

The Florida Senate
PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Regulated Industries Committee

BILL: PCS/SB's 126 & 2282

INTRODUCER: Regulated Industries Committee

SUBJECT: Winery Shipper

DATE: April 1, 2007

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	Pre-meeting
2.			CJ	
3.			FT	
4.			GA	
5.				
6.				

I. Summary:

The bill legalizes the direct shipment of wine to Florida consumers and provides for licensure of winery shippers and regulation by the Division of Alcoholic Beverage and Tobacco (division). It provides Legislative intent. It creates an alcoholic beverage license classification for winery shippers. It limits direct shipment to licensed manufacturers of wine that are located within or outside of the state and hold a wine producer permit issued in accordance with the Federal Alcohol Administration Act.¹ A licensed winery shipper may ship wine directly to a person in this state who is at least 21 years of age for that resident's personal use and not for resale. The bill requires a \$250 license fee and renewal fee.

A licensed direct shipper also cannot manufacture more than 250,000 gallons of wine per year, or ship, or cause to be shipped, more than 6 cases or 72 bottles of wine per calendar year to a household. A winery shipper cannot be a subsidiary or affiliated winery of a winery that manufactures more than 250,000 gallons of wine annually.

The bill requires a license application on forms approved by the division and requires that the applicant qualify for licensure under ss. 561.15 and 561.17, F.S., or provide a true and correct copy of a certification from the alcoholic beverage licensing authority of a state or the federal government that meets the minimum components for licensure in Florida.

The bill provides the following requirements for legal direct shipping of wine:

- Maintain and provide to the division all current state and federal licenses;

¹ See Federal Alcohol Administration Act, codified at 27 U.S.C. s. 203.

- Register as a Primary American Source of Supply under s. 564.045, F.S.;
- Verify the age of the purchaser at the time of sale and delivery;
- Comply with the bill container labeling requirement;
- Register with the Florida Department of Revenue;
- Collect and remit all applicable excise taxes on wine to the Division of Alcoholic Beverage and Tobacco (division) and sales taxes to the Department of Revenue;
- Appoint a registered agent for acceptance of service of process;
- Sales taxes must be calculated as if the sale took place in this state where the delivery occurred in this state;
- File with the division a \$5,000 bond;
- Make monthly reports to the division;
- Maintain records for three years and comply with the bill's record keeping requirement; and
- Submit to state audits, and pay the costs of an audit if a material violation is found.

The bill provides that, by obtaining a direct shippers license, a licensee consents to the jurisdiction of the division, any other state agency, local law enforcement, and the courts of this state.

The bill provides the division with authority to suspend or revoke a direct shipper's license or impose a fine of not more than \$2,500. It also provides a third degree felony for the sale of alcoholic beverage to persons under the age of 21 by a winery shipper. It provides a second degree misdemeanor for delivery of alcoholic beverage to persons under the age of 21 by a common carrier and for persons who obtain wine from a winery shipper in violation of this act.

It exempts winery shipper licensees from the delivery and direct shipment prohibitions of ss. 561.54 and 561.545, F.S.

The bill provides that an order placed over the Internet and received at a vendor's licensed place of business may be construed as a sale actually made at the vendors licensed place of business. It provides for common carrier deliveries. The bill requires that 60 percent of wine produced by a Certified Florida Farm Winery must be made from Florida's agricultural products. The Commissioner of Agriculture may waive this requirement in times of hardship.

The bill provides that it is the intent of the Legislature that the courts disturb only as much of the regulatory system of this state as is necessary to enforce the United States Constitution if any portion of this act is declared unconstitutional. It also provides that contracts not otherwise prohibited by the Beverage Law shall not be impaired.

The bill authorizes the division to adopt rules to implement and administer the provisions of this act.

This bill substantially amends the following sections of the Florida Statutes: 561.14, 561.24, 561.54, 561.545, 561.57, and 599.004. This bill creates section 561.585, Florida Statutes. This bill creates unnumbered sections of the Florida Statutes.

II. Present Situation:

Florida's Three-Tier System

In the United States, the regulation of alcohol has traditionally been through what is termed the “three-tier system.” The system requires that the manufacture, distribution, and sale of alcoholic beverages be separated. Retailers must buy their products from distributors who in turn buy their products from the manufacturers. Manufacturers cannot sell directly to retailers or directly to consumers. The system is also deeply rooted in the perceived evils of the “tied house” in which a bar is owned or operated by a manufacturer or the manufacturer exercises undue influence over the retail vendor.²

There are some exceptions to this regulatory system, usually for special circumstances. Typically the exemptions include allowing beer brewpubs to manufacture malt beverages and to sell them to consumers,³ allowing individuals to bring small quantities of alcohol back from trips out-of-state,⁴ and allowing in-state wineries to manufacture and sell directly to consumers.⁵

In Florida, alcoholic beverages are regulated by the Beverage Law.⁶ These provisions regulate the manufacture, distribution, and sale of wine, beer, and liquor via manufacturers, distributors, and vendors.⁷ The Division of Alcoholic Beverage and Tobacco within the Department of Business and Professional Regulation is the agency authorized to administer and enforce the Beverage Law.⁸

In a three-tier system, each license classification has clearly delineated functions. For example, in Florida, only licensed vendors are permitted to sell alcoholic beverages directly to consumers at retail.⁹ Manufacturers of wine may not be licensed as a distributor.¹⁰ Florida law also prohibits any distributor or vendor from having an interest in any manufacturer.¹¹

In *Granholm v. Heald* (*Granholm*),¹² the U.S. Supreme Court held that states can regulate alcoholic beverages through a three-tier system, but states cannot provide an exception to that system that is limited to in-state businesses, i.e., in-state wine manufacturers.

² Erik D. Price, *Time to Untie the House? Revisiting the Historical Justifications of Washington's Three-Tier System Challenged by Costco v. Washington State Liquor Control Board*, a copy can be found at: <http://www.wsba.org/media/publications/barnews/2004/june-04-price.htm> (last visited September 20, 2005).

