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To: Members of the Authority

From: Amy Male, Licensing Administrator **AM**

Subject: Full Board Review of Attorney Self-Certification Program
Memo 2 of 3: Licensing Bureau Practices and Recent Data Review

Date: 11/4/21

As a longtime employee and manager in the SLA Licensing Bureau, I am familiar with the way we have implemented and utilized the Self-Certification By Attorney program (the “Program”) since its establishment in 2009-10. I have been in charge of the Program since 2013. This memorandum transmits my recollection and understanding of how the Program has operated over time with a specific focus on whether it truly saves the SLA review time. It also transmits the results of a review and comparison of self-certified and non-self-certified applications that I just conducted which reveals that self-certified applications essentially contain the same number of mistakes that non-certified applications contain.

How Review Practices For The Program Have Changed Over Time

In 2009-10, I was working at the SLA as an examiner. Examiners in Licensing received instructions from superiors then, and from time to time since then, about the way to review self-certified applications. (I recently searched for emails on the subject to refresh my recollection and attach the ones I found to this memo.)

As reflected in an email exchange I had with Kerri O’Brien, Deputy Commissioner of Licensing, back in 2009 (**Ex. 11**),¹ we received the following instructions for the review of self-certified applications:

- (a) examine the self-certification form itself;
- (b) review only three application documents: the establishment questionnaire, the method of operation, and the diagram; and
- (c) no deficiency letters were to be sent out for any other document or reason unless it pertained to those three reviewed documents

¹ The identified exhibits in this memo are included in an accompanying appendix.

I was surprised by these instructions. When a review turns up a deficiency – missing documents, inconsistencies, issues with financing records, etc. – it would normally require a deficiency letter sent to make sure the missing or corrected documents are provided, so the application can be considered complete enough to be considered: approved or denied. These instructions were telling us not to look at many of the documents we ordinarily review and to not send deficiency letters even if we knew there were deficiencies that, in our usual process, would stop the application from even being considered.

To clarify, I responded to Ms. O'Brien with a list of items that we routinely review to confirm her instruction to ignore them:

- Certificate of Authority
- Federal Tax ID#
- Workers Comp
- Disability
- Certificate of Occupancy
- filing receipt
- bond
- bond rider
- photos
- color applicant photos
- Certificate of Assumed Name
- newspaper affidavits

Ms. O'Brien confirmed that we were not to even look at them. (Ex. 11.)

The instruction to not send a deficiency letter for anything other than the three named items we were reviewing meant that even if a licensing examiner noticed that important documents were missing from the application, the application was to be passed along for a determination anyway. In other words, we would ignore application deficiencies we actually knew about to move applications along.

In February 2011, we received a new directive that added one additional item to our review: the question in an applicant's personal questionnaire that asks whether they have held an interest in other licensed premises. **(Ex. 12.)**

Over time, we began to see more and more errors and deficiencies in self-certified applications. In 2014, I sent out a directive requiring all self-certified applications to be processed in Albany (instead of in New York City or Buffalo). **(Ex. 13.)** I did this in an attempt to gain control and supervision over the Program, including removing applications from the Program that had significant deficiencies and, from time to time, revoking the privileges of certain attorneys. Had the initially intended restrictions from 2010 been followed completely, and the certified portions of the applications been ignored by reviewers, we would not know enough about an application to remove it from the self-certified queue. But the deficiencies in self-certified applications are so rampant that reviewers looking for other things could not ignore them. Nor could the SLA ignore deficiencies in dispatching its duties to follow the law.

In an email I sent to the team in August 2014 (**Ex. 14**), I listed the documents that licensing examiners should be reviewing – a longer list than the one circulated in 2010 – and I also clarified that errors in the self-certified application would not be ignored, but instead brought to a supervisor’s attention. In October 2014, I added personal questionnaires to the list for examiners to review on self-certified applications (**Ex. 15**). Significantly more work was being done on self-certified applications in 2014 than in 2010.

When Adam Roberts took over as the Deputy Commissioner of Licensing in 2019, he made it clear that SLA examiners would not ignore any deficiencies they became aware of in self-certified applications. He also added financial records to the list of documents that are being reviewed for self-certified applications.

We routinely find significant errors in self-certified applications and, when we do, we remove those applications from the Program – they lose their priority. For example, in 2021, we have received 250 self-certified applications. Fourteen have been removed from the Program. (We removed 15 self-certified applications from the Program in 2020 and twenty-two in 2019.)

How Self-Certified Applications Are Expedited

At the outset of the program, self-certified applications were reviewed immediately, receiving absolute priority over non-certified applications. As a result, for a lengthy period of time, licensing was reviewing self-certified applications and not even getting to the backlog of non-certified applications.

I do not recall exactly when the priority rules were changed, but the Licensing Bureau eliminated this absolute priority approach and began to blend self-certified applications into the review of all applications. We currently assign self-certified applications for review one month earlier than non-certified applications and have been using this approach for several years.

