

Capital Reporting Company  
In the Matter of: Civil Penalty Rulemaking 10-31-2012

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DISTRICT OF COLUMBIA

ALCOHOLIC BEVERAGE CONTROL BOARD

MEETING

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IN THE MATTER OF: :  
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: Public  
CIVIL PENALTY RULEMAKING : Hearing  
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October 31, 2012

The Alcoholic Beverage Control

Board met in the Alcoholic Beverage Control Hearing Room, Reeves Building, 2000 14th Street, N.W., Washington, D.C., Ruthanne Miller, Chairperson, presiding.

PRESENT

RUTHANNE MILLER, Chairperson  
NICK ALBERTI, Member  
DONALD BROOKS, Member  
HERMAN JONES, Member  
CALVIN NOPHLIN, Member  
MIKE SILVERSTEIN, Member

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T A B L E O F C O N T E N T S

WITNESSES

Andrew Kline . . . . . 4

Lynne Breaux . . . . . 46

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1 P R O C E E D I N G S

2 1:40 p.m.

3 CHAIRPERSON MILLER: To start our afternoon  
4 session, we have a rulemaking on the calendar, pursuant  
5 to DC Official Code 25-830 to conduct a public hearing  
6 and take comment on a proposed rulemaking that amends  
7 the existing ABRA civil penalty schedule set forth in  
8 Section 800 of Title 23 of the District of Columbia  
9 Municipal Regulations. The existing penalty schedule  
10 has not been updated since 2004.

11 This proposed rulemaking will not only update  
12 the existing schedule to include those violations that  
13 have become law since 2004; the rulemaking also  
14 proposes a comprehensive warning structure pursuant to  
15 DC Official Code Section 25-830(e)(3). This proposed  
16 warning structure also includes those offenses for  
17 which a first-time violation would require a mandatory  
18 warning.

19 I'm going to call first on those witnesses  
20 who have notified the agency in advance that they  
21 intend to testify at this hearing. And then if anyone  
22 else comes, we will hear their comments as well, if

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1 there is time, and I anticipate that there would be.  
2 If you have any written remarks, please hand them to  
3 Ms. Dannette Walker and she will make certain they're  
4 properly filed.

5           After the Board convenes this hearing today,  
6 the record will remain open for interested parties to  
7 submit additional comments by Friday, November 16th,  
8 2012 at 4:00 p.m. On the witness list we have Mr.  
9 Andrew Kline, general counsel for the Restaurant  
10 Association of Metropolitan Washington, and Jenny  
11 Conrad, general manager of Shake Shack. And I see that  
12 Mr. Kline is here. I don't know if Ms. Conrad will be  
13 coming or I don't know if you know, Mr. Kline.

14           MR. KLINE: I don't know whether she will be  
15 coming. And I should be listed as legislative  
16 representative of --

17           CHAIRPERSON MILLER: Okay. We'll correct --

18           MR. KLINE: -- the Restaurant Association of  
19 Metropolitan Washington.

20           CHAIRPERSON MILLER: That's right. Okay.  
21 We'll correct that. Legislative representative. Okay.  
22 So Mr. Kline?

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1 MR. KLINE: Yes. I'm Andrew Kline here for  
2 the Restaurant Association. I want to also note for  
3 the record that Lynne Breaux, the president of the  
4 Restaurant Association, is in the -- in the room as  
5 well. And I'd first like to give some background on an  
6 issue that's of particular importance to our  
7 association, which is the warning requirement that was  
8 put into the law in 2008.

9 And I think some background might give some  
10 perspective as to why this issue is of such concern to  
11 the Restaurant Association and why we have raised it  
12 with you at almost every rulemaking proceeding and  
13 every council hearing concerning alcohol issues. And  
14 this really gets back to 2008. And at that time  
15 representatives of RAMW, along with representatives of  
16 the Hotel Association in the District of Columbia and  
17 the Nightlife Association -- the DC Nightlife  
18 Association -- met with various officials in  
19 government, including then Chairman Vincent Gray, who  
20 was then chairman of the DC Council.

21 And after that meeting, he asked that we put  
22 together a memo outlining our concerns. And in the

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1 package -- as part of the legislative history, as a  
2 matter of fact -- is a memo dated September 15th, 2008  
3 from our organization, the Hotel Association and the DC  
4 Nightlife Association, in which we expressed our  
5 concern about the hostile regulatory climate for  
6 hospitality businesses.

7           And I'll quote a few of the provisions.

8 "This hostility is manifested by overaggressive  
9 enforcement efforts by the Alcoholic Beverage  
10 Regulation Administration in excessive penalties for  
11 minor regulator violations imposed by the Alcoholic  
12 Beverage Control Board." And we went on to say,  
13 "Although all of our organizations favor compliance  
14 with regulatory standards, in some cases education and  
15 minimal penalties are all that are needed for a first  
16 offense, and that punishment, including fines and  
17 suspensions, are not necessary."

18           As a -- as a direct result of that, in the  
19 amendments that were passed by the council in 2008,  
20 which was the Alcoholic Beverage Enforcement Act of  
21 2008, there was a provision for mandatory warnings that  
22 was put into that law and passed by the council. And

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1 that provision required that the Board by March 25th of  
2 2009 promulgating use of a penalty schedule and provide  
3 for mandatory warnings for minor first offenses.

4 Now, although the statute is not as clear as  
5 it might be on this issue, the legislative history is  
6 quite illuminating in terms of what was meant by the  
7 council in terms of minor first offenses.

8 Specifically, if you look at the committee report,  
9 which we've submitted as part of our testimony, the  
10 committee reasoning on Page 2 of the committee report  
11 indicated a warning requirement for second-tier  
12 violations with part of the law.

13 So instead of minor ABRA violations, the  
14 committee specifically contemplated second-tier  
15 violations. And --

16 CHAIRPERSON MILLER: Could you -- could you  
17 identify where that is again?

18 MR. KLINE: Yes.

19 CHAIRPERSON MILLER: I just found the report.  
20 Okay.

21 MR. KLINE: Sure. That is in the Council of  
22 the District of Columbia Committee on Public Works and

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1 the Environment -- the committee report on Bill 17-983,  
2 the Alcoholic Beverage Enforcement Act of 2008. The  
3 report is dated November 21, 2008, filed with the  
4 Office of the Secretary November 25th of 2008. And on  
5 Page 2 is Part 4, Committee Reasoning, which references  
6 warning requirement for second-tier violations and for  
7 sales to minor first offenses, which is not before you  
8 today but I knew the Board has dealt with in other  
9 rulemakings.

