

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

Prepared By: The Professional Staff of the Regulated Industries Committee

**BILL:** CS/SB 764

**INTRODUCER:** Finance and Tax Committee, Regulated Industries Committee, and Senator Pruitt

**SUBJECT:** Wine Production and Shipment

**DATE:** April 15, 2009      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Rhea	RI	<b>Fav/CS</b>
2.	Fournier	McKee	FT	<b>Favorable</b>
3.		Whitfield	CPSC	<b>Favorable</b>
4.			GA	
5.				
6.				

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

The bill regulates the direct shipment of wine to Florida consumers by winery shippers and provides for licensure and regulation of winery shippers by the Division of Alcoholic Beverage and Tobacco (division). To legally ship wine directly to Florida consumers, an in-state or out-of-state winery shipper must meet the following basic qualifications for licensure. A winery shipper must:

- Be a manufacturer of wine that holds all applicable state and federal wine manufacturer permits and licenses;
- Not manufacture more than 250,000 gallons of wine per year, or be a subsidiary, or affiliated with, a winery that manufactures more than 250,000 gallons of wine annually;
- Not ship, or cause to be shipped, more than 12 cases of wine per calendar year to a household address;
- Meet the same basic license qualifications required for other Florida alcoholic beverage licensees; and
- Pay a \$250 license fee and renewal fee.

The bill also prohibits consumers from purchasing more than 12 cases of wine each calendar year. The bill provides that a licensed winery shipper may ship wine directly only to persons who are at least 21 years of age for personal use and not for resale. To ensure compliance with this requirement the bill requires that the winery shipper must:

- Verify the age of the purchaser at the time of sale and delivery; and
- Comply with the bill's container labeling requirement.

The bill also requires that the common carriers used to deliver the wine must keep records of wine deliveries into Florida for three years.

The bill requires that the winery shippers collect and remit all applicable excise taxes on wine to the division and sales taxes to the Department of Revenue, including discretionary local sales surtaxes. To ensure compliance with these requirements the bill requires that winery shippers:

- Register as a Primary American Source of Supply under s. 564.045, F.S.;
- Register with the Florida Department of Revenue;
- Calculate sales taxes as if the sale took place in this state;
- File a \$5,000 bond with the division;
- Make monthly reports to the division;
- Maintain records of sales for three years, and
- Submit to state audits.

The bill provides that licensed winery shippers consent to the jurisdiction of the division, any other state agency, and the courts of this state. They must also appoint a registered agent for acceptance of service of process.

It provides a first degree misdemeanor for any winery shipper, common carrier, permit carrier, or other commercial conveyance that delivers, ships, or causes to be shipped wine to a person under the age of 21. It provides a second degree misdemeanor for a consumer who violates the provisions of the bill by, for example, purchasing more than 12 case of wine from winery shippers during a calendar year.

The bill requires that at least 60 percent of wine produced by a Certified Florida Farm Winery must be made from Florida agricultural products. The Commissioner of Agriculture may waive this requirement in times of hardship. The bill authorizes the division to adopt rules to implement and administer the provisions of this act.

The bill provides an effective date of October 1, 2009.

This bill creates section 561.222, Florida Statutes. This bill substantially amends the following sections of the Florida Statutes: 561.24, 561.54, 561.545, 564.045, and 599.004.

This bill substantially amends, creates, or repeals the following 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 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.<sup>1</sup>

There are some exceptions to this regulatory system, usually for special circumstances. Typically the exemptions include allowing beer brew pubs to manufacture malt beverages and to sell them to consumers,<sup>2</sup> allowing individuals to bring small quantities of alcohol back from trips out-of-state,<sup>3</sup> and allowing in-state wineries to manufacture and sell directly to consumers.<sup>4</sup>

In Florida, alcoholic beverages are regulated by the Beverage Law.<sup>5</sup> These provisions regulate the manufacture, distribution, and sale of wine, beer, and liquor via manufacturers, distributors, and vendors.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> A manufacturer of wine may not be licensed as a distributor.<sup>9</sup> Florida law also prohibits any distributor or vendor from having an interest in any manufacturer.<sup>10</sup>

In *Granholm v. Heald* (*Granholm*),<sup>11</sup> 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.

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<sup>1</sup> 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 March 11, 2009).

