

# ***Public Policy and Responsible Retailing***

***An examination of how states and communities  
engage alcohol beverage licensees  
in Responsible Retailing practices***

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# Public Policy and Responsible Retailing

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## Section 1: The Case for Public Policies on Responsible Retailing

*Public Policy and Responsible Retailing* (“PPRR”) is an examination of how regulatory and licensing agencies, law enforcement agencies and city / state governments engage alcohol beverage licensees in non-judicial or non-punitive aspects of “Responsible Retailing” (“RR”) – an umbrella term for the various Best Practices in hiring, training, supervision, and point-of-sales protocols by which licensees can consistently comply with alcohol sales laws regarding underage sales and over-service and generally promote the safety and well-being of staff, customers and their communities.

Every state and the District of Columbia explicitly prohibits the sale or service of alcohol beverages to an individual under age 21 and, with some exceptions, selling or serving alcohol to an obviously-intoxicated customer or person habitually addicted to alcohol. The key strategy for achieving compliance with these laws is enforcement. Enforcement has been proven to be effective: and without enforcement, a 2002 report to the Center for Substance Abuse Prevention argued (“*Best Practices Report*”<sup>1</sup>), compliance will be lax. But the effects of compliance checks upon *future behavior* are short-lived<sup>2</sup>. Since compliance checks and administrative actions against licensees cited for sales to minors are both labor-intensive, few communities have the resources to conduct compliance checks with the frequency and intensity needed to sustain high compliance rates.

The broad rationale for public policies that stipulate practices that can or should be adopted by licensees is that these policies send a clear message to industry and the community at large of government’s understanding that it cannot and should not be expected to ‘go it alone’ in efforts to achieve lawful, responsible alcohol sales and service. Even the most aggressive law enforcement program can monitor only a small fraction of transactions. Government’s operational resources alone will never be able to achieve and sustain responsible retailing without a meaningful partnership with those involved at every level. The *Best Practices Report* accordingly called for public and private stakeholders to work cooperatively to assist licensees achieve compliance with the alcohol sales laws. In some states, state laws include a statement of expectation informing retailers that their licenses are to serve the public, provide for public safety, etc. setting a foundation for voluntary compliance.

Whereas all jurisdictions stipulate actions that are prohibited, e.g. the sale or service to underage or intoxicated customers, rarely do jurisdictions prescribe the measures to follow

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<sup>1</sup> *Report on Best Practices for Responsible Retailing* (2002), downloadable at [www.rforum.org/communications](http://www.rforum.org/communications)

<sup>2</sup> A Univ. of Minnesota study found that compliance rates increase following a law enforcement compliance check but those increases were extinguished within three months. AC Wagenaar, TL Toomey, DJ Erickson, Preventing youth access to alcohol: outcomes from a multi-community time-series trial. *Addiction*, 100, 335-345, 2005.

to prevent unlawful behavior<sup>3</sup>. Many alcohol beverage licensees simply do not know what is expected of them and how to accomplish voluntary compliance. The *PPRR* report is an effort to gather in one place the various policies by which licensees have been encouraged or required to adopt Best Practices to comply with alcohol sales laws.<sup>4</sup>

*PPRR* was developed following the model employed in earlier RRForum Best Practices examinations. A core workgroup of regulators, law enforcement, retail associations and service providers was selected to oversee the 24-month process.

- The workgroup cast a wide net to state regulators, law enforcement agencies and retail associations to identify specific state or local policies that required, encouraged or allowed specific RR conduct by retailers. The workgroup group classified and examined these policies, organizing them in terms of *prevalence*.
- Responsible Beverage Service (“RBS”) is the most prevalent RR policy, mandated or incentivized in 37 states. Since RBS policies showed so much variability, the workgroup developed a survey that delved into details of state RBS policies, including how these policies emerged and how they are perceived to operate in that state.
- The workgroup reached out to stakeholders in those states with additional public policies to develop a similar understanding of how those policies are perceived to operate in that state.
- The workgroup developed a draft report, circulated that report to outside experts and revised the report based upon the experts’ recommendations.

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<sup>3</sup> Exceptions include the Utah law requiring club licensees to employ an ID-scanner and the Arizona law stipulating that clerks check IDs.

<sup>4</sup>The public has the expectation that alcohol beverage licensees will act in a responsible way in many additional areas such as complying with alcohol trade practices, noise ordinance, or other factors that also need “responsible” retailers. *PPRR* does not address those areas of responsible retailing.

## Section 2: Public Policies that impact the uptake of RR practices

### 2.1 Training

#### 2.1A Responsible Beverage Service (staff)

Responsible Beverage Service (“RBS”) training is, by far, the most prevalent Responsible Retailing practice, reflecting a widespread perception of the importance of training staff who sell or serve alcohol. RBS training is identified as the first Best Practice in the *Report on Best Practices for On-Premise Establishments (2008)*<sup>5</sup>, an examination by RRForum, NABCA and other RRForum partners. Almost two-thirds of all states have policies that relate to the use of RBS training.

Content. RBS training imparts information to individuals who sell and serve alcohol about alcohol use and sales regulation for that state. The content of RBS training programs, however, varies greatly. RBS training programs typically include information about how alcohol impacts the body, the alcohol content of beer, wine and spirits, requirements to verify the age of young customers and to refuse to sell or serve an obviously intoxicated customer (although the specific responsibility also varies greatly by state). Some programs teach skills for verifying the age of customers and the authenticity of IDs as well as monitoring alcohol consumption and skillfully refusing service when indicated. Other programs may provide information on additional topics, like the alcohol content of newer beverages or dealing with habitual alcohol abusers.

