee shall be approved which:

(A) indicates by any statement, design, device, or representation that the malt beverage is brewed or bottled for any retailer permittee or licensee or for any private club registration permittee (other than the brewpub licensee label applicant itself, an entity under common ownership with it, or an entity with the same name or tradename as it); or

(B) includes the name, tradename, or trademark of any retailer permittee or licensee or for of any private club registration permittee (other than the brewpub licensee label applicant itself, an entity under common ownership with it, or an entity with the same name or tradename as it).

(c) Nothing in this subchapter or in Alcoholic Beverage Code Chapter 74 authorizes a brewpub licensee to engage in contract brewing or alternating brewery proprietorship arrangements, and its facilities may not be used to provide such arrangements or engage in such activities, which are authorized only for holders of permits under Alcoholic Beverage Code Chapters 12 or 13 and holders of licenses under Alcoholic Beverage Code Chapters 62 or 63.

Attachment 9

Approve Adoption of Amendments to Rule §45.110, Inducements

July 22, 2014 Agenda Item 15.

Approve Adoption of Amendments to Rule §45.110, Inducements.

The Texas Alcoholic Beverage Commission (commission) adopts amendments to §45.110, relating to Inducements, with changes to the proposed text published in the April 11, 2014, issue of the *Texas Register* (39 TexReg 2733).

The amendments add a statutory reference, conforms paragraph (c)(3) to a United States District Court finding that the provision currently in effect is unconstitutional, and cites as examples of unlawful inducements certain malt beverage labels using the tradenames or trademarks of retailers.

In *Authentic Beverages Company, Inc vs Texas Alcoholic Beverage Comm'n*, 835 F. Supp. 2d 227 (W.D. Tex., Dec. 19, 2011), §45.110(c)(3) was declared unconstitutional as a violation of the First Amendment and the commission was enjoined from enforcing it, which the commission has not done since the court's ruling. However, the court's order affirms the commission's authority to prohibit undue collusion, financial or otherwise, among the tiers. Accordingly, the paragraph is amended to replace the per se prohibition on advertising that benefits a specific retailer with a prohibition on such advertising that is a product of unauthorized activity.

In addition, the amendments expand the list of examples of unlawful inducements in subsection (c) by adding paragraph (7), which deals with the use of retailer tradenames and trademarks on malt beverage labels.

Section 45.110 was also reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for readoption each of its rules. The commission has determined that the need for the section continues to exist but that it should be amended to provide clearer guidance about prohibited activities.

Comments on the proposed amendments were received in writing, and oral comments were received at a public hearing on April 30, 2014.

The Beer Alliance of Texas and the Wholesale Beer Distributors of Texas filed comments supporting the proposed amendments. Comments opposing the proposed amendments were filed by Mark Anthony Brewing, H.E. Butt Grocery Company, the Texas Craft Brewers Guild, WFM Beverage Corp., Anheuser-Busch InBev, MillerCoors, and the Texas Association of Business. Joint comments were also filed by the Texas Retailers Association and Walgreen Co. opposing the proposed amendments.

In support of the proposed changes to this section, the Beer Alliance submitted an expert report by Dr. Wayne D. Hoyer, Chairman of the Department of Marketing in the McCombs School of Business at the University of Texas at Austin. Dr. Hoyer concludes that there "are significant benefits provided to a retailer ... when its trademark appears on a new brand". Dr. Hoyer's report supports the commission's conclusion that the label prohibitions in subsection (e) are appropriate applications of the language in Alcoholic Beverage Code §102.07(a)(2) and §102.15(a)(1) that forbid a brewer or manufacturer from furnishing a "thing of value" to a retailer.

Mark Anthony Brewing opposes the proposed amendments because, it alleges: they constitute an unconstitutional restriction on the rights of free speech enjoyed by members of the industry; they exceed the agency's legitimate rulemaking authority; they would impose a regime of regulatory restriction that is in direct and arbitrary conflict with both the law and longstanding and unquestioned applications of that law by the commission; they are unnecessary and even counter-productive in light of the legitimate policy purposes of the commission; and they are supported by no experience, evidence or data within the possession of the commission.

Mark Anthony Brewing also argues that there are "enormous amounts of value that flow from the upper tiers to the retail tier" in ways both authorized by the Alcoholic Beverage Code and otherwise allowed by the commission. The suggestion appears to be that that, in light of this, the commission would be acting arbitrarily to enforce Alcoholic Beverage Code §102.07(a)(2) and §102.15(a)(1) if it does not cut off such flow altogether.

