NEW YORK STATE OF OPPORTUNITY. | State Liquor Authority

ADVISORY #2021-26

To: All licensees

Subject: Discontinuance of the Self-Certification by Attorneys Program

Background

In the summer of 2009, the SLA's Full Board, following the recommendation of the Deputy Commissioner of Licensing, instituted the "Self-Certification by Attorneys" program (the "Program"), as reflected in agenda sheet 2009-03543C. The Program was established to address an application backlog that existed at that time.

The Program's concept was that the backlog could be reduced if the SLA Licensing bureau could be relieved from portions of their time-intensive review of applications. The SLA would allow the applicants' attorneys to certify, under oath, that the application was complete, that certain of its documents contain accurate information, and that the application is in compliance with identified legal requirements. In return for saving the SLA this review time, self-certified applications would be put on a faster track for review.

The SLA developed a specific list of questions for attorneys to answer, and they would certify under oath to the accuracy of those answers. For example, attorneys would certify that all required application documents had been submitted, all notice requirements had been complied with, all permits had been obtained, diagrams and photos are accurate based on a site visit, no schools or houses of worship are within 200 feet of the premises, etc. With that certification, made under penalty of perjury, the SLA would be able to approve the application without reviewing substantial portions of it at all, relying on the certification as a substitute for its own review. The SLA would catch self-certification mistakes in post-approval audits and then remove the offending lawyers from the Program, or even prosecute them for perjury.

The Program was initially instituted for six months, but it was subsequently extended for a few six-month periods. In May of 2010, Chairman Rosen reported that the Program had helped to eliminate the backlog of applications. At that time, Chairman Rosen acknowledged that one criticism of the Program was that it created a two-tier system to fast-track applications only from those who were represented by lawyers. But he subsequently reported that the Program was being extended to keep the backlog from growing again. The Program has been in place ever since.

In the Fall of 2019, the SLA invited industry attorneys and representative to a meeting to discuss, among other things, then-current issues that Licensing was having with the processing of applications. The meeting was well-attended: over 50 attorneys and representatives, including the ones who most regularly represent applicants at the SLA, were present and many actively participated. At that meeting, Chairman Bradley raised the subject of the self-certification Program specifically. He noted his concern that self-certified applications contain too many errors to be relied upon. He stated that while the SLA would not be ending the program, they had to get better. A few months later, the Covid-19 pandemic hit New York.

Our 2021 Review of the Program

At the September 29, 2021 Full Board meeting, Adam Roberts, Deputy Commissioner of Licensing, requested that the Members undertake a review of the Program to determine whether it should continue, be modified, or be discontinued. The Members invited the industry to make submissions by October 27, 2021 (within four weeks) and scheduled the issue to be considered at the November 10, 2021 Full Board meeting.

The SLA received multiple written submissions from industry attorneys. The Members also received memoranda from SLA staff on the Program: a memo from (i) General Counsel Gary Meyerhoff transmitting documents on the Program's history and addressing the Members' legal authority for instituting the Program without formal rulemaking; (ii) Amy Male, Licensing Administrator, describing the Program's operation over time and reporting the results of a recently conducted review of self-certified applications, and (iii) Adam Roberts, Deputy Commissioner of Licensing, recommending that the Program be discontinued for various reasons. These memoranda were posted on the SLA's website and emailed to the persons who had delivered written submissions, all in advance of the November 10, 2021 meeting.

At the November 10, 2021 Full Board meeting, the Members opened the floor to anyone to speak on behalf of, or against, the Program. Several attorneys, and a group of 5-6 licensees, appeared and spoke in favor of retaining the program. One attorney and one non-attorney representative opposed the Program.

The Program Will Be Discontinued as of February 8, 2022

Based upon its review of the record and after the lengthy discussion at the meeting, the Members voted unanimously to discontinue the Program. With self-certified applications already in process, the Members decided to "sunset" the discontinuance for 90 days: self-certified applications will be accepted until February 8, 2022. The Members' reasons for ending the Program are as follows:

(1) **Fairness to the industry as a whole/level playing field.** The Program creates a two-tier system for the review of applications. It rewards only those who pay significant extra-legal fees to attorneys, allowing them to "jump the line" the other applicants are waiting in for an approval. Applicants without the financial ability to pay for self-certification are thus treated inequitably.

This issue with the Program was noted at its outset. The SLA Full Board at that time apparently determined that the benefits – saving the SLA time to avoid backlogs – outweighed this inequity. But as discussed below, the Program's anticipated benefits no longer exist.

