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The Use of Regulatory Power by U.S. State and Local Alcohol Control Agencies to Ban Problematic Products

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Abstract

Background: Alcohol is responsible for 4,300 deaths a year in the US among persons under 21. Alcohol companies innovate rapidly and produce new products, some of which prove popular among young people. The 18 “control jurisdictions” in the US – those that exercise monopoly control over some aspect of alcohol distribution – have the ability to govern which products become available within their borders and have, at times, exercised that authority to block particular products from sale.

Objectives: This paper is an exploratory study examining how states use regulatory authority in control jurisdictions to restrict the sale of new alcohol products within their borders, and the reasoning used to justify those decisions.

Methods: The authors, collaborating with the National Alcohol Beverage Control Association, surveyed control state officials regarding procedures and policies governing the sale of new products in their jurisdictions.

Results: Control jurisdictions have banned/restricted different products (e.g. grain alcohol and alcoholic energy drinks) for a variety of reasons (e.g. flavorings/packaging appealing to underage drinkers, blurring of distinctions between alcoholic and non-alcoholic drinks, and judgment that the product was not socially responsible).

Conclusions/ Importance: Although U.S. control jurisdictions universally have the authority to limit access to problematic alcohol products, they vary in the degree to which they use it. These states need to take action, and as of now, there is no systematic reasoning behind when and how

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states make decisions to ban/restrict these products. Greater exploration of regulatory authority in this arena could be protective of public health.

INTRODUCTION:

Underage alcohol consumption is a s(20.3%) reported consuming alcohol in the past 30 dayserious public health problem in the United States. In 2015, 7.7 million youth ages 12 to 20 (20.3%) reported consuming alcohol in the past 30 days (Center for Behavioral Health Statistics and Quality, 2016, p.1014–15). Approximately 5.1 million youth (13.4%) consumed five or more drinks on the same occasion on at least 1 day in the past 30 days (“binge drinkers”) and 1.3 million (3.3%) consumed five or more drinks on the same occasion on each of 5 or more days in the past 30 days (“heavy drinkers”) (p. 1018–19).

Alcohol companies in recent decades have produced several products that national survey research has subsequently found popular among young people. Such products include supersized flavored alcoholic beverages or “alcopops” (Fortunato, et. al., 2014), pre-packaged Jell-O shots (Binakonsky, Giga, Ross & Siegel, 2011), marijuana-infused alcohol and alcohol-infused whipped cream. Higher-risk drinkers often consume the more dangerous products (Albers, et. al., 2015). Among youth ages 13–20 years old, 5.8% had consumed grain alcohol and 20.4% had consumed Jell-O shots in the last 30 days (Siegel, Galloway, Ross, Binakonsky & Jernigan, in press). Flavored malt beverage drinkers who exclusively consumed the supersize versions were four times more likely to report episodic heavy drinking and six times more likely to report alcohol-related injuries than non-flavored alcoholic beverage consumers (Albers, et. al., 2015).

The enactment of the 21st amendment (U.S. Const. amend. XXI) in 1933 both ended prohibition in the United States and also gave States the primary authority to regulate the transportation, importation, and use of alcohol within their state (NABCA, n.d.). Eighteen jurisdictions – 17 states and several counties in Maryland – became “control jurisdictions,” thus choosing to protect public health by having monopoly over some aspect of alcohol distribution within their state. Although all 18 control jurisdictions operate as wholesalers of distilled spirits within their borders, each jurisdiction handles retail distribution differently. (The rest of the states – known as “license jurisdictions” – regulate the sale of alcohol within their state through licensure.) This paper is an exploratory study that seeks to answer two research questions: First, when and how often do control jurisdictions use their regulatory authority to restrict the sale of new alcohol products within their borders? Second, how do control jurisdictions exercise this authority – that is, what processes do they use to ban or restrict particular products? Grain alcohol as a case study will be woven throughout the paper to illustrate how the process of identifying and banning or restricting particular products currently works.

BACKGROUND ON U.S. CONTROL JURISDICTIONS

States originally opted to become control jurisdictions to protect the public from the dangers of alcohol. For example, in 1937 Alabama enacted the Beverage Control Act to “promote temperance and suppress the evils of intemperance...” (Alabama Law Institute, n.d.). Each

of the 18 control jurisdictions acts as alcohol wholesalers for distilled spirits and, in some cases, wine. Thirteen of these jurisdictions also exercise control over retail sales for off-premise consumption.

Control jurisdictions tend to have higher distilled spirits prices than license jurisdictions, with one recent study finding that distilled spirits prices were \$2 lower (6.9%) in license jurisdictions (Siegel, Albers, DeJong, Naimi & Jernigan, 2014). When control jurisdictions have fewer outlets, this may also increase the cost to consumers of purchasing alcohol as they may have to travel further to find an outlet. Such differences in cost are important from a public health standpoint because an increase in the price of alcoholic beverages is inversely related to the prevalence of underage drinking and heavy drinking, and the consequences of alcohol use and abuse among youth (Chaloupka, Grossman & Saffer, 2002). If control jurisdictions use less advertising in the store or elsewhere, this may also influence consumption among youth, as at least 25 longitudinal studies have found significant associations between youth exposure to alcohol marketing and subsequent youth drinking behavior (Jernigan, Noel, Landon, Thornton & Lobstein, 2016).