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

<sup>3</sup> 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.

<sup>4</sup> See s. 561.221, F.S.

<sup>5</sup> The Beverage Law means chs. 561, 562, 563, 564, 565, 567, and 568, F.S. See s. 561.01(6), F.S.

<sup>6</sup> See s. 561.14, F.S.

<sup>7</sup> Section 561.02, F.S.

<sup>8</sup> Section 561.14(3), F.S. However, see discussion below regarding the exception for certified Florida Farm Wineries in s. 561.221, F.S.

<sup>9</sup> See s. 561.24, F.S. However, see discussion below regarding the exception for Florida manufacturers of wine in s. 561.221, F.S.

<sup>10</sup> See s. 561.42, F.S.

<sup>11</sup> *Granholm v. Heald*, 544 U.S. 460 (2005).

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

According to the Wine Institute,<sup>12</sup> as of February 2009, 33 states and the District of Columbia allow direct shipment of wine to consumers and many of these states require a license or permit to ship.<sup>13</sup> Two states require reciprocity with the shipping states and 15 states prohibit direct shipment of wine to consumers.<sup>14</sup> The Wine Institute includes Florida among the states in which direct shipment is permitted but requires the payment of excise taxes and consumer taxes.

### ***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 regulated the sale and importation of wine through three-tier systems and required separate licenses for manufacturers, wholesalers, and retailers. These schemes allowed 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 in place at the time,<sup>15</sup> wine producers were required to distribute their wine through wholesalers. Michigan had an exception for the approximately 40 in-state wineries that were eligible for a wine maker license that allowed 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 allowed them to sell to in-state wholesalers, but not directly to Michigan consumers.<sup>16</sup>

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<sup>12</sup> The wine Institute is an advocacy and public policy association for California wine. It represents more than 1000 wineries and affiliated businesses in California. See <http://www.wineinstitute.org/> (Last visited March 11, 2009).

<sup>13</sup> Florida is included in this list due to the injunction against enforcement of the provisions of ss. 561.54(1)-(2) and 561.545(1), F.S., in the *Bainbridge* case. Florida consumers are required by s. 212.06(8), F.S., to pay use taxes on their out-of-state purchases, but the excise tax on wine imposed by s. 564.04, F.S., requires payment of the excise tax by manufacturers and distributors. The Department of Revenue website does have a tax information link generally for Internet and out-of-state purchases.

<sup>14</sup> [http://www.wineinstitute.org/files/direct\\_shipping\\_laws\\_map.pdf](http://www.wineinstitute.org/files/direct_shipping_laws_map.pdf) (Last visited March 11, 2009).

<sup>15</sup> See Michigan Comp. Laws Ann. ss. 436.1109(1), 436.1305, 436.1403, and 436.1607(1) (West 2000).

<sup>16</sup> 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](http://www.michigan.gov/documents/LC-MW102_154466_7.DirectShipperRequirements.pdf) (Last visited March 11, 2009). 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.

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 United States Court of Appeals for the Sixth Circuit reversed,<sup>17</sup> 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.

### **New York Law**

New York's licensing scheme was somewhat different from Michigan's.<sup>18</sup> It also provided for distribution through the three-tier system and made exceptions for in-state farm wineries. Wineries that produced 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.<sup>19</sup>

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 United States Court of Appeals for the Second Circuit reversed, holding that New York's laws fell within the state's powers under the Twenty-first Amendment.<sup>20</sup>

### **Supreme Court Decision**

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

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<sup>17</sup> *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003).

<sup>18</sup> 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).

<sup>19</sup> New York amended its law, effective August 11, 2005 to provide for a Direct Shipper's License under certain circumstances. See N. Y. Alco. Bev. Cont. Law Ann. s. 79-c. 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 interstate direct shipper's license.

<sup>20</sup> *Swedenburg v. Kelly*, 358 F.3d 223 (2nd Cir. 2004).

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?<sup>21</sup>

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 of the Court of Appeals for the Second Circuit, which upheld the New York laws.<sup>22</sup>

*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.<sup>23</sup> 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."<sup>24</sup>

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.<sup>25</sup> 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.

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<sup>21</sup> *Granholm v. Heald*, 544 U.S. 460, 471(2005). Certiorari was granted at 541 U.S. 1062 (2004).