The first RBS program, TIPS, was developed in 1982 by Dr. Morris Chafetz, founding director of the National Institute on Alcohol Abuse and Alcoholism. Currently, TIPS has over 6,500 certified trainers, including those who are employed by licensees and provide training to their own personnel; law enforcement, community prevention specialist, administrators and peer educators on college campuses, and alcohol trade associations and their industry partners, who offer training in their communities; and independent consultants who provide training and alcohol management assistance to alcohol beverage licensees. Another early entrant to the RBS field was Techniques of Alcohol Management (TAM<sup>®</sup>), developed in 1983 and administered by the National Hospitality Institute, a non-profit educational foundation focused on responsible, efficient and effective management in the hospitality industry. ServSafe, developed in 2005 by the National Restaurant Association, offers online and classroom training taught by a nationwide network of independent instructors and partnerships with State Restaurant Associations. Numerous other third-party providers now exist. Some states have developed and offer their own RBS training and/or approve third-part programs. RBS may be conducted in-person or online.

State Policies to Engage Licensees in RBS. Two principal policies engage licensees in the uptake of RBS: required training or incentives. Thirteen states mandate that managers

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<sup>5</sup> Downloadable at <http://rrforum.org/communications/>

and/or bartenders and wait staff complete RBS training before, or within a specified period following, date of employment. Nineteen additional states do not require that managers and/or bartenders and wait staff complete RBS training but they provide incentives for staff to be trained. Incentives include reduced penalties for service to an underage customer if all staff members, or the staff member who served an underage customer, have received RBS training (or if that training is conducted within a specified period following an infraction). An additional incentive in Texas is that no regulatory action will be taken against the license itself if staff have been RBS-trained. States may require certification of servers, periodic retraining, and detailed records of staff training in order to benefit from an incentive policy.

Eighteen states have no policies related to RBS at all.

## 2.1B Responsible Beverage Service (managers)

More recently, several states have developed a separate training program for owners and managers of alcoholic beverage establishments. In addition to the information provided to servers and bartenders, management training programs provide owners and managers with the foundation to operate their business in compliance with the law and rules. In Florida, the Responsible Vendor Act establishes training content for owners and managers. It includes the development of standard operating procedures for dealing with underage customers, managing employees and customers who use or traffic in illegal drugs, and maintaining records that relate to such incidents. The Responsible Alcohol Management Program (“RAMP”) was developed by the Pennsylvania Liquor Control Board in 1993 as a server training program but was reconstituted in 2001, under legislative mandate, as a certification for licensees that includes training for managers and owner, new employee orientation procedures, and posting of signage in addition to server training. RAMP contains standard RBS topics but also addresses the laws pertaining to establishments and how to serve alcohol responsibly. Other topics address issues that are important to successfully running a responsible establishment, such as: licensing rules; developing, implementing, and enforcing house policies; educating alcohol service staff on their responsibilities; and documenting incidents.

## 2.1C Responsible Vendor Programs

Several states have developed voluntary Responsible Retailing programs for licensees. To encourage participation in these responsible vendor programs, licensees in compliance with the specific measures of that state vendor program receive stipulated benefits.

***Oregon Responsible Vendor Program*** (“RVP”) was enacted in 1999 by the Oregon Legislature and established by the Oregon Liquor Control Commission (“OLCC”) in 2000.

The Oregon RVP Program is a free, self-monitoring program<sup>6</sup> which rewards responsible licensees who take positive steps to prevent the sale and service of alcohol to minors. It is available to a holder of a liquor license for retail sales *if* that holder has not committed a major liquor law violation within the last five years. Participants are eligible for reduced fines if an employee sells alcohol to a minor or fails to properly check ID. Additionally, the OLCC will not cancel a liquor license if an employee sells alcohol to a minor or fails to properly check the ID.

The requirements of the program are that the licensee must: *(1) train employees in responsible alcohol sales, (2) have quarterly employee sessions in which employees refresh their training in responsible alcohol sales, (3) keep records of required employee training, (4) accept only the 4 stand-alone IDs allowed under Oregon law, and (5) have employees read and sign house policies on acceptable ID, methods for properly checking ID and consequences if they sell alcohol to a minor.* The policies must be posted in an area visible to employees. (OLCC provides acceptable policies for both on- and off-premises licensees). Both a list of the valid types of ID accepted and a notice that any customer who looks younger than 26 (or older, if that is the house policy) must show valid ID, must also be posted. OLCC will not verify whether the licensee complied with program requirements until a violation occurs. If all the requirements are not in place, the licensee will be removed from the program and given the higher fine.

**FINES FOR SALE TO A MINOR OR FAILURE TO PROPERLY CHECK ID**

	<u>Non-Member</u>	<u>RVP Member</u>
1st	\$1650 or 10 days	\$1155 or 7 days
2nd	\$4950 or 30 days	\$1650 or 10 days
3rd	30 days	\$3300 or 20 days
4th	Cancellation	\$4950 or 30 days
5th		\$4950 and 30 days

An independent research study in 2007 showed that sales to minors “were significantly less likely at RVP outlets (25%) than non-RVP outlets (39%).”<sup>7</sup>

**Washington State Responsible Vendor Program (RVP)** was established with the passage of a citizen’s initiative in 2011, privatizing the sale of liquor and increasing the number of retailers selling spirits to more than 1,400 compared to 328 stores a year before. To promote the responsible sale of alcohol and voluntary compliance, the initiative included provisions for a Responsible Vendor Program (RVP) to be offered to retailers selling spirits.

<sup>6</sup> The OLCC will not verify that you are complying with program requirements until a violation occurs. If all the requirements are not in place, the licensee will be removed from the program and given the higher fine.

