



# TABC

TEXAS ALCOHOLIC BEVERAGE COMMISSION

*service ★ courtesy ★ integrity ★ accountability*

## COMMISSION MEETING

*October 18, 2011*

Texas Alcoholic Beverage Commission  
5806 Mesa Drive  
Austin, Texas 78731

*José Cuevas, Jr., Presiding Officer  
Midland*

*Steven M. Weinberg, MD, JD, Member  
Colleyville*

*Melinda Fredricks, Member  
Conroe*

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# **AGENDA**

## **REGULAR COMMISSION MEETING**

**9:30 a.m. – October 18, 2011**

**5806 Mesa Drive  
Austin, TX 78731**



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José Cuevas, Jr.  
Presiding Officer-Midland

Steven M. Weinberg, MD, JD  
Member-Colleyville

Melinda S. Fredricks  
Member-Conroe

Alan Steen  
Administrator

**Tuesday, October 18, 2011 – 9:30 a.m.**

**Agenda**

1.	Call to Order	José Cuevas, Jr.
2.	Approval of Commission Meeting Minutes of August 23, 2011	José Cuevas, Jr.
3.	Administrator's Report: Administrator and Agency Activities, Budget Issues, Staff Achievements	Alan Steen
4.	Wildfire Assistance Briefing	Joel Moreno
5.	Office of Professional Responsibility Briefing: OPR Trends FY 2009-FY2011	Andy Peña
6.	Approval to Adopt Amendment to §33.13, Process to Apply for License or Permit	Martin Wilson
7.	Approval to Adopt Amendment to §33.15, Use of Winery Festival Permit	Martin Wilson
8.	Approval to Adopt Amendment to §45.121, Credit Restrictions and Delinquent List for Liquor	Martin Wilson
9.	Public Comment	José Cuevas, Jr.
10.	Executive Session 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)	José Cuevas, Jr.
11.	Next Meeting Dates: Tuesday, November 15, 2011 Tuesday, January 24, 2012	José Cuevas, Jr.
12.	Adjourn	José Cuevas, Jr.

# **MINUTES**

## **REGULAR COMMISSION MEETING**

**9:30 a.m. – October 18, 2011**

**5806 Mesa Drive  
Austin, TX 78731**



# TABC

TEXAS ALCOHOLIC BEVERAGE COMMISSION

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## COMMISSION MEETING MINUTES

October 18, 2011

The Commissioners of the Texas Alcoholic Beverage Commission (TABC) met in Regular Session on Tuesday, October 18, 2011, at the Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Suite 185, Austin, Texas.

### **PRESIDING**

#### **OFFICER:**

José Cuevas, Jr.

#### **COMMISSIONERS**

#### **PRESENT:**

Melinda Fredricks

Steven M. Weinberg, MD, JD

### **STAFF PRESENT:**

Alan Steen, Administrator

Carolyn Beck, Director of Communications and  
Governmental Relations

Mindy Carroll, Assistant Director, Education and Prevention  
Education

Sherry Cook, Assistant Administrator, Executive Division

Darryl Darnell, Lieutenant, Regional Liaison

Luann Dickerson, Executive Assistant, Executive Division

Loretta Doty, Director, Human Resources Division

Shelby Eskew, Director, Business Services Division

Kathy Gersbach, Executive Assistant, Executive Division

Steve Greinert, Director, Tax Division & Marketing Practices

Thomas Graham, Supervisor, Marketing Practices

Amy Harrison, Director, Licensing Division

Emily Helm, General Counsel, Legal Division

Joe Iagnemmo, Web Administrator

Dexter K. Jones, Assistant Chief of Field Operations

Charlie Kerr, Director, Tax Division/Education  
and Prevention

Michael Lockhart, Lieutenant, Training Division

Roland Luna, Lieutenant, Office of Professional  
Responsibility

Joel Moreno, Chief of Field Operations

Merideth Munoz, Information Specialist, Executive Division  
Earl Pearson, Chief of Staff, Executive Division  
Andy Peña, Director, Office of Professional Responsibility  
Gloria Darden Reed, Executive Assistant, Executive Division  
Albert Rodriguez, Lieutenant, Office of Professional  
Responsibility  
Santos Saldana, Supervisor, Ports of Entry  
Loretta Smith, Assistant Director, Business Services Division  
Todd Talley, Regional Liaison  
Rod Venner, Assistant Chief of Field Operations  
Jay Webster, Director, Information Resources Division  
Martin Wilson, Assistant General Counsel, Legal Division

**GUESTS  
PRESENT:**

Lou Bright, General Counsel, Texas Wine and Grape  
Growers Association (TWGGA)  
Colleen Buck, Policy, Governor's Office  
ML Calcote, Consultant, Republic National Distribution  
Company  
Rick Donley, President, The Beer Alliance of Texas  
Glen Garey, General Counsel, Texas Restaurant  
Association  
Alan Gray, Executive Director, Licensed Beverage  
Distributors  
David Jabour, President, Twin Liquors, Texas Package  
Stores Association  
Lance Lively, Executive Director, Texas Package Stores  
Association  
Fred Marosko, Consultant, Texas Package Stores  
Association  
Matt Martin, Shareholder, Addison Law  
Fred Niemann, Attorney, Texas Package Stores Association  
Ralph Townes, Senior Vice President, Licensed Beverage  
Distributors/Glazers  
Randy Yarbrough, Consultant, Wholesale Beer Distributors  
of Texas

**CALL TO ORDER**

The meeting of the Texas Alcoholic Beverage Commission was called to order at 9:41 a.m. by Presiding Officer José Cuevas.

## **APPROVAL OF COMMISSION MEETING MINUTES OF AUGUST 23, 2011**

Presiding Officer José Cuevas called for approval of the Commission meeting minutes of August 23, 2011. Commissioner Steven Weinberg so moved to approve the minutes as written, and Commissioner Fredricks seconded. The motion carried.

### **ADMINISTRATOR'S REPORT: ADMINISTRATOR AND AGENCY ACTIVITIES, BUDGET ISSUES, STAFF ACHIEVEMENTS**

Presiding Officer Cuevas called upon Administrator Steen to give his Administrator's report. After welcoming the Commissioners to Austin for a pleasant fall meeting day, Administrator Steen made a birthday announcement for his Executive Assistant Luann Dickerson and asked for all to wish her well.

Administrator Steen's report began with a discussion of the various trends in the growth of licensed businesses in Texas. He stated that the number of licensed businesses is expected to grow at an average rate of one to two percent annually. The trends involving the excise tax gross and excise tax revenues can be attributed to the increase in businesses therefore causing an increase in the sales of distilled spirits. Administrator Steen elaborated on the changes that have occurred in gallons of wholesale volume sales of distilled spirits, wine, beer and ale as seen in his PowerPoint presentation. Other areas of interest in trends highlighted:

- Ports of Entry – Personal importation taxed
- Ports of Entry – Revenues
- Ports of Entry – Number of containers down (month of September)
- Ports of Entry – Increased volume (month of September, revenue up by 90%)

Commissioner Weinberg asked if the \$3.00 fee is charged by container and not by volume. Administrator Steen concurred with Commissioner Weinberg and stated that the \$3.00 fee is an administrative fee.

Administrator Steen reported on the staff achievements and accomplishments:

- Division of Education and Prevention – Created QR (Quick Response) Codes that will appear on educational materials distributed by the Agency. The codes will allow smartphone users to gain access to the 2young2drink.com or tabc.state.tx.us websites;
- 911 Lifeline Legislation - SB1331/HB3474, TABC's proactive approach in partnering with College/University Presidents statewide to educate their campus law enforcement teams on preventive measures on alcohol poisoning and how to respond when a call is received;
- Tax Division – Worked in partnership with FedEx and UPS to reduce the number of out-of-state retailers that were illegally shipping alcoholic beverages into Texas

Commissioner Weinberg asked Administrator Steen on how the illegal shipments are monitored. Administrator Steen responded that the Tax Division performs a tedious and time consuming task in monitoring the reports received of shipments to Texas. He stated that if the division becomes suspicious of possible illegal shipments, FedEx or UPS are contacted to take care of the issue on future shipments.

Concluding his report, Administrator Steen spoke on the Labor Day fire that happened in Bastrop County. He stated the fire presented a challenge in maintaining standard Agency operations as many of its employees responded to a series of wildfires. Administrator Steen applauded the dedicated efforts of his Executive Management Team, Commissioned Peace Officers, and Civilian employees during the fire. He stated that Bastrop's Sheriff Terry Pickering presented TABC with an award in appreciation of their service.

**Commissioner Weinberg inquired if the Commissioners would be recognizing the Agency participants. Administrator Steen responded affirmatively and stated that Chief Joel Moreno is compiling a list for that recognition.**

The final slide of the PowerPoint presentation is a picture of the Texas flag "untouched and unburned" while everything around it has burned down to the ground. Administrator Steen stated that "even in tragedy, the Texas flag continues to stand." Commissioner Weinberg commented that the Texas flag has survived through the battles at the Alamo and San Jacinto, and World War I and II. He stated that he is not surprised that it made it through the fire in Bastrop. He stated he is proud of the work done by Agency employees.

Presiding Officer Cuevas inquired if we expected over time the percentages gained by the increase in the Administrative fees to go down. Administrator Steen answered the percentage is about 90 percent and expects the revenue to level off but is unable to give an expectant time for it to occur.

Presiding Officer Cuevas asked will the fees cause some dishonesty due to the increase in administrative fees. Administrator Steen stated that Interim Ports of Entry Director Roland Luna is working to establish a relationship with the border police to help curb the illegal transport of products across the border. Presiding Officer Cuevas asked what type of notice is given to the "Winter Texans" as they cross over into Mexico to bring products back into the United States. Administrator Steen stated that a notice is posted for the person entering Mexico with information on the transport of items from Mexico and flyers are available for distribution.

Commissioner Weinberg commented that he is glad that better security has been established at the Ports of Entry with cameras and other equipment. He asked where the cameras are located and who is monitoring the cameras. Assistant Administrator Sherry Cook stated the camera is located at the booth or in close proximity of the booth's location. Administrator Steen stated the cameras during operation are in a video recording mode for playback should there is a need to

review. Presiding Officer Cuevas asked if the camera could be used to view real-time footage at the booths. Administrator Steen answered negatively, stating that funds for that type of equipment are not available at this time.

Assistant Administrator Cook stated that Interim Director Luna has been reviewing Port sites and as a result added additional training sessions regarding safety. When the administrative fees increased on September 1, 2011, Interim Director Luna was at the border booth sites to help ease anticipated issues with the gallon containers. It was reported that there were no issues or problems associated with the administrative fee increases. The customers did not mind the increase and were satisfied that they were able to bring more products back across the border. Administrator Steen commented that the statute equalized Texas resident and non-Texas resident on the volume of products that could be brought across the border which offsets the administrative fee.

Commissioner Weinberg asked Administrator Steen to discuss the reallocation of the Agency's resources. Administrator Steen anticipates having good results in the hiring of the captains and lieutenants in the new regional areas, therefore creating a community policing model in a regulatory environment. He stated the community and the personnel assigned to that region will develop a working relationship and familiarity within that region.

Commissioner Weinberg asked Administrator Steen if he has received any comments from the industry regarding the reallocation of the Agency's resources. Administrator Steen answered negatively, except with the move of personnel from one region to another, he has been asked to whom questions should be directed to on certain issues.

Presiding Officer Cuevas inquired on the profile of the new candidates. Administrator Steen stated that the report to be given in behalf of the Office of Professional Responsibility (OPR)'s director, Captain Peña may be discussed. Administrator Steen stated that the reassignment of the candidate background check to OPR was a good move.

Presiding Officer Cuevas asked Administrator Steen how has the Agency been perceived as he has travelled around the state by other law enforcement agencies. Administrator Steen stated that there are some sheriff's offices that would like for TABC to conduct business under the old image. However, with the leadership of Chief Moreno and his Division using the basic principles behind the cornerstones' theory, a positive impact is occurring in the communities, towns, and cities statewide.

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

## **WILDFIRE ASSISTANCE BRIEFING**

Presiding Officer Cuevas called upon Chief Joel Moreno to present the agenda item entitled, Wildfire Assistance Briefing.

Chief Moreno's report highlighted the events surrounding the fire in Bastrop County on September 5, 2011:

- **Mission**
  1. Public Safety – People were evacuated from the affected areas and controlled access to those areas still under threat.
  2. Protection of Property – Controlled access to affected areas to protect essential personnel and to secure property of evacuees.
- **Responsibility**
  1. Evacuation – Clearing neighborhoods an area in the path of the fires. Assisting emergency response personnel as needed.
  2. Roadblocks – Static posts that controlled access by vehicles
  3. Controlled Re-entry – Adjusted and adapted control points to allow a safe and orderly phase of re-entry process.
  4. Access Control Points – Controlled vehicle access to specific areas and impacted foot traffic into the neighborhoods 24 hours a day.