³ See s. 561.221(2), F.S., which permits the limited manufacture of beer by vendors (brew pubs).

⁴ See s. 562.16, F.S., which permits the possession of less than one gallon of untaxed alcoholic beverages when purchased by the possessor out-of-state in accordance with the laws of the state where purchased and brought into the state by the possessor.

⁵ See s. 561.221, F.S.

⁶ The Beverage Law means chs. 561, 562, 563, 564, 565, 567, and 568, F.S. See s. 561.01(6), F.S.

⁷ See s. 561.14, F.S.

⁸ Section 561.02, F.S.

⁹ Section 561.14(3), F.S. However, see discussion below regarding the exception for certified Florida Farm Wineries in s. 561.221, F.S.

¹⁰ See s. 561.24, F.S. However, see discussion below regarding the exception for Florida manufacturers of wine in s. 561.221, F.S.

¹¹ See s. 561.42, F.S.

¹² *Granholm v. Heald*, 544 U.S. 460 (2005).

Sales, by out-of-state alcoholic beverage manufacturers and retailers to consumers in another state, made outside established three-tier systems are commonly termed “direct shipment.” The term also includes sales made directly to consumers by in-state manufacturers.

Granholm vs. Heald

In *Granholm v. Heald*, consolidated cases from Michigan and New York, the U.S. Supreme Court held that a state cannot allow in-state wineries to sell wine directly to consumers in that state while simultaneously prohibiting out-of-state wineries from also selling wine directly to consumers. The decision invalidated laws in Michigan and New York that discriminated between in-state and out-of-state wine manufacturers in this manner.

Michigan and New York regulate the sale and importation of wine through three-tier systems and require separate licenses for manufacturers, wholesalers, and retailers. These schemes allow in-state, but not out-of-state, wineries to make direct sales to consumers. The Court held that this differential treatment violated the Commerce Clause, Art.I, s. 8, cl. 3 of the U.S. Constitution, which provides that “[t]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”

Michigan Law

Under the Michigan law enacted at the time,¹³ wine producers were required to distribute their wine through wholesalers. Michigan had an exception for the approximately 40 in-state wineries that are eligible for a wine maker license that allows the direct shipment of wine to in-state consumers. Out-of-state wineries could apply for an out-of-state seller of wine license that allows them to sell to in-state wholesalers, but not directly to Michigan consumers.¹⁴

In the Michigan case, Michigan residents, joined by an out-of-state winery, sued Michigan officials, claiming that the state’s laws violated the Commerce Clause. The state and an in-state wholesalers association responded that the direct shipment ban was a valid exercise of Michigan’s power under the Twenty-first Amendment of the U.S. Constitution. The Twenty-first Amendment provides in section 2 that “[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the law thereof, is hereby prohibited.” The United States District Court for the Eastern District of Michigan sustained the scheme, but the Sixth Circuit reversed,¹⁵ rejecting the argument that the Twenty-first Amendment immunizes state liquor laws from Commerce Clause provisions and holding that there was no showing that the state could not meet its policy objectives through nondiscriminatory means.

¹³ See Michigan Comp. Laws Ann. ss. 436.1109(1), 436.1305, 436.1403, and 436.1607(1) (West 2000).

¹⁴ Effective December 16, 2005, Michigan amended its law to allow direct shipment of wine under certain circumstances, P.A. 2005, No. 268. See Mich. Comp. Laws Ann. s. 436.1203. Michigan’s direct wine shipping requirements can be found at http://www.michigan.gov/documents/LC-MW102_154466_7.DirectShipperRequirements.pdf (last visited April 1, 2007). It allows for a winery anywhere in the US that obtains a direct shippers permit from the State of Michigan to ship up to 1,500 cases (9 liters per case) of wine annually to Michigan consumers. The winery must have an approved direct shipper's permit, register with the Michigan Department of Treasury, and pay sales and excise taxes. The license fee is \$100.

¹⁵ *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003).

New York Law

New York's licensing scheme was somewhat different from Michigan's.¹⁶ It also provided for distribution through the three-tier system and made exceptions for in-state farm wineries. Wineries that produce wine only from New York grapes could apply for a license that allowed direct shipment to in-state consumers. An out-of-state winery could ship directly to consumers only if the winery became licensed as a New York Winery, established a distribution operation in New York, and had a physical presence in the state, i.e., a warehouse, office, or storeroom. Moreover, out-of-state wineries that established the requisite in-state presence were still not eligible for the farm winery license that provides the most direct means of shipping to New York consumers. Instead, they had to obtain a separate license that authorized direct shipping to consumers. New York law did not require a separate direct shipping license for its farm wineries.¹⁷

In the New York case, out-of-state wineries and their New York customers filed suit against state officials, seeking a declaration that the State's direct shipment laws violated the Commerce Clause. State liquor wholesalers and retailers' representatives joined in support of the state. The United States District Court for the Southern District of New York granted the plaintiffs' summary judgment against the state, but the Second Circuit reversed, holding that New York's laws fell within the state's powers under the Twenty-first Amendment.¹⁸

Supreme Court Decision

The United States Supreme Court consolidated the Michigan and New York cases into a single case to address this issue:

Does a State regulatory scheme that permits in-state wineries to directly ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Section 2 of the Twenty-first Amendment?¹⁹

The U.S. Supreme Court held in *Granholm* that:

the laws in both States discriminate against interstate commerce in violation of the Commerce Clause, Art. I, s. 8, cl. 3, [United States Constitution] and that the discrimination is neither authorized nor permitted by the Twenty-first Amendment. Accordingly, we affirm the judgment of the Court of Appeals for the Sixth Circuit, which invalidated the Michigan laws; and we reverse the judgment

¹⁶ See N. Y. Alco. Bev. Cont. Law Ann. ss.76-a(3) and 76-a(6)(a) and ss. 3(20-a) and 3(37) (West Supp. 2005).