<sup>22</sup> *Granholm* at 466.

<sup>23</sup> 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 states laws, and the Twenty First Amendment of the U.S. Constitution.

<sup>24</sup> See *Granholm* at 489, quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988).

<sup>25</sup> See *Granholm* at 491.

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 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 wine<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup> 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**

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<sup>26</sup> 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.

<sup>27</sup> See s. 561.221(1), F.S.

<sup>28</sup> See s. 561.221(2), F.S.

<sup>29</sup> See s. 561.14(1), F.S.

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.<sup>30</sup>

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 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.<sup>31</sup> 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*),<sup>32</sup> 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*),<sup>33</sup> the United States 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.<sup>34</sup> 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**

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<sup>30</sup> See s. 599.004, F.S., which establishes the Florida Farm Winery program within the Department of Agriculture and Consumer Services.

<sup>31</sup> *Bainbridge v. Turner*, No. 8:99-CV-2681-T-27TBM (M.D. Fla.).

<sup>32</sup> *Bainbridge v. Martell*, 148 F.Supp.2d 1306 (M.D. Fla. 2001).

<sup>33</sup> *Bainbridge v. Turner*, 311 F.3d 1104 (11<sup>th</sup> Cir. 2002).

<sup>34</sup> *Bainbridge v. Turner*, No. 8:99-CV-2681-T-27TBM (M.D. Fla. August 5, 2005).



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 did not reference any licensure requirement for out-of-state direct shippers of wine. It stated 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 21." The division's Internet site also provided information for the payment of sales and excise taxes, the prohibition against sales in dry counties, and the underage sales prohibition.

However, the division has subsequently removed all references to direct wine shipment from its Internet site, including any directions to out-of-state direct shippers about how to remit tax payments.

According to the department, it is receiving approximately 680 monthly tax payment reports evidencing out-of-state wine deliveries to approximately 15,300 recipients. The division is uncertain whether all of the wine shippers are wineries.

For January 2009, the division's records indicate that 8,594.91 total gallons of wine were reported as shipped into the state directly to consumers. \$19,450.69 in excises taxes was paid to the division for that month. The average monthly excise tax paid in fiscal year 2007-08 by direct wine shippers was \$31,136.

### **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 manufacturer'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 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), F.S., 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.<sup>35</sup> According to the Tax and Trade Bureau, as of March 2009, there are 6,231 active federal basic permits in the U.S. for wine premises (wineries). Retailers and beer manufacturers (brewers) are not required to obtain a basic permit under the FAA Act.

### **Interim Project 2006-146**

Staff of the Senate Committee on Regulated Industries was assigned 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

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<sup>35</sup> 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.

surveying the concerns of the affected interests.<sup>36</sup> 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.

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;

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<sup>36</sup> See *Direct Shipment of Wine to Florida Consumers*, Interim Report No. 2006-146, Senate Committee on Regulated Industries, October 2005.

- 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 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:**

The bill creates s. 561.222, F.S., to provide for the licensure of winery shippers.

#### **Legislative Intent**

Section 561.222(1), F.S., sets forth the legislative intent. The bill states that strict regulation of the sale of alcoholic beverages 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 561.222(2), F.S., establishes the license requirements for a winery shipper license. It provides that a winery may directly ship wine to a resident of this state only with a winery shipper's license. The bill does not define the term "winery shipper" and it is not clear whether the term is limited to wine manufacturers who meet the winery shipper license qualifications in the bill or whether the term includes all wine manufacturers who directly ship wines to consumers.

Section 561.222(2)(a), F.S., provides that, to qualify for the license, a winery must:

- Not manufacture or sell more than 250,000 gallons of wine per year;
- Ship wines that the winery manufactures;
- Obtain a winery shipper's license.

The bill also requires that wineries ship to residents of this state that are at least 21 years of age for that person's personal use and not for resale. The bill does not specifically prohibit retail vendors from purchasing wine from a winery shipper.<sup>37</sup>

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

- Hold a wine producer basic permit issued in accordance with the Federal Alcohol Administration Act.<sup>38</sup>
- Hold a current wine manufacturer's license from the state in which it manufactures wine; and
- Hold a current license as a Primary American Source of Supply under s. 564.045, F.S. and register with the division all brands shipped.