<sup>7</sup> MJ Paschall, JW Grube, C Black and RL Flewelling, Alcohol Outlet Characteristics and Alcohol Sales to Youth: Results of Alcohol Purchase Surveys in 45 Oregon Communities. *Prevention Science*, Vol. 8, No. 2, 153-159, 2007.

The program was designed to be self-monitoring, free and voluntary, and reduced penalties for a 1<sup>st</sup> violation in a 12 month period. To participate in the program, retailers must: *1) establish and enforce in-house policies for alcohol sales, 2) post signs to deter illegal purchases of alcohol by patrons, 3) train employees prior to selling alcohol a minimum of annually, and 4) maintain training records.*

Spirits licensees who join the RVP and maintain compliance with all of the program's requirements are not subject to the doubling of penalties for a single violation in any period of 12 calendar months. Since inception, nearly 70% of spirits retailers have joined the program. Participating retailers have a compliance rate of 92% compared to a rate of 87% for non-participants. In late 2014, the Washington Liquor Control Board expanded the RVP and offered it to more than 7,000 retailers selling beer and wine products. This license group traditionally has had the lowest compliance rate at around 80%. As of December 2015, more than 600 retailers have joined the program. The retailers participating in the program produced a compliance rate of 87% compared to 82% for non-participants.

**Iowa Program for Alcohol Compliance Training (I-PACT)** is a RBS program for servers. Content focuses on key identifying elements of the current (and former) format of Iowa driver's licenses, how to spot altered and fake IDs and prevent underage sales and sales to intoxicated patrons. Participants learn techniques for refusing the sale of alcohol with minimal confrontation and how to legally confiscate an altered or fake ID. The training also includes regulations and tips for offsite delivery of alcohol. Servers who complete the training are certified.

Establishments that participate in the I-PACT training are granted an affirmative defense which may be used once in a four-year period. A business may avoid civil prosecution if an alcohol sale-to-minor violation occurs in their establishment and the employee guilty of the violation was I-PACT certified prior to the time the offense occurred. However, the affirmative defense cannot be used if the employee sold to a minor under the age of 18. Only the business is eligible to avoid a civil penalty; the guilty employee will still be subject to a fine and their I-PACT certification will be revoked.

**RRForum Responsible Retailing Program.** The RRForum's Responsible Retailing Program is a retailer program that assists both on- and off-premises licensees to achieve compliance with the age 21 sales law. The program provides licensees with periodic feedback on actual staff ID-checking conduct as observed by young, legal-age mystery shoppers. The mystery shoppers give real-time feedback (a Green Card for properly requiring an ID; a Red Card if no ID is requested), with follow-up reports sent to managers and/or owners providing additional information on the inspection and on implementing RR Best Practices. Since the mystery shoppers are all age 21 or older, there is no legal liability or risk associated with the visit but individual inspection results are kept confidential, known only by RRForum and the licensee. Aggregate ID-checking rates for the community, however, are shared with licensees, law enforcement and licensing commissions.

The RRForum RR Program was developed under a Small Business Innovation Research award from the National Institute of Alcohol Abuse and Alcoholism. Although the program is conducted by the non-profit RRForum, communities in which the program was developed and evaluated have established public policies to encourage licensees to participate. In Waltham, MA and Green Bay, WI, participation in the program is viewed as a basis for mitigating any alcohol sales-to-minors violation. In Madison, WI, licensees that participate in the WI Respect 21 Responsible Retailing Program (the WI-specific version of the program, sponsored by MillerCoors) earn “credits” on their licensee account that can offset penalties for alcohol sales violations. And the City of Milwaukee (WI) has adopted an expedited version of the same program, involving four mystery shops over six months, to be used as part of a deferred prosecution agreement: licensees cited for an alcohol sales violation can have that violation expunged if the licensee passes all four mystery shop inspections.

**Louisiana ATC Responsible Business Pilot Program.** In January 2016, the Louisiana Alcohol and Tobacco Control (“ATC”) agency launched a pilot project for alcohol beverage licensees. The voluntary program “provides a source of mitigation from cumulative offenses for businesses that demonstrate a strong commitment to voluntary compliance with the alcoholic beverage and tobacco control laws and/or regulations by taking numerous routine and proactive measures to prevent the sale and/or service of alcoholic beverages and tobacco products to underage persons.”

Alcohol and tobacco sales violations stay on the licensee’s record for a period of three years, with increasing penalties for each additional violation within that three year period. Qualifying businesses will have the time period a violation remains on their record, relative to the sale and/or service of alcoholic beverages and/or tobacco products, reduced from three years to one year, potentially reducing the penalties associated with cumulative offenses.

Businesses qualify by implementing and continuously adhering to all stipulated practices, which include:

1. Zero Tolerance Policy - The business must agree to immediately terminate, and not re-employ for a period of at least one year, any employee found guilty by ATC of selling and/or serving either an alcoholic beverage or tobacco product to an underage person.
2. Employee Training - The business must agree to conduct a training course at least once a year for ALL employees relative to the responsible sale and/or service of alcoholic beverage and tobacco products. Additionally, the business must submit a report to the ATC of the date, time, and duration of each training session, along with a list of printed names and signatures of each employee that attended each

training session one year after the program has been approved and each year after that or upon request of an ATC agent.

3. Responsible Vendor (RV) Certification - The business must agree to ensure that all employees maintain a valid RV certification and that each new hire be RV certified prior to hiring.
4. Secret-Shopper Program – The business must implement a secret shopper program approved by the ATC.

## 2.2 Affirmative Defense

An affirmative defense is *a new fact or set of facts that operates to defeat a claim even if the facts supporting that claim are true*. Affirmative defenses against charges of sales or service to underage customers and to intoxicated customers have been established by a number of states for alcoholic beverage licensees who employ an electronic ID-scanner or train on recognizing and dealing with intoxicated patrons.