10 CHAIRPERSON MILLER: Okay. Thank you.

11 MR. KLINE: On Page 3 of that same report in  
12 the section-by-section analysis, Part 6 of the report,  
13 Section 5 -- when discussing Section 5 of the bill, it  
14 says one of the purposes is to institute a warning  
15 requirement for all secondary-tier violation and for  
16 sales to minor first offenses. So we think the intent  
17 of the council, in terms of requiring warnings for all  
18 second-tier violations, although perhaps not as clear  
19 as it could have been in the statute, is pretty clear  
20 from the legislative history.

21 And we certainly ask you to take that into  
22 account as you move forward with this rulemaking. Now,

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1 since then -- that's of course back in 2008. We were  
2 supposed to have proposed law -- proposed regulations  
3 in 2009. That didn't happen but we thank you for  
4 moving this forward and having the opportunity finally  
5 today to talk to you about these warning requirements.  
6 There's been some discussion that, "Well, gee, we don't  
7 really need this; our investigators are already giving  
8 warnings for minor first offenses," that it's not  
9 really an issue.

10           Now, just to refresh the Board's  
11 recollection, the background of this is in the -- in  
12 the old days, I'll call it, an investigator would come  
13 in. If, for example, the pregnancy warning sign wasn't  
14 posted, the investigator would say, "Hey, you don't  
15 have your sign up. If it's not up by the time I come  
16 back, then we're going to have to cite you." So there  
17 was -- there was an education component of  
18 investigations along with the enforcement component.

19           It wasn't just to catch people and punish  
20 them. There was also an effort to educate to make sure  
21 that people knew what the rules were. Now, in 2008 we  
22 didn't find that to be the case under the prior

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1 director of the agency. And that was why we attempted  
2 to legislate which -- what we thought was common sense.  
3 Now, since then in terms of what's happened, this  
4 notion that, "Well, gee, it's happening anyway," we  
5 would very much dispute that.

6           On the table are two stacks of files of  
7 papers. All of these were obtained from the agency in  
8 the Freedom of Information Act request. On the left --  
9 my left is a stack of paper maybe a foot high. This  
10 represents, what I'm told and what we -- having  
11 reviewed, more than half of them represents  
12 investigative reports for any visits to any  
13 establishment from 2009 through September of 2012.

14           The right stack, which is maybe an inch and a  
15 half high, represents the warning citations and the  
16 warning letters issued by the Board. Now, assuming  
17 that the information that's given to us by the agency  
18 is correct -- and obviously we're not in the position  
19 to vouch for it but this is what we were given in  
20 response to our Freedom of Information Act request --  
21 there were 194 warnings -- written warnings given by  
22 investigators over the last three and a half years.

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1           And there were 11 letters of warning issued  
2 on behalf of the Board by Board's -- by Board's counsel  
3 for a total of 205 written warnings during the three-  
4 and-a- half year period. According to the FY11  
5 Performance and Accountability Report by ABRA, which is  
6 a report to the council in terms of efficiencies and  
7 the agency operations, there were 349 citations in 2011  
8 alone. And there were 503 citations in 2010.

9           Now, I'm not saying all those are first  
10 offenses. And -- but those were also not the only  
11 instances of first offenses for which people have been  
12 either suspended or fined. There were also staff  
13 settlements, which would not be included within the  
14 citations, and then there are Board Orders, either  
15 through an offer in compromise or after a hearing, in  
16 which licensees were found liable for what we believe  
17 to be minor first offenses and offenses that are  
18 classified as second tier.

19           Now, in going through these various  
20 investigative reports, coincidentally there's two that  
21 are consecutively and in alphabetical order that --  
22 which kind of make the point in terms of inconsistency

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1 and licensees being treated different. We have an  
2 investigative history for a CR licensee. There was a  
3 visit on 6/29 of 2012 and the investigative history  
4 reflects a warning citation was issued for posting and  
5 carrying licenses. And that was on June 29th of 2012.

6           The entry after that, the next investigative  
7 report for another Licensee, is a visit on 6/8/2012 --  
8 a mere three weeks before -- posting and carrying of  
9 licenses, visible posted license. There's a fine. So  
10 even though some businesses and some licensees may have  
11 been given warnings, it would appear that the treatment  
12 of Licensees, just based upon random alphabetical  
13 order, demonstrates that they have not been treated  
14 equally.

15           In looking at -- and we haven't looked at  
16 every one of these reports but we have looked at over  
17 half of them. It becomes pretty apparent that there  
18 are a small number of violations that make up the vast  
19 majority of the violations for which penalties are  
20 imposed. And those turn out to be ones that are  
21 particularly of concern to our restaurant members. One  
22 for which we couldn't find any warnings ever haven been

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1 given was failure to file a quarterly report.

2           Now, coincidentally, in the memo to then-  
3 Council Chairman Gray, that is one of the specific  
4 examples that's given. Specifically we said, "The  
5 following represent a few of the more egregious  
6 examples of overzealous enforcement activity and  
7 penalties," and about the tenth bullet point,  
8 "Excessive fines and Board action or minor offenses,  
9 such as late filing of quarterly reports or failure to  
10 post alcoholic beverage signs."

11           So, I mean, quarterly report seems way up  
12 there on the list. I daresay -- and this is  
13 unscientific. Unfortunately, given the volume of paper,  
14 we couldn't -- we couldn't analyze it and put it all  
15 into a database, which I certainly would have liked to  
16 have done. But just in eyeballing it, it seems pretty  
17 clear that the quarterly statement violation is  
18 probably one that for which a penalty is imposed more  
19 than any other, maybe because they happened to be filed  
20 quarterly, you don't need an investigator to go out and  
21 determine whether people are doing it.

22           If it doesn't get filed, it's apparent on its

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1 base. We see no reason in the world why licensees  
2 should not be given a warning for the first offense.  
3 So that would eliminate most of them because many of --  
4 many of the licensees are recitative. Whether they get  
5 a fine or they get a warning, they still don't get it.  
6 They still don't file their quarterly reports. We've  
7 no disagreement with you under those circumstances. If  
8 appropriate, go to the next step and fine them.