Several jurisdictions have begun to move towards privatization of either wine or of all alcohol in the state. Research has shown that wine sales increase after privatization: a 150 percent increase in Idaho and a 137 percent increase in Maine (Wagenaar & Holder, 1995). Moreover, access to more alcohol outlets, and thus more alcohol, leads to increases in underage alcohol consumption and in the prevalence of consequences of alcohol use among youth (Popova, Giesbrecht, Bekmuradov, & Patra, 2009).

Privatization has an additional effect on alcohol availability that is often ignored. As alcohol wholesalers, control jurisdictions have the ability to determine what products will be sold and distributed. In making decisions about what types and brands of alcohol are “listed” (i.e. available for sale), they can choose not to sell a product without having first to pass legislation banning its sale. For example, on November 4, 2010, the State of Michigan Liquor Control Commission released an Administrative Order declaring that

“the Commission believes the packaging [on Alcohol Energy Drinks] is often misleading, and the products themselves can pose problems by directly appealing to a younger customer, encouraging excessive consumption” and thus “to protect the public health, safety and welfare of the citizens of the State of Michigan... Alcohol Energy Drinks shall not be sold or offered in the State” (State of Michigan Liquor Control Commission, 2010).

One aspect of this study examined when and how control jurisdictions prohibited or restricted the sale of grain alcohol within their borders.

BACKGROUND ON GRAIN ALCOHOL

The federal Alcohol and Tobacco Tax and Trade Bureau (TTB) classifies high-alcohol content grain alcohol as “neutral spirits”: “spirits distilled from any material at or above 95 percent alcohol by volume (190 proof), and if bottled, bottled at not less than 40 percent alcohol by volume (80 proof)” that are distilled from a fermented mash of grain and stored

in oak containers (TTB, 2007). In addition to having high alcohol content, these products are odorless and colorless, making them difficult to detect in cocktails or punches, especially for inexperienced or unsuspecting drinkers.

Consumption of high-alcohol content grain alcohol is prevalent among youth, especially those who already binge drink. According to a national internet-based survey of 1,032 youth aged 13 to 20, 5.8 percent of all youth reported consuming high-alcohol content grain alcoholic beverages in the past 30 days, while 2.4 percent of youth reported binge drinking with such beverages in the past 30 days (Naimi, Siegel, DeJong, O'Doherty & Jernigan, 2014; Siegel, et. al., 2013). Of youth who drank high-alcohol content grain alcoholic beverages, 35.1 percent reported binge drinking.

In another recent survey among a stratified random sample of 4,209 students from nine Maryland institutions of higher education, 10.6 percent of high-risk drinkers (those who had binged 1–4 times in the past month) reported consuming grain alcohol, while 22 percent of very high-risk drinkers (those who binged 5 or more times in the past month) reported consuming grain alcohol. Both of these studies may have under-reported grain alcohol consumption, since the characteristics of the product and the fact that it is frequently mixed with punch or similar beverages may cause youth to consume it unknowingly.

METHODS

In collaboration with the National Alcohol Beverage Control Association (NABCA) – the professional association for administrators of alcohol control jurisdictions – the authors conducted an exploratory survey to investigate procedures and policies enabling control jurisdictions to ban or restrict problematic products in their jurisdictions. Building on initial oral and e-mail surveys reviewing states' approach to these products, the academic team drafted 13 questions to ask of control jurisdiction administrators. NABCA used those questions to create two SurveyMonkey questionnaires (Appendix A) which it then sent [August 26, 2014; October 30, 2014] to its relevant contacts on alcohol product procedures in 18 control jurisdictions: Alabama, Idaho, Iowa, Maine, Maryland (Montgomery County), Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, West Virginia, Virginia and Wyoming. A member of the academic team followed up with these contacts by email and/or phone to increase the response rate and further clarify responses. Because the respondents were doing so in their official capacity and not sharing any personal information, the survey was not subject to human subjects review. NABCA collected the data from SurveyMonkey and sent the complete dataset to the academic team in pdf documents; there was no editing of the data by NABCA. A member of the academic team compiled these into a single word document for narrative analysis. An Excel spreadsheet was used to categorize the different responses.

All quotations are from survey responses unless otherwise indicated.

RESULTS

Eight control jurisdictions responded to both surveys sent by NABCA (Maine, Montana, Michigan, Mississippi, New Hampshire, Utah, Vermont and West Virginia.) Three additional

jurisdictions only responded to the first survey (Montgomery County, MD, Pennsylvania and Wyoming) and two additional jurisdictions only responded to the second survey (Iowa and Ohio). Ultimately, all 18 control jurisdictions provided some data on their listing practices.