Thus, for example, if a four-month backlog means that Licensing will first begin reviewing applications received in January 2021 four months later, in May 2021, the self-certified applications received in February 2021 will be blended with the January 2021 non-certified applications when assigned for review. Assuming that there are no deficiencies identified, or the application does not have to go to the Full Board for a determination, the decision on a self-certified application will generally happen one month faster than a non-certified application.²

Auditing Practices/Removing Attorneys From The Program

It was apparently the intent of the Program to deal with improperly self-certified applications by finding them through a post-approval auditing process. Attorneys who had improperly certified would then be excluded from the Program (and even prosecuted for perjury). Although I do not recall the details, I do know that efforts were made in the first year

² It is possible that there was an interim step between the original absolute priority system and the current one-month prior system, but I do not recall.

or two to conduct an audit. I have seen the minutes of a 2012 Board Meeting in which it was announced that 50 attorneys had been removed from the Program.

Over the last 11 years, the Licensing Bureau has consistently faced backlogs and the need to keep as many reviewers working on new applications as possible. The devoting of resources to conduct audits has always been a problem and, as a result, the auditing function has died out over the years. More care is instead being taken to make sure that deficiencies in self-certified applications are caught and addressed before the application is deemed ready for consideration.

The pace of removing attorneys from the Program has also slowed down. Each time we simply remove a single application from the Program for deficiencies, we end up in a dispute with the self-certifying attorney about whether or not the cited deficiencies were fair, requiring the commitment of additional time to the process. Such disputes also create a disincentive to take action against particular attorneys who routinely submit incomplete applications while certifying, under oath, that they are complete. Other attorneys have treated the letter removing the application from the program as a deficiency letter. They attempt to submit the missing or incorrect documents and then request the application be reinstated into the program.

Without naming names, some of the most experienced attorneys who practice before the SLA are repeat offenders in filing self-certified applications that need to be removed from the Program or otherwise result in deficiency letters that slow the application's approval down to the point at which they are not being considered on an expedited basis. Having reviewed thousands of applications in my career, it is fairly clear to me that experience in the industry has little to do with the quality of any applications, self-certified or otherwise. Attention to detail and care in the preparing of the application are the key factors.

Recent Data On Self-Certified Applications

I was recently asked to conduct a review of self-certified applications and non-certified applications to provide the Members with a comparison. We chose the two-month period of February/March 2021. The SLA received a total of 917 applications during those months, 59 of which were self-certified. There were 570 in Zone 1, 234 in Zone 2, and 113 in Zone 3.

For the self-certified applications, we took the first 50 of the 59 received. To create a comparison set of 50 non-certified applications, we did a random sampling from the 917. Details on how the random sample was selected can be provided on request.

Only 17 of the 50 self-certified applications were ready for a licensing determination. In the remaining 33, 1 was disapproved at intake, 3 were removed from the Program, and 29 received deficiency letters.

Only 6 of the 50 non-certified applications were ready for a licensing determination. In the remaining 44, 2 were disapproved at intake, 2 were disapproved without prejudice (w/drawn before they were reviewed), and 40 received deficiency letters.

The deficiencies found in the self-certified set were based on a less exhaustive review than the one that Licensing Examiners conduct on non-certified applications. In other words, had examiners conducted the same review of self-certified applications that they conduct on non-

certified applications, the number of cases with deficiencies would be higher. Based on that, and on my experience in this area, these numbers appear to support what I have thought for some time: self-certified applications generally contain just as many mistakes and errors as non-certified applications.

Included as **Ex. 16** are a few of the self-certified application removal and deficiency letters that went out from the applications we reviewed. As the Members will see, these letters range from having one missing or incorrect item to multiple mistakes or failures.

Personal Conclusion On The Program's Effectiveness

Based on my experience with the Program, while it may save some applicants four weeks in getting licensed, the Program does not really provide the SLA with a reliable alternative to its own review of pending applications. The SLA would need a consistent level of accuracy to trust attorney certifications as a replacement for its own review. The industry attorneys, as a group, are not careful enough to present applications that are truly ready for consideration on a consistent basis. Even the most experienced lawyers routinely submit deficient applications while certifying, under oath and under penalty of perjury, that they contain documents that are simply not included.

It also appears, from the data in my recent review, that a large percentage of the applicants paying attorneys extra money to expedite their applications receive nothing for that extra expense. Applicants who are expecting an expedited approval – to have a license faster than current backlog times would allow – are derailed when there are deficiencies.

While the Program could, in theory, be improved if the SLA devoted resources to an auditing process to weed out the attorneys who are certifying mistake-riddled applications, the number of deficiencies suggest to me that most attorneys would end up disqualified. Given that self-certified applications are now such a small percentage of the universe of applications we receive, I believe our resources would be better spent on addressing the overall backlog than in trying to improve a system that impacts such a small percentage of applications received.