

# Sunset Commission Meeting

## January 9, 2019

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### ***Decision Material***

Lower Colorado River Authority

State Office of Risk Management

State Securities Board

Texas State Board of Plumbing Examiners

Texas Windstorm Insurance Association

Texas Board of Professional Land Surveying

Texas Alcoholic Beverage Commission

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### ***Pending Business***

Texas Medical Board

*Proposed modification on expedited licensing process*

Texas Historical Commission

*Proposed modification on historic sites curatorial master inventory*

# TEXAS ALCOHOLIC BEVERAGE COMMISSION

## Issue 1

*Texas Has a Continuing Need for TABC, but a Weak Commission Limits Its Ability to Effectively Oversee and Regulate the Alcoholic Beverage Industry. (Page 13)*

### Change in Statute

#### **Rec. 1.1** (Page 18)

Continue TABC for 12 years.

#### **Rec. 1.2** (Page 18)

Expand the Alcoholic Beverage Commission from three to five members.

##### ***Senator Buckingham Proposed Modification***

In lieu of Recommendation 1.2, expand the Alcoholic Beverage Commission to seven governor-appointed members comprised of four public members and three professional members representing each of the three tiers. Require the commission chair to be a public member appointed by the governor.

#### **Rec. 1.3** (Page 18)

Modernize TABC's conflict-of-interest provisions by defining financial interest to mean 1 percent or more in an alcoholic beverage business.

##### ***Chairman Birdwell Proposed Modification***

Modify Recommendation 1.3 to define financial interest in an alcoholic beverage business to mean 5 percent or more, instead of 1 percent or more, and clarify the limit is cumulative, such that an employee or commission member could not have a total of more than 5 percent interest in the alcoholic beverage industry.

##### ***Senator Watson Proposed Modification***

Modify Recommendation 1.3 to define financial interest in an alcoholic beverage business to mean 5 percent or more, instead of 1 percent or more. Prohibit a TABC employee's or commission member's spouse or dependent child from having a financial interest in an alcoholic beverage business (as opposed to prohibiting a financial connection to anyone with a financial interest in an alcoholic beverage business).

#### **Rec. 1.4** (Page 18)

Authorize the commission to establish advisory committees by rule.

## Management Action

### **Rec. 1.5** *(Page 19)*

Direct the commission to establish advisory committees to provide expertise for rulemaking and other issues, and to adopt rules regarding standard committee structure and operating criteria.

### **Rec. 1.6** *(Page 19)*

Direct TABC to evaluate and address gaps in its rules.

### **Rec. 1.7** *(Page 20)*

Direct TABC to update its rule describing the separation of duties between the commission and executive director.

### **Rec. 1.8** *(Page 20)*

Direct TABC to make meeting materials and recordings available online.

## **Issue 2**

*TABC Cannot Efficiently Regulate the Alcoholic Beverage Industry Without Modernizing the State's Byzantine Licensing System. (Page 21)*

## Change in Statute

### **Rec. 2.1** *(Page 29)*

Streamline the state's alcoholic beverage licensing system by reducing the number of licenses and permits to provide regulatory clarity and administrative efficiency.

#### ***Chairman Birdwell Proposed Modification***

In implementing Recommendation 2.1b to eliminate agent licenses and permits, ensure the statutory language does not change the current statutory liability of employers of agents. (Management action – nonstatutory)

### **Rec. 2.2** *(Page 30)*

Modernize Texas' regulation of malt beverages by eliminating distinctions between beer and ale.

#### ***Chairman Birdwell Proposed Modification***

In lieu of Recommendation 2.2b, require hearings for protests of any malt beverage-related application to be conducted by the county judge of the county in which the applicant seeks to conduct business.

***Senator Watson Proposed Modification***

Apply the Alcoholic Beverage Code’s provisions for beer to all malt beverages in the event of inconsistencies in statutory provisions for beer and ale that are not explicitly addressed by the Sunset Commission’s actions on Recommendation 2.2.

**Rec. 2.3** *(Page 32)*

Remove fees from statute to allow TABC to systematically review and adjust license and permit fees on an ongoing basis.

