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21. WHOLESALER PRICING RESTRICTIONS

Policy Description

The 21st Amendment to the Constitution repealed Prohibition and gave States broad authority to regulate alcohol sales within their borders. Most States established a three-tier structure: producers, wholesalers, and retailers. Many States included restrictions on wholesaler pricing practices, intended to strengthen the three-tier system, reduce price competition among wholesalers and retailers, and combat corruption and crime in the alcohol market.

Research suggests that the specific wholesaler pricing restrictions described below increase the price of alcohol to consumers. Research also shows that underage consumption and problems are strongly influenced by alcohol prices. One study has suggested that restrictions on certain wholesale pricing practices may have a stronger effect on alcohol pricing than alcohol taxes.

Some States operate alcohol wholesale operations directly through a State agency, usually limited to distilled spirits, beer with high alcohol content, and wine with high alcohol content.³⁹ In these cases, the State sets wholesaler prices as part of its administrative function, and statutory provisions are only relevant to that portion of the wholesaler market in the control of private entities. For this policy, an index beverage has been selected: beer (5 percent), wine (12 percent), and spirits (40 percent). If the index beverage is controlled, in whole or in part, by the State at the wholesale level, the State is coded as CONTROL and no additional coding is displayed.

In general, wholesaler pricing policies fall within four types: (1) Restrictions on volume discounts; (2) restrictions on discounting practices; (3) price posting requirements, and (4) restrictions on the ability of wholesalers to provide credit extensions to retailers. These policy categories are closely interrelated but may operate independently of each other. Each is described briefly below.

Types of Wholesaler Pricing Policies

Volume discounting restrictions: Large retailers often have an advantage over smaller retailers due to the large volumes they are able to purchase at once. This purchasing power allows them to

³⁹ For a State-by-State review of control State wholesaler systems, see www.apis.niaaa.nih.gov.

negotiate lower prices on most commodities and therefore offer items at lower prices to consumers. Many States have imposed restrictions on the ability of wholesalers to provide volume discounts—the same price must be charged for products regardless of the amount purchased by individual retailers. The primary purpose of these laws is to protect small retailers from predatory marketing practices of large-volume competitors and to prevent corruption. They have a secondary effect of increasing retail prices generally by making retail price discounting more difficult.

Minimum pricing requirements: States may require wholesalers to establish a minimum markup or maximum discount for each product sold to retailers based on the price of the producer's price for the product or may enact a ban against selling any product below cost. These provisions are designed to maintain stable prices on alcohol products by limiting price competition at both retail and wholesale levels. In most cases, this increases the retail price to consumers, and thus affects public health outcomes.

Post-and-hold provisions: This policy requires wholesalers to publicly “post” prices of their alcohol products (i.e., provide a list of prices to a State agency for review by the public, including retailers and competitors) and hold these prices for a set amount of time, allowing all retailers the opportunity to make purchases at the same cost. Post-and-hold requirements are typically tied to minimum pricing and price discounting provisions and enhance the States' ability to enforce those provisions. The wholesalers' submissions can be reviewed easily to determine whether wholesalers are paying the proper taxes on their products and whether they are providing any illegal price inducements to retailers. Post-and-hold provisions reduce price competition among both retailers and wholesalers because the posted prices are locked in for a set amount of time. They also promote effective enforcement of other wholesaler pricing policies. Some States require wholesalers to post prices but have no “hold” requirement – i.e., posted prices may be changed at any time. This is a weaker restriction.

Credit extension restrictions: Wholesalers often provide retailers with various forms of credit. (e.g., direct loans or deferred payment of invoices). Many States restrict alcoholic beverage wholesalers' ability to provide credit to retailers, typically by banning loans and limiting the period of time required for retailers to pay invoices. The primary purpose of the restrictions is to limit the influence of wholesalers on retailer practices. When a retailer is relying on a wholesaler's credit, the retailer is more likely to promote the wholesaler's products and to agree to the wholesaler's demands regarding product placement and pricing. The restrictions have a secondary effect of limiting the retailer's ability to operate on credit, indirectly increasing retail prices.

