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Committee on Regulated Industries

Senator Dennis L. Jones, D.C., Chair

DIRECT SHIPMENT OF WINE TO FLORIDA CONSUMERS

SUMMARY

In *Granholm v. Heald*,¹ the U.S. Supreme Court held that states 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 regulatory scheme that was invalidated by *Granholm* is comparable to Florida's regulatory scheme that permits in-state wineries to sell their wines directly to consumers but prohibits out-of-state persons from directly selling alcoholic beverages to Florida consumers. In *Bainbridge v. Turner*,² the court enjoined the enforcement of ss. 561.54(1)-(2) and 561.545(1), F.S., which prohibit the direct shipping of alcoholic beverages to consumers from out-of-state, as unconstitutional under the authority in *Granholm* because they 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.

This report reviews the status of the current law, and addresses the issues and concerns presented by the courts' rulings. The report concludes that there is some uncertainty regarding the extent to which it is currently legal to direct ship wines and other alcoholic beverages into Florida, and recommends legislative clarification to resolve this uncertainty.

The *Granholm* decision and the *Bainbridge* court's injunction present two options regarding the continued legality of direct shipping wines into Florida. The Legislature could prohibit the direct shipping of wine, and eliminate the ability of in-state wine manufacturers to sell wine directly to Florida consumers.

Alternatively, the Legislature could continue to permit the legal direct shipment of wine and regulate the practice for out-of-state wine manufacturers, while maintaining the ability of in-state wine manufacturers to sell wine directly to consumers. Should the Legislature choose to regulate direct shipment, staff recommends that the Legislature legalize the direct shipment of wine and regulate the practice by requiring that direct shippers be licensed by the state. Licensure could be limited to persons who operate a winery located in the United States, or include persons operating a foreign winery and out-of-state retailers.

In addition to licensure, the Legislature should require that a direct shipper pay the state sales tax and excise tax on wine, and 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. The Legislature should also require age verification procedures for the point of sale, point of delivery, or both, that, at minimum, require that an adult provide proof of age with a valid photographic identification.

Licensed direct shippers should be required to maintain records of sales and shipments into the state, permit state regulators to have access to these records, and make monthly reports of their sales and shipments to the Division of Alcoholic Beverage and Tobacco within the Department of Business and Professional Regulation. Out-of-state direct shippers should also be required to maintain a bond to secure payment of taxes, pay all attorney's fees and costs in any action to collect unpaid taxes, and pay for all travel related costs necessary to conduct a compliance audit.

¹ *Granholm v. Heald*, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005).

² *Bainbridge v. Turner*, No. 8:99-CV-2681-T-27TBM, (M.D. Fla. August 5, 2005).

BACKGROUND

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. In Florida, only licensed vendors are permitted to sell alcoholic beverages directly to consumers.³ Manufacturers may not be licensed as distributors,⁴ and distributors or vendors may not have an interest in any manufacturer.⁵

Granholm vs. Heald

In *Granholm*, 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 court held that this differential treatment violated the Commerce Clause, Art. I, s. 8, cl. 3 of the U.S. Constitution. *Granholm* explicitly noted that states may regulate the distribution and sale of wine via a three-tier system and that states may prohibit the direct shipment of alcoholic beverages to consumers.⁶ However, states may not impose requirements on interstate commerce that discriminate in favor of in-state interests.

Florida’s Direct Shipping Prohibition

Section 561.545(1), F.S., prohibits the direct shipping of all alcoholic beverages to consumers from out-of-state. It also prohibits common carriers from transporting alcoholic beverages from an out-of-state location to anyone in this state who does not hold a valid manufacturer, wholesaler, or exporter’s license, or who is not a state-bonded warehouse. A violation may result in a felony of the third degree. Section 561.545(5), F.S., exempts sacramental alcoholic beverages shipped to bona fide religious organizations

and 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 vehicles, except to manufacturers, wholesalers, or exporters, or bonded warehouses in this state. Florida’s prohibition against direct shipping is limited to the direct shipping of alcoholic beverages from out-of-state into Florida; it does not prohibit direct shipping from an in-state winery to another state.