**Issue 3**

*Over-Regulation of Certain Business Practices Creates Burdens on TABC and the Alcoholic Beverage Industry With Little Public Benefit. (Page 35)*

Change in Statute

**Rec. 3.1** *(Page 41)*

Streamline TABC’s process for approving alcoholic beverages for sale in Texas.

***Chairman Birdwell Proposed Modification***

If the Sunset Commission does not adopt Recommendation 2.2, modify Recommendation 3.1 to require all manufacturers of alcoholic beverages to include the alcohol content by volume on their labels.

***Chairman Birdwell Proposed Modification***

Modify Recommendation 3.1 to continue the requirement for testing the alcohol content of malt beverages. Require businesses to maintain records of alcohol content testing, rather than submitting them to TABC, for a period of time specified in rule by TABC. As a management action, direct TABC to regularly spot test malt beverages to verify their alcohol content and inspect business’s testing records to ensure compliance.

***Chairman Birdwell Proposed Modification***

Direct TABC to adopt penalty guidelines for licensees who manufacture alcoholic beverages and substantially mislead the public about a beverage’s alcohol content. (Management action – nonstatutory)

***Senator Hall Proposed Modification***

Modify Recommendation 3.1 to exempt a business that manufactures a malt beverage produced and consumed entirely at the business’s location, and not sold for consumption off the premise, from the requirement to obtain a federal Certificate of Label Approval for those beverages.

### ***Senator Watson Proposed Modification***

Modify Recommendation 3.1 to include the following provisions:

- Specify that although TABC may adopt a regular testing program under its general authority to test the content of alcoholic beverages, it may not require testing of a beverage as a condition for beverage registration.
- Authorize a licensee to request a hearing before the State Office of Administrative Hearings (SOAH) if TABC denies label and registration approval for a beverage that has a valid federal Certificate of Label Approval or if TABC does not issue either approval or denial of registration within 45 days of receiving an application.
- Exempt a business that manufactures a malt beverage produced and consumed entirely at the business's location, and not sold for consumption off the premise, from the requirement to obtain a federal Certificate of Label Approval for those beverages. Instead, require businesses to post the alcohol content of those malt beverages at its location.
- Direct TABC to adopt rules and penalty guidelines for licensees who manufacture alcoholic beverages who substantially mislead the public about a beverage's alcohol content. (Management action – nonstatutory)
- Direct TABC to adopt rules regarding the documentation manufacturers must maintain regarding their products' alcohol content testing. (Management action – nonstatutory)

### ***Representative Thompson Proposed Modification***

Modify Recommendation 3.1 to continue the requirement for testing the alcohol content of malt beverages and add a requirement that alcohol content percentage by volume be included on the label for all malt beverages.

### **Rec. 3.2 (Page 41)**

Make cash payments optional by applying the existing credit law restrictions to beer transactions between retailers and distributors.

### ***Senator Hall Proposed Modification***

In lieu of Recommendation 3.2, require distributors to purchase beer from manufacturers using cash or an equivalent payment method.

**Rec. 3.3** (Page 42)

Eliminate overly restrictive outdoor advertising requirements.

Management Action

**Rec. 3.4** (Page 19)

Direct the commission to update its existing penalty guidelines to strengthen enforcement against licensees who violate the credit law.

**Issue 4**

*TABC's Protest Process Needs A Complete Overhaul to Meet Basic Transparency, Accountability, and Fairness Standards. (Page 45)*

Change in Statute

**Rec. 4.1** (Page 48)

Restructure TABC's protest process to align with best practices, improving consistency and accountability for applicants and TABC.

***Chairman Birdwell Proposed Modification***

Modify Recommendation 4.1 to maintain the involvement of county judges in hearing protests of beer-related applications. The hearings process for protests would be as follows:

**Hearing location**

- Require protest hearings of beer-related applications to be conducted by the county judge of the county in which the applicant seeks to conduct business. Consistent with current law, on receiving an order from a county judge, the commission would be clearly authorized to deny a license application if the commission possesses information from which it determines any statement in the application is false or misleading, or that other legal reasons exist to deny the license.
- Consistent with current law, require protest hearings of all other applications to be conducted by SOAH in the county in which the applicant seeks to conduct business, the nearest SOAH regional office, or any location agreed to by the parties.

## **Appeals**

- Authorize applicants to appeal the commission's final decision to deny any license or permit to the district court in the county in which the applicant seeks to conduct business.