The bill also requires that applicants for a winery shipper's license must qualify for licensure under s. 561.15, F.S.<sup>39</sup> It is uncertain what effect the requirement to meet the license qualification requirements under s. 561.15, F.S., would have on the availability of out-of-state wines from out-of-state wineries. Based on a review of federal wine permit requirements, and the wine manufacturer license requirements in California, New York, Oregon, and Washington,<sup>40</sup> 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. California law requires that a licensee not have any felony conviction or conviction related to its beverage law, but California law does not set specific time periods.<sup>41</sup> 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.

The bill requires a license application under s. 561.17, F.S., for licensure as a winery shipper, and provides that the information on the license application must be in the same information required by the division for licensure as a wine manufacturer. The winery shipper license application must include a copy of the following:

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<sup>37</sup> Section 561.14(3), F.S., prohibits a retail vendor from purchasing an 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."

<sup>38</sup> See Federal Alcohol Administration Act, codified at 27 U.S.C. s. 203.

<sup>39</sup> Section 561.15, F.S., sets forth the basic qualifications for an alcoholic beverage license. To qualify, an applicant must be of good moral character and not less than 21 years of age. Section 561.15, F.S., also prohibits licensure and licensure renewal to persons 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.

<sup>40</sup> According to the Wine Institute, these states represent approximately 98 percent of its member wineries.

<sup>41</sup> Cal. Bus. Prof. Code, ss. 23952 and 23958.

- The current basic permit as a wine producer and blenders permit issued in accordance with the Federal Alcohol Administration Act;
- The current state license to manufacture wine;
- Appointment of a registered agent in Florida for acceptance of service of process, which must be maintained and notification to the division of any change in the appointment;
- A sales tax registration number issued by the Department of Revenue;
- An affirmation of consent to the jurisdiction in the court of Florida and its agencies for the enforcement of s. 561.222, F.S., and any related laws or rules, including actions by third parties for violations of this section;
- A surety bond with the division for payment of taxes. The bill requires a surety bond in the amount of \$5,000 bond, but the division may 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. If the winery already has a surety bond on file with the division an additional bond is not required. The bill further provides that the division may not accept a bond of less than \$1,000. It deems the surety bond currently on file with the division pursuant to s. 561.37, F.S., to comply with this provision; and
- Payment of a \$250 license fee, which must be renewed by August 1 of each year by paying a renewal fee of \$250.

Regarding the requirement that an applicant must consent to jurisdiction of the Florida courts for actions by third parties, it is not clear that s. 561.222, F.S., provides any cause of action that may be maintained by a third party.

Section 561.222(2)(b), F.S., specifies the following conditions under which the division may issue or renew a winery shipper license:

- Not violating the conditions of licensure, requirements, or limitations in s. 561.222, F.S.;
- Producing or selling less than 250,000 gallons of wine annually;
- Not having a subsidiary or being otherwise affiliated winery that manufactures more than 250,000 gallons of wine annually;
- Not having an appointed distributor in this state, unless the winery gives the distributor one-year's notice of its intent to obtain a winery shipper's license or the winery provides to the division a copy of the applicant's contract with the appointed distributor showing that the winery does not violate the requirements of the law.

The term "affiliated wineries" is not defined by the bill or in the Florida Statutes.

### **Age Verification and Shipping Requirements**

Section 561.222(3)(a), F.S., provides age verification and shipping requirements for winery shippers and common carriers who ship wines from a winery shipper.

The bill requires that 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 younger than 21 years of age. The bill does not specify a method of verification.

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

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

The bill requires that winery shippers must refuse to ship or cause to be shipped more than 12 cases containing more than nine liters each of its wine per calendar year to any “one household address” in this state. The bill also prohibits consumers from purchasing more than 12 cases<sup>42</sup> containing more than nine liters each of its wine per calendar year.

The bill uses the terms “household” and “household address” but does not define either term.<sup>43</sup> It is not clear whether the use of alternate terms may lead to ambiguity and difficulty in enforcement. For example, if more than one household shares the same address, each household at the single address may be limited to purchasing less than the maximum allowable wine per year because of the bill’s delivery restriction.

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,<sup>44</sup> an identification card issued by this state or another state, a passport, or United States armed services identification card.

