

**Direct Wine Shipments
Testimony before PA
Senate Law & Justice Cte.
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Terri Cofer Beirne
Eastern Counsel

Wine Institute is a non-profit, trade association representing 1,000 California wineries. CA wineries produce 90% of all US wine, and are responsible for 64% of PLCB wine sales by dollar and 53% by unit. Wine Institute supports "direct-to-consumer" wine shipments under model legislation allowing the broadest variety of wine with the fewest consumer restrictions, which prevents underage access, enables tax collection, and safeguards the three-tier system. Wine Institute has worked in the 39 jurisdictions, home to more than 85% of US wine consumption, that currently allow direct wine shipments. (See attached map.)

Also attached is a spreadsheet with the major provisions of the two bills being reviewed by this Committee: **SB 790 (Earll)** and **SB886 (Farnese)**. Wine Institute supports a bill with express details about license/permit eligibility, quantity limits, price of license/permit and renewal, tax collection, reporting, package labeling, and adult signature for delivery. **We respectfully request passage of a bill detailing all aspects of the proposed program, leaving nothing to the discretion of the PLCB via time-consuming or complicated rules or regulations.**

Granholm Prohibits Economic Discrimination against Out-of-State Wineries

In 2005, in Granholm v. Heald the US Supreme Court addressed MI and NY statutes allowing in-state wineries to ship wine to residents while prohibiting out-of-state wineries from doing the same. The Court held that these laws deprived citizens of access to markets of other states on equal terms and "on their face" discriminate against interstate commerce under the Commerce Clause. The Court also held that economic discrimination is not permitted, even when balanced against the state's authority to regulate the transportation and importation of alcohol under the 21st Amendment. State laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of state economic interests that benefits the former and burdens the latter."

In the wake of Granholm, PA administratively extended the privileges of PA limited wineries to out-of-state wineries. However, common carriers have opted not to ship wine into PA, and Wine Institute has advised members that PA law does not create a permit that is clear regarding taxation, reporting and other necessary requirements. While PA wineries continue to ship within PA, only a few out-of-state wineries have limited winery licenses. **Wine Institute is thrilled with the PA legislation being considered, as a new detailed statute will invigorate California wine shipments into the commonwealth and generate significant revenues.**

Capacity Caps

State restrictions based on winery size or annual production -- "capacity caps" -- are a disguised form of economic protectionism, where a privilege extends to wines produced in-state, but also acts as a barrier against out-of-state wines. **Wine Institute**

believes capacity caps, contained in PA House legislation (but not in either SB 790 or SB 886) violate the Commerce Clause and will cause uncertainty about PA law and, potentially, future litigation.

The most recent decision finding a cap in winery size as a barrier to an in-state privilege was Family Winemakers of CA v. Jenkins in 2010. Family Winemakers involved a Massachusetts licensing scheme permitting wineries producing less than 30,000 gallons to sell directly to wholesalers, retailers and consumers, while allowing those producing 30,000 gallons or more to sell directly to consumers only if they were not represented by a wholesaler. The First Circuit found the statute had a discriminatory effect on interstate commerce because as it prevented direct shipment of 98% of out-of-state wine to consumers, but permitted all MA wineries to sell directly to consumers, retailers and wholesalers. Moreover, the Court found that MA failed to justify the discrimination by showing a nondiscriminatory alternative was unavailable. As a result of this loss, MA paid plaintiff's counsel more than three quarters of a million dollars.

Exclusion for Brands Sold in PLCB Stores as a Limit on Shipments

Efforts to limit wine shipments to brands currently unavailable in PLCB stores are poison pills that will render the law commercially impractical, confusing consumers and wineries. **A prohibition against shipping those "classes, varieties and brands" on the list of products in PLCB stores is a broad and undefined exception.** Wineries or the PLCB may start or stop selling a product in PLCB stores at any time, so this restriction could call into question all brands. Many wineries own other wineries and use multiple brand names. What about vintages? What if PLCB stocks the 2009 vintage of a brand but not the 2007, the very wine a consumer drank to celebrate her engagement at that CA winery two years earlier?