The survey questions asked about the listing practices of these jurisdictions, as demonstrated through their handling of both grain alcohol and other products. Most of the jurisdictions indicated that they both had the authority to prohibit or restrict the sale of a product in a state store without enacting a law or regulation and had used that authority in some capacity. However, the extent to which they used this authority and their reasons for using this authority varied (Table 1).

Control Jurisdictions' Decisions on Whether to List a Product

To understand how these control jurisdictions decide whether to list a product, it is important to examine both who makes those decisions and what criteria they use. Ten control jurisdictions provided data about these people and their decision-making process. The rest skipped this question, provided insufficient answers, or made it clear from their response that they do not have a process. Of these 10 control jurisdictions, nine hold listing meetings to evaluate new and current products. (The tenth state – Iowa – requires suppliers interested in listing a product to go through a vendor portal. It is unclear who evaluates the requests afterwards) (S. Larson, personal communication, April 3, 2015).

The majority of the jurisdictions have a board or committee that makes the final decision. Eight of the 10 jurisdictions indicated the “Board” (e.g. Alabama) (D. Peacock, personal communication, April 6, 2015), “Commission” (e.g. Maine), “Management Group” (e.g. Montana) or “Listing Committee” (e.g. Oregon) makes the final decision about what products get listed. Idaho was the only state which provided more information about who makes up their panel, namely: “folks in procurement, district managers, sometimes store managers and bar managers in the area” (H. Wasserstein, personal communication, April 3, 2015). In the other two jurisdictions, the final decision is made by one individual – either the “Superintendent” (Ohio) (D. Panzera, personal communication, April 2, 2015) or the “Commissioner of the Department of Revenue” (Mississippi).

Only one jurisdiction provided more information about the internal process that occurs prior to the group making a listing decision. In Montana, an employee “handles all new items coming into the state” and evaluates each new product based on the state inventory policy. If “she sees something that might [be] cause for concern... she’ll bring it to the group for discussion and they bring it to the management group” (L. Stigen, personal communication, April 3, 2015).

Fifteen of the eighteen jurisdictions provided information about criteria used when making a listing decision. The jurisdictions were specifically asked about what social responsibility criteria they used other than economic or marketability criteria (e.g. price, how it has sold in other jurisdictions, duplication with similar products, etc.). Alabama provided the broadest answer, stating that they are “open to any public health and safety concerns brought up... If there is a public health or safety concern, the board has the discretion to put [the product] on the shelf or not” (S. Larson, personal communication, April 3, 2015). The authors were able

to divide the answers on social responsibility criteria from the rest of the jurisdictions into two components: 1) public health or safety concerns about the product itself, and 2) concerns about the labeling or marketing of the product.

Nine control jurisdictions mentioned factors that fell into the first social responsibility category. Idaho, Iowa, New Hampshire, and West Virginia looked at whether a product had high alcohol content or encouraged over-consumption. Two control jurisdictions discussed whether the products “have an inherent appeal to youth” (Mississippi) or are especially “enticing to kids” (Oregon) (N. Leslie, personal communication, April 2, 2015). Three jurisdictions cited public health and safety factors for why they had prohibited or restricted a specific product – either grain alcohol (Michigan and Pennsylvania) or alcohol mixed with caffeine (Montgomery County, MD).

Ten control jurisdictions mentioned factors from the second social responsibility category – i.e. regarding the labeling or marketing of the product. Seven would not list products “marketed to youth” and three listed “packaging” as an area of concern. Two discussed “the ease of identification as alcohol by law enforcement” (Maine) and whether the product “blur[s] the distinction between an alcoholic and non-alcoholic product or [if the] labeling/packaging ... emphasizes features that are most commonly associated with non-alcoholic products” (Montana). West Virginia and Mississippi expressed concerns over “products which contain nudity or risqué/suggestive themes or contain profanity [which is] offensive or derogatory in nature” (Mississippi). North Carolina said they “would not list anything that is marketed to underage drinkers” (L. Lee, personal communication, April 3, 2015) but among beer and wine products, they will “approve anything that the TTB will approve unless the label specifically targets underage drinkers (i.e. cartoon characters).”

Although only asked about social responsibility factors, for some jurisdictions the decision still appears to be primarily economic. For example, in Idaho, the “Listing and Delisting procedures are used to maintain good product mix by bringing new products to market and removing non-performing products... the final decision regarding whether products enter, stay or leave from the... product line ultimately rests with consumer purchases” (H. Wasserstein, personal communication, April 3, 2015). In Iowa, they never “list[s] a brand just to list it... They have a marketing strategy for why they think it will sell in the state” (S. Larson, personal communication, April 3, 2015).

Vague answers from other jurisdictions suggested they would list almost anything that they were legally allowed to sell. For example, stores are owned by independent retailers and not the state in Wyoming, and even if the state “choose[s] not to list something, the retailer can still special order the product.” And if “the TTB makes it a legal product, then Wyoming will special order the product for them” (A. Lebeda, personal communication, April 6, 2015). Michigan “allow[s] almost everything that is submitted” but “if they] reject a product, a reason is documented.”

