NEW YORK STATE OF OPPORTUNITY. | State Liquor Authority

To: Members of the Authority

From: Gary Meyerhoff, General Counsel

Subject: Full Board Review of Attorney Self-Certification Program
Memo 1 of 3: Program Establishment and Legal Authority

Date: 11/4/21

The "Self-Certification by Attorneys" program (the "Program") was authorized by the Full Board in 2009 and is currently being utilized by the Licensing Bureau in processing licensing applications. Under the Program, when an application is accompanied by an attorney's sworn certification as to the application's completeness and as to the accuracy of an identified list of facts and information, the Licensing Bureau expedites the application's processing over non-certified applications.

On September 29, 2021, the Licensing Bureau asked the Members to review Program. This was precipitated in part by a Declaratory Ruling request which challenges the SLA's authority to institute the Program without following the New York State Administrative Procedure Act's formal rulemaking procedures. This memorandum discusses the Program's establishment through certain available SLA documents and other materials. It also addresses the formal rulemaking argument.

The Members will also be receiving memoranda from (i) Amy Male, who describes the Program's operation over time and reports the results of a recently conducted review of self-certified applications, and (ii) Adam Roberts, Deputy Commissioner of Licensing, who recommends that the Program be discontinued for various reasons. The exhibits to these memoranda are provided in an appendix.

The Program's Initial Establishment

SLA records reflect that the Program, in essentially the form it now operates, began on August 5, 2009. Full Board agenda sheet 2009-03543C attaches a July 14, 2009 memorandum from Deputy Commissioner Kerri J. O'Brien of the Licensing Bureau **(Ex. 1)**. She requested that the Board implement the Program to address a backlog of license applications. Press accounts were reporting a nine-month backlog at the time.

The O'Brien memo states, "Self-certification would minimize the amount of time it takes an examiner to review an application. . . ." (Ex. 1.) She attached a "list of information/

documentation that the Attorneys would certify" prepared by Tom Donohue, SLA General Counsel at the time. The list identified 15 separate items that attorneys would certify, including:

- That all required documents have been submitted;
- That all notice requirements have been complied with;
- That the information given to the Community Board/Municipality is consistent with the information provided in the application;
- That all permits and licenses have been obtained;
- That the diagrams and photos submitted are accurate based on a site visit;
- Whether there are schools/houses of worship within 200 feet and whether there are 3 or more OP liquor licenses within 500 feet;
- That personal questionnaires do not disclose statutory disqualifications; and
- Assuring compliance with ABCL sections relevant to the particular application.

In return, self-certified applications would be "accepted for 'expedited review'"-- a faster track to have such applications approved.[1]

The O'Brien memorandum also indicated that there would be a warning in the self-certification form that attorneys would be signing under penalty of perjury and that, "in the event it is determined that false or misleading statements are made, disciplinary action (as well as criminal charges) will be pursued against both the applicant/licensee and the attorney. . . ." *Id.*

The O'Brien memorandum did not articulate how self-certifying applications would minimize review time, but subsequent internal emails made that clear. As discussed in detail in the Male memo, licensing examiners would avoid reviewing the matters that attorneys had certified to move applications through more quickly; specific instructions were given to ignore known deficiencies that the SLA would require to be addressed in a non-certified application.

The Program uses certifying lawyers as a substitute for the Licensing Bureau's ordinary review and thus depends on accurate certifications. Certified applications with deficiencies that would not have been considered for approval were now being approved. The plan was to catch errors in post-approval audits and remove the responsible lawyers from access to the Program.

Subsequent Extensions Of The Program

The Program's initial six-month period appears to have been extended an additional six months during a March 3, 2010 Board Meeting. The "Minutes" of that meeting state, in pertinent part, "The Chairman, together with Deputy Commissioner O'Brien, announced an extension of the Self-Certification licensing program for an additional six months." **(Ex. 2.)** No video of that particular meeting could be found in the SLA's records. (Tom Donohue informs

[1] The faster track initially meant moving all self-certified applications to the "top of the pile," an absolute priority for review over non-certified applications. As discussed in the Male memo, these priority terms were later modified; currently, they are advanced for review one-month faster than non-certified ones.

me that in those days, with video recording relatively new, some meetings were not recorded at all and some recordings have no sound for significant portions or other flaws.)

The Program was again before the Members at the May 12, 2010 meeting and I was able tor review a video recording. Deputy Commission O'Brien recommended that the Program, set to expire on July 1, 2010, be discontinued on that date. Chairman Rosen can then be seen briefly conferring with at least one other Member and then stating that the Board would be "adopting that as a resolution." He further commented, "it's been working on the whole well, but we've made enough progress with respect to dealing with the backlog, that for that reason as well as other reasons, the Board agrees with the recommendation, and as of July 1, there won't be any certification procedure." (The video can be made available to the Members on request.)