Florida law also provides an exception to the general prohibition against manufacturers of alcoholic beverages selling directly to consumers. Florida permits in-state wine⁷ manufacturers to sell their wines directly to consumers. Florida also permits certified Florida Farm Wineries to conduct tastings and sales of wine directly to consumers at Florida fairs, trade shows, expositions, and festivals.⁸ A certified Florida Farm Winery must produce or sell less than 250,000 gallons of wine annually.⁹

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.¹⁰ This law suit challenged Florida’s statutory scheme that prohibits out-of-state wineries from shipping their products directly to Florida consumers while permitting in-state wineries to do so. On August 5, 2005, the United States District Court, Middle District of Florida, enjoined the enforcement of ss. 561.54(1)-(2) and 561.545(1), F.S., as unconstitutional under the authority in *Granholm* because they discriminate against out-of-state wineries by prohibiting them from selling and delivering wine directly to customers when in-state wineries are not so prohibited.¹¹

METHODOLOGY

Committee staff reviewed the relevant case law and state and federal statutory provisions, including resources from other states, and the rules adopted by

³ Section 561.14(3), F.S.

⁴ See s. 561.24, F.S. However, see discussion below regarding the exception for Florida manufacturers of wine in s. 561.221, F.S.

⁵ See s. 561.42, F.S.

⁶ The Court’s analysis is based, in part, upon the Webb-Kenyon Act, 27 U.S.C. s. 122, which prohibits the shipping of alcoholic beverages into a state in violation of that state’s laws, and Twenty First Amendment of the U.S. Constitution.

⁷ Section 564.01(1), F.S., defines the term “wine.”

⁸ See s. 561.221(2), F.S.

⁹ See s. 599.004, F.S., which establishes the Florida Farm Winery program within the Department of Agriculture and Consumer Services, and specifies the certification requirements.

¹⁰ *Bainbridge v. Turner*, No. 8:99-CV-2681-T-27TBM (M.D. Fla.)

¹¹ *Bainbridge v. Turner*, No. 8:99-CV-2681-T-27TBM (M.D. Fla., August 5, 2005).

the Department of Business and Professional Regulation (DBPR). Staff met and/or conducted telephone interviews with the staff of the DBPR, the Office of the Attorney General, representatives from the Wine Institute, which is a national proponent for direct shipping, and representatives for the affected industries, including Florida wine manufacturers, alcoholic beverage distributors, retailers, and common carriers. Staff reviewed materials provided by the Florida Coalition to Prevent Underage Drinking. Staff also conducted telephone interviews with representatives from other state governments, the Alcohol and Tobacco Tax and Trade Bureau within the U.S. Department of the Treasury, and other interested parties.

FINDINGS

The *Granholtm* decision and *Bainbridge* court's injunction of the enforcement of ss. 561.54 and 561.545, F.S., present two options regarding the continued legality of direct shipping wines into Florida. The Legislature could prohibit the direct shipping of wine, and eliminate the ability of in-state wine manufacturers to sell wine directly to Florida consumers. Alternatively, the Legislature could continue to permit the legal direct shipment of wine and regulate the practice as long as both the in-state and out-of-state direct shippers were treated in a non-discriminatory manner.

The opponents of direct shipment assert that minors would have greater access to alcoholic beverages, it would hurt the three-tier system, it would facilitate tax avoidance, and it would hurt the state's retailers. The advocates of legal direct shipment of wine assert that consumers would have improved access to more wines, and could save money by purchasing wines over the Internet. They also assert that regulation could prevent or limit sales to minors and provide for the collection of applicable taxes.

