HOUSE
RESEARCH
ORGANIZATION bill analysis 5/5/2005

HB 2544
Hamric, et al.
(CSHB 2544 by Flores)

SUBJECT: Continuing the Texas Alcoholic Beverage Commission

COMMITTEE: Licensing and Administrative Procedures — committee substitute recommended

VOTE: 7 ayes — Flores, Geren, Chisum, Goolsby, Hamilton, Homer, D. Jones

0 nays

2 absent — Morrison, Quintanilla

WITNESSES: For — Robert Brown, Wholesale Beer Distributors of Texas/Desert Eagle Distributing; Rick Donley, The Beer Alliance of Texas LLC; Stephen Fenoglio, Distilled Spirits Council of the US; Greg Flores, HEB Grocery Co.; Gary Huddleston, Texas Retailers Association; Ron Kessler, SADA Chamber/Greater Austin Merchants Association; Bill Levine, The Gambrinus Company and Shiner Brewery; Mike McKinney, Wholesale Beer Distributors of Texas; Phil Metzinger, Texas Retailers Association; Keith Strama, Wholesale Beer Distributors of Texas; Richard "Dick" Trabulsi, Jr., The Texas Package Stores Association; James Walter, Pabst Brewing Company

Against — None

On — Jim Haire; Karen Latta, Sunset Commission; Alan Steen, TABC

BACKGROUND: The Texas Alcoholic Beverage Commission (TABC) enforces the Alcoholic Beverage Code and licenses and regulates the three tiers of the alcoholic beverage industry - manufacturers, distributors and retailers. The specific duties of the commission include regulating sales, taxation, importation, exportation, manufacturing, transporting, possession and advertising of alcoholic beverages.

The policy-making body of the agency is a three-member governing board appointed by the governor with the advice and consent of the Senate. Members of the commission hold office for staggered terms of six years, with the term of one member expiring every two years. An administrator, appointed by the governing board, directs the commission's daily operations.

In fiscal 2003, TABC had 215 employees. The licensing division of TABC issues more than 60 different licenses and permits to manufacturers, wholesalers, and retailers. Each year, the agency processes applications or renewals for more than 96,000 licenses, and the commission also can refuse, suspend, or cancel permits and licenses. The enforcement division conducts investigations, while the legal division assists in the prosecution of violators. The compliance division ensures the proper amount of taxes and fees have been assessed, reported, and paid by licensees and permittees. TABC also adopts standards of quality and approves labels and the sizes of containers for all alcoholic beverages sold in Texas.

The Alcoholic Beverage Code allows citizens at the county, city, and justice precinct levels to determine through local-option elections the types of alcoholic beverages that may be sold and how they can be sold.

The agency spent more than $25.2 million for its operations in fiscal 2003 — all of which came from licensing fees and surcharges. Appropriations for fiscal 2004–05 total $60.4 million. The 78th Legislature directed the agency to set a fee schedule such that fees, surcharges, fines, and miscellaneous revenue would cover, at a minimum, its appropriation plus other direct and indirect costs.

The Sunset Advisory Commission last evaluated TABC in 1993. Under the Texas Sunset Act, TABC will be abolished on September 1, 2005, unless continued by the Legislature.

DIGEST: HB 2544 would continue the Texas Alcoholic Beverage Commission until September 1, 2011. The bill would apply, update, or modify standard sunset provisions governing conflicts of interest, unbiased appointments to the agency's policymaking body, gubernatorial designation of a presiding officer, grounds for removing a board member, training of board members, complaint procedures, separation of policymaking and staff functions, public access through technology, and alternative rulemaking and dispute resolution procedures.

The bill would take effect September 1, 2005.

General powers and duties. The bill would specify that TABC's general powers and duties are:

- to protect public safety;
- to promote legal and responsible alcohol consumption;
- to ensure fair competition;
- to ensure consistent, predictable, and timely enforcement of the Alcoholic Beverage Code and of the licensing and permitting process;
- to promote voluntary compliance with the code; and
- to communicate the requirements of the code clearly and consistently.

Public health and safety. TABC by rule would have to require on-premise permit and license holders to display on the door to each restroom a warning sign informing the public of the risks of drinking alcohol during pregnancy.

Enforcement. *Sanctions.* TABC would be required to adopt a schedule of sanctions to replace its existing standard penalty chart and to assure that the severity of each sanction appropriately matched the severity of the corresponding violation. The board would consider factors such as the type of license or permit held and the history of compliance.