Control Jurisdictions’ Restrictions on the Sale of High-Alcohol Content Grain Alcohol

Regarding specific restrictions on the sale of high-alcohol content grain alcohol in control jurisdictions, three jurisdictions (Mississippi, Montana and Wyoming) had no restriction on

the sale of high-alcohol content grain alcohol. Three others (Alabama, Oregon, and Utah) did not prohibit the sale but had measures in place to restrict youth access. In Oregon, high-alcohol content grain alcohol products were not allowed on the shelf or promoted in the store but had to be housed behind the counter or in a backroom and specifically requested (N. Leslie, personal communication, April 2, 2015); this was the same process in Alabama. Utah only permitted these products on the shelf in the store in 200mL bottles. If a consumer wanted a larger size, he or she would need to special order it.

Two jurisdictions – Maryland and New Hampshire – had enacted statutes restricting the sale of high-alcohol content grain alcohol. In Maryland, the law that “a person may not sell at retail an alcoholic beverage with an alcohol content by volume of 95% (190 proof) or more” (Maryland Code: Article 2B §16–505.2) became effective July 1, 2014. However, although the “supplier [in Montgomery County] went to a 151 proof... it is [their] understanding [that the supplier is] going to a 189 proof in the rest of the state” (G. Montes De Oca, personal communication, Dec 8, 2014). Respondents from New Hampshire stated that they had a statute that restricts the sale of anything over 151-proof and although it initially started as an agency policy, it was later officially enacted into law. It was “due to issues with over consumption and injury from consumption in a set age range.” However, they did not provide a citation and the authors were unable to find such a statute.

Liquor Boards in three jurisdictions (Pennsylvania, Vermont and Virginia) promulgated regulations restricting the sale of high-alcohol content grain alcohol. In Pennsylvania, state stores “may only sell grain/ethyl alcohol, 190 proof, to an individual or entity who files an application with the Board and who swears or affirms that the alcohol will purchased for nonpotable use only” (Pennsylvania Code: Article 40 §11.3). However, there are no prohibitions against 151 proof “grain/ethyl alcohol” and “the Board regularly stocks and sells the product Everclear 151 Grain Alcohol, to the general public and to retail licensees.” Additionally, there are no limitations on the maximum alcohol content of the products that licensed distilleries produce and sell to the general public and retail licensees. Pennsylvania’s policy originated in April 1999 and stemmed from the fact that:

“The Board had received feedback from college communities expressing concerns about the sale and use of grain/ethyl alcohol in their areas. After receiving this feedback, the Board examined its sales data and noticed a trend of higher instances of sales of 190 proof grain/ethyl alcohol occurring at its stores located in close proximity to colleges and universities as opposed to stores located in other areas within Pennsylvania.”

In January 2001, “the Board’s Regulations were amended to reflect this policy.”

In Vermont, a regulation prohibits the purchase of “pure ethyl or grain alcohol at the retail outlet” except for “purposes of manufacturing, mechanical, medicinal or scientific purposes” (Vermont Administrative Code: §14–1-9). Unfortunately, Vermont does not define the term “pure ethyl or grain alcohol” so it is unclear whether that refers to 190-proof, 151-proof or both. The effective date of this regulation is also unknown. They explained that as “grain alcohol is of such a high proof it is regulated differently than regular spirits for the safety of the public and the use for which it will be used.”

In Virginia, the regulation states, “No Class 1 neutral grain spirit or alcohol, as defined by federal regulations, that is without distinctive character, aroma, taste or color shall be sold in government stores at a proof greater than 101 except upon permits issued by the Board for industrial, commercial, culinary, or medical use” (Virginia Code: Title 4 §4.1–119(E)). The historical notes indicate that the regulation was promulgated in 1985. As for the evidence in support of this regulation, “at that time... it was strictly anecdotal information and testimony concerning the propensity to over consume at ‘grain’ parties.”

The seven other control jurisdictions (plus Utah) had internal administrative restrictions prohibiting or restricting sale of some type of high-alcohol content grain alcohol. In some jurisdictions, the prohibition is anything 190-proof or greater. For example, Idaho has a policy of listing several 151-proof products but only offering the 190-proof products for industrial uses and not for sale to the general public. Their “Director determines what to list in the state and there is no need for 190 proof if they have 151 proof” (H. Wasserstein, personal communication, April 3, 2015). Maine restricts the sale of Everclear 190-proof and Clear Spring 190-proof because of a “concern over easy access to high proof alcohol.” The decision was made “by the State Liquor and Lottery Commission some years ago... [and there was] no formal administrative process to set up the restriction.” In Michigan, “Everclear 151 can be sold to any spirit licensed business for sale to retail customers [but] Everclear 190 is only sold to Industrial Manufacturers and Limited Alcohol Buyers and is not available to retail customers.” This policy began “at least 30 years ago” and was created for “public health and safety” reasons.