Chief Moreno stated that in addition to the CPOs helping during this catastrophe fire, Agency employees manned the phone bank. Commissioner Weinberg asked who will reimburse the overtime worked by the employees. Chief Moreno stated "FEMA" will reimburse the Agency.

Assistant Administrator Cook thanked the Commissioners, Administrator Steen, Chief Moreno, and Assistant Chiefs for their response to the Bastrop Community. She stated that as a resident of that community, she, Shelby Eskew, Amy Harrison and many others are very appreciative for all the help. She stated that the professionalism displayed by TABC employees literally left the "WOW factor" in our community.

Presiding Officer Cuevas asked what type of training model that was used for this disaster. Assistant Administrator Cook answered that it was a coordinated effort starting with the law enforcement training prospective, maintaining the mission statement of courtesy, public safety, and the professionalism of the interaction with people. She stated her experience from working on the Helpdesk at DPS enabled her to manage the phone bank along with Director Eskew's incredible organizational skills and Assistant Director's Smith ability to create and update a spreadsheet of vital and factual information.

Presiding Officer Cuevas asked what was learned from working a disaster of this magnitude that could potentially be used in future situations. Chief Moreno

responded that a debriefing meeting was held and from that meeting the Agency has discussed how it can better prepare for future events.

Presiding Officer Cuevas asked if “911” access was available to notify the residents in the affected areas. Assistant Administrator Cook stated “911” was not readily available. On the second and third day, the phone bank began receiving information on the status of home owner’s property that was then made available to callers.

Chief Moreno stated that letters are being drafted to thank the various businesses in Bastrop that supplied food, water, and other essential supplies to Agency employees.

Presiding Officer Cuevas called upon Darryl Darnell to come forward for comments. Darryl Darnell comments reflected on the appreciation to the Commissioners for their support from the 65 Commissioned Peace Officers deployed to assist the local law enforcement to protect the citizens in Bastrop, help maintain civil order, and protect property. He stated that Sheriff Pickering had previously worked with TABC agents from hurricane disasters and was aware of TABC’s professional reputation in dealing with the public and the handling issues of an emergency nature.

Presiding Officer Cuevas offered his appreciation to the Agents and Field Operations Staff. He stated that it takes a team effort to make the Agency proud and to be a benefactor to the whole outcome.

Presiding Officer Cuevas asked if the Agency had a communication system to communicate with other state agency systems. Chief Moreno answered affirmatively stating that the TABC’s radio system was able to communicate with the Texas Forest Service through the Texas Fire One Channel system.

Chief Moreno’s report is supported by a PowerPoint presentation.  
(Attachment 2)

## **OFFICE OF PROFESSIONAL RESPONSIBILITY BRIEFING; OPR TRENDS FY 2009-FY2011**

Presiding Officer Cuevas asked for Captain Andy Peña, Director of the Office of Professional Responsibility to present the next agenda item.

Director Peña began his report briefing the Commissioners of TABC’s documented negative image through personnel complaints from three years ago. In his discussion, Director Peña attributed the positive image change toward the “cycle of success” with the support of the administration and emphasis placed on:

### **Hiring of Personnel**

- Background investigations of Commissioned Police Officers (CPOs)
- Interviews

- Check references
- Conduct credit and criminal history checks
- Performance evaluations

### **Conducting Training**

- In-Service
  1. TCLEOSE mandated
  2. Agency needs
- Specialized Programs
  1. Agency needs
  2. Training committees
  3. Surveys
  4. New policy and procedures

### **Policy**

- Review team
- Consistent with agency requirements
- Employee understanding of policy
- Contemporary

Director Peña stated that these positive changes has reinforced the Agency's direction in future trends in hiring the right candidate, conducting the proper and necessary training and to develop policy and procedures that will equal to reduced incidents and complaints.

Director Peña stated that he has been assigned the duties in the Training Division in addition to the OPR duties. He stated that he would like to have more training extended to the non-commissioned personnel as it is to personnel in enforcement.

Commissioner Weinberg commented to Director Peña that he did a great job on his presentation and asked how effective the Agency is. Director Peña responded using Chief Moreno's comment on how well TABC's help in Bastrop's wildfire was received. He referred to an incident surrounding a case in Bastrop that tarnished TABC's reputation. However, when the fire disaster occurred, Bastrop officials and law enforcement agencies welcomed and showed their appreciation toward TABC's involvement and help.

Chief Moreno commented that Director Peña specialized training modules and OPR's responsibilities and duties has made his job easier because of the reduction in the use of force complaints and has allowed his team to maintain the Agency's major focus and its policies of putting good people in business and keeping the bad actors out.

Commissioner Fredricks commended Director Peña on his report. She thinks that he and his staff represents a sense of responsibility and is setting a standard that should proceed forward in every level of enforcement in the state. Commissioner Fredricks stated that Director Pena's presentation reflects the attitude of the leader and to keep up the good work. She expressed a hope that he will be able to expand his good works beyond TABC because it the right thing and the right thing have a way to making its way throughout society.

Presiding Officer Cuevas concurred with Commissioner Fredricks' comments stating that some people confuse intimidation with respect; you have to earn respect. He stated that it is not about the badge and a gun, but how you treat people and he thinks positive change in the Agency's favor occurred; it was not easy. He continued to comment on how the Agency has survived serious personnel matters, revised and developed new policies and procedures and drafted mission/goals in an effort to give the public a concise and better understanding of the Agency's regulatory responsibilities.

Presiding Officer Cuevas stated that the TABC employees are to be commended and leadership does comes from the top and at TABC, it is demonstrated everyday with examples for people to view and understand. Referring back to Assistant Administrator Cook's comment on the "WOW factor" being left behind from the Bastrop County fire, he stated that was an example allowing the public to see the Agency at its best, being respected in the community and making a difference.

Presiding Officer Cuevas recognized the Agency employment of the top number one use of force expert and commended him on being instrumental with the approach and training at the Agency. However, he cautioned Director Peña in referring to Commissioned Peace Officers as Police Officers. He stated that to refer to the Agency CPOs as Police Officers gives the mentality that the Agency hires Police. He stated that the Agency is a regulatory agency with law enforcement powers. Director Peña acknowledged the comment.

Presiding Officer Cuevas ended his comments with an appreciation to all Agency employees stating, "it is truly inspirational with the change that has occurred within the Agency."

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

### **APPROVAL TO ADOPT AMENDMENT TO §33.13, PROCESS TO APPLY FOR LICENSE OR PERMIT**

Presiding Officer Cuevas called upon Assistant General Counsel Martin Wilson for the presentation of the next three agenda items.

Assistant General Counsel Wilson briefed the Commissioners that the rule relates to the process to apply for a license or permit. The amendments to §33.13 are adopted

to conform to the rule recently amended provisions of the Alcoholic Beverage Code. He stated that a public hearing was held and received one oral comment on the proposed amendments. The comments received were from Mr. Alan Gray, representing the Licensed Beverage Distributors (LBD) stating the organization's support for the requirement to post a notice sign in a timely manner and support for the proposed amendments. (Attachment 4)

**Presiding Officer Cuevas called for a motion. Commissioner Weinberg moved for the approval to adopt amendment to §33.13, Process to Apply for License or Permit. Commissioner Fredricks seconded and the motion passes.**

**APPROVAL TO ADOPT AMENDMENT TO §33.15, USE OF WINERY FESTIVAL PERMIT**

Assistant General Counsel Wilson stated that the approval to adopt the amendment to §33.15, Use of Winery Festival Permit is adopted to conform the rule amended Alcoholic Beverage Code to change the limitation on how often the holder of a winery festival permit may offer wine for sale under the permit. Before the amendment, the permit could not be used for more than three consecutive days at the same location. The amendment changed the consecutive day limit from three to four. The amendment to §33.15 changes the consecutive day limitation on use of the permit in subsection (c) from three days to four days to conform to SB438. There were no comments received on this rule. (Attachment 5)

**Presiding Officer Cuevas called for a motion. Commissioner Weinberg moved for the approval to adopt amendment to §33.15, Use of Winery Festival Permit. Commissioner Fredricks seconded and the motion passes.**

**APPROVAL TO ADOPT AMENDMENT TO §45.121, CREDIT RESTRICTIONS AND DELINQUENT LIST FOR LIQUOR**

Assistant General Counsel Wilson stated that the approval to adopt the amendments to §45.121 related to Credit Restrictions and Delinquent List for Liquor. He stated that HB2012 in the 82<sup>nd</sup> Regular Session of the Texas Legislature, §102.32 of the Alcoholic Beverage Code was amended for purposes of credit restrictions and reporting delinquencies when a holder of a winery permit is considered a retailer when purchasing wine from a Chapter 19 wholesaler for resale to ultimate consumers in unbroken packages. Assistant General Counsel Wilson stated that there were no comments received regarding the proposal to amend the definition of "retailer" in §45.121(b) (6) to conform to HB2012 and that amendment is adopted.

In the second portion of the bill §45.121(j)(2), Assistant General Counsel Wilson stated if amended, reduces a retailer by two days to pay a delinquent fee before the retailer's name appears on the Delinquent List. When a retailer's name appears on the Delinquent List, all wholesalers are on notice that they may not sell any liquor to that retailer until that delinquent account is paid in full, pursuant to Code §102.32(d).

Assistant General Counsel Wilson stated other oral comments received on September 28, 2011 from Mr. Fred Marosko and Mr. Lance Lively, representing the Texas Package Store Association (TPSA), both agreed the proposed rule should change the time allowed from six calendar days to six business days. Mr. Ralph Townes attended the public hearing on September 28, 2011, representing Glazer's voiced his opinion to change from six calendar days to six business days acceptable, but also to tighten holes that currently exist in the credit law, specific example was related to the use of the U.S. postal service to deliver payments. Assistant General Counsel Wilson stated a total of 26 comments were received by mail and an additional seven were received by email. All of the written comments received opposed the proposed amendment shortening the time period from eight to six days but urged that if a change was made, it should be to six business days.

At the completion of Assistant General Counsel Wilson's explanation, Commissioner Weinberg stated that he was not prepared to vote on agenda item #8 due to the delay in the receipt of the amendment information. He stated that he did read the comments received from the Texas Package Store Association and other organization opposing the amendment. Commissioner Weinberg questioned his responsibility as a commissioner and why is this change being requested. He asked if the Agency is taking sides between the distributors and the package stores. Presiding Officer Cuevas commented that he believes the Agency is conforming to the statute passed in the Texas Legislative. Based on all the comments received, Commissioner Weinberg questioned why it is necessary to shorten the time period from eight to six days, why not seven days.

Administrator Steen offered an explanation to re-introduce to the Commissioners to what had transpired in earlier discussions on this item. He stated that the Sunset Advisory Commission required the Agency to modernize and automate issues relating to credit law. Administrator Steen stated that there are 10 days recognized in the statute but the Agency gave an additional two days to allow the mail delivery time. Although the Agency did not have the authority to approve the additional time, he stated that when the system became completely automated there was no reason to allow 12 days. In respect and fairness to the businesses, the Agency gave businesses the opportunity to adjust their business model over time, which started over 3 years ago, to reduce the time two calendar days per year until it reached zero. Administrator Steen explained that last year it was decided to reduce the time period from 10 calendar days to 8 calendar days. He stated that the rule is currently ready to post from 8 calendar days to 6 calendar days and the suggestion to change from 8 calendar days to 7 business days is too late to consider. Administrator Steen stated that the Agency is not showing favoritism to those who oppose or favor the rule and is not trying to make criminals out of honest hardworking people, however the Agency will use its authority to find a satisfactory solution for all parties.

Administrator Steen suggested organizing a workgroup committee to meet monthly and work out the issues of concern. He suggests that both those for and against the

rule to fully automate their process. He stated he is fully committed to meeting with the workgroup committee to resolve the issues and move toward the reduction to zero days in credit law.

Commissioner Weinberg commented that he understood Administrator Steen's explanation; however, he disagrees with it. He stated that he above all others have supported the idea of automation in the Agency. Presiding Officer Cuevas disagreed saying "that is not true."

Commissioner Weinberg stated that he did not recall any information in his packet stating anyone appearing on the delinquent list would be considered as criminals or would be arrested. Administrator Steen informed Commissioner Weinberg that if a person appears on the delinquent list a certain number of times, an administrative action will be taken against them.