The schedule of sanctions would have to provide additional information, including details about length of suspensions and a list of the most common violations. It also would have to allow for deviations for specific mitigating circumstances. This schedule would be available to the public and would appear on TABC's Web site.

Risk-based approach to enforcement. TABC would develop a risk-based approach to conducting enforcement activities, which would include detecting serious violations that impact public safety, monitoring entities with a history of violations, and prioritizing investigations about complaints. TABC also would develop benchmarks and goals to track enforcement activities in part by collecting, analyzing, and publishing information about violations and complaints.

Seizure of property. TABC could use funds gained through the sale of seized alcoholic beverages to help defray the costs of forfeiture lawsuits. The bill would clarify the definition of seized beverages that are unfit for consumption and should be destroyed rather than sold.

Regulation of business practices. *Beer containers*. The bill would repeal Alcoholic Beverage Code, sec. 101.44, which requires that beer be sold only in specific container sizes.

Testing and label approval. Alcoholic Beverage Code, sec. 37.11, would be repealed, removing the requirement that TABC conduct chemical analyses of liquor and wine, approve liquor and wine labels, and collect a $25 fee for the approval of liquor and wine. Instead, TABC would set a fee to cover the costs of regulation, including the cost of implementing a label registration program. Some requirements of beer testing also would be relaxed to a degree.

TABC would retain the authority to test any beverage, including liquor, wine, and beer, on an as-need basis to protect public safety. TABC further would be authorized to implement a process to accept federal certificates of approval for liquor and wine.

Licensing issues. TABC would allow for online filing of applications for licenses and permits. The commission also could issue licenses that expired in two years, rather than one, to businesses that had no previous violations.

Electronic funds transfer payment. The bill would require the commission to authorize payment for beer deliveries to retailers by electronic funds transfer initiated on or before the day of delivery.

Reporting requirements. The bill would modify requirements for reporting delinquent retailers and would allow such information to be reported by e-mail or fax to TABC.

Marketing practices. The commission would develop a formal process for making policy decisions regarding regulations for marketing practices. It would create a work group to consult with regard to marketing practices and to guide TABC on acceptable practices relating to rules. The group would include representatives from all three tiers of the industry, non-industry public representatives, and the liquor, beer, and wine segments of the industry. The decision documents would be widely available, including through electronic and online means.

Internal affairs. The bill would direct the TABC administrator to establish an office of internal affairs to conduct investigations of alleged employee misconduct. The bill also would require the internal affairs staff to make monthly reports to the administrator and quarterly reports to the commission.

Interim committee study. The bill would require the Legislature to establish a joint interim committee to study revision of the regulatory structure of alcoholic beverages in Texas. The committee would be directed to study a variety of possibilities, including placing relevant tax collection responsibility with the comptroller, placing responsibility for the issuance of permits with the Texas Department of Licensing and Regulation and abolishing code provisions relating to marketing practices.

SUPPORTERS SAY:

CSHB 2544 would continue TABC for six years, rather than the standard 12 years, while shifting the agency's focus away from many unnecessary and costly regulatory practices and toward the important issue of public safety. A shorter review period would allow the Legislature to better assess the progress demonstrated by TABC in incorporating changes to improve its operations.

Public health and safety. In addition to making public safety a priority through a more vigorous enforcement of alcohol laws, TABC would better serve the state by informing Texans about the health consequences of alcohol use. According to a recent survey, up to 50 percent of women do not connect the consumption of alcohol with the risk of birth defects. Posting signs to inform the public about these risks would be an important step in preventing health problems among many of the state's citizens.

Enforcement. *Sanctions*. Developing a new schedule of sanctions would help ensure that TABC penalties were clear, fair, and consistently applied.

Seizure of property. Currently TABC is required to manage seized property in a way that is different from the process used by other law enforcement agencies. One important difference is that TABC cannot use proceeds from the sale of seized alcoholic beverages to pay the costs of forfeiture lawsuits, which establish the state's right to illegal property. This bill would conform TABC's forfeiture procedures to those of other law enforcement agencies, which are governed under the Code of Criminal Procedure. It would allow the commission to file forfeiture suits and give it a mechanism for paying the associated court costs.

Regulation of business practices. *Beer containers*. The bill would allow market preference, not the size of a bottle, to determine which beers could be sold in Texas. The consumer would benefit from this choice. Requiring the packaging of beer in small containers has little, if any, effect on curbing alcohol abuse because it places no limit on how many smaller beers a person can drink.