Federal Court Challenges to State Wholesaler Pricing Restrictions

As noted earlier, in general, States have broad authority under the 21st Amendment to the Constitution to regulate alcohol availability within their boundaries. That authority has been constrained by U.S. Supreme Court and Federal Court of Appeals cases, which have interpreted the Interstate Commerce Clause (ICC) and Sherman Antitrust Act⁴⁰ to prohibit certain State restrictions on the alcohol market.^{41,42} These cases have led to considerable uncertainty regarding

⁴⁰ July 2, 1890, ch. 647, 26 Stat. 209, 15 U.S.C. § 1-7.

⁴¹ See, e.g., *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937 (1980).

the validity of State restrictions on alcohol wholesaler prices, and additional challenges to those restrictions are anticipated. In the meantime, this uncertainty has prompted States to reexamine their alcohol wholesaler practices provisions.

Status of Wholesaler Pricing Restrictions

Federal Law

Federal law addresses restrictions on wholesaler credit practices:

The Federal Alcohol Administration Act provides for regulation of those engaged in the alcohol beverage industry and for protection of consumers. 27 U.S.C. § 201 et seq. Under the Act, wholesalers may not induce retailers to purchase beverage alcohol by extending credit in excess of 30 days from the date of delivery. 27 U.S.C. § 205(b)(6), 27 C.F.R. § 6.65.

Some States allow wholesalers to extend credit to retailers for a longer period than is permitted under Federal law.

State Law

Exhibits 4.3.48 through 4.3.51 show summary distributions of volume discounts, minimum markup/maximum discount, post and hold, and retailer credit for the license States (beer = 49 license States; Wine = 41 license States; Spirits = 33 license States).⁴³

⁴² Several Federal and State courts have addressed the Constitutionality of selected wholesaler pricing practices, with conflicting results. For example, in *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874 (9th Cir. 2008), the plaintiff challenged nine distinct Washington State restrictions governing wholesaler practices, including policies in all four categories described above. The Court upheld the State's volume discount and minimum markup provisions but invalidated the post-and-hold requirements. In *Manuel v. State of Louisiana*, 982 So.2d 316 (3rd Cir. 2008), a Louisiana appellate court rejected six separate challenges to the Sherman Act, including the ban on volume discounts. It upheld the State's ability to regulate alcoholic beverages within the State and concluded that the Sherman Act had to yield to the State's authority granted under the 21st Amendment. Maryland's post-and-hold law and volume discount ban were challenged in *TFWS, Inc. v. Franchot*, 572 F.3d 186 (4th Cir. 2009), a complicated case involving multiple appeals and rehearings. On Maryland's fourth appeal, the court upheld its previous decisions to strike down the two policies.

⁴³ Comparisons among beverage types must be made with some caution, since the number of license States differs for each beverage.