¹⁷ New York amended its law, effective August 11, 2005 to provide for a Direct Shipper's License under certain circumstances. The New York requirements can be found at <http://abc.state.ny.us/announcements/advisory-out-of-state-winery.pdf> (last visited April 1, 2007). To be eligible for a license, the applicant out-of-state wine manufacturer must be located in a state that allows New York State wine manufacturers substantially similar direct wine shipping privileges. The applicant must have a tax authority certificate, register as an alcoholic beverage distributor, and consent to New York State jurisdiction, among other requirements. The direct wine shipper may not ship more than 36 cases of wine (9 liters per case) to a New York resident. The license fee is \$125 for an Out-of-State Direct Shipper's License.

¹⁸ *Swedenburg v. Kelly*, 358 F.3d 223 (2nd Cir. 2004).

¹⁹ *Granholm v. Heald*, 541 U.S. 1062 (2004).

of the Court of Appeals for the Second Circuit, which upheld the New York laws.²⁰

Granholm explicitly noted that states may regulate the distribution and sale of wine via a three-tier system of licensed manufacturers, distributors, and retailers. The court also noted that states may prohibit the direct shipment of alcoholic beverages to consumers.²¹ However, states may not impose requirements on interstate commerce that discriminate in favor of in-state interests. States can regulate imported wine only to the same extent and in the same manner that they regulate domestically produced wine. The court applied the rule that the court must still consider whether a state's regulatory regime "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."²²

In *Granholm*, the court noted that New York could provide adequate safeguards for direct shipping of wine with licensing and self-reporting, because these methods were sufficient for wine distributed through the three-tier system. The court also noted that licensees could be required to submit regular sales reports and remit taxes. The court observed that licensing, reporting, and tax requirements have been used by other states that permit direct shipping and that these states have reported no problems with tax collection.²³ The court also noted that this is the approach sanctioned by the National Conference of State Legislatures in their Model Direct Shipping Bill.

Florida's Direct Shipping Prohibition

Section 561.545(1), F.S., prohibits the direct shipping of all alcoholic beverages to consumers from out-of-state. It also prohibits common carriers from transporting alcoholic beverages from an out-of-state location to anyone in this state who does not hold a valid manufacturer, wholesaler, or exporter's license, or who is not a state-bonded warehouse.

A first violation of this prohibition results in the issuance of an order to show cause why a cease and desist order should not be issued. A violation within two years of a cease and desist order, or within two years of a previous conviction, constitutes a felony of the third degree.

Section 561.545(5), F.S., provides an exception for the direct shipping of sacramental alcoholic beverages to bona fide religious organizations as authorized by the division. It also exempts registered exporters.

Section 561.54(1), F.S., prohibits deliveries of alcoholic beverages from out-of-state by common or permit carriers, operators of privately owned cars, trucks, buses, or other conveyances, except to manufacturers, wholesalers, or exporters, or bonded warehouses in this state. Section 561.54(2), F.S., provides a cause of action for any licensee who is aggrieved by a violation of this prohibition. The court must assess damages equal to three times the amount of delivery

²⁰ *Granholm* at 466.

²¹ The court's analysis is based, in part, upon the Webb-Kenyon Act, 27 U.S.C. s. 122, which prohibits the shipping of alcoholic beverages into a state in violation of that state's laws, and Twenty First Amendment of the U.S. Constitution.

²² See *Granholm* at 489, quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988).

²³ See *Granholm* at 491.

charges or the fair market value of the merchandise unlawfully brought into the state. The court must also award the plaintiff its costs and reasonable attorney's fees.

Florida's prohibition against direct shipping is limited to the direct shipping of alcoholic beverages from out-of-state to Florida; it does not prohibit direct shipping from a Florida winery to another state or from a Florida winery to a person in Florida.

Sales by Florida Wineries

Florida law provides an exception to the general prohibition against manufacturers of alcoholic beverages selling directly to consumers. Florida permits in-state wine²⁴ manufacturers to sell their wines directly to consumers. The premises licensed to conduct vendor sales must be situated on property contiguous to the manufacturing process.²⁵ Florida also permits wineries that are certified by the Department of Agriculture and Consumer Services as a Florida Farm Winery to conduct tastings and sales of wine directly to consumers at Florida fairs, trade shows, expositions, and festivals.²⁶

Florida wine manufacturers may also function in all three tiers of the state's regulatory system. Wineries may distribute any alcoholic beverages, including beer and liquor.²⁷ Although s. 561.24, F.S., prohibits manufacturers from being licensed as a distributor, this prohibition does not apply to Florida wineries.

Certified Florida Farm Wineries

To qualify as a certified Florida Farm Winery, a winery must meet each of the following standards:

1. Produce or sell less than 250,000 gallons of wine annually.
2. Maintain a minimum of 10 acres of owned or managed vineyards in Florida.
3. Be open to the public for tours, tastings, and sales at least 30 hours each week.
4. Make annual application to the department for recognition as a Florida Farm Winery, on forms provided by the department.
5. Pay an annual application and registration fee of \$100.²⁸

According to industry representatives, many Florida wines are blended with citrus or grapes grown outside the state. Current law does not require that wines from certified Florida Farm

²⁴ Section 564.01(1), F.S., defines the term "wine" to mean:

all beverages made from fresh fruits, berries, or grapes, either by natural fermentation or by natural fermentation with brandy added, in the manner required by the laws and regulations of the United States, and includes all sparkling wines, champagnes, combination of the aforesaid beverages, vermouths, and like products. Sugar, flavors, and coloring materials may be added to wine to make it conform to the consumer's taste, except that the ultimate flavor or the color of the product may not be altered to imitate a beverage other than wine or to change the character of the wine.

²⁵ See s. 561.221(1), F.S.

²⁶ See s. 561.221(2), F.S.

²⁷ See s. 561.14(1), F.S.

²⁸ See s. 599.004, F.S., which establishes the Florida Farm Winery program within the Department of Agriculture and Consumer Services.

Wineries must consist of any particular percentage of Florida-grown grapes or other Florida-grown agriculture products.

Bainbridge v. Turner

Florida's direct shipping prohibition was challenged in the case of *Bainbridge v. Turner* (*Bainbridge*) by wine consumers and out-of-state wineries.²⁹ This law suit challenged Florida's statutory scheme prohibiting out-of-state wineries from shipping their products directly to Florida consumers while permitting in-state wineries to do so.