Testing and label approval. Because a number of federal regulations duplicate TABC regulations on issues such as purity, alcohol content, and labeling, the commission no longer would be required to perform these activities. However, the bill would not change the label approval requirements for beer because eliminating these requirements might limit TABC's ability to determine whether beer products were under 4 percent alcohol by volume. This relates to the definition of "liquor," which is an issue in local-option elections to allow beer sales. Because the federal government does not require beer manufacturers to state the alcohol content of products on the label, TABC should continue to exercise its authority over beer labeling.

Licensing issues. The process of filing for a TABC license currently can take several months. The directive in CSHB 2544 for creating Internet applications would reduce delays for businesses. In addition, the annual renewal of licenses creates an administrative burden. TABC would determine if a licensee was eligible for biennial renewal based on compliance history. Biennial renewals would pay double the current annual licensing fees to avoid any revenue loss to the state.

Internal affairs. TABC currently lacks a formal approach to investigating complaints against its employees. The bill would establish an internal affairs function designed to ensure fair and impartial investigations of alleged misconducts. Having this process would allow more problems to be addressed and solved and increase the efficiency of the entire agency.

Interim committee study. The purpose of the interim study specified by the bill would be to evaluate and recommend ways to modernize the Alcoholic Beverage Code. It would not be the committee's intent to dismantle TABC's three-tier system. Suggested code changes could include, for example, further simplification of regulations and organizational changes such as transferring licensing and tax collection functions to other agencies. A review of the code is welcome, since many believe the code is archaic and a hindrance to commerce.

OPPONENTS SAY:

Public health and safety. Efforts to educate Texans about the dangers of alcohol to pregnant women and unborn children are commendable. Drunk driving, however, poses a far greater threat to the public. The commission should broaden its efforts to combat the damage created by alcohol abuse by abolishing happy hour practices at bars and restaurants, for example.

Enforcement. *Sanctions.* Although it is important to update the schedule of sanctions in the way the bill recommends, it also is important to include sanctions that have a deterring effect, which the bill does not emphasize. Also, TABC should be required to include in the schedule of sanctions referrals to district attorneys for criminal violations.

In reviewing its sanctions on license holders, the commission should consider limiting the lifetime of a violation on record. In addition, the offense of having un-invoiced alcohol on a premises should incur a penalty short of license cancellation. Graduated penalties should be tied to the relevant licensed location where an offense took place, not to the entire company.

Regulation of business practices. *Beer containers*. Rather than eliminating all size restrictions for beer containers, the commission should set a maximum size limit. This would help prevent alcohol abuse.

Testing and label approval. Label approval requirements for beer should be eliminated. This would place the requirements for beer labeling in line with the proposal to eliminate liquor label approval requirements. In addition, it would make more sense to classify beer based on brewing style rather than alcohol content.

Other concerns. The bill does not address a number of concerns related to business practices. For example, distributors should be allowed to deliver beer and wine between midnight and 5 a.m., which is a common delivery time for other products that allows delivery staff to efficiently avoid road traffic and store congestion. Regarding the purchase of alcohol by businesses, restaurants and bars should be allowed to buy liquor from wholesalers directly, and retailers should not be required to pay for beer immediately on delivery, a requirement that is unique to this transaction.

Internal affairs. Establishing an internal affairs office is wise. However, to ensure that TABC staff felt comfortable making complaints, investigations initiated by staff members should be approved at the division director level or above, rather than at the administrator level.

Interim committee study. The interim study could open the door to excessive review or rewriting of the code. These laws have been carefully created to follow legislative directive, and tinkering with the code in an attempt to modernize it or remove "archaic" provisions could lead to unintended consequences. It is especially important not to dismantle the three-tier framework, which prevents abuses associated with monopolies and vertical integrations and raises tax revenue for the state.

The bill should continue TABC for 12 years, rather than six. The commission has performed its duties well since it last was evaluated, and there is no reason to make an exception for TABC in deciding when it next would be subject to Sunset review.

TABC's tax collection functions should be transferred to the Office of the Comptroller of Public Accounts.

NOTES: The committee substitute added authorization for TABC to issue permits and licenses for less than two years and prorate the fees.

The companion bill, SB 421 by Whitmire, has been referred to the Senate Committee on Government Organization.