ID-scanners are electronic devices that read the data encoded in the bar code and/or magnetic strip on the back of a state driver's license. Most ID-scanners "do the math" and indicate whether the customer is of legal age to purchase alcohol and/or tobacco. Since some fake IDs contain encoded data showing the customer to be  $\geq 21$ , more sophisticated ID-scanners can determine whether the ID contains each of the distinctive features (like holograms) that each individual state may embed in the state ID to distinguish authentic from fraudulent IDs or whether the state motor vehicle registry data base lists a driver with the personal information contained on the ID.

In **Arizona** the statute requires that the licensee or employee follow an explicit procedure of *(1) requesting an ID, determining that (2) the ID is authenticate and (3) the picture on the ID matches that of the customer, and (4) the date of birth shows the customer's age is  $\geq 21$* . Proof that the licensee or employee followed the entire procedure is an affirmative defense to a criminal charge for sales to minors. In the absence of a record of performing this procedure, a licensee is presumed NOT to have followed the required procedure. The electronic file or print-out from an electronic ID-reader, photocopies of the ID and written logs of all the ID information, are acceptable records for the affirmative defense.

In **New York**, an affirmative defense is afforded to any licensee that employs an electronic ID-reader and relies upon the authentication of the license or other form of ID after scanning the ID, but the use of the ID scanner does not remove the obligation to use reasonable diligence, e.g. if the picture on the ID is distinctly different from the underage customer who presented that ID, the affirmative defense would not be upheld.

In **Oregon**, the Oregon Liquor Control Commission "may allow the licensee, in lieu of a civil penalty or denial, suspension or cancellation of the license, to acquire and use equipment

designed to prevent sales of alcoholic beverages to minors. For the first or second violation of [sales to minor] in a two-year period, the licensee may choose to purchase age verification equipment in lieu of the standard first level Category III sanction, not to exceed 10 days of the suspension or \$1650 of the civil penalty.

In **Texas**, it is an affirmative defense for the licensee “if a transaction scan device identified a license or certificate as valid and the defendant accessed the information and relied on the results in good faith,” the description and picture need to match the person providing the ID and if the employee had received adequate training in the use of the ID-reader.

[In **Utah**, club licensees are required to use a scanner to verify proof of age. The use of a scanner is not an affirmative defense, but rather an operational requirement and licensees can face administrative penalties for not using the scanner.]

In **Iowa**, an affirmative defense is granted for reasons unrelated to ID-scanners. Establishments that participate in the I-PACT responsible vendor program, as discussed in Section 3.c, may avoid civil prosecution. If an alcohol sales-to-minor violation occurs in the establishment and the employee guilty of the violation was I-PACT certified prior to the time the offense occurred, an affirmative defense may be used once in a four-year period.

### *Observations*

Another challenge has proven to be that if a false identification is used in a scanner there is no evidence that a retailer scanned the ID of the underage person. For example, if 19 year old Tom Smith purchases alcohol using an ID indicating that he is 22 year old Robert Jones, the scanner records do not indicate that Tom Smith’s age was verified.

## 2.3 Mitigation Policies

Mitigation is the reduction in the severity of a sentence due to other circumstances.

ABC agencies are responsible for taking administrative actions against licensees that violate the alcohol sales laws, such as violations for sales or service to those under age 21 and over service of alcohol. Penalties may include warning letters, fines and license suspensions, a combination of fines and suspensions, or license revocation. The agencies may consider mitigating circumstances in reducing the severity of its administrative action, such as

1. Length of licensure at premises without prior discipline or problems (could include past history of success or failure with compliance checks)
2. Positive actions by licensee to correct any past problems and the effectiveness of these actions
3. An employee training plan that includes annual training on alcohol laws
4. Documented training of licensee and employees

Some jurisdictions have established formal policies to mitigate an alcohol sales law violation if a licensee has taken, or will take, specific steps.

- Some states reduce the severity of the penalty for an alcohol sales violation if staff have been RBS-trained or if RBS staff training is conducted immediately following the citation (*see Sec 2.1a*)
- Some states and local units of government reduce the severity of the penalty for an alcohol sales violation if the licensee is a participant in good standing of a state or private Responsible Retailing program (*see Sec 2.1c*)
- Affirmative Defenses (*see Sec 2.2*) have a somewhat different meaning from mitigation (“mitigation” acknowledges the violation and an “affirmative defense” rebuts the violation) but affirmative defenses have the same effect of reducing the severity of the penalty for licensees that take certain actions before or after the violation.

Aggravating circumstances, it should be noted, can also influence the severity of the penalty. Examples of aggravating circumstances include:

1. Prior disciplinary actions and warning letters
2. Licensee involvement in the crime (e.g., licensee or manager is the violator or has directed an employee to violate the law)
3. Willfulness or deliberateness of the violation
4. The violation involved more than one patron or employee
5. The violation resulted in injury or death
6. Lack of cooperation by licensee in investigation
7. Appearance and actual age of minor (in cases of sales to minors)
8. Failure to call 911 for local law enforcement and/or medical assistance when necessary
9. The licensee’s demonstration of a lack of responsibility for the alcohol beverage laws and rules as evidenced by the licensee’s comments (e.g. “The fine was paid: it was a cost of doing business.”)

Some states also list conditions under which a violation may be considered an “egregious offense.” For example, in the case of the District of Columbia, “egregious” violations for sales to minors may include situations where the licensee:

1. Sold or served an alcoholic beverage to a minor who was unable to produce a valid identification after a request from the licensee to do so;
2. Intentionally sold or served an alcoholic beverage to a minor; or
3. Previously sold or served an alcoholic beverage to a minor, which demonstrates a pattern for these types of sales.