As noted previously, the bill does not specifically prohibit the purchase by alcoholic beverage vendors of wine from a winery shipper. Although the bill requires that the sale of wines under s. 561.222, F.S., must be for personal use and not for resale, the bill does not specifically prohibit the purchase by vendors from winery shippers or the resale by vendors of wine purchased from a winery shipper. It is a second degree misdemeanor for any person to sell alcoholic beverages without an alcoholic beverage license issued by the division.<sup>45</sup> It is not clear whether the bill prohibits licensed vendors from receiving wine from a licensed winery shipper. Section 561.14(3), F.S., prohibits retail vendors from purchasing or acquiring “in any manner for the purpose of resale any alcoholic beverages from any person not licensed as a vendor, manufacturer, bottler, or distributor under the Beverage Law.” The bill does not clarify whether a winery shipper is a manufacturer under the meaning of the prohibitions in s. 561.14(3), F.S., and whether a vendor is prohibited from purchasing wine from a winery shipper.<sup>46</sup>

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<sup>42</sup> According to an industry representative, a case contains 12 bottles of wine.

<sup>43</sup> Section 196.075(1)(a), F.S., relating to the homestead exemption for persons 65 and older, defines the term household to mean “a person or group of persons living together in a room or group of rooms as a housing unit, but the term does not include persons boarding in or renting a portion of the dwelling.” Section 409.509(4), F.S., defines a “household” as an individual or group of individuals living in a dwelling unit defined by the Department of Community Affairs.

<sup>44</sup> See s. 322.051, F.S.

<sup>45</sup> Section 562.12, F.S.

<sup>46</sup> Although s. 561.14(3), F.S., also prohibits the importation of alcoholic beverage by a retail vendor from places beyond the limits of the state, it is not clear whether purchase from an out-of-state winery shipper would constitute importation. The importation prohibition in s. 561.14(3), F.S., would not apply to purchases from in-state winery shippers. Therefore, the application of the importation prohibition to out-of-state winery shippers may raise constitutionality concerns related to the disparate treatment of in-state and out-of-state winery shippers.

Section 561.222(3)(b), F.S., requires that licensed winery shippers obtain the common carrier's written policy declaring that the common carrier shall, before delivery, adhere to the age verification requirements of this bill.

Section 561.222(3)(c), F.S., requires that a winery shipper must offer to its distributor for purchase and sale per calendar year the same brands and quantities of wine shipped per calendar year under this bill.

### **Taxes**

Section 561.222(4), F.S., requires that winery shippers pay monthly taxes to the Department of Revenue and all sales and excise taxes on wine to the division for sales in the preceding month. The bill provides that taxes shall be calculated as if the sale took place in this state and calculated as if the sales took place at the location where the delivery occurred. The bill requires the collection and payment of the discretionary sales surtaxes tax (local option sales tax)

Under current law, s. 212.0596, F.S., requires dealers making mail order sales in Florida to collect and remit Florida sales tax pursuant to s. 212.15, F.S. Section 212.15, F.S., provides for the monthly collection of sales tax and provides that the sales are due to the department on the first day of the succeeding month and are delinquent on the 21st day of such month.

Current law, in s. 212.0596(6), F.S., provides that dealers making mail order sales<sup>47</sup> in Florida are exempt from collecting and remitting any local option surtax unless the dealer is located in a county that imposes a surtax, the order is placed through the dealer's location in such county, and the property purchased is delivered into such county, or into another county that imposes a surtax. The bill would exclude winery shippers' sales from this exemption.

### **Reporting and Recordkeeping Requirements**

Section 561.222(5), F.S., 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;
- Quantity and brands of wine shipped;
- Total price of wine shipped;
- Amount of excise tax paid to the division; and
- Any other information that the division determines necessary to enforce this section.

This report is not required if the licensee files a monthly report pursuant to s. 561.55, F.S., that contains all the required information.<sup>48</sup> Section 561.222(6), F.S., requires each winery shipper

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<sup>47</sup> Section 212.0596(1), F.S., defines "mail order sale" to include tangible personal property ordered by mail or any other means of communication.