Commissioner Weinberg asked when was this agenda item posted. Assistant General Counsel Wilson responded it was posted in July. Commissioner Weinberg stated that since that posting there have been a considerable amount of comments received. Commissioner Weinberg asked if the item does not pass at this meeting, will it have to be reposted. Administrator Steen responded in the affirmative.

Commissioner Weinberg asked if there were members of the industry who had signed up to address the Commission. No one had signed up to address the Commission; however, there were members present who desired to speak.

**Presiding Officer opened the floor for comments on agenda item #8, Approval to Adopt Amendment to §45.121, Credit Restrictions and Delinquent List for Liquor.**

Mr. Fred Niemann, Attorney, representing Texas Package Store Association, came forward to address the Commission. He questioned the Commission's authority to have the delinquent soft list process in order to implement what is in the code. Mr. Niemann's answered his query in the affirmative. He stated that over 80 years when credit law was adopted, it has been working. It's not broken, so why fix it. He encouraged the Commission to approve the time period from 8 calendar days to 6 business days in order to compile an accurate list and not to shorten the time below 6 business days.

Presiding Officer Cuevas questioned if the issue of 16 days or is it the 12 calendar days the Commission granted. He stated when there is an invoice dispute; normally it should not take 16 days to resolve the issue. He stated that if the issue is detrimental to the retail industry, the Commission will agree to research and seek a better working solution for all parties. In his personal opinion, Presiding Officer Cuevas believes that this issue is not damaging to the industry.

Assistant Chief Dexter Jones came forward to address the Commission. He stated the industry has 18 calendar days to reconcile and make payment before being entered on the delinquent list. Commissioner Fredricks quizzed Assistant Chief Jones on the exact number of days it takes to get off the delinquent list. He stated that the statute allows 10 calendar days to reconcile and make a payment. Assistant Chief Jones stated that the overall outlook in delinquency of over \$600 million has been reduced to \$20 million in delinquency accounts. He stated that money is being reinvested in the Texas economy. He commented that he does not think that the issue is at a point of no return and affirms that the changes made over the last two years, have been effective to reducing the overall debt. Assistant Chief Jones stated without a doubt, the Agency is not showing favoritism nor taking sides with any retail industry member over the other.

Mr. Alan Gray, representing Licensed Beverage Distributing, came forward to address the Commission. Mr. Gray stated that his group is open to consider the 6 calendar days and will meet with Administrator Steen at the October meeting to further discuss the issue. He stated his group is willing to work with the Commission and the staff to come up with a permanent solution for both sides.

Presiding Officer Cuevas recommended moving the agenda item as presented and instructed the staff to meet with industry and report back to the Commissioners in 90 days. Administrator Steen stated he will conduct a meeting for the industry on October 28<sup>th</sup>.

Commissioner Weinberg asked Administrator Steen what type of meeting will be held on the October 28<sup>th</sup>. Administrator Steen responded that he will be facilitating a meeting on October 28<sup>th</sup> with the Texas Package Store Association and the wholesalers to discuss the billing issues as described in letter written to Commissioner Weinberg and to try to resolve those issues. Commissioner Weinberg inquired why the meeting taking place is after the rule is changed. Administrator Steen stated that there needs to be an understanding between the Association and the wholesalers if the number of 6 or 8 calendar days could be the threshold of no return. Administrator Steen stated he agreed to meet with the two parties to discuss a way to resolve their billing issues and other concerns. He stated that his objective is to offer a recommendation next year to the Commission from an agreement between the Texas Package Store Association and the wholesalers concerning the number of business days of 6, 7, or to go back to 8 days.

Presiding Officer Cuevas stated that the answer to Commissioner Weinberg's question as to why the agenda item is presented at the meeting is because the Commission committed to review the rule in a year and now is the anniversary date. Administrator Steen responded affirmatively. He stated that at this time of the meeting, the Texas Package Store Association has written and voiced opposition to the rule because it may harm their market. He asked when the Commission received the opposition to the change. Assistant General Counsel Wilson stated the comments were received in July. General Counsel Helm stated the rule was

published in the *Texas Register* for a 30-day period to receive public comments and it was discussed and agreed to consider, at the stakeholders meeting, shortening the time period to 6 calendar days.

Commissioner Weinberg asked what will happen differently at the October 28<sup>th</sup> meeting than what occurred in July and September. Administrator Steen responded that the meetings in July and September were stakeholders meetings. The October 28<sup>th</sup> meeting will allow the stakeholders adequate time to understand, discuss, make changes to fix those issues at the retail, wholesale and agency levels with their recommendations to be presented at the commission meeting next year.

Commissioner Fredricks' summarized the issue stating the rule has been on record and the time period has been shortening to two days a year. She stated that there was not a problem with 8 days, however there seems to be a problem with 6 days. She stated that it has been a known fact that this is the trajectory in which the Agency was headed. Commissioner Fredricks stated that the Commission has encountered some turbulence and it will not stop the trajectory, but it will re-examine what is occurring in the mist of the trajectory and try to resolve the issue. She stated that if the issue can be resolved, the Commission will work to help the entire industry by looking at their practices that they may have implemented. However, she stated the Commission should continue with its trajectory on this rule.

Commissioner Fredricks asked if the 8 days referred to "calendar" or "business" days. Assistant General Counsel Wilson responded calendar days. She asked if the Commission changed from 6 calendar days to 6 business days is a substantive change and would it require a reposting. Assistant General Counsel Wilson responded in the affirmative. (Attachment 6)

**Commissioner Fredricks moved for the approval to adopt amendment §45.121, Credit Restrictions and Delinquent List for Liquor and instructed the staff to report back in 90 days at the January Commission meeting, on how the implementation is going i.e., industry delinquent list and Administrator's meeting with industry. Presiding Officer Cuevas seconded the motion. Commissioner Weinberg voted "nay" on the motion. The motion passed and the amendment is adopted.**

### **PUBLIC COMMENT**

Presiding Officer Cuevas opened the floor for public comments. No one came forward to address the Commission.

## **EXECUTIVE SESSION**

The regular open session of the Texas Alcoholic Beverage Commission was recessed at 11:38 a.m., October 18, 2011 and an executive session was 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, pursuant to Texas Government Code, §551.071, §551.074.

The Texas Alcoholic Beverage Commission concluded its executive session and resumed in open regular session on October 18, 2011 at 12:23 p.m. No final action, decision or vote was made in executive session.

## **NEXT MEETING**

Presiding Officer Cuevas announced the next meeting dates are scheduled for Tuesday, November 15, 2011 and Tuesday, January 24, 2012. There will not be a meeting in December.

## **ADJOURNMENT**

Presiding Officer Cuevas called for a motion to adjourn. Commissioner Weinberg so moved and Commissioner Fredricks seconded. The motion was made and seconded. The motion carried, and Presiding Officer Cuevas announced that the meeting was adjourned at 12:24 p.m.

# **Attachment 1**

**Administrator's Report: Administrator and  
Agency Activities, Budget Issues, Staff  
Achievements**



# Administrator's Report

TABC Commission Meeting

October 18, 2011



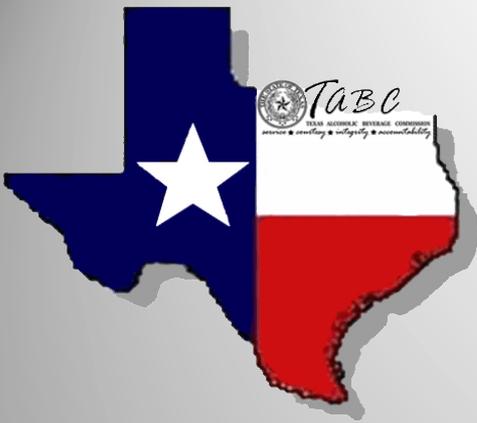
# Happy Birthday to Lu!

Today is Luann Dickerson's



?? Birthday



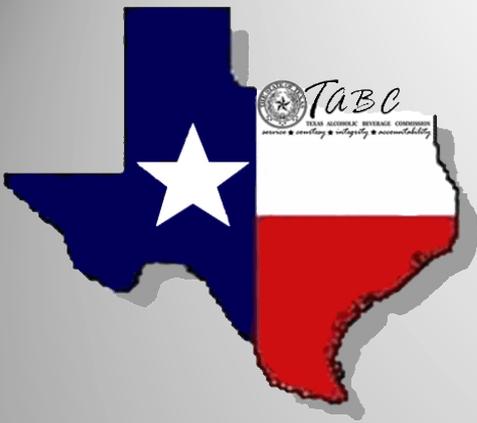


# TRENDS

## Growth of Licensed Businesses in Texas



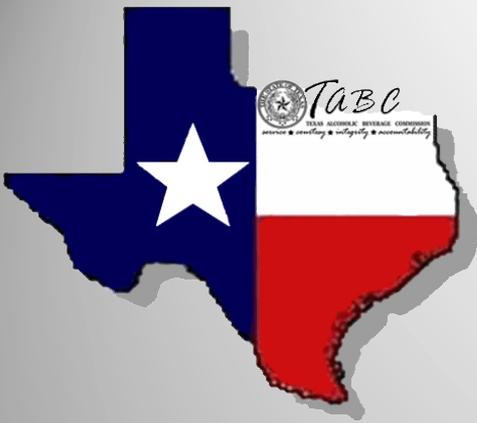
**The number of licensed businesses is expected to continue to grow at an average rate of 1 - 2 percent annually**