Legal Status of the Direct Shipment Prohibition

There is some uncertainty regarding the current legality of direct shipping wines and other alcoholic beverages into Florida, and legislative clarification is required to resolve this uncertainty. Despite the *Bainbridge* injunction of ss. 561.54(1)-(2) and 561.545(1), F.S., other statutes not affected by the court's injunction may continue to bar the practice. For example, s. 562.12, F.S., provides that it is a second degree misdemeanor to sell alcoholic beverage without a license, s. 561.17,

F.S., requires that a person must be licensed to distribute, sell, or in any way deal in alcoholic beverages, and s. 562.01, F.S., requires payment of excise taxes. Arguably, an out-of-state direct shipper could not legally direct ship alcoholic beverages into Florida without first obtaining a license from the division, and paying the excise tax.

The legal status of direct shipping is also complicated by the vague and imprecise terms used in the *Bainbridge* final order. The court held that ss. 561.54 and 561.545, F.S., discriminate against out-of-state wineries to the advantage of in-state producers. The final order did not discuss the constitutionality of the direct shipment ban as applied to non-wineries from out-of-state, including out-of-state retailers. However, the critical language in the court's final order enjoined the enforcement of ss. 561.54 and 561.545, F.S., "against out-of-state vendors and producers."¹² It is not clear whether this injunction permits direct shipment by out-of-state wineries and non-wineries, or whether it was the court's intention to limit the application of the injunction to out-of-state wineries.

According to the DBPR, the division is interpreting the court's order as applicable only to out-of-state wine manufacturers. The division intends 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. The division does not intend to issue vendor permits to out-of-state retailers who wish to direct ship wines into the state.

The *Bainbridge* court limited its order to wine and did not address the constitutionality of the prohibitions in ss. 561.54 and 561.545, F.S., with respect to beer and distilled spirits (liquor). There are currently no legal challenges to Florida's prohibition against the direct shipment of beer and liquor.

Florida Wineries

Vineyards and wineries can be found throughout the state.¹³ According to the division, there are 37 licensed wineries in Florida. There are 14 certified Florida farm

¹² *Id.*

¹³ See *History of Wine Making in Florida*, Florida Department of Agriculture and Consumer Services. This document can be found at the department's Internet address located at: http://www.florida-agriculture.com/consumers/wine_history.htm (last visited August 8, 2005).

wineries.¹⁴ According to Florida wine industry representatives, Florida wineries have approximately 125 to 154 employees, with an annual payroll of over \$1.5 million. These wineries have over 300,000 annual visitors, and pay over \$600,000 in sales taxes, over \$600,000 in excise taxes, and over \$100,000 in local property taxes and licenses.¹⁵

Florida wine industry representatives oppose the option of eliminating the ability of in-state wine manufacturers to sell wine directly to consumers. According to these representatives, the right to conduct direct sales to consumers at their vineyards is crucial to the Florida wineries' efforts to overcome the domestic marketplace's prejudice against non-California wines, and the continued viability of the Florida wineries. The bulk of winery sales, approximately 70 percent, are made directly to consumers in face-to-face sales at the winery, and 15 to 20 percent of sales are delivered directly to consumers via common carriers.

According to Florida wine industry representatives, out-of-state wineries have several economic and legal advantages not shared by Florida wineries. For example, they make no Florida sales and excise tax payments. Certified Florida wineries also have a legal limit to the size of their business; they must produce or sell less than 250,000 gallons of wine annually. To be equitable, the Florida wineries argue that out-of-state wineries should have the same requirements as their in-state counterparts. A gallonage limitation may permit the majority of out-of-state direct shippers to participate in a Florida direct shipment market. For example, according to the Wine Institute, 90 percent of its member wineries produce less than 100,000 gallons a year.

Enforcement of Direct Shipment Restrictions

The primary enforcement mechanism for legalized direct shipment is licensure. According to division and industry representatives, licensure submits the direct shippers to the state's jurisdiction, and the threat of license revocation helps ensure compliance with the

¹⁴ A complete listing of certified Florida Farm Wineries can be found at the Internet address of the Department of Agriculture and Consumer Services located at: http://www.florida-agriculture.com/consumers/wineries_info.htm (last visited August 8, 2005).