9           But we have found many licensees,  
10 particularly those based out of town -- they don't  
11 necessarily know the requirements. Their managers come  
12 in and out. They may not get the message. It doesn't  
13 seem that there'd be any hardship in terms of Board  
14 enforcement or any threat to public safety in requiring  
15 that those licensees receive a mandatory written  
16 warning for the first offense.

17           The second violation which seems to be most  
18 prevalent is failure to have a licensed manager on the  
19 premises. Now, some background on this issue might be  
20 instructive. The licensed manager requirement was  
21 originally simply a revenue-raising mechanism in the  
22 statute. The surrounding jurisdictions do something a

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1 lot -- a lot more simply. For example, Virginia --  
2 what happens is you're required to post your managers  
3 in your establishment.

4           And if you've ever been into any of the  
5 licensed establishments in Virginia, you'll see --  
6 frequently see a list, ABC managers. And what happens  
7 is the ABC investigator -- agents they call them out  
8 there -- go in and say, "First person, Joe Jones, is he  
9 here?" "No." "Sally Smith, is she here?" Now, if they  
10 get to the bottom of the list and none of the people  
11 are there, they're in violation.

12           But the reason for that is the same reason  
13 that we have a licensed manager requirement. They want  
14 to know that someone's designated to be in charge, just  
15 like under our law, you want to know that there's  
16 someone who's in charge if the licensee, the corporate  
17 officer, or the member of the limited liability company  
18 or what have you, is not on the premises.

19           But we see no threat to public safety if a  
20 manager's not there. We see no reason in the world why  
21 -- first offense, again, that's all we're talking  
22 about -- that there would be any violence to the public

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1 policy by not requiring -- or by requiring, I should  
2 say, a warning on a first offense failure to have a  
3 manager on the premises.

4           The other -- the other ones that are  
5 important to us -- books and records is a -- is a big  
6 one. And we think that the Board should make a  
7 distinction between utter failure to have books and  
8 records, which could mean that there are all sorts of  
9 nefarious things going on, and failure to have books  
10 and records on the premises. A recent example, I  
11 think, makes the point very vividly.

12           One of our member licensees had a visit from  
13 an investigator recently. And they came in and said,  
14 "We want to see your books and records." It was 9:00  
15 on a -- on a night they were open. They said, "Okay.  
16 Come look at them." They said, "Well, you only have  
17 two years here. Where's the rest of them?" They said,  
18 "We have them in storage around the corner." They  
19 said, "All right. We're coming back tomorrow. We want  
20 to see them." "Okay."

21           So they retrieved them from the storage  
22 place. They brought them back to the premises.

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1 Investigator came back the next day. They were there.  
2 About two weeks later, the licensed establishment  
3 received an offer of a staff settlement of a \$2000  
4 fine. Now, to our operators, this is incomprehensible.  
5 They don't -- it's not that they don't have the  
6 records. It's just that that particular night they  
7 weren't on premises. They should have been on  
8 premises. That's the law. That's what the statute  
9 provides.

10           We're not arguing with any of that. But what  
11 we're saying is we don't understand why it is that  
12 under those circumstances that licensee would not get a  
13 letter saying, "Hey, there's a requirement that your  
14 books and records be on the premises. If we come back  
15 again, it's -- you know, it's a serious matter. It's a  
16 fine."

17           Now, another example is we have a nationally  
18 recognized, well-thought-of retailer, who -- there's a  
19 visit -- a visit to the establishment. They didn't  
20 have their window lettering. They didn't have their  
21 pregnancy sign. They didn't have their legal drinking  
22 age sign and they didn't file one of their quarterly

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1 reports. And they're -- it's been requested that they  
2 pay an \$850 fine.

3           Why it is that they're not being notified  
4 that they're in violation, given an opportunity to  
5 correct -- this reflects badly on the District of  
6 Columbia. This is an out-of-town, nationally known,  
7 well-thought-of retailer. Word gets around. And when  
8 people hear that, they don't want to do business here.  
9 Now, I've heard from the license administrator of this  
10 particular organization, the District is the toughest  
11 in terms of things like this.

12           And that's not good for our District's  
13 economy. It's not good for our business. Now, we've  
14 talked to a number of our members about these issues.  
15 And some of the quotes from them were kind of  
16 interesting. They say, "Why do they hate us so much?  
17 Why do they treat us like we're the enemy? How many of  
18 -- how many of the Board members or ABRA people were  
19 ever into business? Do they think it's easy out here?  
20 Do they think we're getting rich in this business? Do  
21 they have any idea how small our profit margins really  
22 are?"

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1           That's the reactions we got from our members.  
2 This is not -- this is not a business in -- contrary to  
3 popular belief, in which most people get rich. The  
4 national average from the National Restaurant  
5 Association in terms of profit margin is -- was 4  
6 percent. That figure's been revised downward to 1 1/2  
7 percent. So the margins are very, very small in terms  
8 of net profits.

9           And when someone doesn't know one of these  
10 requirements and then is faced with a fine, that money  
11 comes right off the bottom line. So in thinking about  
12 this and discussing this issue, we hope that you will  
13 take that -- all of that into account. Now, in the  
14 proposed rulemaking that you've put forward, according  
15 to our count, there are 154 separate scheduled  
16 violations.

17           Of those, it's 91 of them -- or 91 of them  
18 are second-tier violations. And of those second-tier  
19 violations, only 14 of them are mandated warnings. We  
20 think it's too few. We think it's not in accordance  
21 with what was intended by the council. And we would  
22 ask you to take another look at that.

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1           A couple of other specific issues. We think  
2 that some care needs to be taken in terms of  
3 consistency between what's required by the statute and  
4 the schedule of penalties. I'll give you a good  
5 example. In the schedule of penalties is listed a  
6 violation of Section 25-113, which is the definition of  
7 an on-premises retailer's license. Now, that section  
8 has several subparts and sub-subparts.

9           And the confusion is evident in that,  
10 although we classify that as a primary-tier offense for  
11 which no warning would be mandated, we have 25-  
12 113(a) (3) for which is classified as a secondary  
13 offense; 25-113(b) (1), classified as a secondary  
14 offense; (b) (2) (A), secondary offense; (d) (1), primary  
15 offense. So it's unclear as to which controls -- is it  
16 the reference to 25-113? And if so, we don't even know  
17 what that violation is.