# TRENDS

## Excise Tax Gross Revenues FY 2010 & FY 2011

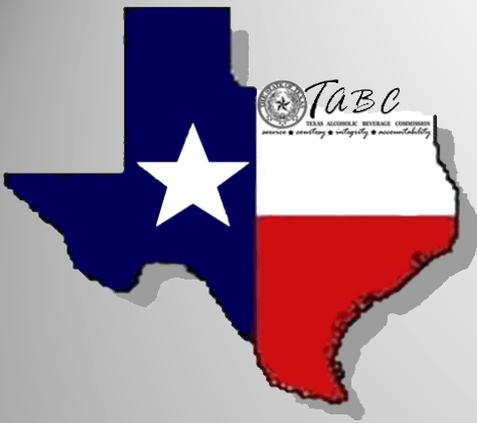




# TRENDS

## Changes in Wholesale Sales Volume From FY 2010 to FY 2011

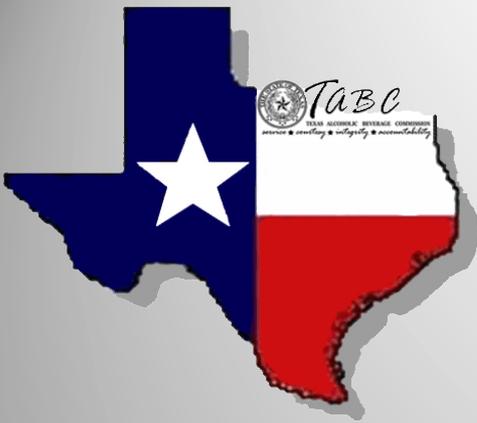




# TRENDS

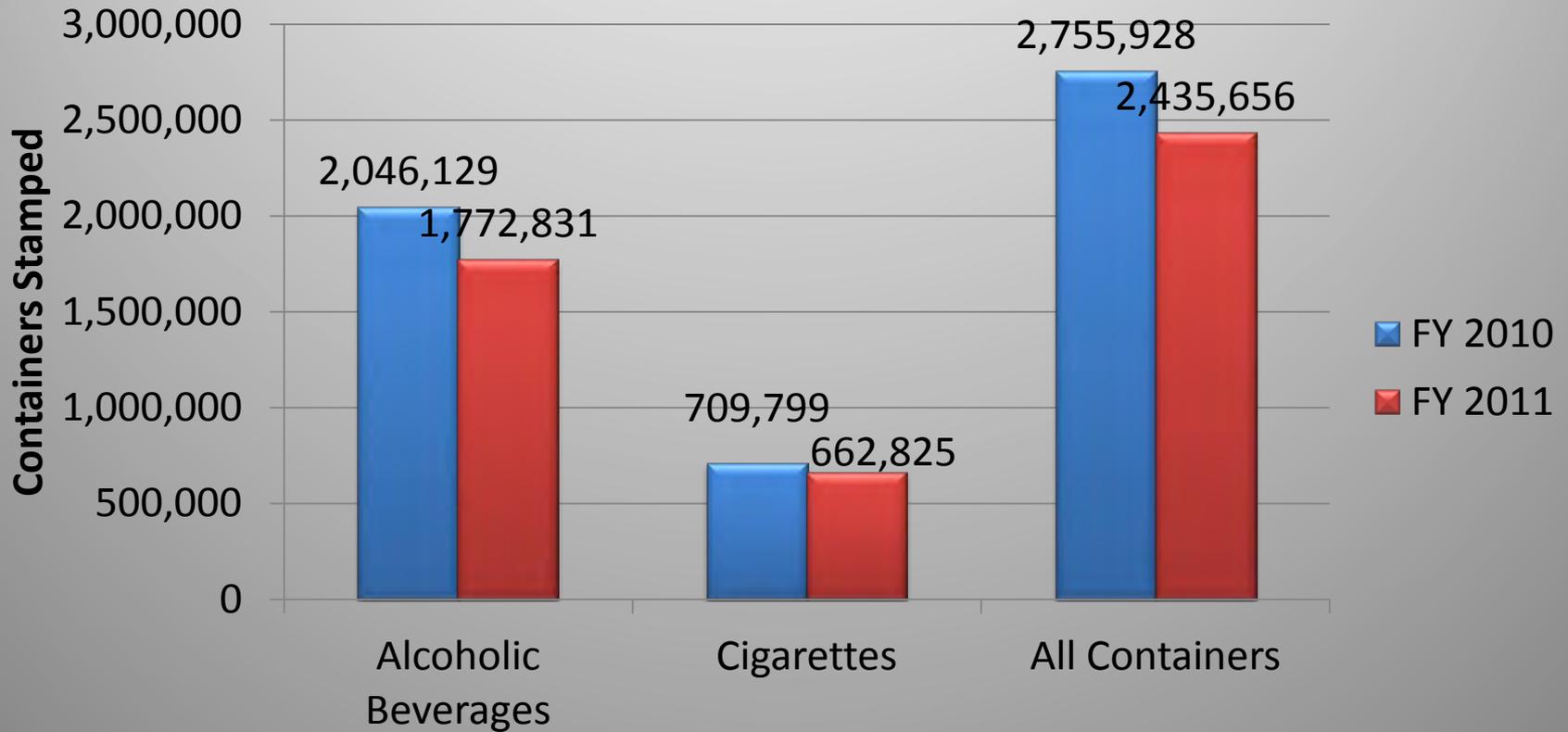
## Changes in Excise Tax Revenues From FY 2010 to FY 2011





# TRENDS

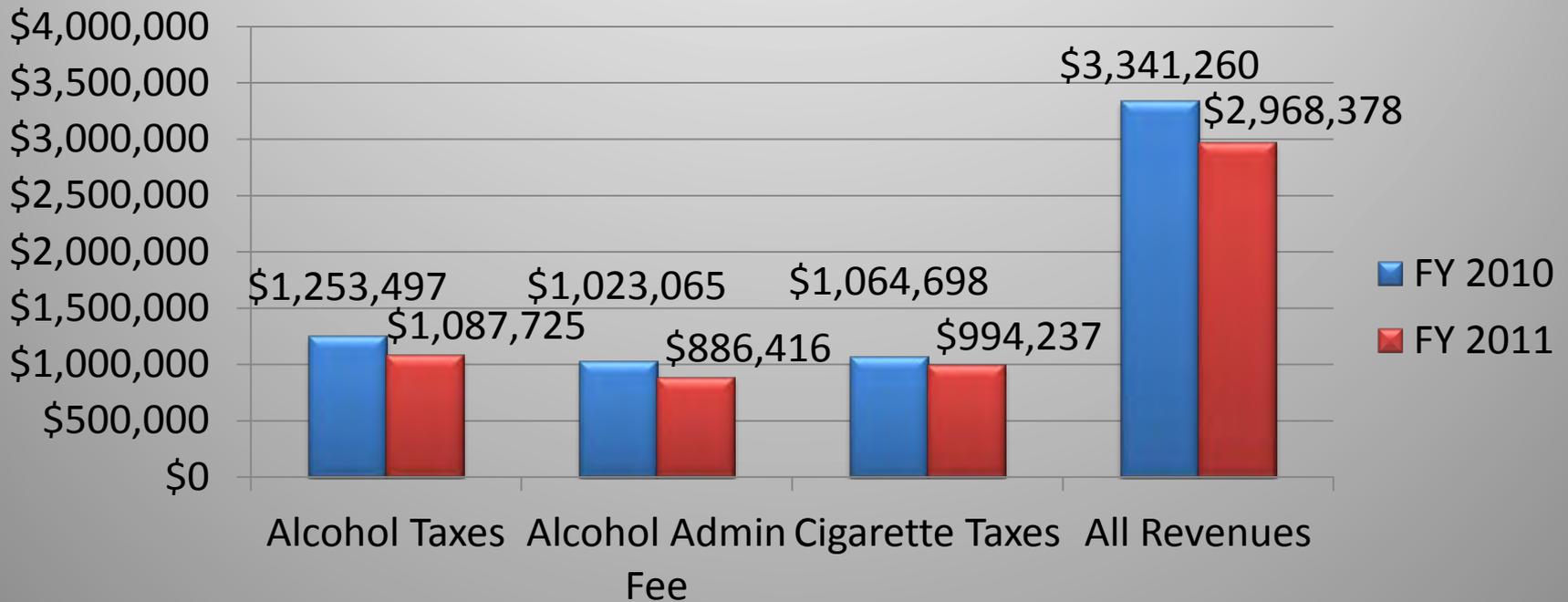
## Personal Importations Taxed by Ports of Entry





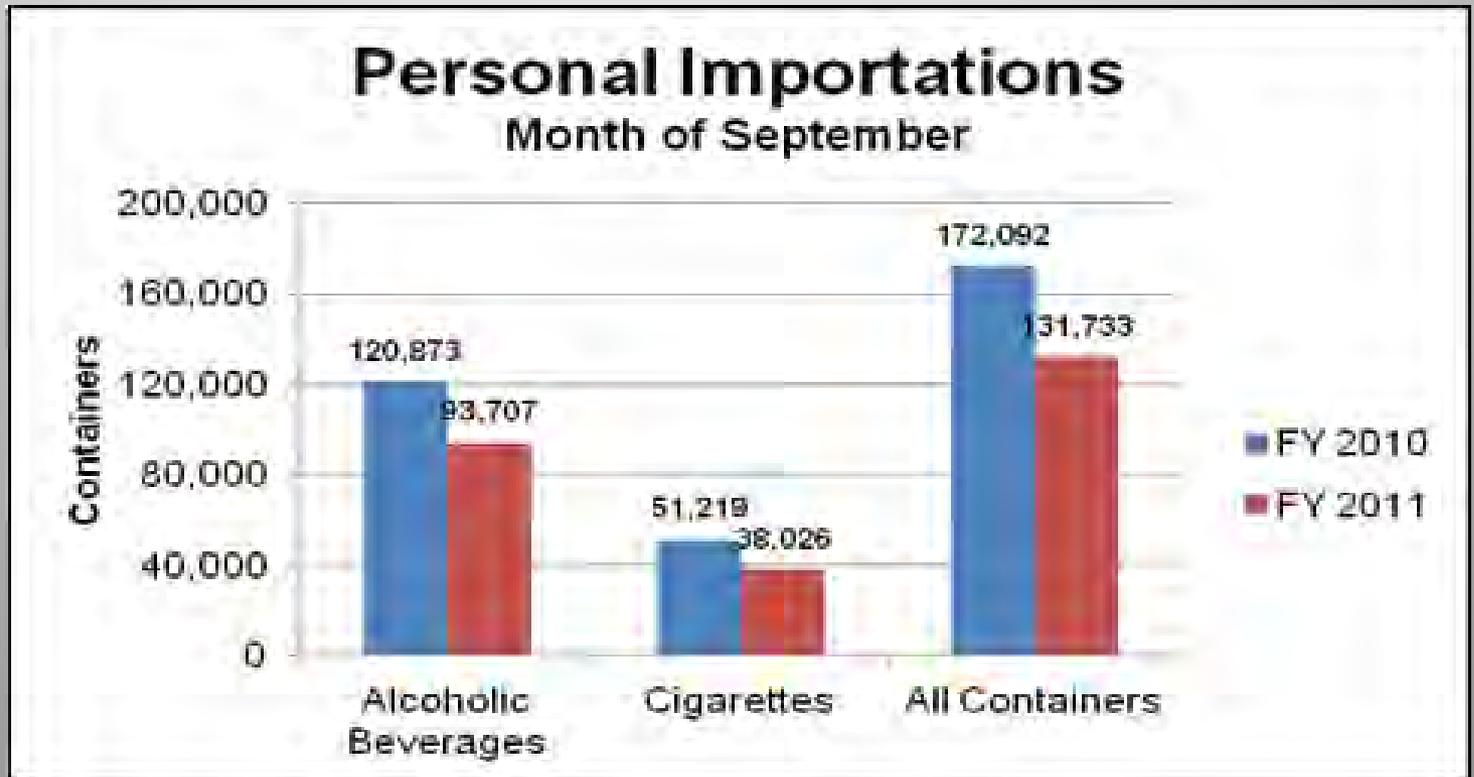
# TRENDS

## Ports of Entry Revenues

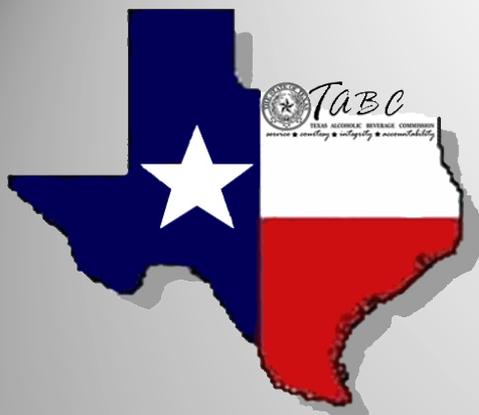




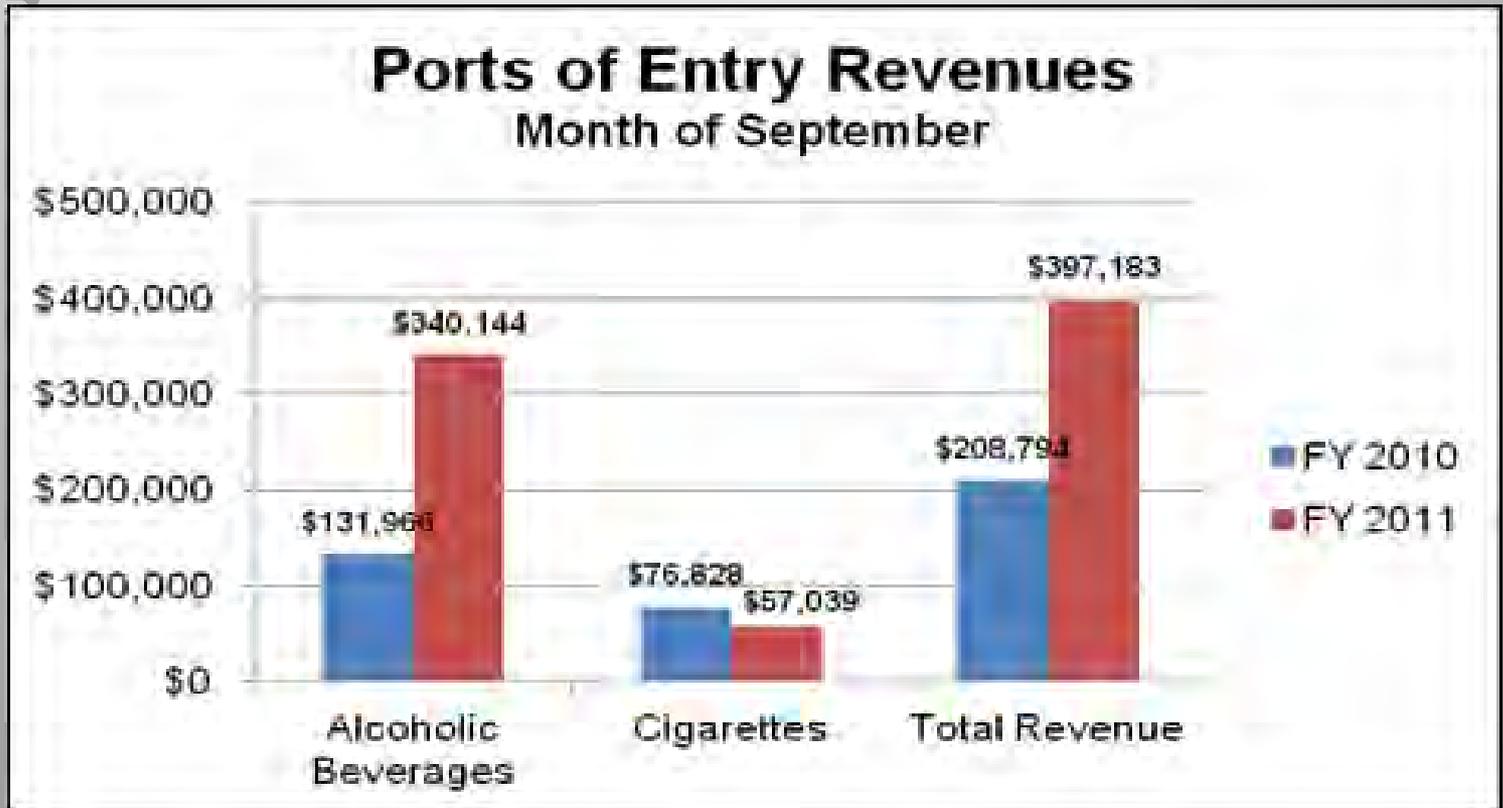
# Ports of Entry Number of Containers Down



September 2011



# Ports of Entry Increased Volume September 2011



Revenue up by 90%



# ACCOMPLISHMENTS

## QR (Quick Response) Codes

### Quick Response Codes



[www.2young2drink.com](http://www.2young2drink.com)



[www.tabc.state.tx.us](http://www.tabc.state.tx.us)



# ACCOMPLISHMENTS

- Working in partnership with Fed Ex and UPS, and the Tax Division to reduce the number out-of-state retailers illegally shipping alcoholic beverages into state from:
  - 171 in March 2011 to 83 in August of the same year.
  - Illegal shipments dropped from 6,564 to 2,507 during the same period.