<sup>48</sup> In-state winery shippers would be required to file monthly reports under ss. 561.55 and 561.222, F.S. Under s. 561.55, F.S., licensed manufacturers are required to make monthly reports showing the amount of:



licensee to maintain records, electronically or otherwise, for at least three years after the date of delivery. The records must be available for inspection by the DOR and division upon request.

The bill requires that winery shippers must permit the division and the DOR 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 specifies the records that must be maintained by a winery shipper regarding wines shipped to residents of Florida, including:

- The license issued under s. 561.222, F.S.;
- Records of all wines ordered, sold, or shipped, the purchasers' names, address, and dates of birth of the purchasers,
- The name of the person to whom the wine was shipped, and the date of the shipment, quantity, and brands shipped; and
- All contracts with the common carriers for delivery, including the carrier's written wine delivery policy.

### **Common Carrier Requirements**

Section 561.222(7), F.S., 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;
- Maintain a written wine delivery policy as specified in the bill;
- 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 signature.

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

### **Penalties**

Section 561.222(8), F.S., provides that the division may suspend or revoke a winery shipper's license or impose a fine for a violation of this section.

Section 561.222(8), F.S., imposes criminal penalties. It provides a first degree misdemeanor for any winery shippers that ships or causes to be shipped wine to a person in this state under the age

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- (a) Beverages manufactured or sold within the state and to whom sold;
  - (b) Beverages imported from beyond the limits of the state and to whom sold;
  - (c) Beverages exported beyond the limits of the state, to whom sold, the place where sold, and the address of the person to whom sold.

of 21.<sup>49</sup> This criminal penalty applies to a “winery shipper licensee.” If a winery that is not licensed under s. 561.222, F.S., ships wine to a Florida consumer under 21 years of age, the criminal penalty does not appear to apply.

The bill also provides a first degree misdemeanor for any common carrier, permit carrier, or other commercial conveyance that delivers wine directly to any person in this state who is under 21 years of age.

A second degree misdemeanor is also provided for persons who obtain wine from a winery shipper in violation of s. 561.222, F.S. the only prohibition against obtaining wine in s. 561.222, F.S., is the prohibition against consumers purchasing more than 12 cases of wine from winery shippers per calendar year. Under this penalty provision, a consumer could be charged with a second degree misdemeanor if he or she purchases more than 12 case of wine from winery shippers during a calendar year.

### **Rulemaking**

The bill authorizes the division to adopt rules to administer and enforce s. 561.222, F.S.

### **Primary American Source of Supply Brand Registration**

The bill amends s. 564.045, F.S., to require primary American source of supply brand registration for winery shippers.

### **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.

### **Florida Farm Wineries**

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, 2008, shall be entitled to renewal of that license. The bill 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.

The bill amends s. 599.004, F.S., to revise the qualifications for a Florida Farm Winery to replace the term “vineyards” with a reference to lands in Florida which produce commodities used in the production of wine. It also requires that at least 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.

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<sup>49</sup> Section 562.11, F.S., prohibits the selling, giving, or serving of an alcoholic beverage to a person under 21 years of age. The penalty is a misdemeanor of the second degree.

## Severability

The bill provides for severability if any provision of the act or its application to any person or circumstance is held invalid.

This provision does not reference the severability of any specific provisions in the bill. 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.”<sup>50</sup> 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.<sup>51</sup>

## Effective Date

The bill provides an effective date of October 1, 2009.

## 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:

#### Gallonage Limits

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

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<sup>50</sup> *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.

<sup>51</sup> *Id.*

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*,<sup>52</sup> 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 state's regulatory regime "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."<sup>53</sup> 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.

Four states have imposed limits on the number of gallons that wineries can produce annually to be eligible to direct ship wines to consumers in the state. The constitutionality of gallonage limits in Kentucky, Massachusetts, and Arizona have been challenged. The gallonage cap in Ohio has not been challenged. The gallonage limits in Arizona and Kentucky have been held to be constitutional. However, the gallonage limit in Massachusetts was held to unconstitutional.