Before the Supreme Court issued its decision in *Granholm*, the case resulted in two written federal appellate court opinions. In the first opinion, *Bainbridge v. Martelli* (*Bainbridge I*),³⁰ the United States District Court for the Middle District of Florida held that s. 561.54, F.S., and the statutory scheme that bars direct shipping violated the Commerce Clause. In *Bainbridge v. Turner* (*Bainbridge II*),³¹ the Eleventh Circuit Court of Appeals held that, if Florida could demonstrate that its statutory scheme was closely related to raising revenue and was not a pretext to mere protectionism, Florida's statutory scheme could be upheld against a Commerce Clause challenge. The appellate court remanded the case to the district court for further consideration of this issue.

The case was held in abeyance because of the pending cases before the U.S. Supreme Court. On August 5, 2005, the United States District Court for the Middle District of Florida issued an order finding ss. 561.54(1)-(2) and 561.545(1), F.S., violated the Commerce Clause and were therefore unconstitutional under the authority in *Granholm*, and enjoined the enforcement of these provisions.³² The court found that these statutes discriminate against out-of-state wineries by prohibiting them from selling and delivering wine directly to customers in Florida when in-state wineries are not so prohibited.

Enforcement by the Division of Alcoholic Beverage and Tobacco

According to the division, the *Bainbridge* final order bars the enforcement of ss. 561.54 and 561.545, F.S., against out-of-state wineries. Also the division indicated that it is interpreting the *Bainbridge* order as applicable only to out-of-state wine manufacturers. The division initially advised that it intended to issue vendor permits to allow out-of-state wine manufactures that hold all current, valid federal permits to legally direct ship wines to Florida consumers, and that it did not intend to issue vendor permits to out-of-state retailers who wish to direct ship wines into the state. However, the division's response to the *Bainbridge* ruling on its Internet site does not reference any licensure requirement for out-of-state direct shippers of wine. It states that the ruling "precludes enforcement of the ban on direct wine shipments from non-Florida wineries to Florida consumers, but does not limit the state's authority to collect taxes on wine or to enforce the prohibition of the sale of alcoholic beverages, including wine, to a person under the age of

²⁹ *Bainbridge v. Turner*, No. 8:99-CV-2681-T-27TBM (M.D. Fla.).

³⁰ *Bainbridge v. Martell*, 148 F.Supp.2d 1306 (M.D. Fla. 2001).

³¹ *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002).

³² *Bainbridge v. Turner*, No. 8:99-CV-2681-T-27TBM (M.D. Fla. August 5, 2005).

21.”³³ The division’s statement on its website provides information for the payment of sales and excise taxes, the prohibition against sales in dry counties, and the underage sales prohibition.

The website notes that the Florida Legislature is considering legislation on this issue and the website will remain as a resource until the last day of the Regular Legislative Session, May 4, 2007.

According to the department, it is receiving approximately 400 monthly tax payment reports evidencing out-of-state wine deliveries to approximately 12,000 recipients. The division is uncertain whether all of the wine shippers are wineries.

For January 2007, the division’s records indicate that 9,310.23 total gallons of wine were reported as shipped into the state. These direct shipments of wine equaled \$21,147.02 in net excise taxes due. \$20,877.48 of that amount was paid to the division.³⁴

Primary American Source of Supply Brand Registration

Section 564.045, F.S., requires registration of wine brands for the purpose of tax revenue control. Before being shipped, sold, or offered for sale to a distributor or importer in Florida, a wine brand must be registered by the brand’s “primary American source of supply,” which s. 564.045(1), F.S., defines as the:

manufacturer, vintner, winery, or bottler, or their legally authorized exclusive agent, who, if the product cannot be secured directly from the manufacturer by an American distributor, is the source closest to the manufacturer in the channel of commerce from whom the product can be secured by an American distributor, or who, if the product can be secured directly from the manufacturer by an American distributor, is the manufacturer. It shall also include any applicant who directly purchases vinous beverages from a manufacturer, vintner, winery, or bottler who represents that there is no primary American source of supply for the brand and such applicant must petition the division for approval of licensure.

The annual license fee for each brand is \$15. All Florida wineries that conduct direct sales to consumers must register the brands they sell and pay the fee for each brand. According to the Wine Institute, some states require brands and labels to be registered before shipping those brands to consumers in the state.

License Fees

Under the Beverage Law, Florida wine manufacturers pay a state license tax for a manufacture’s license, a distributor’s license if they distribute their wines, and a vendor’s license if they sell their wines at retail. Section 564.02(2)(a), F.S., imposes a license tax of \$1,000 for a license to

³³ See http://www.myflorida.com/dbpr/abt/auditing/wine_shipments/wine_shipment_into_florida.shtml (Last visited March 30, 2007).

³⁴ The division maintains monthly direct shipment statistics on its website, including monthly reports of wine shipments into Florida. See http://www.myflorida.com/dbpr/abt/auditing/wine_shipments/wine_shipment.shtml (Last visited March 30, 2007).

engage in the manufacturing or bottling of wines and nothing else. Section 561.02(2)(b), F.S., imposes a license tax of \$1,250 to distribute wines, malt beverages, and fortified wines. Section 564.02(1), imposes the license taxes for vendors who sell wine.

Vendor licenses are divided into two types: vendors operating a business where beverages are sold for consumption on the premises, and vendors operating a business where beverages are sold only for consumption off the premises. The vendor license tax for consumption off the premises is equal to 50 percent of the license tax for the applicable vendor's license for consumption on the premises. The license tax for consumption on the premises is dependent on the population size of the county where the vendor's premises is located. These license taxes range from \$120 for counties having a population of less than 25,000 to \$280 for counties having a population of over 100,000. According to industry representatives, some wine manufacturers have a consumption on the premises license for sales and wine tastings at the winery.

If licensed as a vendor, a manufacturer would also be subject to the annual surtax imposed by s. 564.025, F.S., which is equal to 40 percent of the license fee for each wine vendor, regardless of the wine's alcoholic content.