¹⁵ These estimated amounts are derived from information provided by two Florida wineries that combined constitute approximately 70 percent of the Florida market in terms of tax collections.

state's requirements, including tax payments. In *Granholm*, the court stated that tax collection and other regulatory objectives could be achieved by requiring a permit as a condition of direct shipping.¹⁶

According to division and alcoholic beverage industry representatives, direct shippers should also be subject to the same regulatory requirements that in-state vendors and manufacturers are required to comply with. These include requirements to maintain records, permit state access to these records, and submit to periodic audits by state regulators. There may be travel related costs associated with auditing out-of-state direct shippers. In-state wine manufacturers have stated they do not want to assume the additional cost of paying for state audits. It is not clear whether Florida can require out-of-state direct shippers to pay for the cost of auditing, but, in *Granholm*, the court applied the rule that the court must consider whether a state's disparate regulatory regime "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."¹⁷

As an enforcement mechanism, licensure may be effective for persons who seek to legally direct ship into the state. However, other mechanisms are needed to enforce compliance by persons who choose to evade the state's direct shipment requirements or who do not qualify to be legal direct shippers.

In *Granholm*, the court noted that federal law gives wine manufacturers further incentives to comply with state regulations. The court noted that the Alcohol and Tobacco Tax and Trade Bureau (bureau) within the U.S. Department of the Treasury (formerly the Bureau of Alcohol, Tobacco, and Firearms) may revoke a winery's federal license, which a winery needs to operate in any state, if it violates state law.

The Federal Alcohol Administration Act (FAA Act)¹⁸ requires a basic permit issued by the bureau 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 spirits or producing wine, and for persons who engage in the business of purchasing for resale at wholesale distilled spirits, wine or malt beverages. Retailers and beer

¹⁶ *Granholm* at 1906.

¹⁷ See *Granholm* at 1890, quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988).

¹⁸ See Federal Alcohol Administration Act, codified at 27 U.S.C. s. 203.

manufacturer (brewers) are not required to obtain a basic permit under the FAA Act.

In 2000, the bureau ruled that its basic permits are conditioned upon compliance with state laws, and that it may suspend or revoke the basic permit of a permittee who ships alcoholic beverages into a state in violation of the laws of that state.¹⁹ However, the bureau's authority does not extend to direct shippers who are retailers or beer brewers.²⁰ According to bureau representatives, the bureau is not aware of any instances in which it has sought to revoke or discipline a wine manufacturer's federal permit for violations of state law. The bureau advises that it seeks voluntary compliance before attempting to discipline a permit holder.

Because the potential deterrent of losing a federal permit is not applicable to persons who are not required to hold a federal alcoholic beverage permit, including retailers and brewers, and because such a threat may not discourage all such federal permit holders, the state may need to enforce any limitations and prohibitions in court.

The ability of the state to enforce direct shipping restrictions against out-of-state persons in court may be limited by the doctrine of *in personam* jurisdiction, also known as personal jurisdiction. This legal doctrine requires that a court must have a legal basis to exercise jurisdiction over a person. Florida residents and Florida-based businesses clearly fall within the jurisdiction of the state's courts, including the federal courts located in Florida, but out-of-state persons may not. Florida's state and federal courts have jurisdiction over a non-resident only if there are sufficient jurisdictional facts for the court to exercise its jurisdiction.²¹

It is not clear to what extent a state or federal court would have jurisdiction over an out-of-state direct shipper. In *Dept. of Business and Professional Regulation v. Sam's Wines and Liquors*, the court

¹⁹ See AFT Ruling 2001-1, *Direct Shipment Sales of Alcoholic Beverages*, Bureau of Alcohol, Tobacco and Firearms (currently Alcohol and Tobacco Tax and Trade Bureau). A copy may be found at: <http://www.ttb.gov/alcohol/info/revrule/rules/2000-1.htm>. (Last visited September 15, 2005.)