Many wineries also sell certain varietals via national distribution but retain others under the same name for on-site or wine club sales. **PA consumers will be unable to order wines reserved for tasting room/wine club members with the same brand name, but different varietal or vintage than brands already in PLCB stores.** Limiting wine choices causes confusion and frustration for PA residents when they are placing orders on site alongside residents of other states not subject to these limitations.

Who is responsible for checking if the wines are available at PLCB stores ...winery or consumer? How will enforcement take place? Wineries know which brands are being sold in each state, but don't know which PLCB stores are selling which products, what inventory remains in any store, or whether a wine is available for off-premise purchase at all, having been purchased entirely by a restaurant for on-premise consumption. Is wine ordered by a Pittsburg consumer "available" if the only bottle in PA is in a Philly PLCB store? Finally, **many PA winery brands are already sold in PLCB stores, so they will be excluded from shipping wine to Pennsylvanians under a new law with this exemption.**

Taxation

Wine Institute encourages this Committee to clarify language governing the amount of tax that wineries should collect and remit under a PA wine shippers program. Most states require out-of-state wineries to collect their sales and excise taxes. On a \$100 bottle of wine shipped into VA, for example, a CA winery collects a 5%

sales tax of 6% and a \$1.51/gallon (\$0.40/liter) excise tax by volume of \$0.30, and remits \$5.30 to the VA Dept. of Taxation and ABC respectively. Collection of "all taxes due" in the bills at hand suggests the 6% sales tax, the 30% PLCB mark-up and the 18% emergency tax must be collected. A winery would have to take the bottle back to a wholesale price to calculate the 30% mark-up and the 18% emergency tax, then impose the 6% sales tax on the retail price containing those taxes. Assuming wholesale is half the retail price (estimation only) a \$100 retail bottle will cost \$130 without shipping cost. Consumers balk at wine shipments with exorbitant taxes and tasting room staff will struggle to determine what price to charge consumers.

Other wine control states without excise taxes - New Hampshire and Wyoming - merely set a flat percentage on the retail price: in New Hampshire it is 8%; in Wyoming it is 12%. **We respectfully request that PA establish a specific and reasonable tax in the statute to be imposed on the retail price of wine shipped into PA.**

Potential Economic Impact of PA Wine Shipments

Direct-to-consumer wine shipments account for approximately 2% of all wine sales within a state. While these sales are significant for small wineries and consumers with specific desires, they are not shown to cannibalize sales at local retailers. Often consumer try a product then ask a local store to carry it. Such requests would blossom under the PLCB special order system. Technologically savvy, cost-conscious oenophiles won't pay shipping costs of \$45 per case when a wine is available locally.

Revenues specifically from wine shippers programs are comprised of license fees and taxes remitted by the winery licensee/permittee. VA, with a population 2/3 of PAs and a wine shipper's program since 2003, provides a measure of potential revenue for a direct shipment program without capacity caps. VA was the 7th largest recipient state in 2010 for wine shipments by volume. In FY 2010, 1058 licensed retailers and wineries together paid \$100,000 in license taxes. These shippers sent approximately 104,800 cases of wine, with \$377,000 in wine tax collections (\$1.51/gall). Wines & Vines Magazine estimated the average retail price of wine shipped into VA at \$33.05 per bottle without shipping costs. Sales tax collections are the bulk of these revenues and the 5% VA sales tax collections for FY 2010 totaled \$2.5 million. Together license, sales and excise taxes generated more than \$3 million for VA in FY 2010.