Mitigating and aggravating circumstances speak to the degree of moral culpability by the licensee. Documentary evidence of responsibility, or the lack thereof, may greatly influence penalty assessments, however the greater question is the licensee's ability or desire to maintain compliance.

### *Observations*

To date, there appears to be no published research conducted on whether the consideration of mitigating and/or aggravating circumstances in the adjudication process has an effect on future compliance with alcohol laws by licensed establishments. Research is needed not only in this area but in the larger area of adjudication of alcohol law violations that consider all aspects of the deterrence theory, in terms of the perceived likelihood of apprehension for violations, the swiftness by which penalties are applied, and the severity of penalty for different types of violations. Further, the significance of such circumstances on subjective adjudicatory decision-making should be compared to states and local units of government with objective criteria for assessment of violation penalties.

## 2.4 Safe Harbor

Safe Harbor is the concept that the license itself enjoys protection against administrative actions if the licensee has followed certain practices.

In Texas, the Texas Alcoholic Beverage Commission may give protection to a retailer from administrative action ("Restraint for Certain Violations") if an employee sells, serves, dispenses or delivers an alcoholic beverage to a non-member of a private club, a minor or an intoxicated person, but only if certain criteria are met.

The Texas Alcoholic Beverage Code states:

(a) For purposes of this chapter and any other provision of this Code relating to the sales, service, dispensing, or delivery of alcoholic beverages to a minor or an intoxicated person or the consumption of alcoholic beverages by a minor or an intoxicated person, the actions of an employee shall not be attributable to the employer if:

- (1) the employer requires its employees to attend a commission-approved seller training program;
- (2) the employee has actually attended such a training program; and
- (3) the employer has not directly or indirectly encouraged the employee to violate such law.

The Commission's rules establish criteria that must be met before the Commission restrains enforcement for violations:

1. The person selling is not the owner or an officer of the company;

2. The person selling holds a current seller-server training certificate from a TABC approved school;
3. All employees engaged in the sale, service or delivery of alcoholic beverages, as well as their immediate managers, are certified within 30 days of their hire date;
4. The employer has written policies for responsible alcohol service and ensures that each employee has read and understands these policies;
5. The employer does not directly or indirectly encourage the employee to violate the law; and
6. There are no more than three of these types of violations within a twelve month period.

If an illegal sale is made, the seller or server might be arrested and fined up to \$4,000; *but the company's permit/license may be protected* (emphasis added).

These restrained administrative cases are commonly referred to as "Safe Harbor." Some people also use the term "Safe Harbor" in referring to the effect of Texas Alcoholic Beverage Code section 106.14 in private civil litigation under Texas Alcoholic Beverage Code section 2.02. Although the Commission's rules do not bind a court in private civil litigation, Alcoholic Beverage Code section 106.14(a)(3) does apply in those cases.

## 2.5 Retailer Actions against Underage Customers: "Brown Jug" Laws

**Alaska.** In 2001 and 2004, Alaska enacted statutes championed by the Brown Jug package store chain that enable retailers to take non-criminal actions against underage individuals attempting to purchase or be served an alcoholic beverage in violation of the minimum age 21 sales law. Actions are brought directly by the licensee against either (a) a minor who attempts to buy or be served alcohol or (b) an adult who furnishes alcohol to a minor. Actions are brought in small claims court—no criminal charges or criminal records apply. Violators are subject to a \$1,000 penalty but the court appearance can be averted and the penalty partially waived if the underage violator (or his/her parents) responds to the initial "demand letter" from the retailer with a \$300 payment *and* participation in an alcohol education diversion program. The \$300 payment is typically used by the retailer to reward the employee who detected the underage / 3<sup>rd</sup> party purchase and to fund server training programs for staff.

**Wisconsin.** In an effort to replicate the success of the Brown Jug Law had in Alaska, and with the support of the Green Bay Police Dept and the Tavern League of Wisconsin, the Wisconsin State Assembly drafted similar legislation. Adopted in December of 2013, this law created a "cause of action" for licensees against persons who fraudulently attempt to purchase alcohol. If a judgment is entered in favor of the licensee, the court shall award damages in the amount of \$1,000 and reasonable attorney fees. This "cause of action" is similar to retail stores which can file for a civil judgement against persons who commit retail theft. Wisconsin law differs from Alaska law in that the licensee is the recipient of the

judgement whereas in Alaska, financial incentive is awarded directly to the clerk or person who detected the violation. This is one aspect of Wisconsin law that its detractors suggest will not have the desired results.

### *Observations*

Retailers, both off- and on-premises establishments, have long resented that enforcement of underage sales laws may result in significant penalties for licensees whose staff have negligently served alcohol to a minor—but the minors themselves, and the adults who purchase alcohol on their behalf, often violate the law with impunity. Brown Jug statutes mean that both parties who violate the law—sellers as well as minors and their enablers—will be held accountable.

The greater importance of the Brown Jug model is the potential deterrent effect upon underage and 3<sup>rd</sup> party purchase attempts. Even the most aggressive enforcement of underage sales laws can observe only an infinitesimally small number of transactions. Clerks and servers observe *every* transaction. Since clerks and servers in Alaska have a financial interest in interdicting underage and 3<sup>rd</sup> party purchases, they are attentive to potential violations and emboldened to act. With an attempted underage purchaser subject to a significant penalty, the deterrent effect of Brown Jug statutes could be substantial.

