HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 837 Production and Shipment of Wine
SPONSOR(S): Dorworth and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 854

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Consumer Affairs Subcommittee	14 Y, 1 N	Livingston	Creamer
2) Government Operations Appropriations Subcommittee			
3) Rules & Calendar Committee			
4) Economic Affairs Committee			

SUMMARY ANALYSIS

The Division of Alcoholic Beverages and Tobacco in the Department of Business and Professional Regulation is responsible for regulating alcoholic beverages within the state. Florida's alcoholic beverage law provides for a structured three-tiered distribution system: manufacturer, wholesaler, and retailer. The retailer makes the ultimate sale to the consumer. Alcoholic beverage excise taxes are collected at the wholesale level and the state “sales tax” is collected at the retail level.

The traditional three tier system of alcohol beverage distribution utilized by Florida and many other states was held to be legitimate by the U.S. Supreme Court as long as state laws satisfy the key holdings of applicable Court opinions. As a result, out-of-state wineries are allowed to make direct shipments of wine to adult consumers in Florida without regulatory oversight by the Division of Alcoholic Beverages and Tobacco except for the collection of excise taxes applicable to the transaction.

The bill creates a “winery shipper license” and authorizes winery shipper licensees to ship wine directly to Florida consumers for their personal use only and not for resale. Among its provisions, the bill specifies the qualifications for a winery shipper license, including the requirement that the winery sell no more than 250,000 gallons of wine per licensed premises per year, provides for labeling of packages and the signature of the recipient, provides for monthly reports, requires payment of taxes and specifies penalties for violations.

The Revenue Estimating Conference has not yet estimated the revenue impact of this bill, however, it is anticipated that the bill will have a positive fiscal impact to the state due to increased efficiencies in the collection of taxes under a structured regulatory framework.

The bill has an effective date of July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

The Division of Alcoholic Beverages and Tobacco (Division) in the Department of Business and Professional Regulation (DBPR) is responsible for regulating the conduct, management, and operation of the manufacturing, packaging, distribution, and sale within the state of alcoholic beverages. Florida's alcoholic beverage law provides for a structured three-tiered distribution system: manufacturer, wholesaler, and retailer. The retailer makes the ultimate sale to the consumer. Alcoholic beverage excise taxes are collected at the wholesale level based on inventory depletions and the state "sales tax" is collected at the retail level.

In recent years there has been an expansion of solicitations and advertisements for alcoholic beverage sales, particularly wine, via magazines, specialty catalogues, direct mailings and, more recently, the Internet.[1] During this same time period, consumers and wine industry interests have sought the ability to legally ship wine into the various states through reciprocity laws or laws allowing for limited direct shipping from manufacturers to consumers.

Out-of-state wineries shipping wine directly to consumers located in other states was addresses by the U. S. Supreme Court in *Granholm v. Heald*.[2] In its decision, the Court attempted to balance two parts of the U. S. Constitution: the Commerce Clause which requires unrestricted, non-discriminatory trade between the states and the 21st Amendment which gives regulatory power to the states over all alcoholic beverage sales within that state's borders.

The Court made a clear distinction between laws regarding direct sales by wine producers as distinguished from the state's regulation within its borders of the resale of alcohol beverages. The traditional three tier system of alcohol beverage distribution utilized by Florida and many other states was held to be legitimate as long as state laws satisfy the key holdings of *Granholm.*

As a result of applicable court decisions, in 2006, the Secretary of the DBPR announced that Florida could allow out-of-state wineries to make direct shipments of wine to adult consumers in Florida. At that time, the Division received their first reports from out-of-state entities for direct wine sales made in the state beginning in 2006.

Proposed Changes

The bill creates s. 561.222, F.S., to provide a license and regulatory mechanism for the direct shipment of wine by licensed winery shippers into or within Florida for personal consumption. Among its provisions, the bill specifies the qualifications for a winery shipper license, provides for labeling of packages and the signature of the recipient, provides for monthly reports, requires payment of taxes, and specifies penalties for violations.

The bill creates a "winery shipper license" and statutorily authorizes winery shipper licensees to ship wine directly to Florida consumers for their personal use only and not for resale. To qualify for a winery shipper license the applicant must:

- file an application with the Division and pay a $250 fee;
- produce or sell less than 250,000 gallons of wine per manufacturer premises per year;
- obtain and maintain licensure as a primary American source of supply ("Primary American source of supply" means the manufacturer, rectifier, or bottler, or their legally authorized exclusive agent, who, if the product cannot be secured directly from the manufacturer by an

[1] Federal law, 18 USC 1716 (f), prohibits mailing any alcoholic beverage through the U. S. Postal Service.
[2] *Granholm v. Heald*, 125 S.Ct. 1885 (May 16, 2005)

American distributor, is the source closest to the manufacturer in the channel of commerce from whom the product can be secured;
- provide the Division with a copy of its current wine manufacturer's license issued by this or another state;
- provide the Division with a copy of its current federal basic permit as a wine producer;
- meet qualifications for licensure:
    - good moral character, be 21 years old or older, no conviction of criminal activity within the last 5 years;
    - appointment of a registered agent in this state;
    - sales tax registration number issued by the Department of Revenue;
    - consent to jurisdiction of Florida courts; and
    - file a $5,000 surety bond with the Division.

The bill specifies shipping requirements to be met by a licensed winery shipper to include verifying the purchaser's age at the point of sale and labeling the shipping container indicating the package contains alcohol, the recipient must be at least 21 years of age, and an adult signature is required.

The bill requires a common carrier acting as an agent for delivery to a consumer to verify that the person receiving the alcoholic beverage is at least 21 years of age. A licensee is prohibited from shipping more than 12 cases containing no more than nine liters each per calendar year to any one address.