FedEx





# Challenges

**Maintaining standard operations while many employees responded to a series of wildfires that had broken out across the state, specifically in Bastrop County. On September 5, 2011, while many Central Texas families were celebrating the Labor Day national holiday, thousands of Bastrop citizens fled to escape the engulfing flames of the Bastrop fire.**



Sheriff Pickering presented TABC with an award in appreciation of their service.



Texas Alcoholic Beverage Commission

# QUESTIONS



# **Attachment 2**

**Wildfire Assistance Briefing**

**Service**

**Courtesy**

# WILDFIRE ASSISTANCE BRIEFING

JOEL MORENO  
CHIEF OF FIELD OPERATIONS

**Integrity**

**Accountability**





- ◎ **Public Safety** - evacuated people from the affected areas and controlled access to those areas still under threat.
- ◎ **Protection of Property** - controlled access to affected areas to protect essential personnel and to secure property of evacuees.









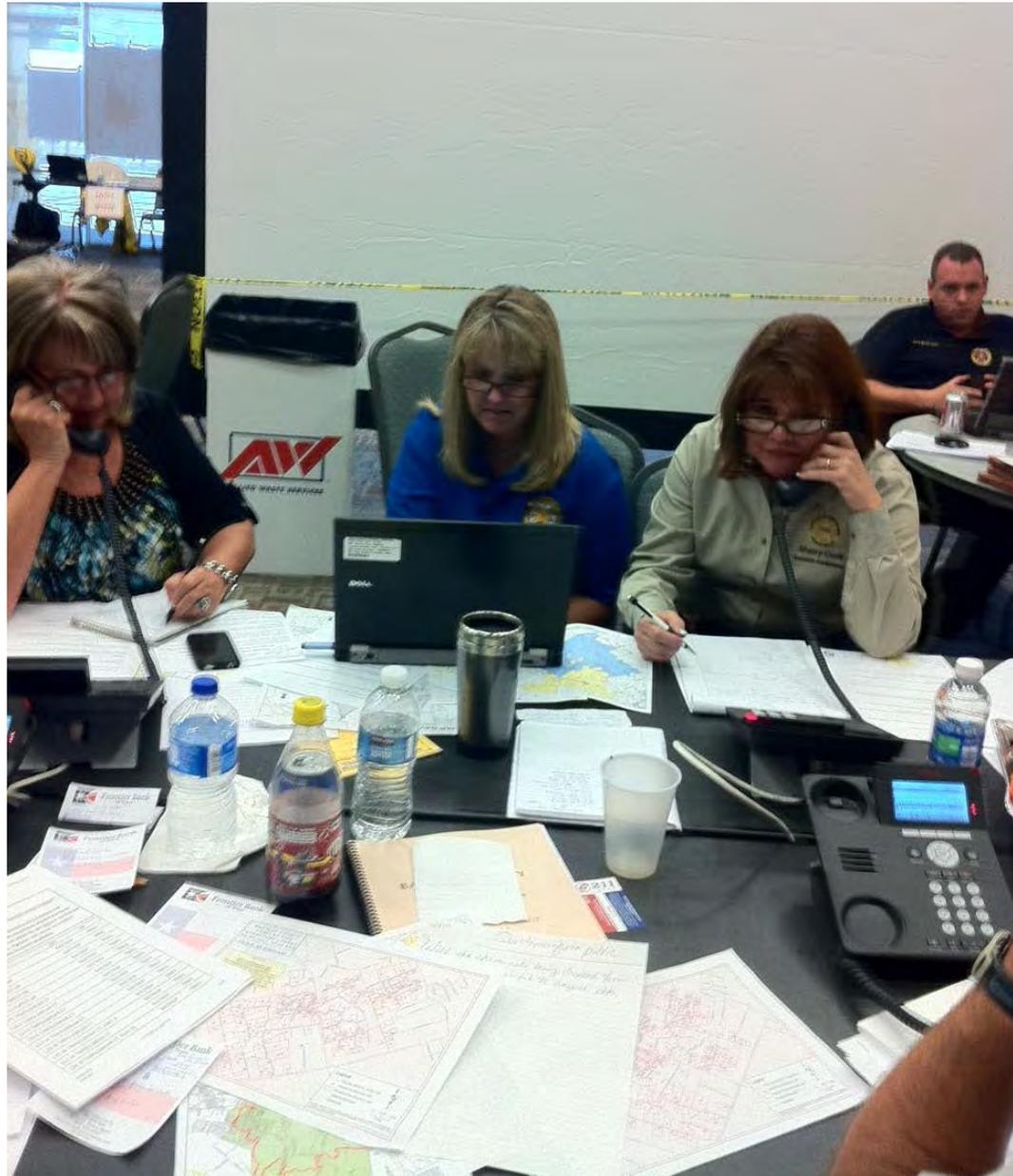




- ◎ Evacuation - clearing neighborhoods and areas in the path of the fires. Assisting emergency response personnel as needed.
- ◎ Roadblocks - static posts that controlled access by vehicles.





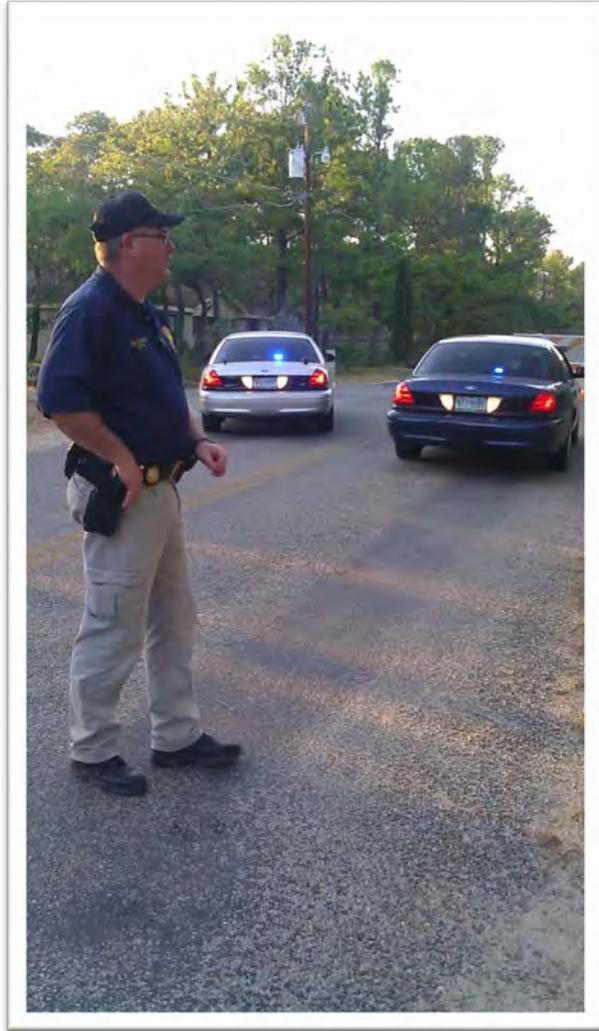


- ◎ Controlled Re-entry -  
adjusted and adapted  
control points to allow  
a safe and orderly  
phase of re-entry  
process.



- Access Control Points - controlled vehicle access to specific areas and impacted foot traffic into the neighborhoods 24 hours a day.





**THANK YOU FROM THE  
BASTROP  
COMMUNITY!**



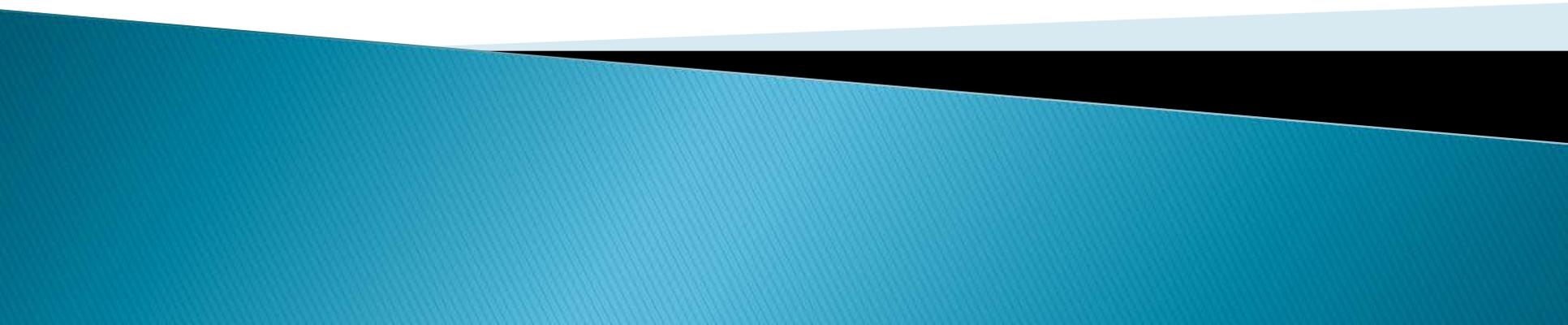
# **Attachment 3**

**Office of Professional Responsibility**

# Office of Professional Responsibility

Trends  
FY2009 – FY2011

Captain Andy Peña



# Use of Force Incidents

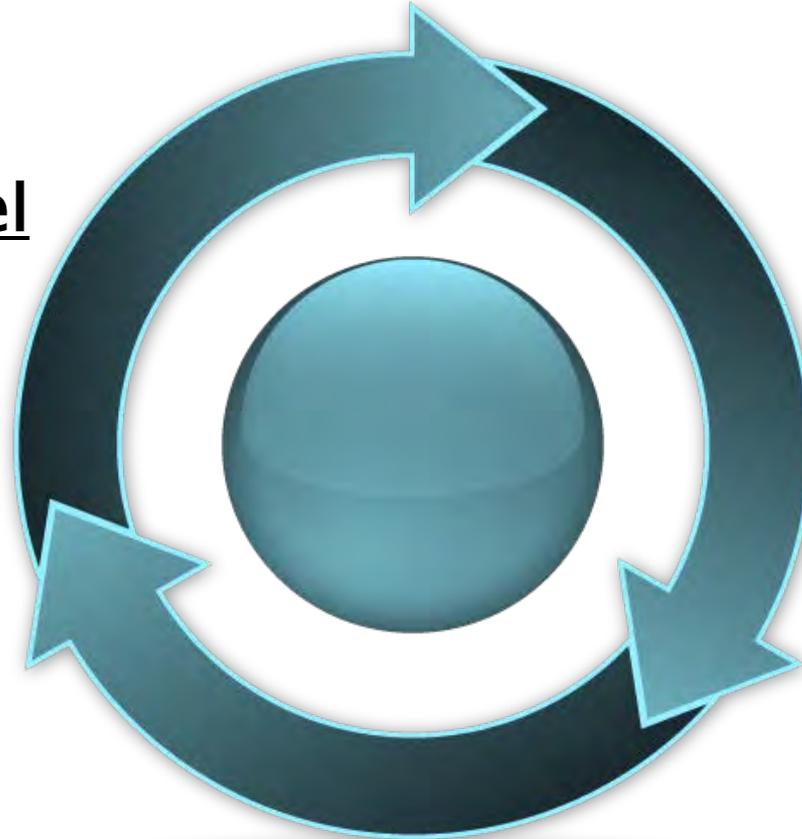
- ▶ FY2009 – 55
- ▶ FY2010 – 45
- ▶ FY2011 – 20