²⁰ *Id.*

²¹ A detailed discussion of personal jurisdiction issues can be found at Philip J. Padovano, *Florida Civil Procedure*, Vol. 5, 2004-2005 Edition, (West's Florida Practice Series), sections 1.2 and 8.7.

dismissed Florida's complaint against an out-of-state direct shipper of wines because the Florida court lacked jurisdiction over the out-of-state defendant.²²

In *Granholm*, the Supreme Court did not address the issue of personal jurisdiction but stated that the Twenty-first Amendment gives state attorneys general the power to sue wineries in federal court to enjoin violations of state law. The Twenty-first Amendment Enforcement Act,²³ provides the federal district courts with subject matter jurisdiction over any action brought by a state attorney general against a person who is engaged in, or has engaged in, the illegal transportation of alcoholic beverages into the state.²⁴ The act also prohibits the direct shipment of wine into a state in violation of state laws and authorizes a state attorney general to bring a civil action to enjoin direct shipment.²⁵ There are no reported cases in which a state attorney general has invoked the act.

Direct Shipment and Minors

It is unclear whether, or to what extent, direct shipping may affect minors' access to alcohol. To date, there are no studies that show a link between direct shipping and an increased risk of delivery or sales of alcoholic beverages to minors. Most instances in which alcohol purchases are made via mail order or the Internet by minors, or in which deliveries by common carrier are made to minors, have involved investigations, or sting operations, conducted by state regulators.²⁶ The representative for the Florida Coalition to Prevent Underage Drinking also stated that several television news services have made similar investigative efforts. There is no evidence that such violations tend to occur outside of these controlled circumstances. States that permit direct shipment have generally reported few or

²² *Department of Business and Professional Regulation v. Sam's Wines and Liquors*, No. 96-3602, (Fla. 2nd Cir. Ct., September 3, 1997), *affirmed* 731 So.2d 655 (Fla. 1st DCA 1999).

²³ 27 U.S.C. s. 122a. This act became law on January 16, 2001.

²⁴ See also 27 U.S.C. s. 124, which prohibits the direct shipment of wine into a state in violation of state laws and also authorizes the state attorneys general to bring a civil action.

²⁵ This provision was enacted on November 2, 2002.

²⁶ For example, in early 2005, a 20 year-old university student ordered wine and tequila over the Internet at the behest of Florida's Attorney General's Office. See Alisa Ulferts, "Crist Sides With Retailers on Mail-Order Alcohol Law," *St. Petersburg Times*, February 2, 2005, 1B.

no problems with shipments to minors. For example, a 2003 study by the Federal Trade Commission found that the 26 states allowing direct shipments reported no problems with minors' increased access to wine.²⁷

The measures designed to avoid direct shipping alcohol to minors address the issue when the sale is made (point of sale) or when the actual delivery is made (point of delivery).²⁸ Point of sale measures involve commercial services designed to confirm the identity and age of the person making a particular purchase via telephone, mail order, or the Internet. These services utilize public and private credit records and various public databases.

Point of delivery age verification requires that an adult provide proof of age and valid photographic identification at the time the delivery is made. The proof of age at the point of delivery may be required of the person who made the purchase, the person accepting the delivery, or both.

Direct shipping proponents and representatives for Florida wine manufacturers expressed concerns that point of sale age verification requirements impose additional, unreasonable costs to transactions, and that point of delivery measures should sufficiently address the concern. They also note that not all wineries have the technological systems needed to utilize these services. The division and representatives for Florida vendors recommend that direct shippers should be required to verify the age of the recipient prior to shipment.

The Model Direct Shipment Bill proposed by the Wine Institute requires that containers of alcoholic beverages shipped directly into a state must be conspicuously labeled with the words "Contains Alcohol: Signature of Person Age 21 or Older Required for Delivery."