18           Our members are left to guess in terms of  
19 what's a violation of 25-113? I think it's about two  
20 and a half pages. And parsing through it and making  
21 sure that there's no violation is very difficult. Now,  
22 the subparts, that's very instructive. There's the

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1 specific violation that's scheduled and listed. I can  
2 read it and determine what the violation is and our  
3 members can read it and determine what the violation  
4 is.

5 But 25-113 is the definition. So we think  
6 it's too open ended in terms of calling that a  
7 violation. And we think that the fact that you've  
8 scheduled the various subparts as distinctive  
9 violations certainly highlights that and makes it  
10 abundantly clear that you can't have a violation of 25-  
11 113 of the whole section. You have a violation of one  
12 of the particular subsections.

13 And in thinking about it, the Board has all -  
14 - obviously considered that some of the subsections --  
15 violations of some of the subsections are more serious  
16 than violations of some of the others because some of  
17 them you've classified as primary-tier violations,  
18 which we don't really disagree with, and some of them  
19 you've classified as secondary-tier violations.

20 So we think that we need to be careful in  
21 terms of establishing a schedule and making sure that  
22 it clearly communicates to our licensees what conduct

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1 is prohibited and what the penalty is, whether it's a  
2 primary or secondary tier. And that's all I have.  
3 We've given you an extensive comment letter where we go  
4 through section by section and comment on the various  
5 provisions.

6 I don't think it would be useful -- a useful  
7 use of time to repeat that here. I more wanted to give  
8 an overview in terms of the background, the history of  
9 the statute which authorizes these regulations from our  
10 perspective, why it is we think that the warnings are  
11 so important and why it is we think that the schedule  
12 of civil penalties is important in terms of clearly  
13 communicating what the violations are and what the  
14 possible ramifications are.

15 I'm happy to entertain any questions that you  
16 might have and I see we have no other witnesses here.

17 CHAIRPERSON MILLER: Okay. Thank you very  
18 much. That was very informative. Do Board members have  
19 questions? Okay. I'm not hearing any. I'll begin. I  
20 have a few questions. First of all, there's an issue,  
21 I think, of mandatory versus discretionary warnings.  
22 This -- the penalty table has a lot more wise than 14

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1 but I think -- I think that was the number you said,  
2 that there was a very limited number of mandatory  
3 versus discretionary. And I'm wondering if you want to  
4 address that.

5 MR. KLINE: Sure. We think the mandatory  
6 warnings are important. The examples that I gave, we  
7 think, highlight that. The example of two places in  
8 the same month -- it's a difference of which  
9 investigator you have. And that just simply isn't  
10 fair. It's -- your agency faces the same challenge  
11 that our members face, which is you have to rely on  
12 employees.

13 Whether they're going to do everything  
14 consistently between them, and having them do  
15 everything consistently can sometimes be difficult. We  
16 know. Our members know. That's the challenge that  
17 they face. And we know your agency faces the same  
18 challenges in terms of -- well, yeah, I mean, it may be  
19 the spirit of the agency that for a failure to post and  
20 carry licenses there should be a warning, but that  
21 doesn't mean every investigator's going to do it and  
22 that doesn't mean it's going to happen in every case.

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1           And we think the council certain recognized  
2 that and the now-mayor recognized it, who was then  
3 council chair, when it was discussed, that one of the  
4 ways to eliminate confusion, discretion, make sure that  
5 our people get what we think they're entitled to --  
6 maybe you don't, but, I mean, the council did -- is for  
7 there to be mandatory warnings. And the legislative  
8 history certainly supports that there would be  
9 mandatory warnings for second-tier offenses.

10           CHAIRPERSON MILLER: And according to your  
11 files, there aren't that many -- there haven't been  
12 that many discretionary warnings?

13           MR. KLINE: We don't see that many, no. In  
14 talking to the director of the agency --

15           CHAIRPERSON MILLER: Uh-huh.

16           MR. KLINE: -- he says, "Well, some of them  
17 are verbal." We've had a lot of discussion about that  
18 among ourselves -- our organization -- what's better,  
19 verbal or written. We think the writtens are better.  
20 We think it establishes clarity from your agency's  
21 standpoint and also from our management's standpoint.  
22 If there's a written warning because a manager hasn't

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1 done something, it's a little hard to 86 that, as they  
2 say in the business.

3           If there's a verbal warning, yeah, they may  
4 forget to tell ownership that the ABC investigator was  
5 in and that particular manager didn't make sure that  
6 the lettering was in the window or the licenses were  
7 posted or what have you. So we think the mandatory  
8 warnings makes everything more transparent from both  
9 standpoints.

10           And particularly -- we have a lot more multi-  
11 unit owners than we used to. I mean, it used to be --  
12 when I first started in this business in this town,  
13 there were -- there were one-shot mom and pops. And  
14 with the exception of Clyde's, maybe Capital Restaurant  
15 Group, and nationals, we didn't see that many multi-  
16 unit owners. Now, we have a whole lot of them, which  
17 means they have to rely on management teams. They have  
18 to rely on systems.

19           And from our standpoint, the more we can help  
20 them by making sure that there's information there that  
21 can move upward to the powers that be, where ultimately  
22 the -- that's who the buck stops with and they can make

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1 sure that their people are paying attention and  
2 complying with your laws because that's what our  
3 organization wants to see them do. We think it's  
4 better.

5 CHAIRPERSON MILLER: Okay. With respect to  
6 determining which violations -- or which secondary-tier  
7 violations, if we distinguish among them, should have  
8 mandatory warnings, I follow your argument about  
9 quarterly statements, books and records, they don't  
10 have any impact on public safety -- any obvious impact.

11 But I really -- I don't exactly see it with  
12 respect to licensed manager on premises because I'm  
13 under the impression that the licensed manager has more  
14 education and training and is more responsible for  
15 watching its employees and detecting whether patrons  
16 are intoxicated and things like that. So it seems to  
17 me that they serve a public safety function. Do you  
18 want to address it?