# Personnel Complaints

- ▶ FY2009 – 66
- ▶ FY2010 – 40
- ▶ FY2011 – 31

# Cycle of Success

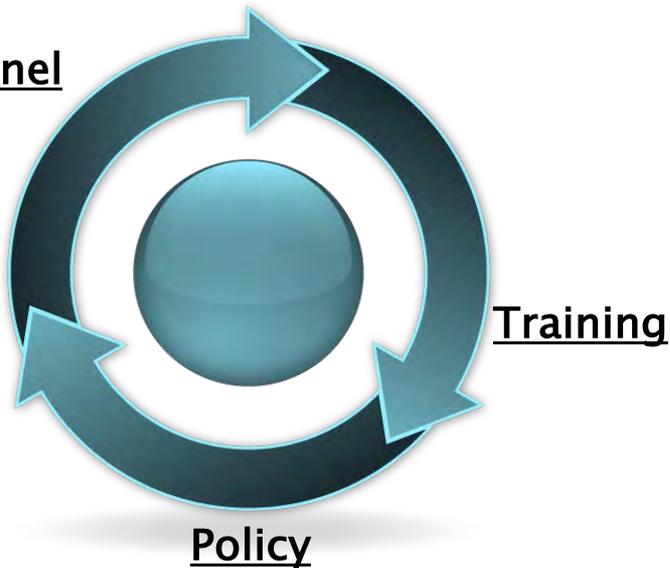
Personnel



Training

Policy

Personnel



## Personnel

- Background investigations of CPO's
- Interviews
- Check references
- Conduct credit and criminal history checks
- Performance evaluations

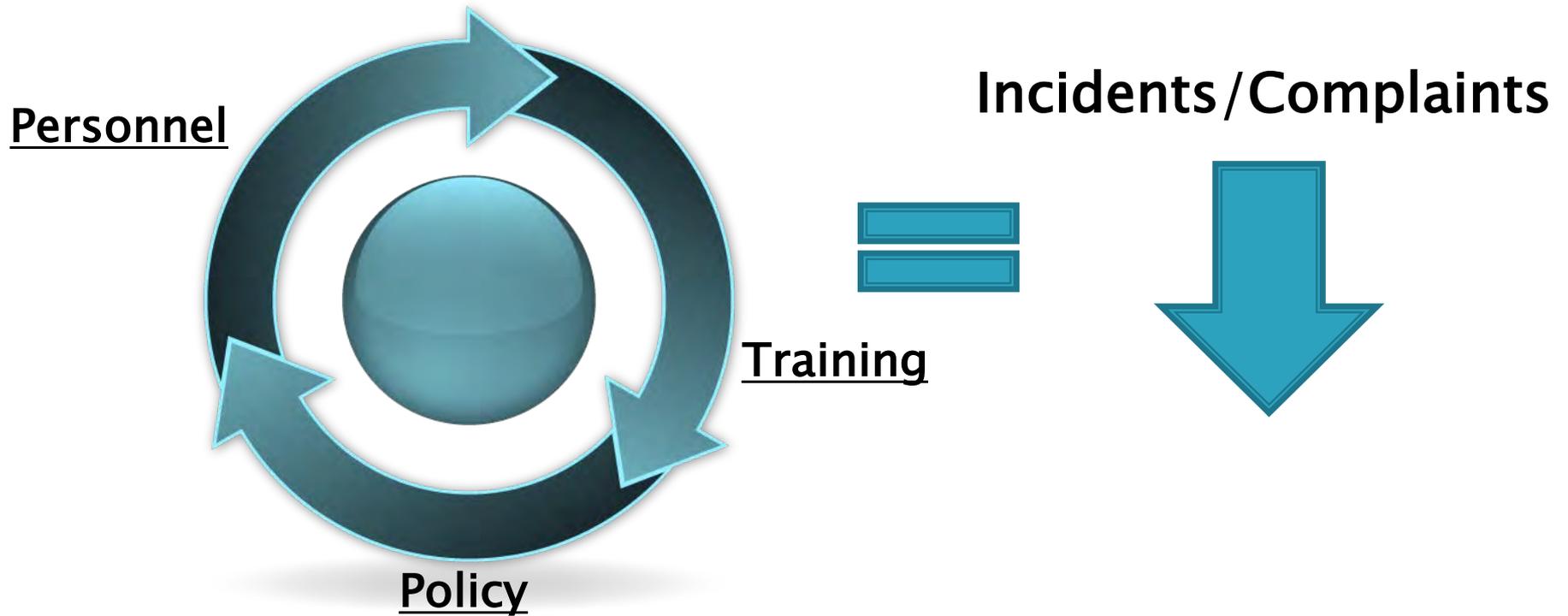
## Training

- In-service
  - TCLEOSE mandated
  - Agency needs
- Specialized programs
  - Agency needs
  - Training committees
  - Surveys
  - New policy and procedures

## Policy

- Review team
- Consistent with agency requirements
- Employee understanding of policy
- Contemporary

# Future Trends



# **Attachment 4**

**Approval to Adopt Amendment to §33.13, Process  
to Apply for License or Permit**

## **OCTOBER 18, 2011 AGENDA, ITEM 6:**

The Texas Alcoholic Beverage Commission (Commission) adopts amendments to §33.13, relating to Process to Apply for License or Permit. The section is adopted without changes to the proposed text as published in the August 19, 2011 issue of the Texas Register (36 TexReg 5171) and the text will not be republished.

The amendments to §33.13 are adopted to conform the rule to recently amended provisions of the Alcoholic Beverage Code.

H.B. 1953, 82nd Regular Session, Texas Legislature amended Alcoholic Beverage Code §§11.391(a) and 61.381(a). These sections require an applicant for an on-premises permit or license to prominently post an outdoor sign giving notice of the application. Before these amendments to the Alcoholic Beverage Code, the notice was required to be posted at least 60 days before the application was filed. After the amendments, the notice is required to be posted at least 60 days before the permit or license is issued. The amendments to §33.13 change the 60-day notification requirement in subsection (e) to conform to H.B. 1953 and add language to subsection (f) to clarify when the notification requirement is triggered.

On September 7, 2011, the staff of the commission held a Public Hearing to receive oral comment on the proposed amendments. Alan Gray, representing Licensed Beverage Distributors (LBD), stated that LBD supports the requirement to post a notice sign in a timely manner and supports the proposed amendments. LBD supported the changes in the Alcoholic Beverage Code (Code) made by House Bill 1953 (HB 1953), 82<sup>nd</sup> Regular Session, Texas Legislature. LBD believes the changes in the Code and in this rule do not harm public safety, because 60 days are required from the time the sign is posted before the application can be granted. This is adequate time for the public to be heard, while allowing the application to be processed in the meantime. No change was requested and none is made as a result of these comments.

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

The agency certifies that the amendments, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

**§33.13. Process to Apply for License or Permit.**

(a) This section relates to any license or permit. The purpose of this section is to clarify the pre-qualification process in subsection (b) of this section and distinguish it from the application process described in subsections (c) and (d) of this section.

(b) Before an application for a license or permit that is required to be certified under §§11.37 or 61.37 of the Alcoholic Beverage Code may be filed with the commission, a pre-qualification packet must be completed. A pre-qualification packet is deemed incomplete if it does not contain all required certifications applicable to the type of license or permit sought and for the location requested, and a response to each item requested by the commission in the packet. For purposes of this section, a completed pre-qualification packet is one that contains:

(1) all required certifications signed by the city secretary, where appropriate, and the county clerk that the location for which the license or permit is sought is in a “wet” area for such license or permit and is not prohibited by charter, by ordinance, or by valid order in reference to the sale of any alcoholic beverage allowed by the license or permit;

(2) all other applicable certifications signed by the city secretary, where appropriate, and the county clerk that are in the pre-qualification packet prescribed by the commission;

(3) the required certification by the Comptroller of Public Accounts that the person submitting the packet holds, or has applied for and satisfies all legal requirements for, the issuance of a sales tax permit;

(4) proof of publication of notice of the application, if required by §11.39 of the Alcoholic Beverage Code; and

(5) a response to each item requested by the commission in the packet.

(c) A person or entity may file an application with the commission by submitting all forms, documents and information prescribed by the commission in accordance with the practices, policies, and standards relating to the processing of applications for licenses and permits. If a pre-qualification packet is required by subsection (b) of this section, the packet must be completed before an application is filed. The commission shall process the application to determine whether the application is in compliance with

all provisions of the Alcoholic Beverage Code and rules of the commission or whether there is legal reason to deny the application.

(d) On completion of its processing pursuant to subsection (c) of this section, the commission shall inform the applicant that the application:

- (1) may be filed with the county judge as mandated by §61.31 of the Alcoholic Beverage Code;
- (2) has been referred to the State Office of Administrative Hearings;
- (3) is granted; or
- (4) is refused.

(e) For purposes of §§11.391 and 61.381 of the Alcoholic Beverage Code, a notice sign must be posted for 60 days before the date the permit or license is issued.

(f) A notice sign is required for purposes of §§11.391 and 61.381 of the Alcoholic Beverage Code unless a license or permit authorizing the on-premises consumption of alcoholic beverages has been active at the requested location any time during the 24 months immediately preceding the filing of the application. For purposes of this subsection, an application is filed on the date a completed application packet is received by the commission.

# **Attachment 5**

**Approval to Adopt Amendment to §33.15, Use of  
Winery Festival Permit**

## **OCTOBER 18, 2011 AGENDA, ITEM 7:**

The Texas Alcoholic Beverage Commission (Commission) adopts an amendment to §33.15, relating to Use of Winery Festival Permit. The section is adopted without changes to the proposed text as published in the August 19, 2011 issue of the Texas Register (36 TexReg 5172) and the text will not be republished.

The amendment to §33.15 is adopted to conform the rule to a recently amended provision of the Alcoholic Beverage Code.

S.B. 438, 82nd Regular Session, Texas Legislature amended Alcoholic Beverage Code §§17.01(b) to change the limitation on how often the holder of a winery festival permit may offer wine for sale under the permit. Before the amendment, the permit could not be used for more than three consecutive days at the same location. The amendment changed the consecutive day limit from three to four. The amendment to §33.15 changes the consecutive day limitation on use of the permit in subsection (c) from three days to four days to conform to S.B. 438.

The commission received no comments about the proposed amendment.

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

The agency certifies that the amendment, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

### **§33.15. Use of Winery Festival Permit.**

(a) This section relates to Chapter 17 of the Alcoholic Beverage Code. In the absence of specific statutory authority to the contrary, this section regulates the activities of holders of Winery Permits who also hold Winery Festival Permits.

(b) Applications for Winery Festival Permits under Chapter 17 of the Alcoholic Beverage Code, and the expiration, denial, cancellation and suspension of such applications and permits shall be in accordance with the statutes, rules and commission policies governing applications, expirations, denials, cancellations and suspensions of permits generally.

(c) No person may sell wine, or possess wine with the intent to sell it, at a farmer's market, at a civic or wine festival, or at a similar civic or wine celebration or event, without first having obtained from the commission a Winery Festival Permit Certificate authorizing sales at the

event. For purposes of this section, a "celebration" is a special cultural or charitable event of a limited and specified duration that is organized for, and open to, the public. Each market, festival, celebration or other event requires a separate certificate, but a certificate may be valid for up to four consecutive days at a single location. A Winery Festival Permit Certificate may only be issued to the holder of a Winery Festival Permit.

(d) The holder of a Winery Festival Permit, or his designated representative, must apply for a Wine Festival Permit Certificate on a form provided by the commission. The application must be submitted prior to the event for which the certificate is sought. The application should be submitted at least three business days prior to the event to allow the commission time to process it. The application must be submitted to the commission's district office having jurisdiction over the location of the event for which the certificate is sought. The application must include the following information:

- (1) the applicant's Winery Permit number;
- (2) the trade name of the Winery Permit holder associated with the Winery Festival Permit;
- (3) the location of the event where the Winery Festival Permit Certificate will be used;
- (4) the date and time of the event where the Winery Festival Permit Certificate will be used; and
- (5) a brief description of the event where the Winery Festival Permit Certificate will be used.

(e) The commission shall issue a certificate if the application is accepted. The certificate and a copy of the application must be displayed in a conspicuous place at the location of the event at all times during the event.