In the Kentucky case, *Cherry Hill Vineyards v. Hudgins, L.L.C.*,<sup>54</sup> the court held that the state's 50,000 gallon limit did not discriminate against out-of-state state producers and did not violate *Granholm* because the limit provides similar licensing opportunities to in-state and out-of-state wineries. The court stated that the limit does not give Kentucky wineries a competitive advantage over similarly situated out-of-state wineries. In the Arizona case, *Black Star Farms, L.L.C. v. Oliver*,<sup>55</sup> the court held that the state's 20,000 gallon limit was facially neutral. It noted that, as of 2004, more than half of the 2000 wineries in the United States were able to qualify under the Arizona gallonage cap. It also noted that the number of wineries that produced less than 20,000 gallons of wine a year

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<sup>52</sup> *Supra* at n. 19.

<sup>53</sup> *Supra* at n. 22.

<sup>54</sup> *Cherry Hill Vineyards v. Hudgins, L.L.C.*, 488 F.S. Supp.2d 601 (W.D. Ky. 2006).

<sup>55</sup> *Black Star Farms, L.L.C. v. Oliver*, 544 F.Supp.2d 913 (D. Ariz. 2008).

“dwarfed the number of in-state wineries” that were able to qualify for Arizona’s direct shipment license. The court also stated that “the simple fact that there are more out-of-state wineries than in-state wineries that produce more than 20,000 gallons of wine per year and are thus required to adhere to the three-tiered distribution system in order to gain access to Arizona's wine market does not by itself establish patent discrimination in effect against interstate commerce.”<sup>56</sup>

However, in *Family Winemakers of California v. Jenkins*,<sup>57</sup> the court held that the 30,000 gallon limit in Massachusetts to be unconstitutional because it was designed to allow all in-state wineries to continue direct shipping while forcing the majority of interstate wine to go through the three-tier system, thereby preserving the economic interests of both Massachusetts wholesalers and Massachusetts wineries. The court was particularly persuaded by the state’s exemption for fruit wine, which benefited the only in-state winery that, absent the exemption, would have exceeded the production cap. The district court also noted that the cap blocked approximately 98 percent of out-of-state wine production while allowing 100 percent of Massachusetts wineries to sell directly to consumers. The court noted that this clearly conferred a disproportionate benefit on both Massachusetts wineries and wholesalers.

### **Regulation of Common Carriers**

The bill’s requirements for winery shippers and common carriers raise concerns relating to federal preemption over the regulation of common carriers. The bill requires that common carriers maintain delivery records for three years and make the records available to inspection by the division upon request. In *Rowe v. New Hampshire Motor Transport Association*,<sup>58</sup> the U.S. Supreme Court held that federal regulation of carriers, including the Motor Carrier Act of 1980<sup>59</sup> and the Federal Aviation Administration Authorization Act of 1994,<sup>60</sup> pre-empted the State of Maine’s regulations for the delivery of tobacco products that were intended to prevent the delivery and sale of tobacco products to minors. (See discussion, *supra*.) Maine’s regulations required that the persons shipping cigarettes into Maine utilize only delivery companies that used specified delivery services, including recipient-verification services. The Supreme Court rejected the state’s argument that its regulations were intended to prevent minors from obtaining cigarettes.

### **Florida Farm Wineries**

The bill amends s. 599.004, F.S., to authorize the Commissioner of Agriculture in times of hardship to waive the requirement that at least 60 percent of wine produced by a Certified Florida Farm Winery be made from Florida’s agricultural products. The bill does not define hardship. This may constitute an unconstitutional delegation of legislative authority.

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<sup>56</sup> *Id.* at 925-926.

<sup>57</sup> *Family Winemakers of California v. Jenkins*, No. 1:06-CV-11682-RWZ (E.D. Mass 2008).

<sup>58</sup> *Rowe v. New Hampshire Motor Transport Association*, 128 S.Ct. 989 (2008).

<sup>59</sup> 94 Stat. 793.

<sup>60</sup> 108 Stat. 1605-1606.

An invalid delegation of authority violates the principal of separation of powers in Art. II, s. 3, Fla. Const.<sup>61</sup> When assigning to an agency a regulatory responsibility, the legislature must provide the agency with adequate standards and guidelines when delegating the duties.<sup>62</sup> The executive branch must be limited and guided by an appropriately detailed legislative statement of the standards and policies to be followed.<sup>63</sup> Arguably, the bill may unconstitutionally delegate authority because it fails to provide the Commissioner of Agriculture with any standards by which to judge what qualifies as a hardship.