Elsewhere, the prohibition has a lower cut-off proof. As of October 2005, West Virginia does not sell anything over 151 proof except for industrial use. At the time, they were in “communication with other states that were considering changes and [they were all concerned about] the fatalities associated with over-consumption of grain alcohol, [which] moved West Virginia to take an active approach.” In addition to restricting the sale of anything over 151 proof, “association representatives and brokers that have or produce grain alcohol have taken an active approach to educating individuals in the ‘educational hub’ areas to the dangers of over-consumption.” Iowa has a policy wherein it does not list products that are 150-proof or more; furthermore, Everclear is specifically limited to a maximum of 125 proof. Although not in writing, this was a decision made by the administrator. If someone wanted to sell this product in Iowa they “would have had to present it for listing and [the administrator] would not have approved it” (S. Larson, personal communication, April 3, 2015).

Two other jurisdictions (North Carolina and Ohio) restrict but do not prohibit high-alcohol content grain alcohol product, in a manner similar to Utah as previously discussed. In these three jurisdictions, consumers who want to purchase this product must do so through a special order. This requires buying by the case (in North Carolina and Utah), paying money in advance, and having an address to which to ship it – all of which deter sales by underage individuals. In 2010, North Carolina decided that anything over 151 proof would have to be specially ordered after a young woman died jumping off a balcony at a dorm in a campus after-party after consuming punch containing grain alcohol (L. Lee, personal communication, April 3, 2015). In Ohio, while they “do allow that type of product to be

sold... once it gets to a certain proof they maintain control over it and who it goes to” (D. Panzera, personal communication, April 2, 2015). For example, it makes a difference if it “goes to research or medical uses versus someone buying it off the shelf.” Therefore, grain alcohol is not kept on the shelf and consumers have to special order it. Ohio also requires that the sales outlet maintain a file with a letter referencing the purchaser’s intended use (Everclear DOLC 2952 B Policy 7–06).

Control Jurisdictions’ Restrictions on the Sale of Other Products

Seven control jurisdictions reported they have chosen not to list other products in addition to high-alcohol content grain alcohol based on flavors, product designs and product labeling/marketing. Often these jurisdictions cite public health reasons for their actions, with a particular emphasis on a concern for consumption of these dangerous products by minors.

Montana, North Carolina and Mississippi have restricted products based on flavors. For example, in Montana they have a written “Inventory Policy” that explains which products the state will or will not list. The inventory policy prohibits any product that “uses flavors that are designed to target or particularly appeal to underage persons” such as bubble gum or cotton candy (Montana Inventory Policy: Rule §42.11.402). Mississippi declined to sell artificially flavored marijuana vodka (D. Robertson, personal communication, Dec. 19, 2014).

Neither North Carolina nor Montana allows the sale of Jell-O shots or alcohol-infused whipped cream. North Carolina mentioned that it might be “cool to put [the whipped cream] on a drink, but you can just imagine what an underage drinker would do with it” (L. Lee, personal communication, April 3, 2015). North Carolina has also prohibited alcohol in plastic pouches, “shooters,” or test tubes because it is either “designed to take alcohol where it is not supposed to go” or “designed to drink the entire content at one time and cannot [be] put... down.” Similarly, Virginia does not allow vaporizing of alcohol or powdered alcohol.

Although Alabama also does not sell Jell-O shots, they were not sure why as they do sell other products similar to them (D. Peacock, personal communication, April 6, 2015). They stated that it could be because of a lack of demand or because they require refrigeration. Products are “generally not allowed to adulterate alcohol because then they cannot guarantee the amount of alcohol [in the product].” They generally “don’t sell a lot of things that require upkeep (e.g. alcohol-infused whipped cream)... People can order it but [we] don’t sell it.”

Four control jurisdictions (North Carolina, Mississippi, Montana and Montgomery County, MD) restrict products outright based on product labeling/marketing, whereas one jurisdiction (Iowa) works with the company to change the product or labeling if it finds it concerning. North Carolina does not list any product where they “can construe abuse or marketing to younger [individuals]” (L. Lee, personal communication, April 3, 2015). For example, “Tippy Cow” looked like an old-fashioned milk bottle, and the regulators were concerned because it was “so easy for a child to think it’s chocolate milk.” The Montana Inventory Policy states that “liquor products are a mature product category, restricted by law to only consumers age 21 or older and who are not intoxicated, and therefore should be

marketed in a responsible and appropriate manner” (Montana Inventory Policy: Rule §42.11.402). They will not approve liquor products that utilize “labeling and/or primary packaging that emphasize features that are most commonly associated with nonalcoholic consumable products.” Thus they restrict hollow candies or mason jars that contain fruit. And Montgomery County, Maryland does not sell products that “are marketed toward young people” such as “products that mix caffeine and alcohol” (G. Montes De Oca, personal communication, Dec 8, 2014).

Given that Iowa tries “to be sensitive to anything attracted to children,” they were concerned when someone proposed a product that was called “Adult Chocolate Milk (15).” It was essentially flavored vodka but nothing on the label referenced vodka (S. Larson, personal communication, April 3, 2015). So the state worked with the supplier to change the label to showcase that it was an alcoholic product and to take off any other reference to it being a carton of milk.