A May 14, 2010 New York Times article reported the results of the May 12, 2010 meeting, including that "the authority's board voted unanimously to end the self-certification process, starting on July 1." **(Ex. 3.)** Chairman Rosen is quoted: "[W]e were aware of one criticism of the program from the beginning, that it created a two-tier system to fast-track applications only from those who were represented by lawyers." "But now that the backlog has been substantially reduced, it's time to put everyone back on even footing."[2]

The minutes of the next bi-weekly Full Board meeting, held on May 26, 2010, state: "Chairman Rosen announced that the Self Certification will be continuing. There will be an increase in audited applications." **(Ex. 5.)** While we do have a copy of the video of that meeting, it has no audio for its first segment and the discussion of the Program cannot be heard. SLA records, thus, fail to explain why the Board changed course and continued the Program two weeks after it resolved to discontinue it. A May 28, 2010 New York Times article **(Ex. 6),** however, reports reasons. It quotes Chairman Rosen as saying, "the budget impasse in Albany would affect the agency's functioning severely enough to keep self-certification in place, to keep the backlog from growing again." The article further reports, "Self-certification will continue 'due to budget constraints,' said William Crowley, a spokesman for the authority. Although layoffs and furloughs were a concern, the most threatening situation was 'the prohibition on overtime for state employees,' he said."

There is a Delegation in SLA records, dated just two weeks later, delegating to the Deputy Commissioner of Licensing "the power to identify, those attorneys who file applications with false, misleading or incomplete information and, in her discretion, direct that no applications from such an attorney be accepted into the Self Certification Program." **(Ex. 7.)**[3]

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[2] The minutes of the May 12, 2010 meeting conflict with the video and the New York Times article. The minutes state, "Deputy Commissioner O'Brien requested the Members continue the Self Certification program which was to discontinue on July 1, 2010. Chairman Rosen made a motion to continue the program as there is still a backlog of licensing applications. Commissioner Green Concurs. Resolution adopted." **(Ex. 4.)** The reason for this conflict is not apparent from the available record.

[3] The Delegation states that the Members adopted the resolution "at a meeting of its Members held on June 6, 2010." Tom Donohue advises me that records do not reflect a meeting taking place on that date, nor do the meetings for which we do have records contain an agenda item for this delegation. The reason for this is unclear.

The Program was extended again for six months at a meeting on September 22, 2010, but neither the minutes **(Ex. 8)** nor the video reflects when this new period was to begin or end.

The Program was again discussed at a Full Board meeting more than two years later, on December 5, 2012. The minutes reflect Chairman Rosen's "announcement that 50 attorneys are not currently allowed to participate in the Self-Certification program; and that 10 attorneys have been placed on warning. Submission of incomplete applications are frequent." **(Ex. 9.)**

Tom Donohue advises that he has reviewed the meeting summaries from the Program's inception through July 2015 and can find no other mention of the Program, nor does he recall the Full Board revisiting the Program at any time since. While the Full Board apparently was acting in 2012 as if the Program was still in place, available records do not appear to reflect whether or when the Program was extended after September 22, 2010, although the Licensing Bureau has operated with the Program been in place from its inception in 2009 until the present.

The certification form itself, containing the questions that must be certified and the warnings about perjury, appears to have been amended at least once since the Program began. The version currently in use, reflecting that it was "Revised 08/06/2014," contains 24 questions and a detailed notice on the signature page about the penalties for false certifications. **(Ex. 10.)** The Deputy Commissioner of Licensing has continued to use the 2010 Delegation to bar attorneys who have failed to provide accurate self-certifications from the Program from time to time.

Formal Rulemaking Law

John Springer's Declaratory Ruling request challenges the Program as being illegal and unfair: illegal because the Board did not go through SAPA's formal rulemaking process, and unfair because non-attorney representatives are not allowed to self-certify.[4]

The formal rulemaking process – notice through publication in the state register, a comment period, etc. – is only required if an agency's procedure is actually a "rule." SAPA defines "rule" as an "agency statement, regulation or code of general applicability that implements or applies law. . . ." SAPA §102 (2)(a). SAPA also expressly defines what is *not* a rule. Mr. Springer mentions only one of the two exceptions that are relevant to the Program:

> (b) Not included with paragraph (a) of this subdivision are:
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> (i) rules concerning the internal management of the agency which do not directly and significantly affect the rights of or procedures or practices available to the public;

[4] Mr. Springer *defended* the Program in 2010. The New York Times quoted him: "Some who assist restaurant and bar owners with their applications expressed confusion about why the program was ending. 'Over time, I suppose I'm concerned that the backlog could go up again, but I think there has been a lasting change in the commission,' said John Springer, a non-lawyer liquor license consultant who owns the Old Port Pub in Port Jefferson, N.Y." (Ex. 3.)