Mark Anthony Brewing also asserts that the proposed rule was driven by the commission's desire to protect the profit margins of distributors, which is no part of the commission's legitimate business.

In reply comments, Mark Anthony Brewing also posits that to address each real three-tier system concern, the commission only needs to prohibit products with retailer names on the label that are exclusive to that retailer. It describes those concerns as retailer

independence, small retailers, distributor margins and business justification. It asserts that the commission has misconstrued its enabling statutes.

The commission disagrees with all of Mark Anthony Brewing's assertions. The commission is engaged in litigation with Mark Anthony Brewing in the Travis County District Court regarding the effects of this section on the company's free speech rights and believes the section as amended is both lawful and consistent with the commission's position in the litigation.

H.E. Butt Grocery Company asserts that the San Antonio Court of Appeals decision in the 1985 *TABC v. Pearl Brewing Company* case forecloses proposed paragraph (c)(7), and that proposed paragraph (c)(8) misconstrues the Alcoholic Beverage Code. It also asserts that the use of a trademark constitutes commercial free speech.

The Texas Craft Brewers Guild ("Guild") asserts that proposed paragraphs (7) and (8) are redundant and confusing to clearly written law, and that resolution of the underlying issue is best left to the court in the Mark Anthony Brewing litigation. Further, it alleges that proposed paragraphs (c)(7) and (c)(8) could be read to conflict with the authority granted to brewpubs in §45.96 of this chapter, which is being adopted simultaneously.

The Guild also asserts that the proposed amendment to paragraph (c)(3) are needless, confusing and "seems to flatly contradict" one of the purposes of Alcoholic Beverage Code §102.75(b). The Guild concedes that a possible distinction is that Alcoholic Beverage Code §102.75(b) governs "ordinary business transactions" whereas the proposed amendment only applies to advertising that is the result of "unauthorized activity". It states that things that are illegal are already illegal, and that inclusion of the language in proposed paragraph (c)(3) would "roil" the marketplace. Indeed, the Guild alleges, "even the suggestion of it could be seen as problematic".

WFM Beverage Corp. seeks confirmation that proposed paragraph (c)(7) does not apply with respect to its registration of labels for malt beverage products that it will produce for its own account. It also asserts that proposed paragraph (c)(8) misconstrues the Alcoholic Beverage Code.

Anheuser-Busch InBev concurs with the position of the Texas Craft Brewers Guild regarding the proposed amendment to paragraph (c)(3). It alleges that its adoption would "create great uncertainty and confusion in the marketplace".

MillerCoors urges the commission, "for clarity and simplicity" to strike the proposed amendment to paragraph (c)(3) and to substitute for it the words: "unless the activity is permitted by the code".

The Texas Association of Business states that it was a party to discussions during the last legislature where all parties agreed that advertising funds are clearly "an ordinary business transaction". It asserts that the proposed amendment to paragraph (c)(3) "turns that agreement on its head and will drastically interfere with a free and functioning marketplace". It is also concerned that "even the suggestion of interference through regulation could have the effect of stifling economic growth".

The Texas Retailers Association and Walgreen Co. ("TRA/Walgreen") also support the comments of the Texas Craft Brewers Guild regarding the proposed amendment to paragraph (c)(3). They assert that the proposed wording of "financial remuneration, incentive, inducement or compensation" is lawful under Alcoholic Beverage Code §102.75(b) "in the form of allowances, rebates, refunds, service, capacity, advertising funds, promotional funds, and sports marketing funds" as part of "ordinary business transactions". TRA/Walgreen further assert that the proposed rule would outlaw "advertising funds" allowing for financial remuneration, incentive, inducement or compensation. They state that "unlawful conduct is already unlawful conduct under the code and rules and therefore the proposed language does nothing to further the commission's ability to ensure compliance with the same".

In response to concerns about the proposed language amending paragraph (c)(3), the commission adopts the amendment with a modification. The commission strikes the proposed language that the commenters believe conflicts with Alcoholic Beverage Code §102.75(b), but leaves the language necessary to assert the commission's jurisdiction over advertising that results from unauthorized activities. This modification is consistent with the *Authentic Beverage* decision.