Federal Wine Producer Permits

The Federal Alcohol Administration Act (FAA Act) requires a basic permit issued by the Alcohol and Tobacco Tax and Trade Bureau (Tax and Trade Bureau or bureau) within the U.S. Department of the Treasury (formerly the Bureau of Alcohol, Tobacco, and Firearms) to engage in the business of importing into the United States distilled spirits, wine, or malt beverages. A basic permit is required to engage in the business of distilling distilled spirits, producing wine, rectifying or blending distilled spirits or wine, or bottling, or warehousing and bottling, distilled spirits in the business of distilling spirits or producing wine, and for persons who engage in the business of purchasing for resale at wholesale distilled spirits, wine or malt beverages.³⁵ According to the Tax and Trade Bureau, as of April 2, 2007, there were 5,236 active federal basic permits in the U.S. for wine premises. Retailers and beer manufacturers (brewers) are not required to obtain a basic permit under the FAA Act.

Interim Project 2006-146

The Senate President approved Interim Project Report 2006-146 to study the issues presented by the direct shipment of wine to Florida consumers by unlicensed out-of-state persons. This study included a review of the status of the current law and surveying the concerns of the affected interests.³⁶ The interim project resulted in the recommendation that the Legislature either continue to prohibit all direct shipment of wines into Florida and eliminate the ability of in-state wine manufacturers to sell wine directly to consumers, or legalize the direct shipment of wine and regulate the practice.

³⁵ See Federal Alcohol Administration Act, codified at 27 U.S.C. s. 203. See also, 27 C.F.R. part 1subpart C, section 1.20.

³⁶ See Senate Committee on Regulated Industries, *Direct Shipment of Wine to Florida Consumers*, report no. 2006-146, October 2005.

The study recommended that a single license classification to license out-of-state and in-state direct shippers of wines should be created and that licensure should be required as a condition of legal direct shipping. The study recommended the following licensure options:

- Licensure may be limited to persons who operate a winery located in the United States and hold all state and federal permits necessary to operate the winery;
- The Legislature may permit persons operating a winery outside the United States to qualify for licensure;
- In addition, the Legislature may permit non-manufacturers, e.g., out-of-state retailers, to be licensed direct shippers; and
- If the Legislature opts to limit licensed direct shippers to wine manufacturers, it may require that a winery licensed as a direct shipper must produce or sell less than 250,000 gallons of wine annually.

In addition to licensure, the study recommended consideration of the following options for regulating direct shipment of wine:

- Require, as a condition of licensure, that out-of-state direct shippers must satisfy all of the minimum license qualification requirements required under the Beverage Law for a Florida alcoholic beverage license;
- Require, as a condition of licensure, that the license holder submit to the jurisdiction of the regulatory agency and the courts of this state in regards to compliance with the laws of this state;
- Limit direct shipment sales to sales for personal consumption, and prohibit the resale at retail of wines purchased directly from a direct shipper;
- Require age verification procedures for the point of delivery, point of sale, or both, that, at minimum, require that an adult provide proof of age with a valid photographic identification at the time of the delivery;
- Require that containers of wine shipped directly to consumers must be conspicuously labeled with words that identify them as containing alcohol requiring the signature of a person 21 years of age or older before delivery can be made;
- Impose specific shipping requirements on common carriers, including requiring that the common carrier must require that the recipient of wine provide proof of age, and that the recipient of the wine must sign an acknowledgment of receipt. The common carrier should also be required to refuse delivery if the recipient refuses to provide proof of age;
- Require that direct shippers remit to the state all applicable Florida excise and sales taxes;
- Require that direct shippers register all wine brands before shipping, selling, or offering for sale any wine to a consumer in Florida;
- Require payment of a license fee comparable to the fee required for an in-state wine vendor;
- Require that direct shippers maintain records of sales and shipments of wine into Florida, and require that the direct shippers permit state regulators to have access to these records;
- Require that direct shippers pay all attorney's fees and costs in any action to collect unpaid taxes;
- Require monthly reporting to the Division of Alcoholic Beverage and Tobacco that details all shipment of wine made into Florida, including the number of bottles shipped,

- to whom the wine was shipped, the identity of the common carrier making the shipment, and the brands shipped;
- Require periodic audits of direct shippers by the division, that all required reports should be signed by a certified public accountant, or both; and
 - Require that direct shippers pay all travel related costs necessary to conduct a compliance audit of an out-of-state direct shipper if the state auditor must travel out-of-state to conduct the audit.

III. Effect of Proposed Changes:

Winery Shipper Classification

The bill amends s. 561.14, F.S., to create an alcoholic beverage license classification for winery shippers under s. 561.585, F.S.

Legislative Intent

The bill sets forth the legislative intent. The bill states that it is the legislative intent that this section apply only to the sale and distribution of wine produced by wineries that manufacture no more than 250,000 gallons of wine per year. It provides that the Legislature “finds a rational basis for the limitations contained [in the bill] as the least discriminatory means of protecting the public and state revenues through equivalent regulation of warm wineries.” It finds that strict regulation promotes temperance by discouraging consumption by underage persons, the abusive consumption by adults, and the collection of excise and sales taxes. The bill also reaffirms the legislative intent that the direct shipment of beer and spirits to residents of this state remains prohibited.

Licensure Requirements

Section 561.585, F.S., establishes the license requirements for a winery shipper. To qualify for the license, the winery shipper licensed to manufacture wine in this state or another state, must hold a wine producer and blenders permit issued in accordance with the Federal Alcohol Administration Act.³⁷ A licensed winery shipper may ship wine directly to a person in this state who is at least 21 years of age for that resident’s personal use and not for resale. This provision prohibits winery shippers from selling wine for the purpose of resale. The bill does not specifically prohibit retail vendors from purchasing wine from a winery shipper.³⁸

The applicant must file an application with the division, pay a \$250 license fee, and provide proof of its federal and state permits. The renewal fee is also \$250.

³⁷ See Federal Alcohol Administration Act, codified at 27 U.S.C. s. 203.

