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 Committee on Regulated Industries

BILL: SB 642

INTRODUCER: Senator Hays

SUBJECT: Distilled Spirits

DATE: March 25, 2013 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Pre-meeting**
2.			AFT	
3.			AP	
4.				
5.				
6.				

I. Summary:

SB 642 permits craft distilleries to sell the distilled spirits they produce on their licensed premises, to consumers for both on and off premises consumption. The bill defines a "craft distillery" to mean a licensed distillery that produces 75,000 or fewer gallons of distilled spirits on its premises. The bill does not define the time period for the production limitation.

The sales must be made on private property contiguous to the licensed distillery premises, and included on the sketch submitted with the license application and approved by the Division of Alcoholic Beverage and Tobacco (division) within the Department of Business and Professional Regulation. Craft distilleries and licensed distilleries may only sell distilled spirits in face-to-face transactions with consumers making the purchases for personal use and not for resale.

The bill requires that craft distilleries must cease making sales to consumers on the day after they reach the 75,000 gallon production limitation. The craft distilleries may not ship to consumers within the state. However, the craft distillery may ship, arrange to ship, or deliver manufacturers of distilled spirits, wholesale distributors, bonded warehouses, and exporters.

The bill permits licensed distilleries to own 100 percent of a vendor's license and to transport distilled spirits to any vendor's licensed premises on property contiguous to the distillery and owned or leased by the distillery. It allows a distillery operating as a vendor under this bill to purchase alcoholic beverage directly from another distillery. The distillery is responsible for submitting any beverages excise taxes in its monthly report to the division with any tax payments due to the state.

The bill authorizes the division to adopt rules to administer s. 565.03, F.S.

The bill would take effect on July 1, 2013.

This bill substantially amends section 565.03, Florida Statutes.

II. Present Situation:

In Florida, alcoholic beverages are regulated by the Beverage Law.[1] These provisions regulate the manufacture, distribution, and sale of wine, beer, and liquor via manufacturers, distributors, and vendors.[2] The Division of Alcoholic Beverage and Tobacco (division) within the Department of Business and Professional Regulation is the agency authorized to administer and enforce the Beverage Law.[3]

Section 565.01, F.S., defines the terms "liquor," "distilled spirits," "spirituous liquors," "spirituous beverages," or "distilled spirituous liquors" to mean:

> that substance known as ethyl alcohol, ethanol, or spirits of wine in any form, including all dilutions and mixtures thereof from whatever source or by whatever process produced.

Section 565.03(1)(a), F.S., requires each liquor manufacturer to pay an annual $4,000 license tax for each plant or branch it operates in the state, if the manufacturer is engaged:

- In the business of distilling spirituous liquors and nothing else; or
- In the business of rectifying and blending spirituous liquors and nothing else.

Licensed liquor manufacturers may also rectify and blend spirituous liquors in addition to distill without paying an additional license tax.[4]

Florida law does not define the term "distillery."

According to the Florida Craft Distillers Guild, there are 15 distilleries that are located in Florida and members of the guild.[5]

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. In a three-tier system, each license classification has clearly delineated functions.

In Florida, only licensed vendors are permitted to sell alcoholic beverages directly to consumers at retail.[6] Vendors are limited to purchasing their alcoholic beverage inventory from licensed

[1] The Beverage Law means chs. 561, 562, 563, 564, 565, 567, and 568, F.S. *See* s. 561.01(6), F.S.
[2] *See* s. 561.14, F.S.
[3] Section 561.02, F.S.
[4] Section 565.03(1)(b), F.S.
[5] *See* Florida Craft Distillers Guild at http://floridadistillers.org/members (Last visited March 27, 2013).

distributors, manufacturers, or bottlers.[7] Alcoholic beverage manufacturers cannot hold a vendor's license.[8] Importers, whether resident or nonresident, are licensed to sell, or to cause to be sold, shipped, and invoiced, alcoholic beverages to licensed manufacturers or licensed distributors, and to no one else. An importer can have no direct or indirect affiliation with any vendor licensed in this state.[9]

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.[10]

There are some exceptions to this regulatory system. The exceptions include allowing vendors to manufacture malt beverages[11] and to sell them to consumers,[12] allowing individuals to bring small quantities of alcohol back from trips out-of-state,[13] and allowing in-state wineries to manufacture and sell directly to consumers.[14]

There are two license options that permit vendors to manufacture malt beverages for sale directly to consumers. Section 561.221(2), F.S., permits a vendor to manufacturer malt beverages, even if the vendor is also licensed as a distributor. The malt beverages the vendor manufactures must be sold on property consisting of a single complex that includes a brewery and other structures that promote the brewery and the tourist industry of the state. The property may be divided by no more than one public street or highway. This type of license does not limit the amount of malt beverages that may be manufactured.