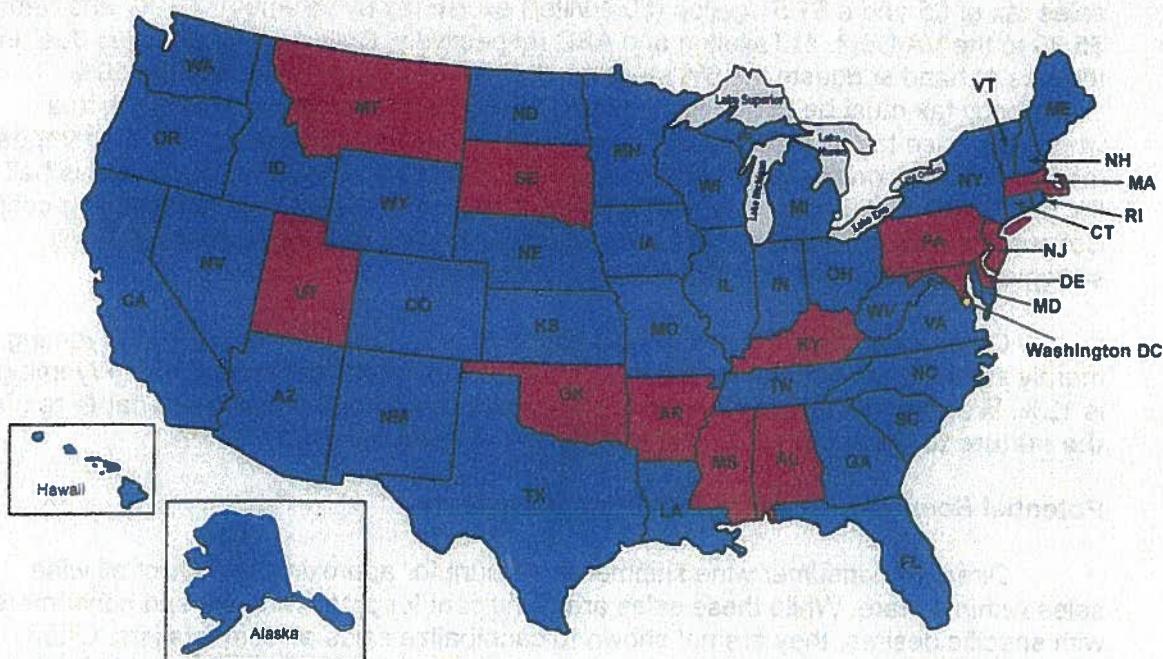
Compared to VA, PA has a larger population with similar demographics (12 million v. 8 million), a comparable number of in-state wineries (approximately 190), and a higher sales tax (7% v. 5%). PA's higher sales tax on up to 1/3 more sales than in VA suggest a PA wine shipper program should generate \$4 million per year.

Contact Terri Cofer Beirne at (804) 301-5505 or tbeirne@wineinstitute.org.

Direct Shipment Laws by State for Wineries

(Information Current as of July 1, 2011)

Contact: Wine Institute for latest updates
www.wineinstitute.org
 (415) 512-0151



Limited direct shipping & permit states:
 allowance of limited shipments:

- Alaska (a reasonable amount)
- Arizona (permit required for off-site sales only)
- California (permit required - taxes paid)
- Colorado (permit required - taxes paid)
- Connecticut (permit required - taxes paid)
- Florida (excise taxes/ consumer taxes paid)
- Georgia (permit required - taxes paid)
- Hawaii (permit required - taxes paid)
- Idaho (permit required - taxes paid)
- Iowa (permit required - taxes paid)
- Illinois (permit required - taxes paid)
- Indiana (permit required - taxes paid)
- Kansas (permit required off-site sales only)
- Louisiana (permit required - taxes paid)
- Maine (permit required - taxes paid)
- Maryland (permit required - taxes paid)
- Michigan (permit required - taxes paid)
- Minnesota
- Missouri (permit required-taxes paid)