No one advocating for the Program came close to addressing this fairness concern. One failed attempt from an advocate was to argue that it is the "American way" to pay more to have the benefit of an experienced attorney's expertise. That missed the point about fairness. Self-certified applications are not expedited because they take less time to review; they are advanced on a faster track regardless of how long it actually takes for their review. The SLA, a governmental agency, has instituted a procedure that gives a benefit only to the few who can afford to pay for this swifter justice. This is on its face arguably discriminatory. No one advocating for the Program has addressed its inherent unfairness.

Indeed, that inequity was further revealed by the few licensees who appeared and argued in favor of the Program. Each of them indicated that they hold multiple licenses and thus having financial success in the industry. It is hardly surprising that the group that has the financial wherewithal to "jump the line" would be against seeing the Program end. The SLA's obligation, however, is to address the fairness to the entire industry. Given how many of the laws the SLA is obliged to enforce are focused on the even-handed treatment of all industry members, equity amongst all applicants has to be a factor, and an important one, in the Member's evaluation of the Program, and no credible argument in favor of keeping the Program was presented on its fairness to the industry as a whole.

(2) **Since the SLA's statutory duty of review cannot be transferred to self-certifying attorneys, the SLA does not get any time-savings from the Program.** Licensing bureau leadership has advised us that the real reason for instituting the Program – to reduce overall review times for the SLA to deal with application backlogs – is not accomplished through the Program. Over the years, the Licensing bureau has gradually recognized that attorneys make too many errors to be relied upon as a substitute for a Licensing bureau review. The SLA has ended up reviewing the self-certified applications anyway. The result of bad self-certified applications is that Licensing does not actually get any time-savings from the Program.

The study of 2021 applications Amy Male conducted supports this conclusion, and also supports what Chairman Bradley noted from his anecdotal understanding of the quality of self-certified applications back in 2019. In a randomly selected two-month period in 2021, roughly 66% of the self-certified applications the SLA received had deficiencies. A higher percentage of non-certified applications were found to have deficiencies, but as Ms. Male noted, self-certified applications are still not reviewed as exhaustively as non-certified applications. If they were, Ms. Male makes the expertised prediction that they would be found to contain as many mistakes and errors as non-certified applications.

We accept Licensing's conclusion that the SLA, in dispatching its statutory duty to review applications, cannot rely on self-certifications as the Program anticipated. Accordingly, the time savings to Licensing from having a Program simply does not exist.

(3) **Fixing the Program is not an option.** Some have suggested that increasing the post-review auditing of self-certified applications to identify those attorneys who should not be in the Program would allow the SLA to fix the Program instead of ending it. Licensing leadership advises that it does not believe that this is possible. We credit their conclusion that deficiencies in self-certified applications are usually caused by lack of care, not by a lack of experience as an attorney. With even the most experienced attorneys routinely making errors, even if the worst offenders could be weeded out, it would be unlikely that the SLA could ever have sufficient confidence that it could meet the statutory obligation to review applications by relying on an attorney's review of that application. Moreover, even if adequate audit parameters could be

determined, the low percentage of self-certified applications the SLA receives would not warrant the devotion of additional resources to conduct the audits. SLA Licensing personnel should be spared of auditing a few already approved applications so their time can be devoted to reviewing new applications.[1]

In summary, while the Members do not dispute that application backlogs are a problem for the industry, the Program is not the way to address that problem. Attorney self-certifications have proved to be incapable of being a substitute for the review process the SLA ordinarily conducts to dispatch its statutory duty to review applications. As a result, there is no time-savings to the SLA, or other benefit to the overwhelming majority of applicants for liquor licenses, to warrant the continuation of a two-tier system that allows applicants to pay to jump in front of others waiting for their applications to be approved.

This matter was heard and determined by the Members of the Authority at a Full Board meeting held on November 23, 2021 before Chairman Vincent Bradley, Commissioner Lily Fan, and Commissioner Greeley Ford. The above written advisory was approved by Chairman Bradley on behalf of the Members of the Authority on November 24, 2021.

Dated: 11/24/21

Thomas J. Donohue
Secretary to the Authority

[1] One attorney requested, at the November 10, 2021 Full Board meeting, that the Members hold this matter open while he has the opportunity to present the parameters for a better self-certification program. We are not opposed to receiving and reviewing any such proposal, but we are more than skeptical about promises to present a program that fixes the identified problems with the Program. That attorney, and the entire industry, was given six weeks to make written or oral comments on whether to continue, discontinue, *or modify* the existing Program. Not a single novel idea was presented, even by the attorney now suggesting “he alone” can fix the program, despite his making multiple written submissions and speaking at length at the meeting.