Section 561.221(3), F.S., permits a vendor also to be licensed as a manufacturer of malt beverages if the vendor is engaged in brewing malt beverages at a single location in an amount that does not exceed 10,000 kegs per year.[15] The malt beverages must be sold to consumers for consumption on the vendor's licensed premises or on contiguous licensed premises owned by the vendor. These vendors are known as "brew pubs."

Florida law allows in-state wineries to manufacture and sell directly to consumers.[16]

Florida's Direct Shipping Prohibition

Section 561.545(1), F.S., prohibits the direct shipping of all alcoholic beverages to consumers

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[6] Section 561.14(3), F.S. However, see discussion supra regarding the exceptions.
[7] Section 561.14(3), F.S. Vendors may buy from vendors in a pool buying group if the initial purchase was by a single purchase by a pool buying agent.
[8] Section 561.22, F.S.
[9] Section 561.14(5), F.S.
[10] 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.lanepowell.com/wp-content/uploads/2009/04/pricee_001.pdf (Last visited February 28, 2013).
[11] Section 563.01, F.S., defines the terms "beer" and "malt beverage" to mean all brewed beverages containing malt.
[12] *See* ss 561.221(2) and (3), F.S., which permits the limited manufacture of beer by vendors.
[13] *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.
[14] *See* s. 561.221(1), F.S.
[15] Section 561.221(3)(a)1., F.S., defines the term "keg" as 15.5 gallons.
[16] *See* s. 561.221, F.S.

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 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.

III. Effect of Proposed Changes:

Definitions

The bill creates s. 565.03(1)(a), F.S., to define the term "craft distillery" to mean a licensed distillery that produces 75,000 or fewer gallons of distilled spirits on its premises. The bill does not define the time period for the production limitation.

The bill creates s. 565.03(1)(b), F.S., to define the term "distillery" to mean a manufacturer, rectifier, blender, or processor of distilled spirits; and

The bill amends s. 565.03(2)(a)1., to require businesses engaged in manufacturing, rectifying, blending, or processing distilled spirits to pay a state license tax of $4,000. Current law applies the license tax to liquor manufacturers that are engaged in the business of distilling spirituous liquors and nothing else.

The bill maintains the current exemption from the annual $4,000 license tax for distilleries engaged in the business of only rectifying and blending spirituous liquors.

Craft Distillery License

The bill creates s. 565.03(1)(c), F.S., to permit a craft distillery to sell the distilled spirits it produces on its premises, to consumers, for both on and off premises consumption.

The bill requires that the sales be made on private property contiguous to the licensed distillery premises, and included on the sketch submitted with the license application.[17] The bill requires that the division approve any subsequent revisions to a craft distillery's sketch to verify that the retail location operated by the craft distillery is "owned or leased by the craft distillery and on property contiguous to the craft distillery's production building.

Section 565.03(1)(c), F.S., prohibits craft distilleries and licensed distilleries from selling distilled spirits except in face-to-face transactions with consumers making the purchases for personal use and not for resale. The bill references both craft distilleries and licensed distilleries in the context of the face-to-face transaction requirement. This is the only provision in s. 565.03(1)(c), F.S., that references both craft distilleries and licensed distilleries. It is not clear whether it is the intent of the bill to permit all distilleries to sell distilled spirits directly to consumers, but that only the craft distilleries are subject to the other restrictions in s. 565.03(1)(c), F.S.

Section 565.03(1)(c)1., F.S., provides that this paragraph does not impact any land use for a craft distillery approved before July 1, 2013.

Section 565.03(1)(c)2., F.S., requires the craft distillery to report to the division with five business days after it has reached the 75,000 gallon production limitation. The craft distillery must cease making sales to consumers on the day after it reaches the production limit.

Section 565.03(1)(c)3., F.S., prohibits the craft distillery from shipping their distilled spirits to consumers within the state. However, the craft distillery may ship, arrange to ship, or deliver distilled spirits to manufacturers of distilled spirits, wholesale distributors, bonded warehouses, and exporters.

The bill creates s. 565.03(5)(a), F.S., to provide that the Beverage Law does not prohibit a licensed manufacturing distillery from owning 100 percent of a vendor's license, if:

- The vendor's premises meets the minimum qualifications for the vendor's license;
- The vendor's licensed premises are owned or leased by the distillery; and
- The vendor's licensed premises are situated on property contiguous to the licensed premises where distilled spirits are produced.