## 2.6 Alcohol Impact Areas

The State of Washington has established *Alcohol Impact Areas* (“AIA”) as specific geographic areas located within a city, town or county that are adversely affected by chronic public inebriation or illegal activity associated with liquor sales or consumption. To establish an AIA, a local authority must submit findings of fact that demonstrate how chronic public inebriation or illegal activity associated with liquor sales or consumption within a proposed alcohol impact area contributes to the deterioration of the general quality of life within an alcohol impact area; or threatens the welfare, health, peace or safety of an alcohol impact area's visitors or occupants. The local authority must:

- demonstrate a pervasive pattern of public intoxication or public consumption of liquor as documented in crime statistics, police reports, emergency medical response data, detoxification reports, sanitation reports, public health records, other similar records, community group petitions, public testimony or testimony by current or former chronic public inebriants;
- demonstrate the local authority's past good faith efforts to control the problem through voluntary measures
- explain why past voluntary measures failed to sufficiently resolve the problem; and
- explain how the conditions or restrictions will reduce chronic public inebriation or illegal activity associated with off-premises sales or liquor consumption

Conditions or restrictions the board may put in place for an alcohol impact area include limitations on:

- the business hours of operation for off-premises liquor sales;
- off-premises sale of certain liquor products within an alcohol impact area
- container sizes available for off-premises sale
- product restrictions (e.g., prohibition of certain liquor products or container sizes).  
Restricted beer and wine products must have minimum alcohol content of five and seven-tenths percent by volume and twelve percent by volume, respectively.

### *Observations*

AIAs attempt to remedy the problems of public intoxication by placing restrictions upon alcohol beverage licensees and the products they sell in hopes of displacing problem drinkers from the community. Retailers and their industry partners have objected to the AIA as too broad of an approach, depriving those customers not abusing alcohol from choosing certain alcoholic beverages and restricting retailers from selling these beverages to these customers.

## 2.7 Do Not Sell Lists

The Green Bay, WI Police Department developed an alternative approach to the problem of public intoxication and the negative impact of chronic alcohol abusers upon businesses and the community. Photographs of chronically inebriated individuals who had multiple engagements with Green Bay PD and/or emergency medical services in the prior six months were placed on a “Do Not Sell” list that was distributed to alcohol beverage licensees. Licensees were instructed not to sell or serve alcohol to anyone appearing on the Do Not Sell list.

### *Observations*

In Alcohol Impact Areas, the problems of public drinking and disruptive behavior are addressed by prohibiting the sale of products most favored by chronic inebriants in hopes that problem drinkers will migrate elsewhere to obtain their preferred beverages. Retailers and their suppliers have objected that a product ban penalizes customers who favor these products and do not over-consume or cause problems for the community. The Do Not Sell List is an approach that focuses upon the chronically intoxicated individual rather than upon the licensee or the product that can be consumed responsibly by others.

## 2.8 BestBarNone™

**Toronto and Alberta, CAN; UK.** BestBarNone™ (“BBN”), developed in Manchester, UK and now spread throughout the UK and to Canada, is a voluntary compliance program in which alcohol beverage serving establishments that adopt specific RR practices are publicly acknowledged in their communities for adopting practices that promote and protect the health and safety of customers and staff.

BBN presents licensees with a comprehensive list of practices that the establishment must adopt in order to be accepted as a BBN member. The most prominent practices relate to safety and security but other practices relate to compliance with alcohol sales laws, staff training and alcohol management best practices. Paid staff of the BBN administrator (public agencies manage BBN in Alberta; the hospitality association manages the Toronto BBN) visit licensed establishments that apply for BBN membership to verify the full adoption of all these stipulated practices. Once accepted, the licensee is included in lists of BBN establishments that is provided to tourists and the community. Licensed establishments that go above and beyond the stipulated practices receive public recognition through local awards.

### *Observations*

Unlike most other public policies, which engage licensees through risk-reduction strategies, the key to BBN is marketing: by adopting the BBN practices, licensees are openly providing assurances to customers that the establishment is safe and professionally managed. Conversely, by not adopting these practices and not earning the BBN designation, licensees may be in danger of losing customers to establishments that belong to BBN. Additionally, with the BBN special awards program, licensees are encouraged to develop even more extensive policies to compete with their peers for public recognition awards. The need to inspect licensees to validate the adoption of all the BBN stipulated policies, and to assist licensees in demonstrating compliance with the policies, is extremely time-intensive and costly. It is not clear that the commitment to administer a comprehensive BBN program could be made by regulatory and hospitality organizations in the U.S. without additional funds or staff.

## 2.9 One-of-a-Kind Programs

- **Privileges for Retailers Based on Local Ordinances in Florida**

In Florida, state law allows very little local alcohol sales control at the city or county level. The Florida alcoholic beverage laws view the state as a whole, as one community with a singular community standard and norm for the sale of alcohol. Under Florida's alcoholic beverage licensing scheme, each community is deemed to have the same needs and standards. No allowance is made for the unique situations and wishes of each city or

county or whether a community wants an additional alcoholic beverage premises or whether the business' behavior is consistent with community wishes. A beverage licensee is entitled as a matter of right to the license and to subsequent renewals if the licensee has not violated the beverage law at a level warranting license revocation.

Under state law cities and counties may only exercise reasonable zoning restrictions and may choose to extend the hours of sale from the state-mandated midnight closing in regulating alcoholic beverage businesses. While cities and counties throughout Florida have extended the hours of sale to 2 a.m., 4 a.m., 6 a.m., or some other time, at last count approximately seventeen cities or counties had utilized this local control provision to require the beverage retailers in their jurisdiction to do something affirmatively in solving a specific community public safety issue such as preventing alcohol sales to minors or increasing security practices at a licensed premises in granting that extension.