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

The bill imposes a \$250 license and an annual \$250 license renewal fee for the winery shipper license created under s. 561.222, F.S. Winery shipper licensees would have to pay excise taxes and sales taxes to the state.

As of the date of this analysis, the Revenue Estimating Conference has not determined the fiscal impact of this bill. The bill is substantively identical to CS/SB 1096, that was filed during the 2008 Regular Session and that died in messages having passed the Senate. For CS/SB 1096, the Revenue Estimating Conference determined that the bill would have generated \$4 million in revenue for FY 2008-09 on an annualized basis. Of this amount, \$3 million was General Revenue, \$.5 million for the Alcoholic Beverage and Tobacco Trust Fund, and \$.5 million for local revenue.

### B. Private Sector Impact:

The Department of Business and Professional Regulation estimates that 2,104 wineries nationwide would become licensed winery shippers during FY 2009-10. In addition to the license fee, winery shipper licensees would incur costs related to the record keeping and reporting requirements of the bill.

Common carriers may incur expenses to comply with the record keeping requirements of this bill. One common carrier, United Parcel Service (UPS or “the carrier”), has expressed its concerns with the provision in s. 561.222(7)(d), F.S., that requires common carriers to maintain delivery records for three years and make the records available to inspection by the division upon request. The carrier advised there would be significant costs related to maintaining its records of wine deliveries to Florida for three years. There also may be costs, including legal expenses, related to responding to the division’s inspection requests. It is not clear to what extent the UPS’s concerns reflect the concerns of other common carriers.

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<sup>61</sup> *Gallagher v. Motors Insurance Corp.*, 605 So.2d 62 (Fla. 1992).

<sup>62</sup> *Florida East Coast Industries, Inc. v. Dept. of Community Affairs*, 677 So.2d 357 (Fla. 1st DCA 1996).

<sup>63</sup> *Florida Home Builders Association v. Division of Labor*, 367 So. 219 (Fla. 1979).

**C. Government Sector Impact:**

According to the Department of Business Regulation, the Division of Alcoholic Beverages and Tobacco indicated that it will require additional personnel and travel costs in order to implement and maintain the licensing process, the monthly tax reporting process and audit process (beginning in FY 2008-09) required by this bill. The division will need one additional position, an OPS Regulatory Specialist II, to review and process the initial license applications for the out-of-state shippers during the first year of implementation. It will need seven Revenue Specialist I positions to process the monthly tax reports from the out of state shippers.

Beginning in FY 2010-11, the department will need 17 Tax Auditor II positions to perform annual audits of the out-of-state winery shippers to ascertain the validity of the reported information pertaining to individual shipments into Florida and to verify that unlawful shipments are not being made into Florida. The division estimates additional travel of \$24,000 annually per auditor. The division's Bureau of Enforcement will need one additional Administrative Assistant II to prepare and process official notices, prepare and track administrative cases, and collect and receipt civil penalties for violations.

The Division of Information Technology will need one additional position, a Systems Programming Administrator, to develop and maintain auditing and compliance programs.

The department estimated recurring expenditures of \$458,567 and non-recurring expenditures of \$71,191, for a total of \$529,758 for FY2009-10

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Regulated Industries on March 17, 2009:**

The committee substitute:

- Deletes the provision in s. 561.222(3)(a)2.c., F.S., of the bill that requires that the label on the box of wine state that the wine is for personal use and not for resale.
- Deletes the provision in s. 561.222(3)(a)3., F.S., of the bill that requires that the common carrier's signature form must also inform the recipient that their signature acknowledges that the wine is for personal or household use and not for resale.
- Amends s. 561.222(4), F.S., to require winery shippers to collect discretionary sales surtaxes.

- Amends s. 561.222(7)(d), F.S., to delete the requirement for each delivery that the common carrier obtain the address of the recipient and a signed acknowledgment that the wine is for personal use and not for resale.
- Amends s. 561.222(8), F.S., to provide criminal penalties. It also deletes the procedure for the issuance of a cease and desist order by the division, including the authority to impose a fine of not more than \$50,000.
- Amends s. 599.004(1)(a), F.S., to revise the qualifications for a Florida Farm Winery to replace the term “vineyards” with a reference to lands in Florida which produce commodities used in the production of wine.
- Extends the effective date from July 1, 2009 to October 1, 2009.

B. Amendments:

None.