19 MR. KLINE: I think that's a myth. I think  
20 that if there were --

21 CHAIRPERSON MILLER: You think it's a myth?

22 MR. KLINE: -- for example -- yeah, I think

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1 it's a myth. Because I know of too many places where  
2 licensed managers are fungible. The GM may or may not  
3 be a licensed manager. There isn't a -- the only  
4 training requirement for a licensed manager is alcohol  
5 awareness training. Now, Montgomery County, their law  
6 says you have to have someone on the premises at all  
7 times who's alcohol awareness trained.

8           So in terms of a minimum qualification for  
9 managers, we don't really have one other than they take  
10 alcohol awareness training, get their picture taken,  
11 you know, and have a police clearance and come down and  
12 pay a fee. That does not guarantee that they have any  
13 different level of competence. And as I said, I know  
14 many places where the GM is not even a licensed  
15 manager. It is the -- you know, the fungible managers  
16 come and go.

17           So I think that that -- I understand that. I  
18 understand that position. But I don't think it's  
19 necessarily reality given the business and the way it  
20 works. They know they have to have a licensed manager  
21 on the premises -- most of them know -- during all  
22 hours that they're in operation. So they get somebody

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1 with a license. That person may not be the one at the  
2 top of the totem pole in terms of chain of authority.

3 Now, we're not suggesting that you change  
4 that. We think we have enough regulatory requirements --

5 CHAIRPERSON MILLER: Uh-huh.

6 MR. KLINE: -- at this point. So let me be  
7 clear on that point. But we don't agree. And when we  
8 have out-of-town operators, they're not necessarily  
9 familiar with the requirement. Some of them are very  
10 well run companies and very good people. But the  
11 vagaries of Montgomery County versus Virginia, where  
12 they only have to list them, versus Pennsylvania,  
13 versus Illinois, and so on and so forth -- we just  
14 don't see why.

15 Now, if there's no licensed manager and  
16 there's a -- there's a serious violation, then have  
17 this serious violation. But we don't see the fact of  
18 not having the licensed manager there as something that  
19 makes the establishment any less or any more safe or  
20 likely to fall --

21 CHAIRPERSON MILLER: You're saying the  
22 difference between Montgomery County and DC is that

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1 they just have to have alcohol awareness training, but  
2 they have to have somebody there with alcohol awareness  
3 training?

4 MR. KLINE: That's all they have to have,  
5 correct.

6 CHAIRPERSON MILLER: And if they -- but if  
7 they don't, they get a fine?

8 MR. KLINE: If they don't, then they're in  
9 violation. Montgomery County is not one in the first  
10 instance that typically fines.

11 CHAIRPERSON MILLER: They have a warning  
12 system?

13 MR. KLINE: Informal as it is, yes.

14 CHAIRPERSON MILLER: So it'd be, like,  
15 informal, like, not written down, like, verbal?

16 MR. KLINE: Correct. Remember the background  
17 here is that's the way it used to work here. But we  
18 saw what we think is common sense had gone by the  
19 wayside, which is why we urge the council to make this  
20 change in the law.

21 CHAIRPERSON MILLER: Other than the mandatory  
22 warnings -- it's probably not at issue at this -- in

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1 this hearing but I'm just going to ask you, do your  
2 members think the fines are too high? And you were  
3 giving examples about being fined instead of being  
4 warned. And then they were -- you gave the impression  
5 they were high fines. But is that part of the issue,  
6 how high they are?

7 MR. KLINE: Certainly, depending upon --  
8 depending upon what the violation is. I mean, the  
9 example that I gave in terms of not having your records  
10 on the premises and being around the corner --

11 CHAIRPERSON MILLER: Uh-huh.

12 MR. KLINE: -- yeah, we think it's pretty  
13 outrageous to suggest somebody should be fined \$2000  
14 because they thought it was okay to keep their records  
15 around the corner. It's not that they don't have the  
16 records, just in fact -- in our comments -- in our  
17 comment letter, we said, "Hey, break it down. Have two  
18 offenses. One is violation of the same section, not  
19 having records," which we agree with you is the more  
20 serious situation. Because that means you may not be  
21 able to determine, you know, food sales requirements.  
22 You may not be able to determine whether they're buying

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1 their beverages from licensed wholesalers.

2 I mean, there are a whole lot of things that  
3 that could be a symptom of that we understand and that  
4 we agree with are more serious. Not having them on the  
5 premises is -- you know, it's a requirement but it's  
6 certainly a lot less serious in our minds than not  
7 having them at all.

8 CHAIRPERSON MILLER: Okay. You also quoted  
9 some of your members have -- there's, you know, making  
10 statements, like, you know, "Do they hate us? Do they  
11 not understand, you know, what we're up against," etc.  
12 Has that changed in any way since 2008? Has it gotten  
13 worse? Has it gotten better? Is it the same?

14 MR. KLINE: I think in some ways it's  
15 certainly gotten better. I mean, we would concede in,  
16 you know, many ways it has gotten better. And -- but  
17 we think that we were at the bottom of the valley on  
18 that issue at that point. Our members really felt put  
19 upon at that time, which is why we ended up going at  
20 that point -- myself and members of the other  
21 associations to the then-council chair and also,  
22 frankly, to the deputy mayor for economic development.

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1 I mean, it was -- it was something that we  
2 were hearing even more loudly then. But in the context  
3 of the examples that I've given you, we still hear it  
4 in terms of the minor things. I mean, no one's  
5 certainly questioning the Board's intentions with  
6 respect to making the District of Columbia safe and  
7 protecting residents from disturbances from licenses.  
8 But on some of these little issues, they just say,  
9 "Well, they don't -- they don't get it. Why are they -  
10 - why are they doing this to us?"

11 CHAIRPERSON MILLER: And how about in  
12 comparison to, say, Montgomery County? Do -- is this a  
13 more unfriendly environment or about the same?

14 MR. KLINE: You asked. I'll answer.

15 CHAIRPERSON MILLER: You know, I mean, it  
16 isn't exactly, I mean --

17 MR. KLINE: Right now the director in  
18 Montgomery County is very steeped in Responsible  
19 Hospitality Institute values. And she is a believer --  
20 and she was also an operator, you know, at one time.  
21 So she gets -- she was an -- she was an operator. She  
22 was a substance abuse counselor and now, she's on the

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1 regulatory process. So she's kind of done it all. She  
2 has all those perspectives.