Exhibit 4.3.48: Volume Discounts

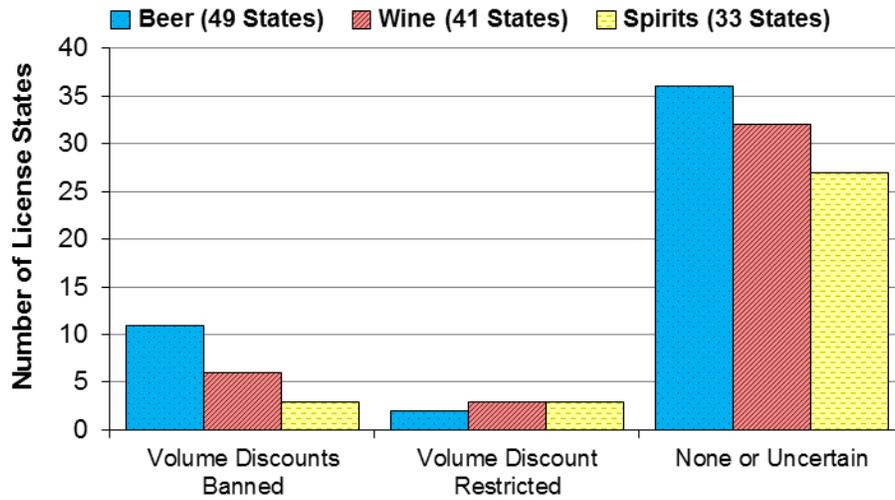


Exhibit 4.3.49: Minimum Markup/Maximum Discount

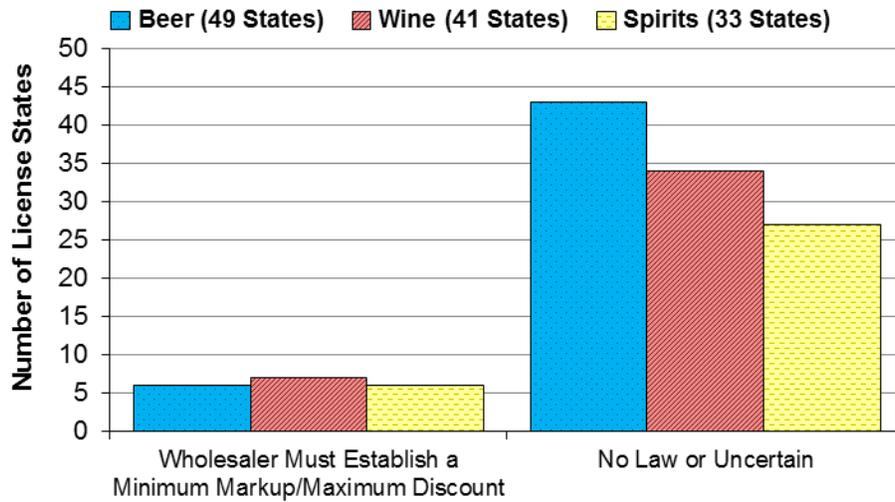


Exhibit 4.3.50: Post and Hold

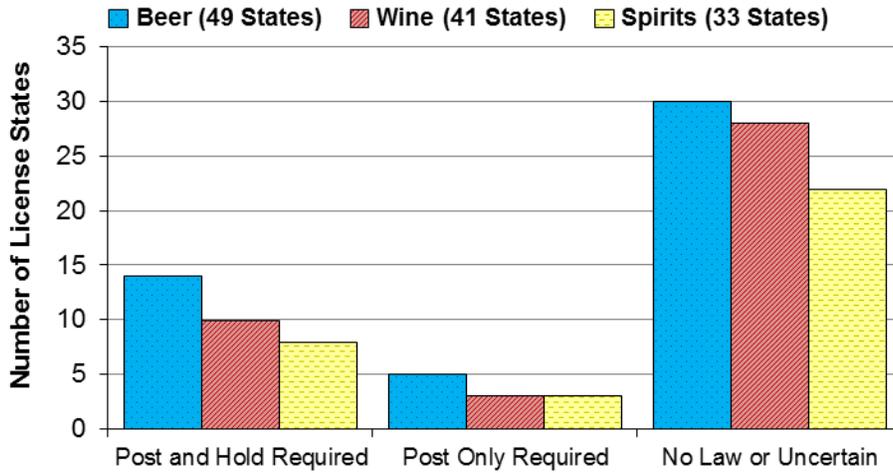
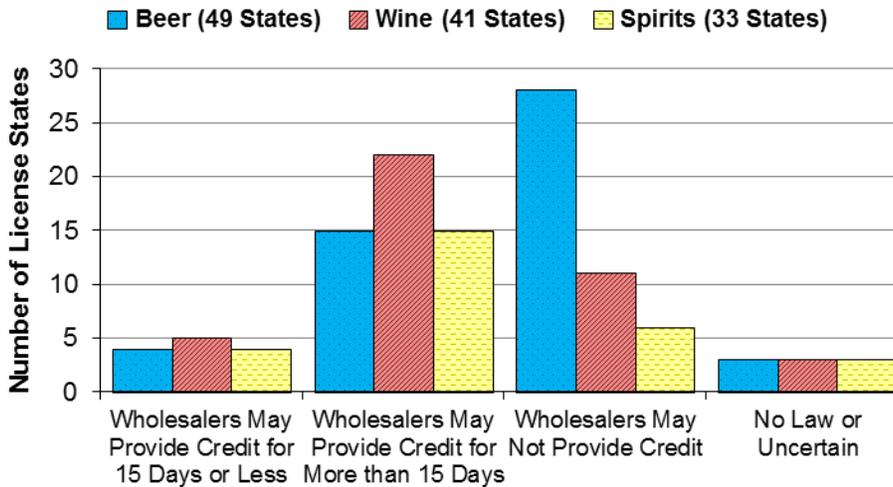


Exhibit 4.3.51: Retailer Credit



Only two license States (Alaska and Rhode Island) have no wholesaler pricing restrictions. Among the remaining States, bans on extending credit and post and hold (excluding post only) are the most common wholesaler pricing restrictions (ranging from about a fifth to about half the States depending on beverage type). Other restrictions range from under 10 percent of the license States to about a quarter of the States depending on beverage type.