It is illegal to use the U.S. Mail to deliver alcoholic beverages.²⁹ Consequently, direct shipments of alcoholic beverages must be made by use of the direct shipper's own vehicles or by common carriers.

²⁷ See *Possible Anticompetitive Barriers to E-Commerce: Wine*, Federal Trade Commission (July 2003).

²⁸ For a detailed discussion of age verification systems see: *Final Report of the COPA Commission Presented to Congress*, Commission on Online Child Protection, October 20, 2000. A copy of the report is available at <http://www.copacommission.org/report> (last visited August 11, 2005).

²⁹ See 18 U.S.C. s. 1716(f)

Representative for two national common carriers advised that the direct shippers should be required to use the age verification services provided by common carriers, and that any labeling requirement should not specify the form and words used on the label.

They also expressed the concern regarding the exposure of their delivery persons to criminal penalties if they deliver an alcoholic beverage to a person less than 21 years of age. Representatives for Florida's alcoholic beverage retailers believe that direct shippers and common carriers should be held to the same standards as Florida retailers because the prospect of arrest and criminal sanctions deters under age sales.

Tax Collection

Florida alcoholic beverage industry representatives assert that direct shipment results in lost tax revenue to the state, and that, if legalized, direct shippers should be required to pay all applicable state sales and excises taxes.

Wine sales in Florida are subject to two forms of taxation: the excise tax on wine and the sales tax. Section 564.06, F.S., imposes an excise tax on wines.³⁰ As surety for the payment of taxes, s. 561.37, F.S., requires the each distributor and manufacturer secure a bond acceptable to the division. The required bond for a wine manufacturer is \$5,000. Florida law does not provide a bond for vendor sales because the state's three-tier system requires tax collection by the distributor. The division recommends that a surety bond in the amount of \$15,000 to \$25,000 would be a sufficient surety for payment of taxes by out-of-state direct shippers of wine. Florida wine manufacturers have expressed the concern that a \$25,000 surety bond may be too high.

Alcoholic beverages are also subject to the six percent sales tax imposed by s. 212.06, F.S. In *Quill v. North Dakota*,³¹ the U.S. Supreme Court held that there must be a sufficient connection between a state and a retailer before the state can impose a tax. It is unclear whether

³⁰ Section 562.16, F.S., also prohibits the possession of untaxed alcoholic beverages. It provides an exception for possession of less than one gallon of 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. This provision does not specify whether the consumer can personally ship into the state the beverages that the consumer purchased out-of-state.

³¹ 504 U.S. 298 (1992)

alcoholic beverages are exempted from the nexus requirement, but licensure may constitute a sufficient nexus to permit the state to tax sales made from out-of-state.

Section 564.045, F.S., requires registration of wine brands for the purpose of tax revenue control. The annual license fee for each brand is \$15. All Florida wineries that conduct direct sales to consumers must register and pay the fee for each brand they sell. Section 564.045, F.S., does not require brand registration for out-of-state state direct shippers.

License Fees

Under the Beverage Law, Florida wine manufacturers must pay a state license tax for a manufacturer, distributor, and a vendor's license. Section 564.02(1), imposes the license taxes for vendors who sell wine for consumption on premises that range from \$120 for counties having a population of less than 25,000 to \$280 for counties having a population of over 100,000. For direct shipment, the vendor's license for sales limited to consumption off premises would appear to be the relevant license tax which is equal to 50 percent of the on-premises license tax.³²

Other Limitations on Direct Shipment

A review of various Internet wine merchants and brochures for mail-order wine reveals that many of these direct shippers do not appear to be wine manufacturers, but are third party retailers who sell wines from several manufacturers. Wines from these third party merchants are widely available. Some states limit licenses for direct shipment to wine manufacturers.³³

According to Florida alcoholic beverages industry representatives, if legalized, Florida should limit direct shipment licensure to wine manufacturers because permitting non-manufacturers to direct ship would erode the state's three-tier system. They also assert that Florida-licensed out-of-state direct shippers should be required to meet the same licensure requirements as Florida-based licensees. These include the license

³² According to industry representatives, some wine manufacturers have a consumption on the premises license for wine tastings and sales.