The City of Winter Park, for example, limits beverage licensees from operating after 11:00 p.m. if they violate the alcoholic-beverage law three times within a three-month period. This restriction is primarily aimed at businesses that repeatedly sell to under-age persons. Other cities limit the hours of sale of establishments that have repeated instances of violence unless the business implements security procedures, including installing magnetometers and providing employees with security training. Still other cities require beverage licensees to institute effective alcohol service policies and employee training in order to remain open during the prime late-night hours. The City of Oakland Park, for example, requires all beverage licensees wishing to remain open after 11:00 p.m. to provide server training to their employees.

Florida law also allows cities and counties to restrict the age of patrons in certain establishments. At least thirteen (13) Florida cities and counties have enacted ordinances to bar admission to who are not at least 21 years old at all times, an initiative designed to prevent underage alcohol consumption and disturbances. Other cities have conditional restrictions on underage persons entering bars. For example, Gainesville restricts patrons under 21 from patronizing any establishment after 9:00 p.m. that consistently sells alcohol to minors.

- [Spot the Mystery Shopper™](#)

In Maryland, the Montgomery County Department of Liquor Control (“MCDLC”) partnered with the Responsible Retailing Forum to test a new strategy to improve retailer age-verification conduct by creating a positive incentive for businesses and staff to conscientiously check IDs.

In September, 2013, the MCDLC informed licensees that they could be randomly selected for a visit by RRForum Mystery Shoppers who would ask to buy or be served alcohol. The Mystery Shoppers are all young individuals in their early twenties, *and thus of legal drinking age*, but young enough that they should trigger an ID check by the clerk or server. The

Mystery Shopper would hand a Green card to the clerk or server who correctly checks an ID, or a Red card (handed to the manager) if staff fails to check an ID. The names of the Mystery Shoppers (e.g., James S., age 22) were also provided on reminder cards for the cash register; and clerks and servers were told that if they recognized the Mystery Shopper when inspecting the ID, they would receive a \$100 Thank You reward. In November 2013, Mystery Shoppers visited 40 different randomly selected Bethesda licensees. 39 of these establishments correctly requested an ID – a 98% Pass rate. Further, staff identified the customer as a Mystery Shopper 10 times.

### *Observations*

The Spot the Mystery Shopper campaign provides licensees with a way of measuring, and reinforcing, ID-checking by staff in a non-punitive educational process. MCDLC relates that licensees have called to express their appreciation for an educational, rather than a punitive, effort by the agency and that these retailers expressed a strong commitment to RR moving forward. Additionally, it creates a positive incentive for staff to check IDs. In the Spot the Mystery Shopper campaign, each ID check is a chance to earn a reward for correctly and carefully doing one's job.

- **Licensee Rating System in Madison, Wisconsin**

The City of Madison, Wisconsin maintains a rating system for alcohol beverage licensees. Similar to safety rating systems for drivers, a licensee will receive points against the licensee for stipulated actions, e.g. violation of alcohol sales law. After sufficient points against the license, punitive actions are taken. To promote compliance with the sales-to-minors laws, licensees that participate in the Wisconsin Respect 21™ Responsible Retailing Program (developed by RRForum under the sponsorship of MillerCoors) receive credits on their license record that offset points against the license.

## Section 3: Observations on PPRR

### 3.1 Relationship of State and Community Authority

A significant difference among the states and territories is the level of governmental vested with authority to grant or approve the initial alcoholic beverage license and the subsequent renewal of the license. Alcoholic beverage sale and service controls may be held exclusively by a state agency or shared between the state and local governments.

Three prevalent models are utilized for the issuance and renewal of alcoholic beverage licenses: *state-centered control*, *state-shared control*, and *independent control models*. Each of these models reflects a different non-judicial form of control over the sale and service of alcoholic beverages.

The *state-centered control model* grants authority to issue and to renew the alcoholic beverage law exclusively at the state-level. Applicants apply to the state licensing authority for the initial license and for subsequent renewals. The decision to grant the license or renewal is considered a matter of law and is only conditioned on statutory prohibitions for issue or renewal such as a conviction of a felony or a beverage law by an owner or prior revocation of a beverage license. Local control is generally limited to dichotomous decisions such as whether the business location complies with zoning or health requirements

The wishes of local governments or the application of local community standards are not considerations in the issuance or renewal of the license in state-centered control model. Community wishes such as the number of licenses within a community or community standards including issues such as required retailer training, alcohol use in conjunction with certain business models such as adult entertainment venues, locations where persons under 21 are allowed, and reoccurrence of violence or patron intoxication are not considered as factors for license issuance or renewal unless specifically codified in state law.

In the *state-shared control model* the state and the local unit of government, principally the city or county, share in the authority to grant and to renew the license. While the state makes the license issuance or renewal decision as a matter of law applied equally across the state, the state defers to the local community in matters of discretionary concern to the community. The deference may be based on a codified local matter such as a desire not to allow alcohol service in certain types of businesses, requirements for employee and/or manager training, security requirements, or outlet density. The deference may also be location specific wherein the local government grants or denies approval for the state license based on community input and/or an evaluation of the expected effects on community quality of life or an evaluation of the business operation's effect on the community.

The *independent control model* is similar to the state-shared control model in that the state issues an alcoholic beverage license or license renewal based on matters of law

while the local government makes an independent determination of the suitability of the business to its needs and community standards. However, with the independent control model the local unit of government, principally cities and counties, issues its own and separate alcoholic beverage license and renewal based on local wishes and local requirements. Under this model, the local government may independently suspend, fine, or revoke the local alcoholic beverage license thus affecting the ability of the business to sell alcoholic beverages even if the state has not taken such action.

### *Observations*

When control over the alcohol sales license is maintained exclusively at the state level, cities and counties may have limited ability to ensure that the operations of alcoholic beverage retailers within their jurisdictions comply with community standards and act in a manner protective of their citizens. Some cities and counties have developed processes to exercise local control over alcoholic beverage retail operations—as opposed to control over the alcohol license.