Exhibits 4.3.52 through 4.3.55 present detailed State-by-State information for wholesaler pricing policies for beer.

Exhibit 4.3.52: Volume Discounts for Beer as of January 1, 2011

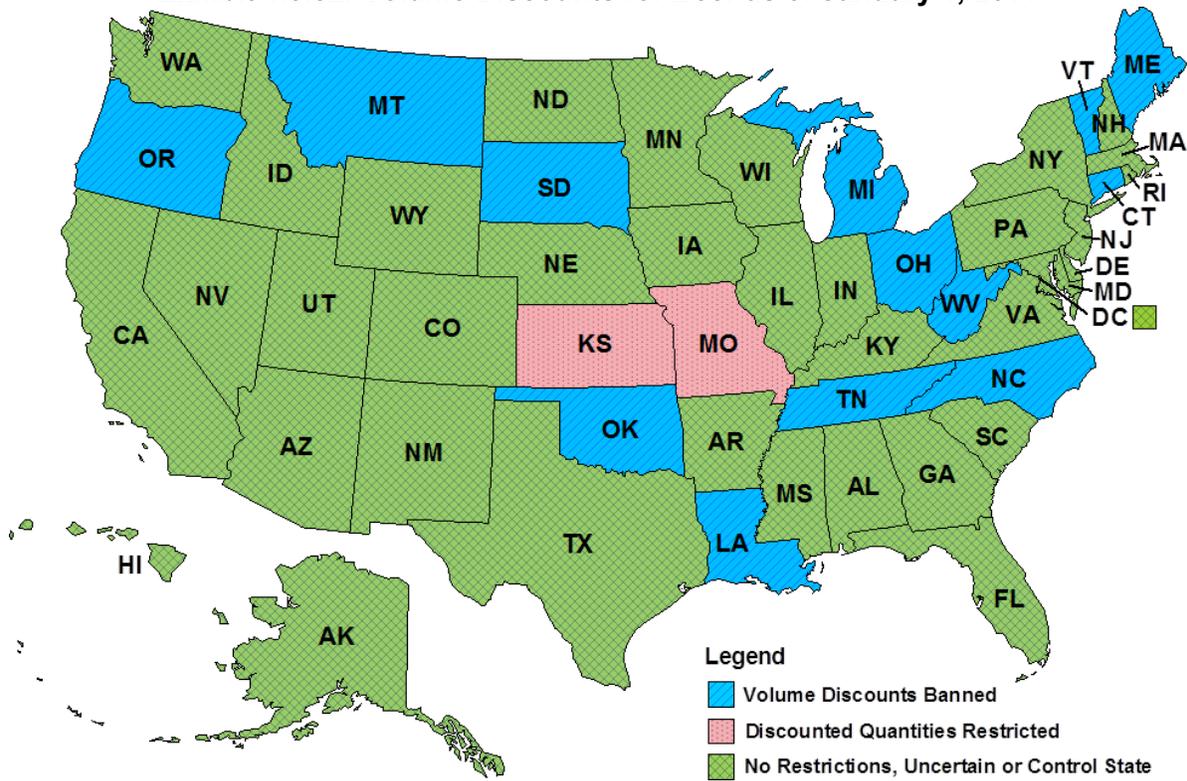


Exhibit 4.3.53: Minimum Markup, Maximum Discount for Beer as of January 1, 2011

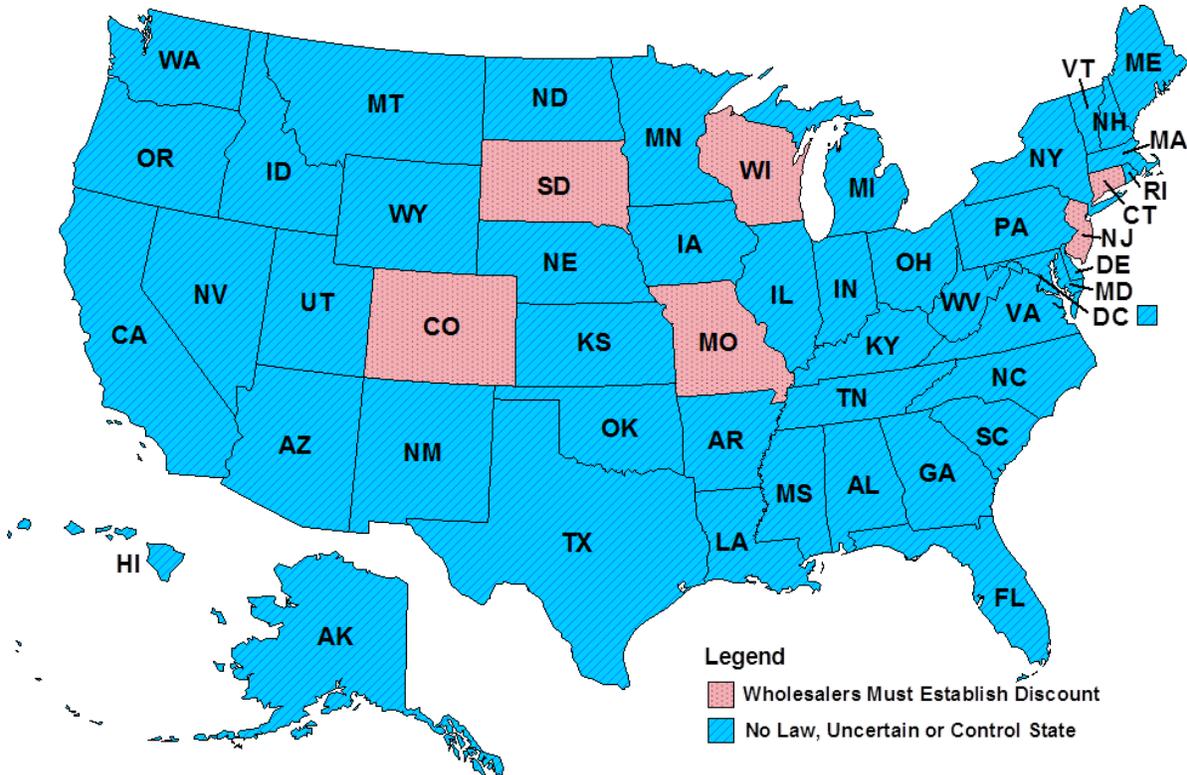


Exhibit 4.3.54: Post and Hold Requirements for Beer as of January 1, 2011