The bill requires winery shipper licensees to pay the appropriate excise tax to the Division and the appropriate sales tax to the Department of Revenue monthly. To establish that the transfer of title takes place in Florida and that sales and excise taxes are due in Florida, the bill specifies that taxes be calculated as if each sale takes place at the location where the delivery occurs in Florida. Records of the direct shipments, including the names, addresses, amounts, and dates of shipments to persons in this state must be maintained and are subject to audit by the Division or the Department of Revenue.

The bill establishes penalties for violations of the newly created winery shipper licensure requirements and provides that in addition to other penalties provided in the beverage law, the Division may suspend or revoke a winery shipper's license or impose a fine. The bill specifies other violations which carry a criminal penalty of a misdemeanor of the second degree.

The bill also contains a severability clause and rulemaking authority for the Division and the Department of Revenue.

Florida Farm Winery

<u>Current Situation</u>

Section 599.004, F.S., establishes the criteria necessary to be designated as a certified Florida Farm Winery. The Commissioner of Agriculture is authorized to recognize a certified Florida Farm Winery as a state tourist attraction, and the Department of Transportation is authorized to place logo, emblem and directional signs on the state's interstate, primary and secondary highways. To qualify as a certified Florida Farm Winery a winery must:

- Produce or sell less than 250,000 gallons of wine annually;
- Maintain a minimum of 10 acres of owned or managed vineyards in Florida;
- Be open to the public for tours, tastings, and sales at least 30 hours each week;
- Make application for the designation and pay an annual fee of $100.

<u>Proposed Changes</u>

The bill amends the criteria for designation as a certified Florida Farm Winery by requiring at least 60 percent of wine produced at the winery be made from Florida agricultural products.

The bill changes the 10 acres of vineyard requirement to allow the 10 acres to be land which produces ingredients used in the production of wine.

B. SECTION DIRECTORY:

Section 1. Creates s. 561.222, F.S., creating a winery shipper license that authorizes the direct shipment of wine for personal consumption; establishes qualifications and restrictions; imposes labeling requirements; provides signature requirements; requires monthly reports; requires collection and remittance of sales taxes and payment of excise taxes; authorizes audits; provides jurisdiction; establishes penalties; and provides rule making authority.

Section 2. Amends s. 561.24(5), F.S., to remove the authority for renewal of distributor licenses held by a wine manufacturer and to grandfather in existing licensees.

Section 3. Creates s. 561.54(3), F.S., exempting shipments of wine by a licensed winery shipper from direct shipping prohibitions.

Section 4. Amends s. 561.545, F.S., to exempt wines shipped by a licensed winery shipper from the direct shipping prohibitions and penalties in this section.

Section 5. Amends s. 561.045, F.S., to specify application of provisions as a primary American source of supply to applicants for a winery shipper's license.

Section 6. Amends s. 599.004, F.S., to add new criteria to be a certified Florida Farm Winery.

Section 7. Provides for severability.

Section 8. Effective date – July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The DBPR and Division calculate that the bill will increase the number of licenses with an associated fee. It is anticipated that 2,575 wineries will become licensed as winery shippers and pay a fee of $250 each in the first fiscal year. This is estimated to generate approximately $643,750 in state trust funds. This fee will also be paid on an annual basis for renewal of the winery shipper licenses. In addition, these winery shippers will be required to register their wine brands and pay a brand fee of $15 for each brand registered.

The bill provides for the payment of sales taxes and sales tax surcharges on the sale of wine products. The Revenue Estimating Conference has not yet estimated the revenue impact of this bill.

2. Expenditures:

The DBPR indicates there will be a cost associated with the implementation of this bill. An electronic filing mechanism must be obtained to accept the winery shippers' monthly reports, and employees must be in place to license the wineries, receipt the tax revenues, and audit the sales for consistency with the statutory requirements.

The division would require 11.5 temporary positions for the first full month to review and process anticipated new licensees. In addition, the division will need three additional permanent employees.

According to DBPR, with the number of entities that would be receiving a winery shipper license, the division will need OPS positions for three months to perform the initial application review and approval. After the initial licensing workload is completed, 3 permanent positions will be required to maintain and renew these licenses and process any subsequent applications; validate receipt of the reports and payments each month; audit the winery shipper report data for verification of adherence to statutory requirements and to calculate and monitor the limit of gallons sold to each recipient or recipient household.

The total expenditures for these resources are estimated to be $216,328 in FY 2011-12, and $157,832 annually thereafter.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill provides for the collection and distribution of sales tax and the local option discretionary sales surtax. Licensed winery shippers, both in-state and out-of-state, will be required to pay the surtax at the rate imposed by the county where delivery is made. The Revenue Estimating Conference has not yet estimated the bill's revenue impact on local governments.

2. Expenditures:

Indeterminate.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill statutorily specifies that it is lawful to sell and ship wine by out of state wineries to Florida consumers and, therefore, creates a regulatory structure for wine sales transactions.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

Lawsuits have been filed in other states to challenge the constitutionality of imposing limits on the number of gallons that wineries can produce annually to be eligible to direct ship wines to consumers in the applicable state. Generally, the courts have upheld the constitutionality of the gallonage limits. Opinions track the reasoning that the limits do not discriminate against out-of-state wine producers and do not violate *Granholm* because the limit provides similar licensing opportunities to in-state and out-of-state wineries.[3]

B. RULE-MAKING AUTHORITY:

The bill specifies broad rule making authority for the Division and the Department of Revenue relating to the implementation of the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

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[3] See for example *Cherry Hill Vineyards v.Hudgins, LLC, 488 F.S. Supp.2d 601 (W.D. Ky.2006).*

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.