Three control jurisdictions commented that they had not yet been presented with certain products. For example, in Idaho they are “skeptical of things that might be used for quick consumption [or] that might fall into the hands of minors” (H. Wasserstein, personal communication, April 3, 2015). However, in both Idaho and Oregon, no one has proposed listing either alcohol energy drinks or Jell-O shots so that has not been a decision that either state has had to make. (N. Leslie, personal communication, April 2, 2015). Additionally, although there has been no demand for powdered alcohol in Alabama, they have “heard about concerns about public safety with powdered alcohol so if there was a demand they still might not sell it” (D. Peacock, personal communication, April 6, 2015).

Lastly, two control jurisdictions mentioned that they specifically do not restrict additional products. For example, Vermont said it does not treat products other than high-alcohol content grain alcohol differently (B. Goggins, personal communication, Dec. 11, 2014) and Ohio says they list most things such as Jell-O shots and alcoholic energy drinks (D. Panzera, personal communication, April 2, 2015).

CONCLUSIONS/IMPORTANCE

State monopolies on sales of alcohol exist to protect public health. Selecting the products that may be sold in a jurisdiction is an important aspect of this mission. However, this exploratory study has shown that control jurisdictions’ use of this authority is inconsistent, and that procedures and the reasoning behind such bans are far from transparent.

Using high-alcohol content grain alcohol as a case example, 14 of the 18 control jurisdictions either banned or placed restrictions on youth access for this potentially dangerous product. This is exactly the type of product where state action may be needed to protect public health, as its high alcohol content and low price make it very attractive to youth (Albers, et. al., 2015; Siegel, Galloway, Ross, Binakonsky & Jernigan, in press).

However, whereas almost all of the jurisdictions indicated they had the authority to unilaterally prohibit or restrict the sale of products in their state stores, only slightly more than half of the jurisdictions (10) used this authority to prohibit or restrict high-alcohol

content grain alcohol without legislation. Jurisdictions had also used this authority to prohibit or restrict products such as Jell-O shots or alcoholic energy drinks or that had bubble-gum or cotton candy flavorings. A few jurisdictions stated that high-alcohol content grain alcohol was the only product on which they had placed prohibitions or restrictions.

When surveyed, the control jurisdictions provided a diverse array of justifications for banning particular products, but the majority had nothing in writing documenting the types of products they could ban or had previously banned. Whereas some jurisdictions' responses were well thought-out and important – e.g. flavorings or packaging thought to appeal to underage drinkers, blurring of distinctions between alcoholic and non-alcoholic drinks, and judgment that the product was not social responsible – there were no examples of formal codification of these standards into administrative rules. Although control jurisdictions have the authority to ban dangerous products quickly and efficiently as they do not require legislation to do so, without both clear rationales applied across all beverages and a transparent process for decision-making, this authority invites challenge from producers whose products have been rejected.

Among control jurisdictions, two regulatory motives are often in tension: social responsibility and economic concerns. Future research could systematically compare the administrative practices between control jurisdictions that are more social responsibility-oriented versus those that are more economically oriented to determine how these jurisdictions resolve this tension.

Recent legal developments and research have concluded that the courts have largely abandoned the original intent of the 21st Amendment to the U.S. Constitution – which had granted the bulk of authority over alcohol products to the states in order to protect public health and safety – in favor of protecting commercial interests pursuant to the Interstate Commerce Clause of the U.S. Constitution (Grossman & Mosher, 2011). There is clear public health merit to control jurisdictions preserving their authority to ban dangerous products. The control jurisdictions should make more consistent use of this authority, and if they are to be preserved, would be well served by the development of consistent and transparent criteria and procedures by which decisions to list products are made.

Control jurisdictions should implement practices that would move them towards greater consistency, transparency and socially responsive consumption. This may include written guidelines such as the “Inventory Policy” in Montana that detail the types of products that the state will not list. It may also include providing specific feedback to alcohol companies such as when Iowa worked with a supplier to change a product label for “Adult Chocolate Milk” to showcase that it was an alcoholic product and to take off any references to it being a carton of milk.

Jurisdictions should also have a clear listing process that outlines who evaluates the products and who makes the final decisions. Only ten control jurisdictions provided data about their listing process, with the majority having a board or committee who makes the final decision. However, Idaho was the only jurisdiction to provide information about who makes up their panel.

Jurisdictions should use public health data to inform their decisions and document the data used. In Pennsylvania, the decision to restrict high-alcohol content grain alcohol started as an agency policy after the state received feedback from college communities expressing concern about the product and then analyzed Pennsylvania grain alcohol sales data.

Alcohol companies have a substantial track record at this point of introducing potentially risky products that rapidly become popular among youth. “Super-sized alcopops”, Jell-O-shots, high-alcohol content grain alcohol and powdered alcohol are just a few examples of such products, and there is evidence that risk-taking youth are more likely to consume at least some of these (Siegel, Galloway, Ross, Binakonsky & Jernigan, in press). The power of public health authorities such as control jurisdiction agencies to take rapid and effective steps to protect the public from such product innovation is a valuable asset to these authorities, and should itself be protected by better and more transparent administrative procedures.