The bill creates s. 565.03(5)(a), F.S., to permit a licensed distillery to transport its distilled spirits, if in compliance with federal and state alcoholic beverage laws and administrative rules, to any vendor's licensed premises on property contiguous to the distillery and owned or leased by the distillery. Notwithstanding s. 561.14, F.S.,[18] a licensed distillery that is also licensed as a vendor may purchase or acquire alcoholic beverage products produced at another licensed distillery in this state directly from that distillery. The intent of this provision is unclear because it is not clear that current law prohibits this activity. Section 561.14(3), F.S., prohibits vendor from purchasing or acquiring in any manner for the purpose of resale any alcoholic beverages

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[17] *See* s. 561.01(11), F.S., which defines the term "licensed premises" to include the area embraced within the sketch that appears on, or is attached to, the application for the license.

[18] Section 561.14, F.S., prohibits vendors from

from any person not licensed as a vendor, manufacturer, bottler, or distributor under the Beverage Law.

The bill requires that a distillery that transports its distilled spirits to its licensed retail premises or makes sales at its own retail location is responsible for submitting any beverages excise taxes under the Beverage Law in its monthly report to the division with any tax payments due to the state.

The bill authorizes the division to adopt rules to administer s. 565.03, F.S.

Effective Date
The bill would take effect on July 1, 2013.

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:

Granholm vs. Heald
In *Granholm v. Heald*,[19] 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 system. 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 . . . ."

[19] *Granholm v. Heald*, 544 U.S. 460, 471(2005).

Under the Michigan law in place at the time,[20] wine producers were required to distribute their wine through wholesalers. Michigan had an exception and allowed the in-state wineries to ship directly 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.[21]

New York's licensing scheme was somewhat different from Michigan's.[22] It also provided for distribution through the three-tier system and made exceptions for in-state farm wineries to ship to in-state consumers. An out-of-state winery could ship directly to consumers only if the winery became licensed as a New York Wine shipping license, established a distribution operation in New York, and had a physical presence in the state, i.e., a warehouse, office, or storeroom. New York law did not require a separate direct shipping license for its farm wineries.[23]

The United States Supreme Court consolidated the cases and held 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.[24]

Granholm explicitly noted that states may regulate the distribution and sale of wine via a three-tier system of licensed manufacturers, distributors, and retailers and could prohibit the direct shipment of alcoholic beverages to consumers.[25]

Bainbridge v. Turner

Florida's direct shipping prohibition was challenged in the case of *Bainbridge v. Turner* by wine consumers and out-of-state wineries.[26] After the Supreme Court issued its

[20] *See* Michigan Comp. Laws Ann. ss. 436.1109(1), 436.1305, 436.1403, and 436.1607(1) (West 2000).

[21] 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 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.

[22] *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).

[23] 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.

[24] *Granholm* at 466.

[25] 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.

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

decision in *Granholm*, the case resulted in two written federal appellate court opinions. In the first opinion, *Bainbridge v. Martelli* (*Bainbridge I*),[27] 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*),[28] 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.

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.[29] 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.

Face-to-Face Transaction Requirement

Although the holdings in *Granholm vs. Heald* and *Bainbridge v. Turner* were limited to wine sales by wineries to consumers, the holding in these cases may implicate the prohibition in s. 561.545(1), F.S., as applied to the sale of distilled spirits by out-of-state manufacturers to Florida consumers. Regarding the face to-face transaction requirement in the bill, one federal appellate circuit court has ruled that a face to face transaction prerequisite for direct sales from a manufacturer to consumers was unconstitutional. In *Cherry Hill Vineyard, L.L.C., v. Lilly*, [30] the United States First Circuit Court of Appeals held that Maine's face-to-face transaction requirement for sales by a farm winery to consumers was unconstitutional because it discriminated against out-of-state manufacturers.

However, since *Granholm*, several federal circuit courts have upheld face-to-face transaction requirements as lawful prerequisites for wineries to make direct sales of wine to consumers in the First, Fifth, Sixth, and Ninth Circuits.[31] In *Cherry Hill Vineyard, LLC v. Baldacci*, the court held that *Granholm* and related cases could be distinguishable because the state's statutory scheme allowed farm winery licenses that were available on equal terms to both in-state and out-of-state vineyards and the state prohibited direct shipping evenhandedly across the board. The plaintiffs in this case were unable to prove that allowing farm wineries to sell face to face, either on the premises or at an approved in-state location discriminated against interstate commerce to violate the Commerce Clause.

[27] *Bainbridge v. Martell*, 148 F.Supp.2d 1306 (M.D. Fla. 2001).
[28] *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002).
[29] *Bainbridge v. Turner*, No. 8:99-CV-2681-T-27TBM (M.D. Fla. August 5, 2005).
[30] *Cherry Hill Vineyard, L.L.C., v. Lilly*, 551 F.3d 423 (6th Cir. 2008).
[31] *See Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, (5th Cir.2010); *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, (9th Cir 2010); *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, (1st Cir.2007); and *Baude v. Heath*, 538 F. 3d 608 (6th Cir. 2008).

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

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.)

None.

B. Amendments:

None.