³⁸ Section 561.14(3), F.S., prohibits a retail vendor from purchasing alcoholic beverage from a person that is not licensed as a vendor, manufacturer, bottler, or distributor under the Beverage Law. It also prohibits a retail vendor from importing, or engaging in the importation of, any alcoholic beverages from places beyond the limits of the state. It is not clear whether purchases by a retail vendor from an out-of-state winery for the purpose of resale to consumers constitutes the importation of wine under the beverage law because s. 561.14(3), F.S., defines acting as an importer as selling, “or to cause to be sold, shipped, and invoiced, alcoholic beverages to licensed manufacturers or licensed distributors, and to no one else, in this state.”

To qualify for the license, a winery shipper must also:

- Qualify for licensure under ss. 561.15 and 561.17, F.S.;
- Maintain and provide to the division all current state and federal licenses;
- Obtain and maintain a current license as a Primary American Source of Supply under s. 564.045, F.S.; and
- Provide a copy of its registration with the Florida Department of Revenue; and
- Appoint a registered agent for acceptance of service of process.

The bill prohibits the division from issuing or renewing a license under this section if the applicant or licensee is owned by a winery that manufactures more than 250,000 gallons of wine annually. The bill prohibits the division from issuing or renewing a license under this section if the applicant or licensee has subsidiary or affiliated wineries that manufactures more than 250,000 gallons of wine annually. The term “affiliated wineries” is unclear.

The bill prohibits winery shippers from shipping or causing to be shipped the equivalent of more than 6 cases or 72 bottles of wine per calendar year to any household. The bill does not define term household. The bill defines the term case to mean a container of bottles of wine totaling no more than 9,000 milliliters of wine. This is the equivalent of twelve 750 milliliter bottles. It also defines the term bottle as a container of not more than 750 milliliters.

The bill also specifies that winery shippers must comply with the wine container limits in s. 564.05, F.S., which limits the size of wine containers to one gallon.

The bill requires that a license application must be on forms approved by the division and requires that the applicant qualify for licensure under ss. 561.15 and 561.17, F.S., or provide a true and correct copy of a certification from the alcoholic beverage licensing authority of another state or of the federal government that meet the minimum components set forth in the bill. The minimum components include:

- Finger printing of the applicant;
- Disqualification of applicants under 21 years of age; and
- Disqualification of applicants convicted of:
 - Any beverage law violation in this state, any other state, or the United States in the past five years;
 - Any felony in this state, any other state, or the United States in the past fifteen years; or
 - Any criminal violation of the controlled substance act of this state, any other state, or the United States.

This provision’s effect on the availability of out-of-state wines is uncertain. Based on a review of federal wine permit requirements, and the wine manufacturer license requirements in requirements in California, New York, Oregon, and Washington,³⁹ Florida’s alcoholic beverage license requirements appear to be more extensive than those states’ minimum licensure requirements. For example, California does not have a specific minimum age requirement.

³⁹ According to the Wine Institute, these states represent approximately 98 percent of its member wineries.

California law requires the licensee not have any felony conviction or conviction related to its beverage law, but California law does not set specific time periods.⁴⁰ According to the California Department of Alcoholic Beverage Control, convicted felons may be licensed by the department if they can demonstrate that they have been rehabilitated. It is not clear whether a felony in another state would disqualify an applicant in California. Whether the applicant is a rehabilitated felon is within the discretion of the California Department of Alcoholic Beverage Control.

As surety for payment of taxes, the bill requires that winery shippers file with the division a \$5,000 bond. The bill authorizes the division to accept a lesser bond if the volume of business done by the winery shippers is such that a lesser bond would be adequate to secure tax payments. The bill further provides that the division may not accept a bond of less than \$1,000, and may also increase a lesser bond to \$5,000.

The bill permits an applicant for a winery shipper license to obtain a temporary initial license under s. 561.181, F.S. This provision would permit the applicant to conduct wine sales and deliveries to Florida while the application is processed the applicant's qualifications are investigated by the division.

Age Verification Requirements

The bill requires that each winery shippers verify the purchaser's age at the point of purchase before completing a sale and requires that the winery shippers refuse to sell wine to any person under 21 years of age. The bill requires that the verification method must include receiving a copy, electronic or otherwise, of a purchaser's driver's license or other acceptable form of identification.

The bill provides a labeling requirement for each container of wine shipped directly to a resident of this state. Winery shippers must ensure that each container is conspicuously labeled with the following information:

- That the package contains alcohol.
- An adult signature is required.
- The recipient must be at least 21 years of age.

The winery shippers and common carriers must also require, before delivery, the signature of a person 21 years of age or older using one of the valid forms of identification specified in the bill, including a valid Florida driver's license or identification card,⁴¹ and the specified acceptable forms of identification for persons who are physically handicapped, a comparable identification card issued by another state, a passport or United States Uniformed Services Identification card.

The bill provides a good faith defense to any civil action, except for an administrative action by the division, to winery shipper licensees and common carriers who sell, give, deliver, or transfer an alcoholic beverage to a person not of legal age. This good faith defense applies if the person receiving the alcoholic beverage falsely evidenced that he or she was of legal age to purchase or

⁴⁰ Sections 23952 and 23958, California Codes.

⁴¹ See s. 322.051, F.S.

consume the alcoholic beverage, and his or her appearance was such that an ordinarily prudent person would believe him or her to be of legal age to purchase or consume the alcoholic beverage. In addition, the winery shipper or common carrier must have relied on the person's misrepresentation and appearance, and must have carefully checked one of the forms of identification specified in the bill.

Reporting and Recordkeeping Requirements

The bill requires that winery shippers report to the division, on a monthly basis, the following information regarding shipments during the previous month to residents of this state:

- Whether any wine was shipped;
- Total amount of wine shipped;
- Quantity and types of wine shipped; and
- Amount of excise tax paid to the division.