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Appendix A

First NABCA Survey (sent August 26, 2014):

1. 1. Please state your jurisdiction.
2. 2. Does your jurisdiction allow any grain alcohol to be sold (e.g. Everclear 151 proof or 190 proof)?
3. 3. If you restrict the sale of grain alcohol, which types are restricted?
4. 4. If you restrict the sale of grain alcohol, when was the restriction put in place?
5. 5. If you restrict the sale of grain alcohol, what data (if any) was used to justify the restriction?
6. 6. If you restrict the sale of grain alcohol, is this restriction the result of legislative action or a policy/listing action by your agency?
7. 7. If you restrict the sale of grain alcohol via statute or regulation, please provide that information. If you restrict the sale of grain alcohol via policy please provide material or links documenting the decision or contact information so that information may be provided via email.
8. 8. Please provide any additional comments or information regarding the sale of grain alcohol in your jurisdiction.
9. 9. If you would be available for follow-up on this topic, please provide your name and contact information.

Second NABCA Survey (sent October 30, 2014):

1. 1. Please provide your jurisdiction.
2. 2. What is the procedure to not allow a particular product to be sold in a retail store in your state? Is this done legislatively, through regulations, or as agency policy?
3. 3. Does the agency document the reasons why a particular product will not be allowed for sale?
4. 4. Describe/list what public health and safety factors go into the decision to not allow a particular product for sale. (For example: marketed to youth, high alcohol content, etc). Please do not describe/list economic or revenue driven factors.

REFERENCES:

- Alabama Law Institute. (n.d.). Alabama: Alabama Law Institute. Retrieved June 24, 2016 from: <http://ali.state.al.us/documents/02ABCHistory-MacGipson.pdf>
- Alcohol Tobacco Tax and Trade Bureau (TTB). (2007). *Chapter 4: Class and Type Designation*. Washington DC: Alcohol Tobacco Tax and Trade Bureau. Retrieved from: <http://www.ttb.gov/spirits/bam/chapter4.pdf>.
- Albers AB, Siegel M, Ramirez RL, Ross C, DeJong W, & Jernigan DH (2015). Flavored alcoholic beverage use, risky drinking behaviors, and adverse outcomes among underage drinkers: Results from the ABRAND study. *Am J Public Health*, 105(4): 810–815. [PubMed: 25713955]
- Binakonsky J, Giga N, Ross C, & Siegel M (2011). Jello shot consumption among older adolescents: A pilot study of a newly identified public health problem. *Substance Use & Misuse*, 46(6): 828–835. [PubMed: 21174500]
- Center for Behavioral Health Statistics and Quality. (2016). 2015 National Survey on Drug Use and Health: Detailed Tables. Substance Abuse and Mental Health Services Administration, Rockville, MD.
- Chaloupka F, Grossman M, & Saffer H (2002). The Effects of Price on Alcohol Consumption and Alcohol-Related Problems Report by the National Institute on Alcohol Abuse and Alcoholism.
- Fortunato EK, Siegel M, Ramirez R, Ross C, DeJong W, Albers AB, & Jernigan DH (2014). Brand-specific consumption of flavored alcoholic beverages among underage youth in the United States. *The American Journal of Drug and Alcohol Abuse*, 40(1): 51–57. [PubMed: 24266600]
- Grossman E & Mosher JF (2011). Public health, state alcohol pricing policies, and the dismantling of the 21st amendment. *Michigan State University Journal of Medicine and Law*, 15(2): 177–201.
- Jernigan D, Noel JK, Landon J, Thornton N, & Lobstein T (2016). Alcohol marketing and youth alcohol consumption: A systematic review of longitudinal studies published since 2008. *Addiction*, 112(Suppl 1): 7–20. [PubMed: 27565582]
- Kerr WC, Williams E, & Greenfield TK (2015). Analysis of price changes in Washington following the 2012 liquor privatization Alcohol and Alcoholism.
- McKelvey W (June 8, 2016). Gov. Tom Wolf signs sweeping reforms to Pa.'s liquor system. Penn Live. Retrieved from: http://www.pennlive.com/politics/index.ssf/2016/06/liquor_reforms_gov_tom_wolf_si.html
- Naimi TS, Siegel M, DeJong W, O'Doherty C & Jernigan D. (2014). Beverage- and brand-specific binge alcohol consumption among underage youth in the US. *J Subst Use*: 1–7.
- National Alcohol Beverage Control Association (NABCA). (n.d.). Virginia: National Alcohol Beverage Control Association. Retrieved June 24, 2016 from: <http://www.nabca.org>
- Popova S, Giesbrecht N, Bekmuradov D, & Patra J (2009). Hours and days of sale and density of alcohol outlets: Impacts on alcohol consumption and damage: A systematic review. *Epidemiology & Policy*. 44(5): 500–516.