To be consistent with the commission policy expressed in the amendments to §45.73 and §45.82 of this chapter that are being adopted simultaneously with the amendments to this section, the commission adopts paragraph (c)(7) (with one modification) and does not adopt paragraph (c)(8). The modification to paragraph (c)(7) addresses the concern expressed by WFM Beverage Corp. regarding a possible inconsistency with §45.96 of this chapter, which is being adopted simultaneously and which deals with brewpubs.

The amendments are adopted under the authority of Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and by Government Code §2001.039, which requires the agency to periodically review its rules to determine whether the need for them continues to exist.

§45.110 Inducements.

(a) General. This section is enacted pursuant to Alcoholic Beverage Code §§102.04, 102.07, 102.12, 102.15 and 108.06.

(b) Unless otherwise specified, this section applies to members of the manufacturing and wholesale tiers for all alcoholic beverages.

(c) Inducements. Notwithstanding any other provision of these rules, practices and patterns of conduct that place retailer independence at risk constitute an illegal inducement as that term is used in the Alcoholic Beverage Code. Examples of unlawful inducements are:

(1) purchasing or renting shelf, floor or warehouse space from or for a retailer;

(2) requiring a retailer to purchase one product in order to be allowed to purchase another product at the same time;

(3) providing or purchasing, in whole or in part, any type of advertising benefitting any specific retailer, if the advertising is a result of unauthorized activity;

(4) furnishing food and beverages, entertainment or recreation to retailers or their agents or employees except under the following conditions:

(A) the value of food, beverages, entertainment and recreation shall not exceed $500.00 per person on any one occasion; and

(B) food, beverages, entertainment and recreation provided may only be consumed or enjoyed in the immediate presence of both the providing upper tier member and the receiving retail tier member; and

(C) in the course of providing food, beverages, entertainment or recreation under this rule, upper tier members may only furnish ground transportation.

(D) food, beverages, recreation and entertainment may also be provided during attendance at a convention, conference, or similar event so long as

the primary purpose for the attendance of the retailer at such event is not to receive benefits under this section.

(E) each upper tier member shall keep complete and accurate records of all expenses incurred for retailer entertainment for two years.

(5) furnishing of service trailers with equipment to a retailer;

(6) furnishing transportation or other things of value to organized groups of retailers. Members of the manufacturing and distribution tiers may advertise in convention programs, sponsor functions or meetings and other participate in meetings and conventions of trade associations of general membership; or

(7) except as otherwise allowed under §45.96 of this chapter, marking, branding or labeling a malt beverage with:

(A) the tradename or trademark of any retailer permittee or licensee or any private club registration permittee; or

(B) a tradename or trademark that is owned or licensed by, or is exclusively used by any retailer permittee or licensee or any private club registration permittee.

(d) Criteria for determining retailer independence. The following criteria shall be used as a guideline in determining whether a practice or pattern of conduct places retailer independence at risk. The following criteria are not exclusive, nor does a practice need to meet all criteria in order to constitute an inducement.

(1) The practice restricts or hampers the free economic choice of a retailer to decide which products to purchase or the quantity in which to purchase them for sale to consumers.

(2) The retailer is obligated to participate in a program offered by a member of the manufacturing or wholesale tier in order to obtain that member's product.

(3) The retailer has a continuing obligation to purchase or otherwise promote the industry member's product.

(4) The retailer has a commitment not to terminate its relationship with a member of the manufacturing or wholesale tier with respect to purchase of that member's products.

(5) The practice involves a member of the manufacturing or wholesale tier in the day-to-day operations of the retailer. For example, the member controls the retailer's decisions on which brand of product to purchase, the pricing of products, or the manner in which the products will be displayed on the retailer's premises.

(6) The practice is discriminatory in that it is not offered to all retailers in the local market on the same terms without business reasons present to justify the difference in treatment.

CERTIFICATION

REGULAR COMMISSION MEETING

10:00 a.m. – July 22, 2014

5806 Mesa Drive
Austin, Texas 78731

TABC

TEXAS ALCOHOLIC BEVERAGE COMMISSION

service ★ courtesy ★ integrity ★ accountability

STATE OF TEXAS

COUNTY OF TRAVIS

This certifies that the attached is a true copy of the proceedings of the Texas Alcoholic Beverage Commission meeting held on July 22, 2014.

Sherry Cook
Executive Director

Sworn and subscribed before me this the 6th day of August 2014.

GLORIA DARDEN REED
NOTARY PUBLIC WITHOUT BOND
STATE OF TEXAS
EXPIRES MAY 11, 2017

Gloria Darden Reed
Notary in and for Travis County