* * *

> (iv) forms and instructions, interpretive statements and statements of general policy which themselves have no legal effect but are merely explanatory

SAPA §102(2)(b).[5]

The scope of these "internal management" and "interpretation" exceptions have been the subject of a substantial body of case law. Mr. Springer purports to present, in his submission, a "discussion of relevant case law" on SAPA rulemaking. But all he offers is a discussion of two dated court decisions that found agency actions to have required rulemaking. In *People v. Cull,* 10 N.Y.2d 123 (1961), the Court of Appeals held that the State Traffic Commission did not have the authority to establish a speed limit on a state highway without formal rulemaking. And *Schwartfigure v. Hartnett,* 83 N.Y.2d 296 (1994) concerned a Labor Department policy to recover 50% of "nonwillful overpayments" of unemployment benefits as a set-off from future unemployment claims. The cases do not involve licensing procedures and are not otherwise similar to the Program factually. Nor do they set forth any articulable standards that would help one reach a conclusion about whether the Program requires rulemaking or not.

The New York Court of Appeals did decide a licensing case under the "interpretation" exception far more recently. In *Cubas v. Martinez,* 8 N.Y.3d 611 (2007), decided just two years before the Program was established, the court addressed whether a DMV procedure required rulemaking. The procedure concerned the law that prevented persons from getting a driver's license without a social security number (SSN) unless they could prove they were *ineligible* for an SSN (based on immigration status). The DMV adopted its own policy on what documents would be needed to prove this ineligibility, and did so without formal rulemaking. The court held that the DMV's procedure was not a "rule" because it was "merely an interpretation or explanation of an existing rule," and "merely specifies what proof is acceptable." The court wrote:

> The policy does not create or deny substantive rights of members of the public – i.e., it does not provide that some people are eligible and some ineligible for driver's licenses – but sets forth the procedure for the agency to follow in deciding who meets a predetermined test for eligibility.

Id.

In another licensing case, *Matter of Urban Strategies, Inc. v. Novello,* 97 A.D.2d 745 (2d Dep't 2002), the court found the Department of Health's decision to create a temporary moratorium on the processing of nursing home "establishment and construction" applications to not require rulemaking. The DOH wanted to have time to review and revise its complex methodology for estimating the need for nursing home beds.

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[5] Mr. Springer mis-identifies the relevant SAPA sections as "201. Sub 2 (a) and (b)."

The Program appears to be far more aligned with these two licensing cases than with Mr. Springer's cases. As in *Cubas,* the Program does not have an impact on who is eligible or ineligible for liquor licenses; it merely establishes the procedure the SLA uses to process the applications. And to the extent the complaint about the Program is the agency's power to institute rules that could delay the processing of some application, procedures affecting the timing of review were found to not require rulemaking in the *Urban Strategies* case.

That is not to say that it is a certainty that a court would consider the Program to not require formal rulemaking. The Program is fairly unique, and the test for the most likely applicable exception is vague – whether it "directly and significantly" affects the industry. Mr. Springer tries to make it seem like it is a certainty that the Program does require rulemaking, and there is no support for that conclusion. For example, he makes the generalized characterization of the Program as having "far-reaching implications," but that conclusion is unsupported by any data or analysis. Indeed, it is hard to see how the Program's effect on non-certified applications is at all "significant."

It may be true that giving self-certified applications expedited treatment means that each non-certified application will sit for longer before it is first reviewed. But how much longer? The data reflects that the SLA received less than 30 self-certified applications per month. If we assume that Licensing starts reviewing non-certified February applications and certified March applications in July (the current, one-month expediting rule), even if all 30 certified were reviewed before a single non-certified, how long would that take? Licensing reviews more than 30 applications a day. The impact on the non-certified applicants is waiting no more than one additional day, and likely less, since the certified applications are not all reviewed first. This is hardly a "direct and significant" impact.

Indeed, with a case like *Cubas* out there, decided by New York's highest court just two years before the Program was initiated, it would seem rational for the 2009-10 SLA Board to have believed that the Program did not need formal rulemaking to be adopted. With no subsequent, significant cases undermining *Cubas* or *Urban Strategies* since that time, it would still be rational to conclude that the Program falls within either the internal management or the interpretation exceptions to formal rulemaking.