## 3.2 Pro's and Con's of Public Policy Initiatives

Discussions with stakeholders about public policies regarding responsible retailing revealed that these policies can impact the retail environment in unanticipated ways. Although the evidence for this is anecdotal only, these unintentional consequences are no less important.

Unsurprisingly, some licensees may try to “work the system.” For example, an Iowa Alcoholic Beverages Division policy provides an affirmative defense for licensees that meet the requirements of the state vendor program. This defense is available only one time in a four-year period. A licensee that is cited for a *first* violation may decline to use its affirmative defense and instead pay all associated fines for a first violation, choosing to apply the affirmative defense to a second offense, whose penalties are far more substantial, should another violation occur within the 4-year period.

Communities, however, may also game the system. In California, RBS training is incentivized but not required. A number of communities, however, have added laws / regulations that require alcohol beverage licensees – whose license is issued by the California Department of Alcoholic Beverage Control (“CABC”) – to train staff in RBS. Since the CABC is required to offer RBS training, free of charge, to licensees, these community laws / regulations create an unfunded mandate for CABC to provide additional RBS trainings in these communities.

Another unintended outcome of public policies on responsible retailing is that those actions required to receive a specified incentive become the limit of actions that the licensee may take. For example, analyses by RRForum of over 1 million mystery shop

inspections of national and regional retailer chains have shown the mystery shop feedback on actual staff conduct improves ID-checking rates for both tobacco and alcohol sales significantly, with most of that improvement occurring in the first months. RRForum's own Responsible Retailing model (*Sec 2.1C*), which employs mystery shops and RR resources, similarly improved ID-checking rates by staff of independently owned and operated alcohol retailers and serving establishments from baseline rates just over 80% to over 92% in a 4-state, 16-community field effectiveness study. In states that offer a responsible vendor program (*Sec 2.1C*), there is no incentive for participating licensees to include mystery shops since they will already enjoy mitigation for any future violation without incurring the additional expense of mystery shop inspections.

Another grey area is: Should the licensee, or staff member, or both, be held liable for a violation? Some state laws require that actions be taken against the *staff member* who sells / serves alcohol to an underage or intoxicated customer, rather than against the licensee. A new Wisconsin law, passed in 2016, stipulates that an alcohol beverage server, not the retail licensee, is the person to be issued a citation for selling or providing alcohol beverages to an underage person on licensed premises if the violation is detected by means of an undercover law enforcement "sting" operation. A strong argument can be made that a licensee who has established clear policies and protocols to comply with alcohol sales laws, and has trained staff to follow them, should not be held responsible when an individual staff member fails to follow them. But licensees that are insulated by state laws from responsibility for staff misconduct may be less motivated to train and supervise staff aggressively. Aggressive manager supervision, however, has been found to be a strong predictor of compliance.<sup>8</sup> Licensees who work hard to train and motivate staff certainly feel that is unfair for them to be punished for lax conduct by staff. But insulating the licensee from the consequences of staff misconduct may not produce greater public benefits as relates to community- or state-wide compliance.

### 3.3 Questions for the Field / Research Priorities

All states and communities share a clear and common policy interest in engaging licensees to implement practices that promote compliance with alcohol sales laws and thus protect staff, customers and the community against the harm and liability associated with underage drinking and intoxication. There is enormous variability in the policies among states and communities to achieve compliance and rarely have there been examinations to determine the effectiveness of these various approaches. RBS, as noted in *Sec. 21.a* and *2.1b*, is the most frequently cited practice to promote effective Responsible Retailing. Eighteen states mandate RBS and 19 states establish incentives for RBS training. *Are*

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<sup>8</sup> A study of a national convenience store / gas station chain by RRForum examined training, knowledge and attitudes of both clerks and managers regarding the sale of age-restricted products. The only statistically significant difference between stores that were consistently compliant and stores that failed one or more compliance check was that clerks in consistently compliant stores reported that their managers constantly were harping on the importance of checking IDs.

*incidents of underage sales and over-service lower in states with mandatory RBS? Do states that incentivize RBS have lower rates of underage sales and over-service than those states with no RBS policies? . . . but higher rates than states with mandatory RBS?* The hypothesis that mandation > incentivization > no RBS policies is plausible. But senior staff of one RBS provider (TIPS) have argued forcefully that mandation creates a “check-off the box” approach to compliance and is less effective than when the licensee voluntarily has staff trained out of a commitment to sell and serve responsibly. This could be true: but many more servers will have been trained.<sup>9</sup> These questions of effectiveness need to be examined.

Apart from the efficacy of policies to mandate or incentivize RBS, the content of RBS and the delivery of RBS also need to be examined. The workgroup found high variability in the topics covered in RBS, the methods in which RBS is delivered (online, in person) and the ways in which participants demonstrate that they have understood RBS program content. Since some states determine the RBS curriculum content and other states must approve any third-party RBS curricula, both regulators and RBS providers have a compelling interest in evaluating RBS content and delivery.

Another issue that emerged from this examination is that public policies do not set requirements for applicants to obtain an alcohol license. Whereas applicants can be disqualified from obtaining a licensee because of past actions, states and communities do not require an applicant to demonstrate the knowledge and ability to manage an alcohol serving establishment or serve the community in which it is located.

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<sup>9</sup> Research in the effectiveness of smoking cessation approaches has found that free services produce lower success rates than programs in which the participant pays a cost that is reimbursed upon successful cessation; but free services attract so many more participants that the total number of ex-smokers, and the costs-benefits, are much greater even though the success rates are lower.

## Appendix

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