(f) The administrator or his designated representative may refuse to accept an application for a Winery Festival Permit Certificate if:

- (1) the application is incomplete or inaccurate;
- (2) the applicant does not qualify under subsection (c) of this section;
- (3) the event does not qualify under subsection (c) of this section; or
- (4) there are reasonable grounds to believe that issuance of the certificate will:
  - (A) result in a violation of the Alcoholic Beverage Code or the rules of the commission; or
  - (B) is otherwise detrimental to the public.

(g) The grounds for refusing to accept an application for a Winery Festival Permit Certificate shall be communicated in writing to the applicant as soon as is reasonably practical.

(h) All wine sold or possessed with the intention to sell at an event held in an area where the sale of wine has not been authorized by a local option election must comply with the terms of §16.011 of the Alcoholic Beverage Code.

(i) If a Winery Festival Permit Certificate is issued in error, the commission may rescind the certificate.

# **Attachment 6**

**Approval to Adopt Amendment to §45.121, Credit  
Restrictions and Delinquent List for Liquor**

## **OCTOBER 18, 2011 AGENDA, ITEM 8:**

The Texas Alcoholic Beverage Commission (Commission) adopts amendments to §45.121, relating to Credit Restrictions and Delinquent List for Liquor. The amendments are adopted without changes to the proposed text as published in the September 9, 2011 issue of the Texas Register (36 TexReg 5779) and the text will not be republished.

The amendments to §45.121 are adopted to conform the rule to a recently amended provision of the Alcoholic Beverage Code and to shorten the time allowed from the end of the payment period to the date of publication of the Delinquent List.

H.B. 2012, 82nd Regular Session, Texas Legislature amended Alcoholic Beverage Code (Code) §102.32 to specify that, for purposes of credit restrictions and reporting delinquencies, a holder of a winery permit is considered a retailer when purchasing wine from a Chapter 19 wholesaler for resale to ultimate consumers in unbroken packages. No comments were received regarding the proposal to amend the definition of “retailer” in §45.121(b)(6) to conform to H.B. 2012, and that amendment is adopted.

In addition, §45.121(j)(2) is amended to give a retailer two fewer days to pay a delinquent bill before the retailer’s name appears on the Delinquent List. When a retailer’s name appears on the Delinquent List, all wholesalers are on notice that they may not sell any liquor to that retailer until that delinquent account is paid in full, pursuant to Code §102.32(d).

Comments were received from Alan Gray, representing Licensed Beverage Distributors (LBD), at a September 7, 2011 Public Hearing held by Staff to receive oral comments. LBD supports adoption of the rule as published. Mr. Gray noted that it is consistent with a plan developed two years ago to shorten by two days (each year for five years) the time allowed for payment after the reporting period. He stated that the changes already made pursuant to the plan have resulted in a significant improvement in fostering an orderly marketplace. At a September 28, 2011 Public Hearing held by Staff, Mr. Gray indicated LBD’s belief that the plan to phase in these reductions was a fair means to bring current practice in line with the requirements of the Code, since it allowed parties time to adjust their current practices.

Also at the September 28, 2011 Public Hearing, Fred Marosko, representing the Texas Package Store Association (TPSA), noted that TPSA had not agreed to the initial plan for reductions on an annual basis and indeed had reserved the right to review developments as the plan progressed. Lance Lively, also representing TPSA at the September 28, 2011 Public Hearing, noted that since the plan was implemented

delinquencies had fallen from about \$600 million to about \$20 million. He also noted that fewer stores appear on the Delinquent List now and that repeat offenders account for some of those who continue to appear on that list. However, because of the technical problems mentioned in written comments filed by TPSA, Mr. Lively indicated that the proposed reduction in the time period from eight to six days would have a detrimental effect on the industry. Both Mr. Marosko and Mr. Lively stated that if the commission decides to proceed with the plan by adopting the proposed rule, the time allowed should be changed from six calendar days to six business days.

Ralph Townes, representing Glazer's at the September 28, 2011 Public Hearing, said that a change from six calendar days to six business days might be considered acceptable, but that such a change would need to be accompanied by tightening holes that currently exist in the credit law. Specific examples mentioned by Mr. Townes as things that would need to be addressed related to the use of the U.S. Postal Service to deliver payments.

A total of 26 comments were received by mail and an additional seven comments were received by e-mail. All of the written comments oppose the proposed amendment shortening the time period from eight to six days but urge that if a change is made, it should be to six business days.

TPSA's written comments state that "shortening the time period to less than eight days will be counterproductive to the effective and fair implementation of the credit law, will create major workability problems, and will increase the TABC workload". TPSA asserts that any period less than six business days will result in a dramatic increase in errors on the published Delinquency List. (TPSA notes that six calendar days may actually result in less than six days to actually resolve disputes if weekends and holidays occur somewhere other than at the end of the six-day period.) The errors resulting from the shortened time period would harm a significant number of businesses who will not be able to purchase product until the errors are corrected. This, in turn, will dramatically increase TABC workload as the TABC is forced to deal with urgent requests by industry members to correct the errors. TPSA believes that the commission is better served by keeping the current system in place, which allows retailers and wholesalers to resolve disputes among themselves.

TPSA contends that there must be a reasonable time after the statutory payment deadline before a retailer's name is published on the Delinquent List to account for the time required for payments mailed on the payment deadline to be delivered. There also must be a reasonable time (which TPSA asserts cannot be less than six business days) because the commission should be interested in assuring the

Delinquent List is as accurate as possible. Finally, there must be a reasonable time because it would be unfair for an innocent retailer who has mistakenly been placed on the Delinquent List to first learn from publication of the list that an error has been made.

TPSA observes that while changes in technology and business practices may lead some to argue that a shorter time period is required, such changes also create pressures to have more time to correct errors. TPSA asserts that the time savings for sending notices electronically rather than by mail has already been accounted for when the time was shortened from ten days to eight days. However, because mail is still a communication option for some, across-the-board time savings are not guaranteed by switching to electronic communication. Similarly, computerization of TABC clerical processing does not guarantee time savings because some manual entry still must be made for paper reports. More significantly, decreasing TABC clerical processing time does not add any time for wholesalers and retailers to resolve disputes. More generally, computerization across the board also makes it easy to create errors, which take time to track down and rectify.

Furthermore, TPSA argues that the increase in the number of available products, brands and sizes complicates the reconciliation process. TPSA states that a mid-sized liquor store may deal with up to 7,000 different wine and distilled spirits products. The process is made more even more complex by multi-store retailers who must consolidate invoices from many locations. And another level of complexity is introduced by wholesaler practices such as individual salesmen negotiating customer-specific pricing deals, different pricing structures for the same wholesaler in different regions across the state, and frequent price changes (which might be made daily).

TPSA urges the commission to consider “real world workability” in deciding whether to amend the rule. Among these “real world” factors that should be considered are: payment delivery and bank processing time; time required to communicate the delinquency to the commission; TABC clerical processing time; additional TABC resources needed to resolve more disputes if the time is shortened and the parties cannot resolve the disputes on their own; providing advance notice to the retailer that the retailer has been reported as delinquent; opportunity and time required to correct errors in the “soft” or preliminary Delinquent List; allowing the retailer to file an affidavit requesting removal from the list due to a payment dispute; and the time the retailer remains on the “hard” Delinquent List (and thus is unable to buy product) until the wholesaler notifies TABC that the dispute is resolved.

Comments were also received from the following, affirming their own and TPSA's opposition to the proposed amendment shortening the "delinquent list process": Steven E. Mayfield, Bergheim Cellars; Joseph L. Saglimbeni, Joe Saglimbeni Fine Wines; Mehul Shah, Bottle Giant; David Arterburn, Legacy Liquors, Inc.; Sanjeev Patel, The Bottle Shop – Lampasas; Frank W. Dicorte, Frank Dicorte's Wine & Beer Emporium and Frank Dicorte's Bad Bear Liquor; Jami Clark, Benny's Liquor; Austin R. Keith, Pinkie's Inc.; Vernon Russell, Two Bucks Beverages; Leon Myers, River Liquor; Arthur Madeley, Faultline Liquor; Cheryl Ahlschlager; Rick R. Zipp, Ralston Drug Stores and Discount Liquor; Kyle Gillin, Tuckers Package Store; Chelsea Allen, Uptown Liquor; Jorge E. Baca, Licores Baca; Craig James, Village Bottle Shop; Justin Spirits; David and Margaret Jabour, Twin Liquors; Vanny Huoth, Buckshot Liquor; Edith Clark, The Line & The Line II Inc.; and Desh Dhingra, Dany's Liquor. These comments assert that shortening the time period to less than eight days will be counterproductive to the effective and fair implementation of the credit law, will create major workability problems and will increase the TABC workload. They urge consideration of the complexities of getting invoices corrected and paid in a timely fashion based on very short delivery windows. If the time is shortened, they support revising the proposal to insure the passage of at least six full business days, because little can be done to correct errors between wholesalers, retailers or the TABC on a non-business day.

In addition to joining the general comments made by other TPSA members, Pinkie's states that it spends most of the time waiting on statements or credit memos. Pinkies has stores located in Abilene, Amarillo, Lubbock, Midland and Odessa. The Abilene stores receive deliveries and communicate with Republic National Distributing in Grand Prairie, while the other four markets deal with either Amarillo or Odessa.

In addition to joining the general comments made by other TPSA members, Edith Clark notes that for her business located in Fritch, Texas on the Potter County line, having to mail checks to San Angelo instead of Amarillo has resulted in checks being lost by the Post Office for awhile. This is also a problem with deposits being mailed to the bank in Amarillo.

Karen Pospisil comments that she opposes the proposal to decrease the time period from eight to six days. She notes that because of holidays and three-day weekends, she frequently does not receive statements until near the 10<sup>th</sup>. Mail delays will increase if the postal service stops Saturday mail deliveries. "If anything, the time time period needs to be increased because of the postal service or changed to include business days only.

Milton Syring comments that the current rule should not be changed.

Lewis Syring, LiquorMax, comments that a further shortening of the payment window would be a tremendous burden on his business. He asserts that a six-day payment window “is not practical for most small retailers, as it provides inadequate time to correct errors between wholesalers, retailers or the TABC on a non-business day.” He notes that cashier’s checks or money orders cannot be obtained on a non-business day. He also observes that the payment window is actually shorter because the time is not extended under the rule unless the publication date falls on the weekend or a holiday, but not if a weekend or holiday falls in the middle of the payment window. If the period is shortened it should be to six business days instead of six calendar days.

Hermen Key, Spec’s Wines, Spirits and Finer Foods, comments that an analysis based on the company’s business model shows that the proposed amendment shortening the time period “will impact our ability to reasonably conduct our reconciliation process”. Spec’s asserts that the proposed change “will create an inefficient burden on customer’s payables programs” because it does not account for delays associated with: mail delivery; the supplier’s need to reconcile all events through the pay period before the supplier’s statement reconciliation is even delivered to the customer; the supplier’s responsiveness to customer inquiries related to corrections, errors and discrepancies; and clerical and administrative tasks related to the cycle of communication between the supplier and the customer, especially since there is little incentive on the supplier.

Spec’s also contends that the proposed change may impose greater TABC involvement in the process. Since the opportunity to mutually resolve mistakes, errors and discrepancies will diminish, the customer will make payment decisions based on incomplete information in order to avoid enforcement penalties. The increased number of published default events will require use of the formal dispute resolution process, which requires use of more TABC resources.

Spec’s notes that invoice errors involving quantity mistakes and rejections typically involve ten percent of every pay period’s invoices that require individual verification and resolution. Furthermore, the supplier’s corrections are quite often not confirmed until receiving the supplier’s statements. Spec’s also states that pricing errors on supplier’s invoices typically represent one percent of the total value of any pay period’s outstanding balance due. Although pricing disputes are usually amicably concluded, they are rarely corrected until after delayed discussions between supplier and customer. Spec’s strongly urges that the time period should allow for common, established business practices and should recognize that

days of business do not include weekends and holidays. If the period is shortened it should be to six full business days.

Jack Labovitz, King's Liquors Inc., comments that his few appearances on the Delinquent List during his many years in business were attributable to mistakes by the wholesaler. Shortening the current period would not allow enough time for many problems to be corrected and would be unfair to retailers. Although a few people do abuse the system, most retailers are honest, well meaning people. If the period is shortened it should be to six full business days.

Richard Telles-Goins, The Barrel House Liquor Stores, comments that changing the current waiting period would be a big mistake. Among factors to be considered are: ending periods on weekends or Fridays when little or no billing is done by the wholesalers; the likelihood that the U.S. Postal Service will stop delivering mail on Saturdays; Monday holidays; and bank procedures that cause delay in sending out checks their customers request.