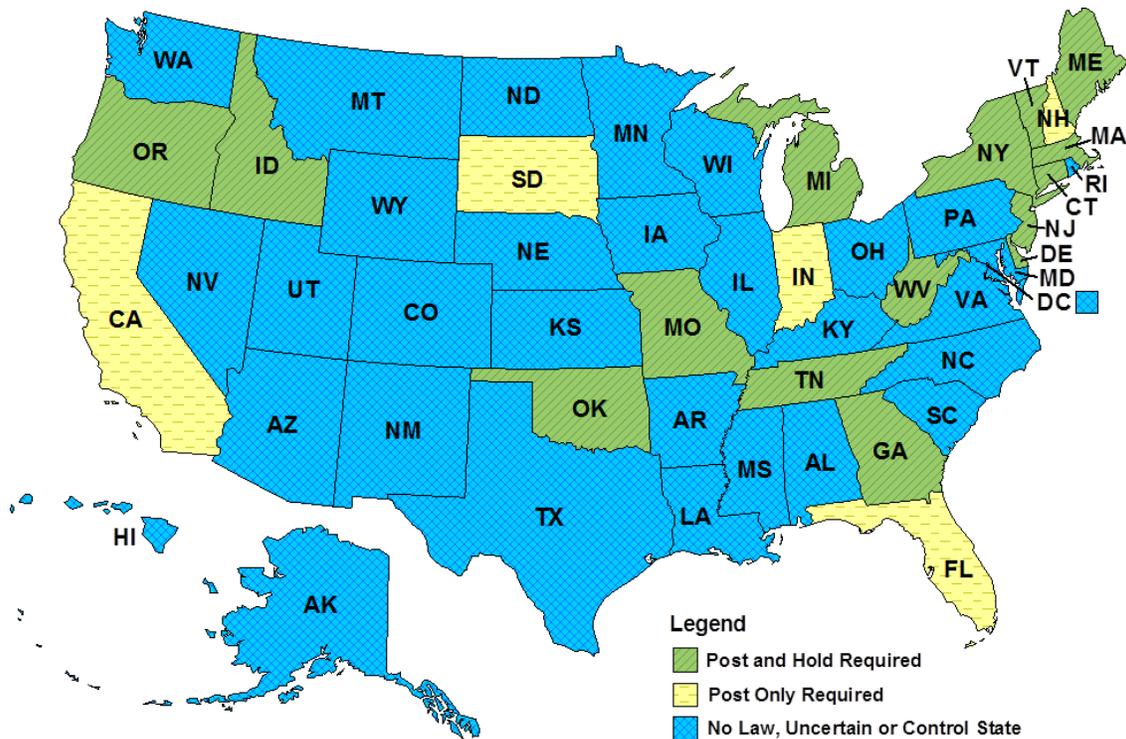
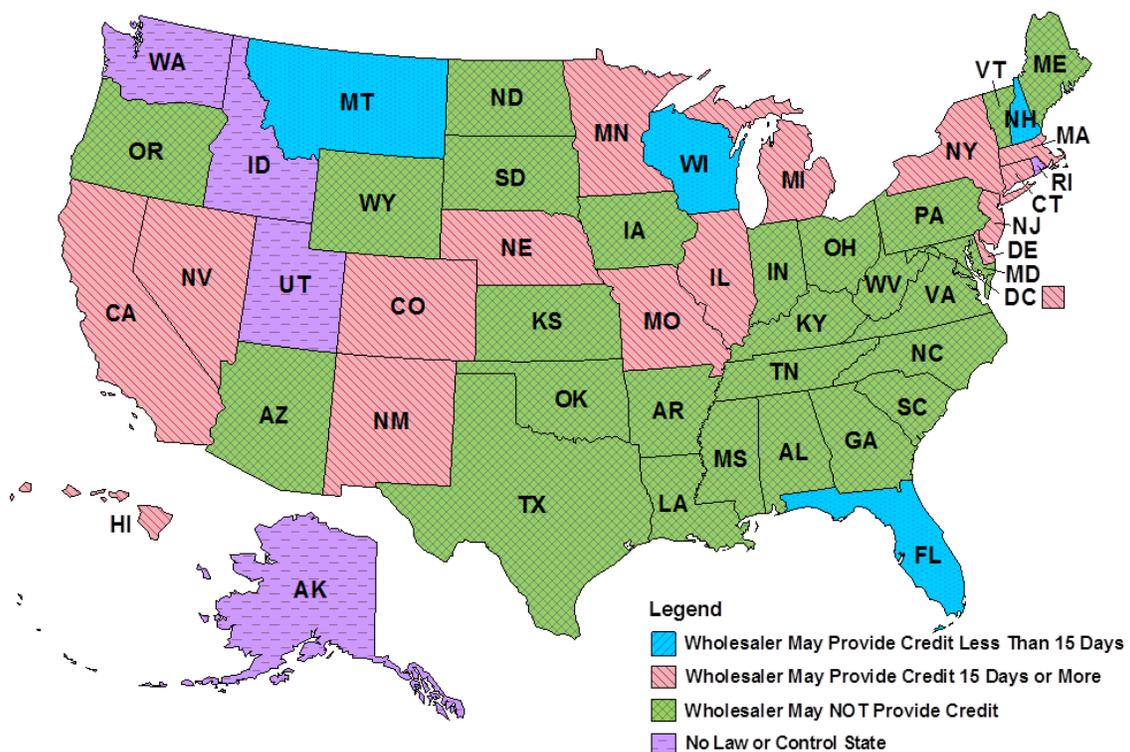


Exhibit 4.3.55: Retail Credit for Beer as of January 1, 2011



*MI allows 30 days credit to on-sale retailers but no credit to off-sale retailers

Trends in Wholesaler Pricing Restrictions

Between 2010 and 2011, only one State changed its wholesaler pricing restriction policies. South Dakota adopted a price posting requirement.

References and Further Information

Legal research and data collection for this topic are planned and managed by SAMHSA and conducted under contract by The CDM Group, Inc. To see definitions of the variables for this policy, go to Appendix B. For further information and background see:

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