3           But her attitude is, you know, you need to  
4 comply with the regulations. We'll work with you to  
5 comply. If you don't, we've got another prescription  
6 for you. But they tend to -- they tend to leave  
7 everything at the agency level unless they've got an  
8 operator who just, you know, won't -- now, I must say  
9 they have a lot fewer licenses than we do. So I don't  
10 want to be unfair in terms of comparing two areas.

11           And they also have a lot fewer urban  
12 licensees than we do. I mean, the District of Columbia  
13 is different than surrounding areas with the exception  
14 of, you know, maybe the Boston Corridor or Bethesda and  
15 what have you. Because almost every licensee is within  
16 proximity of residences. We don't have shopping  
17 centers with parking lots that insulate residences from  
18 operators.

19           And we're cognizant of that. And I don't --  
20 you know, I want to -- I want to make sure that we're  
21 crystal clear and we're fair in terms of making  
22 comparisons.

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1           CHAIRPERSON MILLER: Okay. I mean, I was  
2 just picking up on one of your points. And I don't  
3 think we're there at the -- you know, the -- if it's  
4 too harsh, the businesses are going to go elsewhere.  
5 And I think a lot of businesses are coming to the  
6 District. So I don't think we've seen a flight of  
7 businesses because of ABRA's penalties as of yet,  
8 unless -- but --

9           MR. KLINE: Well, I wouldn't say that we have  
10 in terms of penalties. But I will tell you -- and  
11 Lynne can certainly speak to this -- we've had members  
12 who have vowed that they won't -- they won't do  
13 business in the District. They will open in Virginia.  
14 We don't have too many members in Maryland at this  
15 point.

16           CHAIRPERSON MILLER: Okay.

17           MR. KLINE: But we have had members -- we've  
18 heard it, "I'm not going back there. I won't do it."  
19 So we do hear that. Now, I'm not going to --

20           CHAIRPERSON MILLER: Okay.

21           MR. KLINE: -- sit here and tell you that  
22 that's because you don't give warnings. I mean, that

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1 is -- it's the overall difficulty in terms of doing  
2 business, some of which relates to this agency, a lot  
3 of which relates to other agencies. You know, if you  
4 do business in the District, you have to deal with  
5 obviously this agency, but also DCRA and the Department  
6 of Health, the Department of Transportation, on and on  
7 it goes.

8           So I'm not going to overstate it and say,  
9 "They're not doing business here because of ABRA and  
10 the ABC Board." No, I'm not saying that.

11           CHAIRPERSON MILLER: Okay. And my last  
12 question until I let others ask, I -- and I haven't  
13 read your specific analysis yet because we just saw it.  
14 But does your -- do you break it down for warnings or  
15 no warnings between public safety and, you know,  
16 bookkeeping or --

17           MR. KLINE: Yes.

18           CHAIRPERSON MILLER: -- things like that?

19           MR. KLINE: We think we did, yes.

20           CHAIRPERSON MILLER: Okay.

21           MR. KLINE: I mean, that's the analysis. If  
22 you go back and read the material between us and then-

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1 Chairman Gray and also in the -- in the committee with  
2 Councilmember Graham, who's actually the one  
3 surprisingly who moved the warning requirement -- yes.  
4 If it relates to the public safety, then we agree with  
5 you. I mean, if it relates to the public safety, those  
6 are the ones that need to be stressed and for which a  
7 penalty off the bat might be appropriate.

8           So we -- and we may disagree as to what  
9 impacts public safety and what doesn't. I mean, we've  
10 had this discussion about licensed managers. And there  
11 may be others where we disagree. But in principle,  
12 yes, we agree with that concept. That was what we  
13 communicated to the council. That's what we  
14 communicated to (inaudible) --

15           CHAIRPERSON MILLER: Okay. I have one other  
16 question basically. If you just can kind of summarize  
17 this though? The other reasons for a warning  
18 otherwise, not just that they don't impact public  
19 safety, but because there are some positive reasons to  
20 give warnings, be it one chance to be educated or  
21 positive reaching out to the -- to the hospitality  
22 industry or whatever, I just want to make sure that I

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1 have those reasons.

2 MR. KLINE: Yeah, we think it's an important  
3 education component. The regulations here are  
4 certainly more complex than in many other  
5 jurisdictions. There's a lot of laws because of the  
6 tension that I alluded to earlier between residences  
7 and businesses because of the proximity. Then there  
8 necessarily are. And there are just a lot more  
9 requirements. There's a lot more to comply with.

10 Although, the agency has -- we applaud and  
11 agree -- made great strides in terms of educating.  
12 When Fred first took the position, he had his staff  
13 work up a guide book that's different than the code  
14 book and the regulations. And we think that that's a  
15 great step. I understand that they're also planning a  
16 welcome kit, which we also think is a great step. And  
17 I'm sure that the Board has had input over that.

18 I mean, anything that can be done to educate  
19 our members and licensees, we think is a good thing.  
20 We see warnings as part of that. Because even if they  
21 read it and they -- and they get a welcome kit, they  
22 get the -- they get the guide book, there's a lot of

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1 laws and regulations. They get a formal warning  
2 notice. It's different. It's -- you're going to pay  
3 attention to those because it says if we don't -- you  
4 know, if we don't comply, we're going to get fined.

5           And even multi-store operators, they don't  
6 want to -- you know, even though it's not directly  
7 coming out of their pocket as the manager, it's  
8 certainly coming out of their pocket in terms of a  
9 performance review. Because one of the things that  
10 they're typically charged with is complying with the  
11 laws in whatever jurisdiction that they're doing  
12 business in.

13           So we think that the warning requirement  
14 educates the individual managers and also educates the  
15 licensee even if that licensee be an organization.  
16 Because typically, if it's a piece of paper, they have  
17 to transmit it somewhere. It's got to go to  
18 headquarters. It's got to go to the owner. It's got to  
19 go to the general manager.

20           And we think that's a good thing because  
21 there may be a requirement that the business was not  
22 aware of that they then learn about because they got

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1 this written warning.