If the Sunset Commission adopts staff Recommendation 2.2, modify Recommendation 4.1 to require protests of all malt beverage-related applications to be heard by the county judge of the county in which the applicant seeks to conduct business. All other recommendations in staff Recommendation 4.1 would remain unchanged.

### ***Senator Watson Proposed Modification***

Modify Recommendation 4.1 to clarify that applicants who wish to seek judicial review of a TABC decision on a protested application must first exhaust all administrative remedies available within TABC, pursuant to the Administrative Procedure Act.

## **Management Action**

### **Rec. 4.2 (Page 50)**

Direct TABC to clearly inform applicants of their due process rights.

## **Issue 5**

*Several TABC Enforcement Practices Do Not Follow Common Standards, Limiting Regulatory Efficiency and Effectiveness. (Page 53)*

## **Change in Statute**

### **Rec. 5.1 (Page 57)**

Require TABC to regularly inspect every regulated location in the state within a reasonable period and direct the commission to set a minimum inspection period by rule that prioritizes public safety risks.

### ***Mrs. Pataki Proposed Modification***

Modify Recommendation 5.1 to also require TABC to regularly inspect every regulated location in the state through either a compliance reporting process or through a physical inspection in a reasonable period of time established by the commission in rule.

**Rec. 5.2** *(Page 57)*

Remove the requirement that TABC offer licensees a choice between a suspension or fine and, instead, authorize TABC to determine the appropriate penalty for each violation.

**Rec. 5.3** *(Page 57)*

Authorize TABC to consider profits earned from violating the law when penalizing licensees.

***Mrs. Pataki Proposed Modification***

Modify Recommendation 5.3 to authorize TABC to consider the profits a licensee earns by committing a violation when setting a disciplinary penalty, but only for repeat violations by a licensee.

**Rec. 5.4** *(Page 57)*

Authorize TABC to temporarily suspend licenses and permits if it finds a continuing threat to the public welfare.

**Rec. 5.5** *(Page 58)*

Make noncompliance with a commission order a statutory violation and authorize TABC to take disciplinary action or deny license or permit renewal for noncompliance.

**Rec. 5.6** *(Page 58)*

Remove the nonstandard requirement allowing the public to testify at TABC disciplinary hearings.

**Rec. 5.7** *(Page 58)*

Require the commission to make final determinations on most enforcement and disciplinary actions.

***Mrs. Pataki Proposed Modification***

In lieu of Recommendation 5.7, require the commission to take final action on enforcement cases for all contested cases as well as agreed orders that meet a threshold established by rule. Authorize the commission to delegate to staff the authority to enter into final orders for agreed orders not meeting the threshold.

As a management action, direct TABC staff to report information about disciplinary actions to the commission at each regular commission meeting. These reports should include information such as a summary of any significant cases settled or dismissed by staff, trend data regarding case resolution and

assessed penalties, and a summary of pending enforcement actions being pursued by agency staff.

### Management Action

#### **Rec. 5.8** (Page 58)

Direct TABC to complete its schedule of sanctions to account for all regulatory violations.

## **Issue 6**

*The High Cost of Collecting Alcohol Import Taxes at the Border Outweighs the Negligible Public Safety Benefit. (Page 61)*

### Change in Statute

#### **Rec. 6.1** (Page 66)

Repeal the state's inefficient tax on alcohol imported for personal use and eliminate TABC's ports of entry tax collection program.

#### ***Senator Watson Proposed Modification***

In lieu of Recommendation 6.1, direct TABC to issue a report to the Legislature by March 1, 2019 with recommendations to make the Ports of Entry Program cost-neutral. The report should address the pros and cons of various options, including but not limited to

- operating additional ports of entry locations,
- expanding operating hours,
- increasing the administrative fee or the tax, and
- increasing the statutory limits on the amount of alcohol that can be imported for personal use.

(Management action – nonstatutory)

## **Issue 7**

*TABC's Statute Does Not Reflect Standard Elements of Sunset Reviews. (Page 69)*

### **Change in Statute**

#### **Rec. 7.1 (Page 70)**

Update the standard across-the-board requirement related to commission member training.

#### ***Chairman Birdwell Proposed Modification***

Modify Recommendation 7.1 to require each board member to attest to both receiving and reviewing the training manual annually.