The bill exempts winery shippers from this reporting requirement if they file a report under s. 561.55, F.S., that contains all the information required by the bill. This provision's applicability is limited to in-state wineries because out-of-state shippers are not required to file any reports under s. 561.55, F.S. It also grants the division rule making authority to proscribe forms to avoid duplicative filings.

The bill requires each winery shipper licensee to maintain records for at least three years after the date of delivery of the wine into Florida. The records must include the purchasers' names and dates of birth, copies of the identification cards used to make the purchase, the purchasers' addresses, the amounts delivered, and the dates of all shipments to persons in Florida.

Common Carrier Requirements

The bill sets forth requirements for common carriers that deliver wines for the winery shippers. The bill requires that the common carriers:

- Register with the division and acknowledge the intent to deliver wines and the requirements for delivery of wine shipments;
- Refuse to deliver wine to recipients who appear to be under 21 years of age and who do not present a valid identification; and
- Obtain the recipient's address, signature, and acknowledgment of personal consumption for each delivery.

The bill requires that the common carriers maintain such records for three years, and have them available for inspection upon request by the division.

Tax Collection

The bill requires that winery shippers collect and remit monthly all applicable excise taxes on wine to the division and sales taxes to the Department of Revenue for the preceding month. The

bill provides that, notwithstanding s. 212.0596, F.S., such taxes shall be calculated as if the sale took place in this state where the delivery occurred in this state.⁴²

Audit requirements

The bill requires that winery shippers must permit the division and the Department of Revenue to audit their records upon request. The bill requires that winery shippers must permit the division and the Department of Revenue to audit their records upon request. The bill requires that winery shippers be audited at least once per year. It also requires that winery shippers furnish any documents within 30 days after a request is made.

The bill assigns the cost of the audit to the division or the Department of Revenue. If a material violation is found, the cost of the audit is assigned to the winery shippers. The bill does not define what constitutes a material violation.⁴³

Jurisdiction

The bill provides that, by obtaining a winery shippers license, a licensee consents to the jurisdiction of the division, local law enforcement, any other state agency, and the courts of this state concerning compliance with state laws.

Penalties

The bill provides that, in addition to any other penalty in the Beverage Law, the division may suspend or revoke a winery shipper's license or impose a fine of not more than \$2,500 for any violation of this section.⁴⁴

The bill provides the following criminal penalties:

- A third degree felony for a winery shipper licensee that knowingly and intentionally ships, or causes to be shipped, wine to a person under the age of 21;
- A second degree misdemeanor for a common carrier, permit carrier, or other commercial conveyance that knowingly and intentionally delivers wine to a person under the age of 21; and
- A second degree misdemeanor for any person who knowingly and intentionally obtains wine from a winery shipper in violation of this section.

⁴² Section 212.0596(6), F.S., exempts mail order sales from any local option surtax within the meaning of s. 212.054(3)(a), F.S., unless the seller is in the county where the surtax is imposed. Section 212.0596(1), F.S., defines "mail order sale" to include tangible personal property ordered by mail or any other means of communication.

⁴³ There are several disciplinary provisions in the Florida Statutes that provide a sanction for a material violation. *See, for example*, s. 481.225(3)(c), F.S., relating to registered architects, s. 481.2251, F.S., relating to registered interior designers, and s. 553.781, F.S., relating to the Florida Building code. There is no clear case law that sets forth a rule on what constitutes a "material violation." However, there is some indication that the term may mean a violation that is more than accidental or inadvertent. *See, for example, Jayne v. Department of Environmental Regulation*, Division of Administrative Hearings, Case No. 84-4242, September 24, 1985, in which an accidental violation relating to a dredge and fill permit was deemed not to be a material violation.

⁴⁴ Under s. 561.29(3), F.S., the maximum fine that the division may impose for violations arising out of a single transaction is \$1,000.

Other Shipping Provisions

The bill amends the shipping prohibitions in ss. 561.54 and 561.545, F.S., to exempt deliveries made under s. 561.575, F.S., by licensed winery shippers to persons over 21 years of age or older.

The bill amends s. 561.57, F.S., to provide that an order placed over the Internet and received at a vendor's licensed place of business is construed as a sale actually made at the vendors licensed place of business. Current law permits vendors to make deliveries away from their place of business of sales made at the licensed place of business, including telephone and mail orders received, and these sales are construed as sales actually made at that location.

The bill also provides that common carriers or any licensee or other person using a common carrier as his or her agent are not prohibited from delivering alcoholic beverages within this state. It also exempts these persons from the reporting requirements in s. 562.20, F.S. It is not clear who is the "other person using a common carrier as his or her agent" referenced in this section. The bill requires that each common carrier acting as the designated agent for delivery must verify that the person receiving the alcoholic beverage is at least 21 years of age.

Florida Farm Wineries

The bill amends s. 599.004, F.S., to require that 60 percent of wine produced by a Certified Florida Farm Winery shall be made from Florida's agricultural products. The bill authorizes the Commissioner of Agriculture to waive this requirement in times of hardship. The bill does not define hardship.

The bill amends s. 561.24(5), F.S., to provide that any manufacturer of wine holding a license as a distributor on July 1, 2007, shall be entitled to renewal of that license. The bill provides the date of July 1, 2007, in place of the date provided in the "effective date of this act" referenced in current law. It also deletes the provision that this subsection does not apply to certified Florida Farm wineries. The effect of this provision is to restrict any certified Florida Farm Winery from being licensed as a distributor if the winery is not licensed as a distributor on the effective date of this act.

Severability

The bill provides that it is the intent of the Legislature that the courts disturb only as much of the regulatory system of this state as is necessary to enforce the United States Constitution if any portion of this act is declared unconstitutional.

Impairment of Contracts

The bill provides that notwithstanding the provisions of s. 561.585, F.S., contracts not otherwise prohibited by the Beverage Law shall not be impaired. The meaning and intent of this provision is unclear because it is not clear what types of contracts could be impaired by provisions not affected by the provisions in this bill, which are exclusively within the Beverage Law.

Rulemaking Authority

The bill authorizes the division to adopt rules to implement and administer this act.