2 CHAIRPERSON MILLER: Great. Thank you.

3 Okay. Others? Yes, Mr. Alberti.

4 MR. ALBERTI: Hi, Mr. Kline. I hear your  
5 recommendations loud and clear on the warnings and you  
6 make some very good arguments and I recognize that. So  
7 my questions really are -- I'm trying to understand  
8 fully what your -- what your recommendations are. And  
9 so I'm going to ask questions in regards to that. You  
10 used the term, "Mandate a warning," and, "Require a  
11 warning." And I'm trying to understand what --

12 MR. KLINE: It's the same.

13 MR. ALBERTI: It's the same. So you mean the  
14 same? Okay. So -- okay. Am I understanding you to  
15 say that for all secondaries, you're suggesting that we  
16 mandate a warning, meaning the Board is -- the required  
17 first penalty, let's -- so to speak, is a warning for  
18 that offense?

19 MR. KLINE: Yes.

20 MR. ALBERTI: For all secondaries?

21 MR. KLINE: Yeah.

22 MR. ALBERTI: Okay. So there is --

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1 MR. KLINE: We think that's what was intended  
2 by the council.

3 MR. ALBERTI: Okay. So there is no -- there  
4 are no discretionary warnings, where you may give a  
5 warning or you may not give a warning, depending on the  
6 facts of the case?

7 MR. KLINE: That was something --

8 MR. ALBERTI: We're talking secondaries only  
9 now.

10 MR. KLINE: Right. Correct. With respect to  
11 secondaries, yes.

12 MR. ALBERTI: So you don't -- you're not  
13 suggesting that we have any of those discretionary  
14 warnings, that they all be mandated warnings?

15 MR. KLINE: Correct.

16 MR. ALBERTI: Okay. And just to be clear,  
17 when -- even if they were discretionary and certainly  
18 if they're mandatory, they would be written notices?

19 MR. KLINE: Yeah.

20 MR. ALBERTI: And so the notice that some of  
21 these cases that you have before you may -- where the -  
22 - where the -- we don't know -- I mean, the

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1 investigator may have -- may have given a warning and  
2 then ended up charging them with a violation. We just  
3 don't know because it may or may not be reflected in  
4 the report. But in all -- but in any event, it's not --  
5 it's not really considered a warning unless it's a  
6 letter, I mean, technically. Would you agree?

7 MR. KLINE: Yes.

8 MR. ALBERTI: Okay. Okay. So I'm not going  
9 to take a lot of time but I do want one of your -- one  
10 of your recommendations in here -- it's 25-762. It's  
11 on -- it looks like the fourth or fifth page in. One,  
12 two, three, four, five, sixth page in.

13 MR. KLINE: 762?

14 MR. ALBERTI: 762(b)(16), Failure to obtain  
15 approval to change booth size.

16 MR. KLINE: Oh, okay.

17 MR. ALBERTI: All right. And your comment  
18 says it all, "Seriously?" I understand perfectly. It  
19 conveys everything to me. But here's the dilemma and  
20 then I want you to comment. Here's the dilemma that I  
21 see is that we have something that's in the statute.  
22 Do you suggest that the Board actively overlook

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1 something that's in the statute and not find it as a  
2 penalty?

3 I mean, whether you agree whether that  
4 provision should be in the statute or it makes sense or  
5 not, it's in the statute.

6 MR. KLINE: Are you talking about (b)(16)?

7 CHAIRPERSON MILLER: Uh-huh.

8 MR. ALBERTI: Yeah.

9 MR. KLINE: Oh, I mean, that -- we're not  
10 saying you can't enforce it. It's in the statute.  
11 But, I mean, that's a --

12 MR. ALBERTI: But then what's the,  
13 "Seriously?"

14 MR. KLINE: I mean, really?

15 MR. ALBERTI: I didn't know if there was a  
16 stronger message there but I'll take that (inaudible).

17 MR. KLINE: I think we said it all.

18 MR. ALBERTI: No, thank you.

19 MR. KLINE: And, you know (missing audio) you  
20 don't know how many hundreds or thousands --

21 MR. ALBERTI: You're not going to find it  
22 there.

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1 MR. KLINE: -- of cases over there.

2 CHAIRPERSON MILLER: Right.

3 MR. KLINE: I haven't found that violation.

4 So --

5 MR. ALBERTI: In my three years here, I have  
6 not seen it either but --

7 MR. KLINE: Yeah.

8 MR. ALBERTI: I just -- I just wanted to make  
9 sure there wasn't a stronger message you were trying to  
10 send us. That's fine.

11 MR. KLINE: Oh, no. That's it.

12 MR. ALBERTI: All right. Thank you.

13 MR. KLINE: A little levity, I think, helps  
14 the law.

15 MR. ALBERTI: Yes, thank you.

16 CHAIRPERSON MILLER: Other questions? So Mr.  
17 Kline, I just want to ask you, in this section-by-  
18 section analysis -- right -- okay -- which I haven't  
19 gone through yet, basically you're saying all secondary  
20 tiers should be mandatory warnings? We don't even need  
21 to think about whether there's public safety or not  
22 based on your understanding of the legislative history?

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1 MR. KLINE: Correct.

2 CHAIRPERSON MILLER: Okay. Then are there so  
3 many primaries that you think should get mandatory  
4 warnings?

5 MR. KLINE: I think that discretionary  
6 warnings are always a good thing. Because the Board,  
7 in its infinite wisdom, may say, "You know what? This  
8 guy or this woman or whatever -- this licensee to use  
9 the term properly -- this licensee didn't really do  
10 anything wrong. Yes, they're in technical violation of  
11 the statute. But you know what? They don't need to be  
12 penalized. They get it."

13 And, yes, we do think that under those  
14 circumstances that there are circumstances -- and we  
15 also believe -- and I'm sure the Board believes that  
16 there's certain requirements for which there should be  
17 no warning. I mean, for example, I'll give you a real  
18 simple, straightforward one. If you're selling alcohol  
19 at 4:00 on a Sunday morning absent any extended hours  
20 or anything else, there's no confusion about that.

21 I mean, there are certain basic things that  
22 licensees should be expected to know. And we do accept

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1 that. We're not saying, "Gee, Licensees shouldn't know  
2 anything." And even licensees that do business in  
3 different jurisdictions, they may not know that, "Hey,  
4 we shorten them here under certain circumstances." But  
5 they all know there's a maximum hour. And that's  
6 always a central question, "Well, how late can we  
7 sell?"

