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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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CIVIL PENALTY RULEMAKING : Public
: 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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<p style="text-align: right;">6</p> <p>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</p>	<p style="text-align: right;">8</p> <p>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,</p>
<p style="text-align: right;">7</p> <p>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</p>	<p style="text-align: right;">9</p> <p>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. 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</p>

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<p style="text-align: right;">10</p> <p>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.</p> <p>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.</p> <p>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.</p>	<p style="text-align: right;">12</p> <p>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.</p> <p>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.</p> <p>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 have been</p>
<p style="text-align: right;">11</p> <p>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.</p> <p>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.</p> <p>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</p>	<p style="text-align: right;">13</p> <p>1 given was failure to file a quarterly report.</p> <p>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."</p> <p>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</p>

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14	<p>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</p>	16	<p>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.</p>
15	<p>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</p>	17	<p>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</p>

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<p style="text-align: right;">18</p> <p>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?"</p>	<p style="text-align: right;">20</p> <p>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</p>
<p style="text-align: right;">19</p> <p>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.</p>	<p style="text-align: right;">21</p> <p>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</p>

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22	<p>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</p>	24	<p>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</p>
23	<p>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.</p>	25	<p>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</p>

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26	<p>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.</p> <p>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.</p> <p>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?</p> <p>19 MR. KLINE: I think that's a myth. I think 20 that if there were --</p> <p>21 CHAIRPERSON MILLER: You think it's a myth?</p> <p>22 MR. KLINE: -- for example -- yeah, I think</p>	28	<p>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.</p> <p>3 Now, we're not suggesting that you change 4 that. We think we have enough regulatory requirements --</p> <p>5 CHAIRPERSON MILLER: Uh-huh.</p> <p>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.</p> <p>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 --</p> <p>21 CHAIRPERSON MILLER: You're saying the 22 difference between Montgomery County and DC is that</p>
27	<p>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.</p> <p>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.</p> <p>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</p>	29	<p>1 they just have to have alcohol awareness training, but 2 they have to have somebody there with alcohol awareness 3 training?</p> <p>4 MR. KLINE: That's all they have to have, 5 correct.</p> <p>6 CHAIRPERSON MILLER: And if they -- but if 7 they don't, they get a fine?</p> <p>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.</p> <p>11 CHAIRPERSON MILLER: They have a warning 12 system?</p> <p>13 MR. KLINE: Informal as it is, yes.</p> <p>14 CHAIRPERSON MILLER: So it'd be, like, 15 informal, like, not written down, like, verbal?</p> <p>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.</p> <p>21 CHAIRPERSON MILLER: Other than the mandatory 22 warnings -- it's probably not at issue at this -- in</p>

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30	<p>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</p>	32	<p>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</p>
31	<p>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.</p>	33	<p>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.</p>

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34	<p>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</p>	36	<p>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</p>
35	<p>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-</p>	37	<p>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</p>

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38	<p>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</p>	40	<p>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</p>
39	<p>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 --</p>	41	<p>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</p>

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<p style="text-align: right;">42</p> <p>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.</p>	<p style="text-align: right;">44</p> <p>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</p>
<p style="text-align: right;">43</p> <p>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?</p>	<p style="text-align: right;">45</p> <p>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?</p>

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46	<p>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</p>	48	<p>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</p>
47	<p>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.</p>	49	<p>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</p>

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<p style="text-align: right;">50</p> <p>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.) 18 19 20 21 22</p>	<p style="text-align: right;">52</p> <p>1 CERTIFICATE OF TRANSCRIPTION 2 3 I, MIRANDA PENNACHI, hereby certify that I am not 4 the Court Reporter who reported the proceeding and that 5 I have typed the transcript of the proceeding using the 6 Court Reporter's notes and recordings. The 7 foregoing/attached transcript is a true, correct and 8 complete transcription of the proceedings. 9 10 11 12 13 _____ 14 Date MIRANDA PENNACHI 15 Transcriptionist 16 17 18 19 20 21 22</p>
<p style="text-align: right;">51</p> <p>1 CERTIFICATE OF NOTARY PUBLIC 2 3 I, RICK SANBORN, the officer before whom the 4 foregoing hearing was taken, do hereby certify that the 5 testimony appearing in the foregoing pages was recorded 6 by me and thereafter reduced to typewriting under my 7 direction; that said transcription is a true record of 8 the testimony given by said parties; that I am neither 9 counsel for, related to, nor employed by any of the 10 parties to the action in which this hearing was taken; 11 and, further, that I am not a relative or employee of 12 any counsel or attorney employed by the parties hereto, 13 nor financially or otherwise interested in the outcome 14 of this action. 15 16 17 18 _____ 19 RICK SANBORN 20 Notary Public in and for the 21 District of Columbia 22</p>	

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