³³ See s. 16.09, Texas Alcoholic Beverage Code, which limits licensure to persons who operate "a winery located in the United States and holds all state and federal permits."

qualification requirements in s. 561.15, F.S., which requires that alcoholic beverage licensees must be of good moral character and not less than 21 years of age, prohibits persons who hold certain criminal records from being licensed, and requires criminal background checks.³⁴

Representatives for the distributors stated that, if direct shipment were legalized, the practice should be limited to consumers and licensed retail vendors should not be permitted to obtain wine outside of the established alcoholic beverage distribution system.

Some states limit the quantity of alcoholic beverages that may be directly shipped into the state. For example, New York's recently enacted direct shipment law limits direct shippers to no more than 36 cases (no more than nine liters each case) per year to a resident of the state.³⁵ According to a Florida wine industry representative, a monthly shipment limit of two to four cases (9 liters or 12 bottles per case) would reduce their sales by less than one percent.

Two bills, SB 480 by Senators Saunders and Dockery and SB 2552 by Senator Geller, which were filed in the 2005 Regular Session, required that wines could only be shipped to persons who were registered with the division to receive shipments. Both bills provided that a person who illegally obtains wine from a direct shipper commits a second degree misdemeanor. Consumer registration may provide a means to verifying that direct shippers are not exceeding shipping limitations. Opponents of consumer registration argue that consumer registration is not necessary and that direct shipper reporting requirements should be sufficient to verify compliance. According to the department, consumer registration would also require additional regulatory costs.

RECOMMENDATIONS

The *Granholtm* decision and the *Bainbridge* court's injunction of the enforcement of ss. 561.54 and 561.545, F.S., present two options regarding the direct shipping of wine into Florida. Unless otherwise indicated, the term direct shipper in these recommendations includes in-state and out-of-state direct shippers of wine.

³⁴ See ss. 561.15, 561.17, and 561.18, F.S.

³⁵ See s. 79-c, N. Y. Alco. Bev. Cont. Law Ann.

Should the legislature choose to continue to prohibit all direct shipment of wines into Florida, staff recommends that the Legislature eliminate the ability of in-state wine manufacturers to sell wine directly to Florida consumers.

Should the Legislature choose to maintain the ability of in-state wine manufacturers to sell wine directly to Florida consumers, staff recommends that the Legislature legalize the direct shipment of wine and regulate the practice. The principal method to regulate direct shipment is to establish licensure requirements for a direct shipper. The Legislature should create a single license classification to license out-of-state and in-state direct shippers of wines, and require licensure as a condition of legal direct shipping. The Legislature should consider 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 retailer, 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 Legislature should consider the following additional options for regulating direct shipment:

- 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 wine purchased directly from a licensed 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 the delivery;

- Require that containers of wine shipped directly into the state 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 the sales taxes;
- Amend s. 564.045, F.S., to require that direct shippers register all wine brands before shipping, selling, or offering for sale any wine to a consumer in Florida;
- Require payment of a license fee comparable to the fee required for an in-state wine vendor;
- Require that direct shippers maintain records of sales and shipments of wine into Florida, and require that the direct shippers permit state regulators to have access to these records;
- Require that direct shippers pay all attorney's fees and costs in any action to collect unpaid taxes;
- Require monthly reporting to the Division of Alcoholic Beverage and Tobacco that detail all shipment of wine made into Florida, including the number of bottles shipped, to whom the wine was shipped, the identity of the common carrier making the shipment, and the brands shipped.
- Require periodic audits of direct shippers by the division, that all monthly 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.