Effective Date

The bill provides that this act shall take effect upon becoming law.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill raises Commerce Clause concerns under the U.S. Constitution because it prohibits direct shippers who produce more than 250,000 gallons of wine annually from being licensed under the bill. According to representatives for Florida producers, none of Florida's certified farm wineries produce more than the 250,000 gallons annually. Consequently, the limitation would only affect out-of-state wineries, and the bill may be considered as discriminating against out-of-state direct shippers because it provides for the regulation of out-of-state direct shippers of wine in a manner that differs from the requirements imposed on in-state wineries.

In *Granholm v. Heald*,⁴⁵ the U.S. Supreme Court held that laws in New York and Michigan that discriminated between in-state and out-of-state wineries in the regulation of the direct shipment of wine were unconstitutional. The Supreme Court held that these states' laws discriminated against interstate commerce in violation of the Commerce Clause, Art. I, s. 8, cl. 3 of United States Constitution and that the discrimination was not authorized nor permitted by the Twenty-first Amendment. The court stated that when a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, the court has generally struck down the statute without further inquiry. In determining the extent to which states may impose requirements on interstate commerce that discriminate in favor of in-state interests, *Granholm* applied the rule that states can generally regulate imported wine only to the same extent and in the same manner that they regulate domestically produced wine. If there is any disparate treatment, the court must consider whether a

⁴⁵ *Supra* at n. 19.

state's regulatory regime "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."⁴⁶ It is not clear what "legitimate local purpose" is served by the 250,000 gallon limit that is not discriminatory in favor of in-state interests.

Alternatively, a gallonage cap may not violate the commerce clause as interpreted in *Granholm* if the cap is applied even-handedly to all in-state and out-of-state wineries. If limited to the issue of discrimination against interstate interests through distinctions between in-state and out-of-state wineries to the commerce clause concern in *Granholm* may not be implicated.

The bill amends s. 561.54(2), F.S., but maintains the provision permits any licensee to bring an action in any court of competent jurisdiction to recover for the state all moneys obtained by common carriers or permit carriers; the operators of busses and other specified conveyances, and out-of-state state wine manufacturers or suppliers for violations of this section. By limiting this provision to out-of-state manufacturers, s. 561.54(2), F.S., may violate the commerce clause because it discriminates between in-state and out-of-state manufacturers.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

Direct shipper licensees will have to pay excise tax and sales tax on wine shipped to Florida.

B. Private Sector Impact:

Direct shipper licensees would have to pay a \$250 license and a renewal fee of \$250. Direct shipper licensees would have to pay excise taxes and sales taxes to the state.

C. Government Sector Impact:

The Revenue Estimating Conference concluded that license fees and tax revenues for this bill were indeterminate.

The Department of Business and Professional Regulation anticipates administration costs of \$609,358 to implement and maintain the licensing and registration process, the monthly tax reporting process, and audit process. The department advises that anticipated license fees and tax revenues will be insufficient to cover the anticipated administrative costs.

The department's cost estimate is based on the assumption that 1,800 of the current 4,862 federally licensed manufacturers will become licensed during the first year. The department's analysis sets forth the outer range of potential direct shipper licensees and tax revenue and does not reflect the department's actual expected number of direct

⁴⁶ *Supra* at n. 22.

shipper licensees, which the department is unable to estimate. According to the Wine Institute, a national association representing wine manufacturers, it anticipates that approximately three-fourths of its membership, or 600 wineries, would seek licensure in Florida as a direct shipper. This estimate is based on its experience in other states.

Since the bill creates an unranked third degree felony for a winery shipper who knowingly delivers wine to an underage person, the fiscal impact upon the Department of Corrections should be insignificant. However, there could be some indeterminate fiscal impact because of the misdemeanor penalties.

VI. Technical Deficiencies:

The bill amends s. 599.004, F.S., to require that 60 percent of wine produced by a Certified Florida Farm Winery shall be made from Florida's agricultural products. It is not clear whether 60 percent is a target, a minimum, or a cap for the amount of Florida agricultural products in wine produced by a Certified Florida Farm Winery. This provision should be amended to clarify that at least 60 percent of the wine produced by a Certified Florida Farm Winery shall be made from Florida's agricultural products.

Section 561.585(7)(c), F.S., provides a second degree misdemeanor for any person who knowingly and intentionally obtains wine from a winery shipper in violation of this section. It is not clear what provisions in this section may be violated by persons who are not a winery shipper or a common carrier, permit carrier, or other commercial conveyance.

Section 561.57(6), F.S., provides that common carriers or any licensee or other person using a common carrier as his or her agent are not prohibited from delivering alcoholic beverages within this state. It also exempts these persons from the reporting requirements in s. 562.20, F.S. It is not clear who is the "other person using a common carrier as his or her agent" referenced in this section. This section also provides that the prescribed age verification requirements give the common carrier, licensee, or other person hiring the common carrier a complete defense "of selling, giving, or serving alcoholic beverages to any person younger than 21 years of age." It is not clear who is the "other person hiring the common carrier" referenced in this section, and whether the intent is that that person is an alcoholic beverage licensee.

The bill provides that it is the intent of the Legislature that the courts disturb only as much of the regulatory system of this state as is necessary to enforce the United States Constitution if any portion of this act is declared unconstitutional. This provision does not reference the severability of any provisions in the bill. It is also not clear which portions of the "regulatory system of this state," the courts are directed to not disturb. It is also not clear which portions of the "regulatory system of this state," or the Beverage Law, that are not a part of this bill, would be affected if any provision of this act were held to be unconstitutional by a court.

As noted in the *Manual for Drafting General Bills* for the Florida Senate, the "[c]ourts do not need a severability section to sever unconstitutional provisions or applications and allow the

other provisions or applications to stand.”⁴⁷ If a severability clause is included in a bill, the standard severability clause provides:

If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.⁴⁸

VII. Related Issues:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

⁴⁷ *Manual for Drafting General Bills*, Legal Research and Drafting Services, Office of the Secretary of the Senate, The Florida Senate (5th Edition, 1999) at page 50.

⁴⁸ *Id.*

VIII. Summary of Amendments:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