#### **Rec. 7.2 (Page 71)**

Discontinue the requirement for TABC to prepare a limited report on after-hours violations.

#### **Rec. 7.3 (Page 71)**

Update the agency's statute to reflect the requirements of the person-first respectful language initiative.

# Proposed New Recommendations

## Agency Administration

### ***Vice Chairman Paddie Proposed New Recommendation 1***

Restrict the release of personnel records of commissioned TABC officers involved in an open internal investigation.

### ***Vice Chairman Paddie Proposed New Recommendation 2***

Direct TABC to implement a policy allowing license applicants to submit only the name and address of each owner and director, and only require further personal information if cross-tier concerns arise. (Management action – nonstatutory)

### ***Vice Chairman Paddie Proposed New Recommendation 3***

Specify that market data from members of the alcoholic beverage industry has no monetary value and may be given to TABC, and clarify the data is protected from disclosure.

### ***Senator Buckingham Proposed New Recommendation 4***

Specify that market data from members of the alcoholic beverage industry has no monetary value and may be given to TABC.

### ***Senator Buckingham Proposed New Recommendation 5***

Modify Alcoholic Beverage Code Section 11.01(c) to clarify TABC's authority to pass rules where the code is silent.

### ***Senator Hall Proposed New Recommendation 6***

Repeal Alcoholic Beverage Code Section 11.01(c), which specifies that acts not permitted by the code are unlawful.

### ***Senator Hall Proposed New Recommendation 7***

Require county and city officials to complete the local certification process for TABC license and permit applicants within 30 days of receiving the application.

### ***Senator Hall Proposed New Recommendation 8***

Direct TABC to modify its applications to allow local jurisdictions to clearly indicate if they do not certify an area as wet for the license or permit being sought. (Management action – nonstatutory)

## **Authority of Regulated Entities**

### ***Senator Hall Proposed New Recommendation 9***

Authorize brewpubs to transfer malt beverages that it produces at one location to another brewpub location, owned by the same licensee or permittee.

### ***Senator Hall and Representative Flynn Proposed New Recommendation 10***

Authorize breweries to import ale for manufacturing purposes by adding the following provisions to the Alcoholic Beverage Code:

- Authorize the holder of a brewer’s permit to blend and mix ales.
- Authorize the holder of a brewer’s permit to import ale purchased from the holder of a nonresident brewer’s permit for manufacturing purposes. Specify that the state tax on ale imported for manufacturing purposes does not accrue until the product manufactured with the imported ale is placed in containers for sale.

### ***Senator Watson Proposed New Recommendation 11***

Authorize brewpubs to sell products they are already allowed to sell to qualified persons outside the state.

### ***Representative Lambert Proposed New Recommendation 12***

Authorize manufacturing tier businesses that have licenses and/or permits for multiple types of alcoholic beverages, and are currently authorized to have a tasting room, to have a common tasting room for those beverages.

## **Alcoholic Beverage Code Modernization**

### ***Representative Thompson Proposed New Recommendation 13***

Require the Sunset Commission staff and the Texas Legislative Council (TLC), with assistance from TABC, to analyze and make recommendations for a modernization and non-substantive revision of the Texas Alcoholic Beverage Code. Sunset staff and TLC would not consider changes to the overall three-tier regulatory system, but would evaluate

- inconsistencies in authorities and treatment of different alcoholic beverages and regulated businesses;
- use of the terms “license” for beer and “permit” for all other alcoholic beverages;

- technical changes needed, including but not limited to removing unconstitutional provisions and outdated language, updating the code's structure to comply with modern drafting standards, and correcting legal citations; and
- other changes needed to modernize the code within the three-tier system.

TLC would identify statutory inconsistencies and other issues that may impede modernizing the code. Sunset staff would work directly with TLC and TABC to determine whether and how to address the identified issues. Sunset staff would be authorized to engage interested stakeholders in this process. TLC would prepare a non-substantive revision bill to address any technical changes needed, which the Sunset Commission would consider for a vote by September 1, 2022. Separately, Sunset staff would make recommendations to the Sunset Commission by September 1, 2022, to address other, more substantive issues needed to modernize the Texas Alcoholic Beverage Code.