



COMMONWEALTH of VIRGINIA

NELSON SMITH
COMMISSIONER

DEPARTMENT OF
BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES

Post Office Box 1797
Richmond, Virginia 23218-1797

Telephone (804) 786-3921
Fax (804) 371-6638
www.dbhds.virginia.gov

May 1, 2023

To: The Honorable Janet D. Howell, Chair, Senate Finance and Appropriations Committee
The Honorable Barry D. Knight, Chair, House Appropriations Committee
Secretary of Finance Stephen E. Cummings

Fr: Nelson Smith, Commissioner, DBHDS

Re: Item 311 GG.2 of the 2022 Appropriations Act

Item 311 GG.2 of the 2022 Appropriations Act directs the Department of Behavioral Health and Developmental Services (DBHDS) partner with Virginia Alcoholic Beverage Control Authority to conduct additional tobacco retailer compliance checks. The language states:

2. The Department of Behavioral Health and Developmental Services, in consultation with the Virginia Alcoholic Beverage Control Authority, shall develop a plan to further increase the number of tobacco retailer compliance inspections to be completed annually for the purpose of reducing the retailer violation rate. The plan shall include identification of additional resources needed, alternative options for the provision of compliance checks, and any necessary legislative changes. The Department shall identify and pursue any applicable federal grants that may be used for the costs of implementing the plan. Agencies in the executive branch shall provide assistance as needed in development of the plan. The Department shall submit the plan by September 1, 2022 to the Secretary of Finance and the Chairmen of the House Appropriations and Senate Finance and Appropriations Committees

In accordance with this item, please find enclosed the combined report for Item 311 GG.2. Staff are available should you wish to discuss this request.

CC:
The Honorable John Littel, Secretary, Health & Human Resources
Susan Massart
Mike Tweedy



Report on Additional Tobacco Retailer Compliance Checks

(Item 311 GG.2)

September 1, 2022

DBHDS Vision: A Life of Possibilities for All Virginians

1220 BANK STREET • P.O. BOX 1797 • RICHMOND, VIRGINIA 23218-1797 PHONE: (804) 786-3921 • FAX: (804) 371-6638 • WEB SITE: WWW.DBHDS.VIRGINIA.GOV

DBHDS Report on Additional Tobacco Retailer Compliance Checks

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Executive Summary

The Department of Behavioral Health and Developmental Services (DBHDS), through Item 311.GG.2 of the 2022 Appropriations Act, received \$101,970 for use to conduct additional tobacco retailer compliance checks in an effort to reduce the state's Synar Retailer Violation Rate. This funding will cover the costs of an additional 618 checks. DBHDS will partner with Virginia Alcoholic Beverage Control Authority (ABC) to complete these compliance checks by May 2023. A statewide random sample of 1,000 retailers has already been sent to ABC to complete the checks. All results will be compiled and reported to state partners and the Secretary of Health and Human Services once completed.

DBHDS will continue to look at additional strategies to affect responsible retailing. These include grants to local law enforcement agencies, federal grants, and state-wide licensing programs.

Compliance checks ensure the health and safety of our youth and communities. We know that tobacco/nicotine use continues to be the number one cause of preventable health consequences and death. Stopping tobacco/nicotine use before it starts is key to keeping youth and communities healthy. Responsible retailing is one strategy to assist in keeping these products out of the hands of youth.

Background

The Office of Behavior Health Wellness (OBHW) is required, by Substance Abuse Mental Health Services Administration (SAMHSA), to uphold all aspects of the Synar regulation. The Synar regulation requires states to:

- Enforce underage access laws to a degree that reasonably can be expected to reduce the illegal sale of tobacco products to individuals under the age of 21.
- Conduct annual, unannounced inspections that provide a valid probability sample of tobacco sales outlets accessible to minors.
- Report their sampling methodology and results of the annual Synar survey as a part of the Annual Synar Report no later than December 31. This includes the State's sampling methodology, Synar survey results, Synar inspection report, and the Synar inspection protocol.
- Revise their methodology, inspection reports, and inspection protocols, to include the revised age requirements (under 21). In addition, the Synar survey results must now include results for sales to youth and young adults under the age of 21.
- Achieve a noncompliance rate of no more than 20 percent (SAMHSA requires that each state reduce its retailer violation rate to 20 percent).

OBHW partners with the Virginia Alcoholic Beverage Control Authority (ABC) to conduct the Synar compliance checks. Virginia uses a simple, state-wide, random sample for Synar compliance checks. FY2023's sample included 868 retailers. 725 of those were completed by ABC at a cost of \$116,000.00. The current Retailer Violation Rate (RVR) for FY23 is 16.5 percent.

The Retailer Violation Rate, per SAMHSA, must not be more than 20 Percent or the state will be penalized. The penalty is up to 10 percent of the total Block Grant allocation. For Virginia, this would equate to nearly \$5 million. Virginia's current RVR, based on inspections conducted in 2019 prior to the Tobacco 21 law taking affect, is 16.8 percent. Inspections were not conducted in 2020 and 2021 due to COVID.