- Siegel M, Albers AB, DeJong W, Naimi TS, & Jernigan DH (2014). Differences in liquor prices between control state-operated and license-state retail outlets in the United States. *Addiction*, 108(2): 339–347.
- Siegel M, DeJong W, Naimi TS, Fortunato EK, Albers AB, Hearen T, Jernigan DH (2013). Brand-specific consumption of alcohol among underage youth in the United States. *Alcohol Clin Exp Res*, 37(7): 1195–1203. [PubMed: 23398328]
- Siegel M, Galloway A, Ross CS, Binakonsky J, & Jernigan D (In press). Jell-O shot consumption among underage youth in the United States. *J Child Adolesc Subst Abuse*.
- State of Michigan Liquor Control Commission. (2010). Michigan: Liquor Control Commission Administrative Order 2010. Retrieved from: <http://www.annarbor.com/Alcohol%20Energy%20Drink%20Order%2011%204%202010.pdf>
- Steward K (12 1, 2015). Would privatizing alcohol sales in Montgomery County mean a tax increase? WTOP News. Retrieved from: <http://wtop.com/montgomery-county/2015/12/would-privatizing-alcohol-sales-in-montgomery-county-mean-a-tax-increase/>
- Wagenaar AC & Holder HD (1995). Changes in alcohol consumption resulting from the elimination of retail wine monopolies: Results from five U.S. states. *J Stud Alcohol Drugs*, 5(56): 566–572.

Table 1:

Data from NABCA Survey on Control States

Jurisdiction	Has your jurisdiction used agency policy, independent of regulation, to prohibit or restrict the sale of a product in state stores?	Does your jurisdiction restrict grain alcohol? If yes, how?	What public health and safety factors about a product goes into the jurisdiction's decision to use agency policy to prohibit or restrict its sale in state stores?	What public health and safety factors about the labeling or marketing of a product goes into the jurisdiction's decision to use agency policy to prohibit or restrict its sale in state stores?
Alabama	YES	NO ^a	"Open to any public health and safety concerns brought up"	"Open to any public health and safety concerns brought up"
Idaho	YES	YES Agency Policy	"... Things that might be used for quick consumption... [or] that might fall into the hands of minors"	NONE
Iowa	YES	YES Agency Policy	Alcohol content; "social responsibility"	Packaging; marketing
Maine	YES	YES Agency Policy	NONE	Marketed to youth; "ease of identification as alcohol by police"
Montgomery County, MD	YES	YES Statute	"... Do not sell some products that mix caffeine and alcohol and are marketed towards young people"	"... Do not sell some products that mix caffeine and alcohol and are marketed towards young people"
Michigan	YES	YES Agency Policy	"Public health and safety reasons" for restricting sale of grain alcohol	NONE
Mississippi	YES	NO	Products that "have an inherent appeal to youth"	Marketed to youth; labeling contains "nudity or risqué / suggestive themes [or] profanity [which is] offensive or derogatory in nature"
Montana	YES	NO	NONE	Product "blurs the distinction between an alcoholic and non-alcoholic product"; "labeling/ packaging that emphasizes features that are most commonly associated with non-alcoholic products"
New Hampshire	YES	YES Agency Policy, then Statute	High alcohol content; "consumption by "younger uneducated consumers"	NONE
North Carolina	YES	YES ^b Agency Policy	NONE	"... Marketed to underage drinkers" or has "label [that] specifically targets underage drinkers (i.e. cartoon characters)."
Ohio	YES	YES ^b Agency Policy	NONE	Marketed to youth; packaging
Oregon	YES	NO ^a	"... Public safety ... [if] enticing to kids; how accessible [to kids]"	Packaging (e.g. "draws kids' attention")
Pennsylvania	YES	YES Agency Policy, then Regulation	Concerns about "a trend of higher instances of sales of 190 proof grain/ethyl alcohol occurring at its stores located in close proximity to colleges and universities as opposed to	NONE

Jurisdiction	Has your jurisdiction used agency policy, independent of regulation, to prohibit or restrict the sale of a product in state stores?	Does your jurisdiction restrict grain alcohol? If yes, how?	What public health and safety factors about a product goes into the jurisdiction's decision to use agency policy to prohibit or restrict its sale in state stores?	What public health and safety factors about the labeling or marketing of a product goes into the jurisdiction's decision to use agency policy to prohibit or restrict its sale in state stores?
			stores located in other areas within Pennsylvania"	
Utah	YES	YES ^{bc} Agency Policy	NONE	Marketed to youth; "questionable labeling"
Vermont	NO	YES Regulation	N/A	N/A
Virginia	NO	YES Regulation	N/A	N/A
West Virginia	YES	YES Agency Policy	Encourages over-consumption; high alcohol content	Marketed to youth; "public perception (e.g. extreme or sexual product name)"
Wyoming	NO (Does not have state stores – stores are independent retailers)	NO	N/A (Even if state chooses to not list something, stores can still special order it. However, state "may steer away from [listing] controversial items.")	N/A (Even if state chooses to not list something, stores can still special order it. However, state "may steer away from [listing] controversial items.")

^a = Grain alcohol not allowed on the shelf – must be kept behind the counter or in the back-room

^b = Grain alcohol must be purchased through special order

^c = 200mL bottles may be sold on shelf in the store