8           So under those circumstances, we're not  
9 saying, "Oh, you've got to give them a warning." No.  
10 I mean, you know, there are certain basic requirements.  
11 You know, making moonshine in the basement and selling  
12 it to your customers. Hello. I mean, you know, we  
13 understand. I mean, we want our operators to be  
14 responsible. We just want the system to be fair such  
15 that they have an opportunity to be educated and know  
16 what the laws are before they're penalized. And that's  
17 what we think is important.

18           CHAIRPERSON MILLER: Okay.

19           MR. KLINE: Because we're always for  
20 compliance. I mean, is there something you want to say?  
21 You look like you're chomping at the bit. You want to  
22 come up?

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1           CHAIRPERSON MILLER:  If you do, you can come  
2 forward and introduce yourself on the record.

3           MS. BREAUX:  Lynne Breaux, president of the  
4 Restaurant Association.

5           CHAIRPERSON MILLER:  Okay.

6           MS. BREAUX:  Good afternoon.  Just to your  
7 questions especially, it does seem disingenuous that we  
8 would want mandatory written warnings for these things.  
9 And he and I have had this discussion a lot.  Because  
10 it sounds -- well, don't you just want somebody to walk  
11 in and say, "Oh, go on and fix this?"  But that's  
12 exactly what we don't want because then you get this  
13 fine.

14           So it has to be written.  We want it defined.  
15 It's easier for everybody.  And you're right; we -- I  
16 start off so many meetings in all these years I've been  
17 doing this with, "We all want the same thing,  
18 responsible hospitality."  We want what you want.  We  
19 want to be able to communicate that to our members and  
20 we have a great relationship with the director in terms  
21 of communicating information to our members.

22           But just got to clean up this -- it's

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1 confusing and frustrating and there's no question that  
2 things have improved and that the attitude is better  
3 towards -- from our members towards the ABC Board and  
4 the inspectors, etc. But there is room for improvement  
5 and I think this would help to clarify a lot of those.

6 CHAIRPERSON MILLER: Thank you. Okay.

7 MR. ALBERTI: I just want to come --

8 CHAIRPERSON MILLER: Uh-huh.

9 MR. ALBERTI: Thank you for that -- for that  
10 comment. Because I think the strong message here is  
11 whether the -- whether the warning is discretionary or  
12 mandated. All right. It's still a start in the  
13 direction you want because it's important to have the  
14 letters. Because as I say, we don't know whether --  
15 and we can't control how the investigators give  
16 warnings or when they give warnings.

17 MS. BREAUX: That's --

18 MR. ALBERTI: And you want some certainty --

19 MS. BREAUX: That's --

20 MR. ALBERTI: -- and some consistency and I  
21 appreciate that. And I think that's a good point to  
22 take away from this.

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1           MS. BREAUX: It doesn't seem to make sense  
2 but it really does.

3           MR. ALBERTI: Yeah, it does. Thank you.

4           CHAIRPERSON MILLER: Any other questions,  
5 comments from Board members? Anything else you want to  
6 say, Mr. Kline?

7           MR. KLINE: No. I just thank you for --  
8 again, we do thank you and appreciate the fact that  
9 this has finally moved forward. I know that we've been  
10 screaming about it for the last three years. And we're  
11 glad that the Board's finally moved forward. We think  
12 it's important. It's important to our members. Our  
13 members have expressed that to us, which is why we  
14 expressed it to you.

15           And we hope that you will, you know, consider  
16 what we've said today and also, the comments that we've  
17 given in writing in thinking about this further. And  
18 we are happy. This is a rulemaking. It's not a  
19 contested case, which means we're able to talk about  
20 this any time that we want to. We don't have the  
21 constrictions of only talking in this hearing room.  
22 But we're prepared to work with you in any way that we

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1 can to try to come to some reasonable understanding.

2 We may not agree but it always, in our opinion, helps  
3 to talk and communicate.

4 CHAIRPERSON MILLER: Well, thank you. Thank  
5 you very much. I think -- I look forward to reading  
6 your -- all these comprehensive comments and going back  
7 into the legislative history, I think that's really  
8 helpful. So thank you. And again, I would -- oh, go  
9 ahead, Mr. Silverstein.

10 MR. SILVERSTEIN: Thank you, Mr. Kline for  
11 your presentation and I'd like to thank you, Ms.  
12 Breaux, for your many years of service and wish you  
13 well.

14 MS. BREAUX: Thank you. This would be a  
15 great going away present. I've been asking for a few  
16 from different agencies lately so this would be  
17 awesome. Thank you.

18 CHAIRPERSON MILLER: Oh, how much time do we  
19 have?

20 MS. BREAUX: This is --

21 MR. KLINE: Counting down.

22 MS. BREAUX: The clock is ticking and -- by

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1 the end of the year.

2 CHAIRPERSON MILLER: Oh, okay. Okay. Well,  
3 thank you for everything. And I would just remind  
4 everyone that we -- the record is open until November  
5 16th at 4:00. So

6 MR. KLINE: November 16th?

7 CHAIRPERSON MILLER: November 16th. So if  
8 you think of more things you want to add to the record,  
9 feel free.

10 MR. KLINE: No, I don't want to think --

11 CHAIRPERSON MILLER: Okay.

12 MS. BREAUX: Thank you.

13 CHAIRPERSON MILLER: Thank you.

14 MR. KLINE: Thank you.

15 MR. ALBERTI: Thank you.

16 (WHEREUPON, at 2:35 p.m., the hearing was  
17 concluded.)

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CERTIFICATE OF NOTARY PUBLIC

I, RICK SANBORN, the officer before whom the foregoing hearing was taken, do hereby certify that the testimony appearing in the foregoing pages was recorded by me and thereafter reduced to typewriting under my direction; that said transcription is a true record of the testimony given by said parties; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

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RICK SANBORN

Notary Public in and for the  
District of Columbia

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CERTIFICATE OF TRANSCRIPTION

I, MIRANDA PENNACHI, hereby certify that I am not the Court Reporter who reported the proceeding and that I have typed the transcript of the proceeding using the Court Reporter's notes and recordings. The foregoing/attached transcript is a true, correct and complete transcription of the proceedings.

\_\_\_\_\_

Date

\_\_\_\_\_

MIRANDA PENNACHI

Transcriptionist

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