Joe Spano, H&H Beverage, comments that the changes to the credit rules that have already taken place over the last two years, coinciding with the largest recession since the Great Depression, have already caused hardship to many small package store owners. They have been placed at a competitive disadvantage to larger businesses that have unlimited lines of credit from banks. He does not understand "why the TABC became a collection enforcer for private enterprise i.e.: the Major Wholesalers." He asks how the agency benefits and why the enforcement burden should be increased for something that should be handled between a vendor and his customer. He notes that the vendors have remedies to deal with their customers on a one on one basis, which is the free enterprise system. He raises the issue of whether there are forces trying to eliminate small players in the industry. Noting that the eventual goal of the commission is to keep reducing the days from six to four to two, he asks whether any other industry in Texas is held to such a standard and questions whether it is consistent with the "business Friendly Texas" touted by the Governor as he pursues the office of President of the United States. He asks that the proposal be reconsidered and that if a change must be made, it should be to six business days.

Alvin Miller comments that shortening the time period would be counterproductive because TABC will have to remove more retailers from the Delinquent List. Changing from eight to six days would make it impossible to do a credible job of reporting. Just the time it takes for the mail to be delivered is a problem.

Kermit Belzer, JT's Liquor Box, comments that the proposed amendment should not be adopted. He notes that much of his small business operation depends on customers who use credit cards. The majority of his business falls on the weekend. "However, when a credit card is used in my store on Thursday, Friday or Saturday, I do not actually receive that money from the credit card company until the following Monday morning at the earliest." Shortening the time from eight to six days does not allow for possible errors. It is counterproductive to the effective and fair implementation of the credit law, will create major workability problems, and will increase TABC's workload. He asks that if the time period is shortened, it allow six full business days. "Or if the 10<sup>th</sup> and 25<sup>th</sup> falls on a weekend then please delay publishing of the list until Tuesday at 12:01am in order to allow time for credit card companies to post transactions, and to correct any errors between my store, wholesalers and TABC."

After reviewing the comments, the commission believes that the amendments should be adopted as proposed and declines to make the change to six business days recommended in the comments.

In contrast to the payment scheme for beer outlined in Code §102.31, which requires cash on or before delivery, the payment scheme for liquor outlined in Code §102.32 allows payment to be made by cash or on the terms prescribed by the Legislature in Code §102.32(c). In upholding the constitutionality of the credit scheme for liquor, the Court of Appeals in Austin speculated that "probably for reasons of business convenience", the Legislature allowed short periods of time for payment of goods purchased. *Neel v. Texas Liquor Control Board*, 259 S.W.2d 312 (Tex. App.-Austin 1953, writ ref. n.r.e.) The credit terms prescribed by Code §102.32(c) require payment to be made on or before the 25<sup>th</sup> day of the month for purchases made from the 1<sup>st</sup> to the 15<sup>th</sup> day of that month. Where purchases are made from the 16<sup>th</sup> to the last day of the month, payment must be made no later than the 10<sup>th</sup> day of the following month. Code §102.32(d) further provides that an account becomes delinquent if it is not paid when required by Code 102.32(c). The Legislature specifically set the credit terms allowed, and did not allow for payment on credit terms to be devised by the commission or as decided upon between the parties.

When a retailer becomes delinquent in the payment of an account for liquor, Code §102.32(d) requires the wholesale dealer to immediately report that fact in writing to the commission. No wholesale dealer may sell any liquor to a delinquent retailer until the delinquent account has been paid in full and "cleared from the records of the commission", and any wholesale dealer who participates in a scheme to assist a retailer in violation of Code §102.32 commits an offense.

The commission is required to adopt rules to give effect to Code §102.32. In Rule 45.121(j), the commission provides for publication of a Delinquent List as a means to provide notice of payment delinquencies. However, the Delinquent List is designed to give effect to the provisions of Code §102.32 and not to substitute for it. The length of the credit period is provided by the Code. For example, for a purchase from the 1<sup>st</sup> to the 15<sup>th</sup> day of a month, the credit period ends on the 25<sup>th</sup> and not on the date the Delinquent List is published. If a retailer does not make the payment on the 25<sup>th</sup>, the Code has already been violated. The retailer's subsequent appearance on the Delinquent List is not itself an offense. It is the means by which we know if an offense has been committed.

For a retailer, the real penalty for a delinquency is, of course, not being able to make purchases from any wholesaler until the delinquency is resolved. The significance of the Delinquent List is therefore that the wholesalers will not begin enforcing that penalty until they receive notice of the delinquency when the list is published.

It is the commission's intention to shorten the length of the perceived credit period (i.e., from the date of purchase to the date of publication of the Delinquent List) to the length of the Code-mandated credit period (i.e., from the date of purchase to the date specified in Code §102.32(c), which could be the 25<sup>th</sup> of the month when the purchase is made or the 10<sup>th</sup> day of the following month depending on when the purchase is made). In recognition of the fact that current business practices have grown around the perceived credit period, the commission is gradually shortening the perceived credit period until it matches the Code-mandated credit period. The commission is powerless to alter the Code, but understands the need to allow a reasonable period of time for the industry to change its business practices to meet the requirements of the Code. In furtherance of that goal, the commission believes the reduction in the time period proposed in this rulemaking is appropriate and therefore declines to make any changes to the rule as proposed.

The commission urges all segments of the industry to cooperate in making changes to current business practices to facilitate this transition. As always, the commission will monitor the industry to gauge the progress of this transition, and the effect of these amendments in particular.

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, Alcoholic Beverage Code §102.32(f), which requires the commission to adopt rules to give effect to that section of the Code, and

Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The agency certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

## **TEXT**

### **§45.121. Credit Restrictions and Delinquent List for Liquor.**

(a) Purpose. This rule implements §§102.32, 11.61(b)(2), and 11.66 of the Texas Alcoholic Beverage Code (Code).

(b) Definitions.

(1) Alcoholic beverage--As used in this section includes only liquor, as that term is defined in §1.04 of the Code.

(2) Cash equivalent--A financial transaction or instrument that is not conditioned on the availability of funds upon presentment, including , money order, cashier's check, certified check or completed electronic funds transfer.

(3) Delinquent payment--A financial transaction or instrument that fails to provide payment in full or is returned to the Seller as unpaid for any reason, on or before the day it is required to be paid by §102.32(c) of the Code.

(4) Event--A financial transaction or instrument that fails to provide payment to a Retailer and results in a Retailer making one or more delinquent payments to one or more Sellers.

(5) Incident--A single delinquent payment.

(6) Retailer--A package store permittee, wine only package store permittee, private club permittee, private club exemption certificate permittee, mixed beverage permittee, or other retailer, and their agents, servants and employees. For purposes of this section, the holder of a winery permit issued under Chapter 16 of the Code is a retailer when the winery permit holder purchases wine from the holder of a wholesaler's permit issued under Chapter 19 for resale to ultimate consumers in unbroken packages.

(7) Seller--A wholesaler, class B wholesaler, winery, wine bottler, or local distributor and their agents, servants and employees.

(c) Invoices. A delivery of alcoholic beverages by a Seller, to a Retailer, must be accompanied by an invoice of sale showing the name and permit number of the Seller and the Retailer, a full description of the alcoholic beverages, the price and terms of sale, and the place and date of delivery.

(1) The Seller's copy of the invoice must be signed by the Retailer to verify receipt of alcoholic beverages and accuracy of invoice.

(2) The Seller and Retailer must retain invoices in compliance with the requirements of §206.01 of the Code.

(3) Invoices may be created, signed and retained in an electronic or internet based inventory system, and may be retained on or off the licensed premise.

(d) Delinquent Payment Violation. A Retailer who makes a delinquent payment to a Seller for the delivery of alcoholic beverages violates this section unless an exception applies.

(1) A Retailer who violates this section must pay a delinquent amount, and a Seller may accept payment, only in cash or cash equivalent financial transaction or instrument.

(2) A Retailer whose permit or license expires or is cancelled for cause, voluntarily cancelled, suspended or placed in suspension while on the delinquent list will be disqualified from applying for or being issued an original or renewal permit or license until all delinquent payments are satisfied. For purposes of this section, the Retailer includes all persons who were owners, officers, directors and shareholders of the Retailer at the time the delinquency occurred.

(e) Reporting Violation and Payment; Failure to Report.

(1) A report of a violation or payment must be submitted electronically to the commission on the commission's web based reporting system at [www.tabc.state.tx.us](http://www.tabc.state.tx.us).

(2) A Seller who cannot access the commission's web based reporting system must either:

(A) submit a request for exception to submit reports by paper; or

(B) contract with another seller or service provider to make electronic reports on behalf of the Seller.

(3) All reports of violations or payment under this subsection must be made to the commission on or before the date the delinquent list is published.

(4) A Seller who fails to report a violation or a payment as required by this subsection is in violation of this section.

(f) Prohibited Sales and Delivery.

(1) Sellers are prohibited from selling or delivering alcoholic beverages to any licensed location of a Retailer who appears on the commission's Delinquent List from the date the violation appears on the Delinquent List until the Release Date on the Delinquent List, or until the Retailer no longer appears on the Delinquent List.

(2) A sale or delivery of alcoholic beverages prohibited by this section is a violation of this section.

(g) Prohibited Purchase or Acceptance.

(1) A Retailer who violates subsection (d) of this section is prohibited from purchasing or accepting delivery of alcoholic beverages from any source at any of Retailer's licensed locations from the date any violation occurs until all delinquent payment are paid in full.

(2) A prohibited purchase or acceptance of a delivery of alcoholic beverages is a violation of this section.

(h) Exception. A Retailer who wishes to dispute a violation of this section or inclusion on the commission's Delinquent List based on a good faith dispute between the Retailer and the Seller may submit a detailed electronic or paper written statement with the commission with an electronic or paper copy to the Seller explaining the basis of the dispute.

(1) The written statement must be submitted with documents and/or other records tending to support the Retailer's dispute, which may include:

(A) a copy of the front and back of the cancelled check of Retailer showing endorsement and deposit by Seller;

(B) bank statement or records of bank showing funds were available in the account of Retailer on the date the check was delivered to Seller; and

(C) bank statement or records showing:

(i) bank error or circumstances beyond the control of Retailer caused the check to be returned to Seller unpaid; or

(ii) the check cleared Retailer's account and funds were withdrawn from Retailer's account in the amount of the check.

(2) A disputed delinquent payment will not be removed from the delinquent list until documents and/or other records tending to support the Retailer's dispute are submitted to the commission.

(3) The Retailer must immediately submit an electronic notice of resolution of a dispute to the commission under this subsection.

(i) Penalty for Violation. An action to cancel or suspend a permit or license may be initiated under §11.61(b)(2) of the Code for one or more violations of this section. The commission may consider whether a violation is the result of an event or incident when initiating an action under this subsection.

(j) Delinquent List.

(1) The Delinquent List is published bi-monthly on the commission's public web site at <http://www.tabc.state.tx.us>. An interested person may receive the Delinquent List by electronic mail each date the Delinquent List is published by registering for this service online.

(2) The Delinquent List will be published the 1<sup>st</sup> day of the month for purchases made from the 1st to the 15th day of the preceding month, for which payment was not made on or before the 25th day of the preceding month. The Delinquent List will be published the 16<sup>th</sup> day of the month for purchases

made between the 16th and the last day of the preceding month for which payment was not made on or before the 10th day of the month.

(3) The Delinquent List is effective at 12:01 A.M. on the date of publication.

(4) The Delinquent List is updated hourly to reflect reports of payments submitted.

(k) Calculation of Time. A due date under this section or §102.32(c) of the Code or the publication date of the Delinquent List that would otherwise fall on a Saturday, Sunday or a state or federal holiday, will be the next regular business day. A payment sent by U.S. postal service or other mail delivery service is deemed made on the date postmarked or proof of date delivered to the mail delivery service. A payment hand delivered to an individual authorized to accept payment on behalf of the Seller is deemed made when the authorized individual takes possession of the payment.

# **CERTIFICATION**

## **REGULAR COMMISSION MEETING**

**9:30 a.m. – October 18, 2011**

**5806 Mesa Drive  
Austin, Texas 78759**



# 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 October 18, 2011.

A handwritten signature in cursive script, appearing to read "Alan Steen".

Alan Steen  
Administrator

Sworn and subscribed before me this the 11th day of November 2011.



A handwritten signature in cursive script, appearing to read "Gloria Darden Reed".

Gloria Darden Reed  
Notary in and for Travis County, Texas