Merchant Education

The Office of Behavior Health Wellness partners with the Prevention teams of each of the Community Service Boards (CSB) to provide merchant education to 100 percent of the tobacco/nicotine retailers in their catchment area, every two years. The Prevention teams visit each tobacco/nicotine retailer, provides them with information and materials to ensure the retailer is aware of what the laws are regarding selling tobacco/nicotine products. Penalties for selling to underage buyers are reviewed, as well as, how to spot a fake ID and how to refuse a sale. Materials are left for the retailer to display stating they do not sell to anyone under the age of 21. The current two-year cycle goes from July 1, 2022 through June 30, 2024.

The Office of Behavior Health Wellness is currently working to develop an online merchant education training that will be available free of charge for all tobacco/nicotine retailers. The hope is that this education module will be utilized by all point-of-sale staff at every retailer across the state. The training will be interactive and designed for the adult learner and will not take more than 30 minutes to complete.

We estimate that there are approximately 6,900 tobacco and nicotine retailers across the state. There is not a state-wide licensing program, therefore we do not have an exact number of retailers. In addition to merchant education, CSB Prevention teams are asked to update the retailer database by deleting stores that are no longer in business and adding new stores that have opened since the last two-year cycle.

Compliance and Enforcement

We know that compliance checks and enforcement is key to keeping the RVR under 20 percent. Virginia is only inspecting roughly 10 percent of tobacco/nicotine retailers annually. This is down from around 50 percent in 2018 when there was a more robust FDA inspection program in place. When Virginia was inspecting closer to 50 percent of retailers, we had an RVR of around 10 percent. Since the drastic decrease in FDA enforcement activity, and the only enforcement coming from Synar inspections (roughly 10 percent), the RVR saw an increase of 60 percent between FY19 and FY20. Because of this, we have asked for funding for additional compliance checks.

We have received confirmation from Virginia ABC that with appropriate funding, they have the human resources to conduct additional checks. The funding will cover an additional 618 retailer inspections. Virginia ABC stated they can only conduct a maximum of 1,500 tobacco compliance checks annually. Protocol for these compliance checks will follow the protocols already in place for Synar checks but will not factor into the calculation of the RVR. Sampling methods will be different from what is used for Synar. We will use a state-wide random sample of 1,000 retailers. The over sampling will allow for errors in our retailer list (i.e., stores who do not sell nicotine products, no longer in business, require a membership, etc.) as well as allow Virginia ABC to select retailers in close proximity to each other or to the regional ABC offices,

therefore creating more efficiency and less burden to ABC officers. Any tobacco/nicotine product can be asked for, but a priority should be given to vaping products. The plan is to have these inspections completed by May 2023, prior to the next cycle of Synar inspections.

While Virginia ABC conducts alcohol underage buyer compliance checks to deter underage access to alcohol, it is not codified that they are the only agency authorized to conduct such enforcement activities. On occasions, local law enforcement agencies have conducted underage buyer checks, however, there have been extremely limited issues with some cases brought to court if the ABC protocol was not followed. ABC uses proven procedures that the courts are confident are fair and proper. Some have problems in court such as using Underage Buyers (UABs) that would not meet ABC's 'youthful' standards or having the underage buyer lie when asked their age. It is important to note that the underage buyer is committing a "crime" and must be under the supervision of a law enforcement officer or any other exemption granted by 18.2-371.2 of the Virginia code while conducting the check. Therefore, only law enforcement can conduct the checks and charge the offender with an offense if compliance was not met.

Additional Strategies

Future strategies to conduct additional compliance checks could include working with local law enforcement agencies or with community coalitions (who would partner with their local law enforcement agency). An initiative similar to the one Virginia ABC uses which offers grants of up to \$10,000 through Education and Prevention is a model program to follow. Organizations eligible to apply include community coalitions, law enforcement, nonprofits, schools, colleges and universities, faith-based organizations and prevention-related groups.

Federal grants to fund additional compliance checks have been explored, however, DBHDS has not found any that would be applicable. DBHDS will continue to seek out additional federal funding for these efforts and apply if any appropriate grants are available.

A state-wide tobacco/nicotine licensing program could be used to fund such efforts. Efforts have been made over the last four years to get such a bill passed but have been met with resistance from the industry and retailers. It was put up for study after 2021 but did not result in any recommendations. An annual licensing fee of \$500 per retailer would cover the proposed fiscal impact statement provided by ABC in 2021.

The purpose of these compliance checks is not to get businesses in trouble, but rather to ensure the health and safety of our youth and communities. Tobacco/nicotine use continues to be the number one cause of preventable health consequences and death. Stopping use before it starts is key to keeping youth and communities healthy. Responsible retailing is one strategy to assist in keeping these products out of the hands of youth.

Conclusion

DBHDS, in collaboration with VA ABC, will complete an additional 618 tobacco retailer compliance checks by May 2023 with the additional resources received from the State via additional appropriations provided by 2022 General Assembly. Results of these inspections will be shared with state partners and the Virginia Secretary of Health and Human Services.