- Nebraska (permit required - taxes paid)
- Nevada (permit required -taxes paid)
- New Hampshire (permit required - taxes paid)
- New Mexico permit required - taxes paid)
- New York (permit required - taxes paid)
- North Carolina (permit required - taxes paid)
- North Dakota (permit required - taxes paid)
- Ohio (permit required - taxes paid)
- Oregon (permit required - taxes paid)
- Rhode Island (on-site sales only)
- South Carolina (permit and report required - taxes paid)
- Tennessee (permit required - taxes paid)
- Texas (permit required - taxes paid)
- Vermont (permit required - taxes paid)
- Virginia (permit and report required - taxes paid)
- Washington (permit required -taxes paid)
- Washington D.C. (one case per person)
- West Virginia (permit required/ taxes paid)
- Wisconsin (permit required/ taxes paid)
- Wyoming (permit required - taxes paid)

Direct Shipment Not Permissible:

- Alabama
- Arkansas
- Delaware
- Kentucky (felony)
- Massachusetts
- Mississippi
- Montana (consumer permit - no carrier)
- New Jersey
- Oklahoma
- Pennsylvania (special interstate by 3-tier only)
- South Dakota
- Utah (felony for winery to direct ship)

Federal On-Site Shipment States:

- Delaware - no limit
- New Jersey - up to 1 gallon
- Oklahoma - up to 1 liter
- South Dakota - up to 1 gallon

Analysis of DIRECT-TO-CONSUMER WINE SHIPPING BILLS before PA Senate Law & Justice Committee

Bill-Sponsor	Eligibility	Quantity Limits	Cost of License/Renewal	Tax to Be Collected and Frequency	Reporting Requirement	Labeling Required	Adult Signature Required	Notes
SB 790--Earl	in or out-of-state licensed producer, supplier, importer, wholesaler, distributor or retailer of wine	18 liters (24 bottles) per month per resident	\$100/annually tbd by board	"all taxes due" to be calculated as if the sale were in PA via annual payment	licensee reports annually to board the total shipped; board reports annually to legislative committees the number of licensees and quantity shipped	yes	requires licensee to require proof of recipient's age in manner approved by the board	excludes "those classes, varieties, and brands of wine" on the list of products at PLCB stores; no express requirement for licensure of common carrier or adult signature capture by common carrier; deletes requirement for affidavit of personal use; board may promulgate rules and regulations
SB 886--Farnese	in or out-of-state licensed producer, supplier, importer, wholesaler, distributor or retailer of wine	18 liters (24 bottles) per month per person	\$100/annually tbd by board	"all taxes due" to be calculated as if the sale were in PA via annual payment	licensee reports annually to board the total shipped; board reports annually to legislative committees the number of licensees and quantity shipped	yes	not expressly required, but board may promulgate rules and regulations	no exclusion for wine available in PLCB stores; no express requirement for licensure of common carrier or adult signature capture by common carrier; deletes requirement for affidavit of personal use
Model DTC Bill from NCSL Task Force on Wine	license available to licensed wine producer, supplier, importer, wholesaler, distributor or retailer	24 cases per person per year	\$100/\$50	sales and excise taxes due on sale annually	annually	yes	n/a	

Analysis of DIRECT-TO-CONSUMER WINE SHIPPING BILLS before PA House Liquor Control Committee

Bill-Sponsor	Eligibility	Quantity Limits	Cost of License/Renewal	Tax to Be Collected and Frequency	Reporting Requirement	Labeling Required	Adult Signature Required	Notes
HB 110-Godshall	license available to producer, supplier, importer, wholesaler, distributor or retailer of wine	24 bottles per month per resident	\$100/tbd by board	"all taxes due" annual payment	annually	yes	n/a	
HB 430-Costa	permit available to licensed limited in and out-of-state wineries with annual production >200,000 gall (84,120 cases) per year	27 liters (36 bottles) per month per person	n/a	6% sales and 18% emergency tax	"monthly transaction reports" with name/address, quantity/description of purchase, date and retail cost and tax collected; AND "periodic reports" as required by department	n/a	yes, and consumer affidavit of personal use	excludes wine available in PLCB stores; transporter-for-hire license required of carriers; detailed penalty scheme; quarterly reports by department to legislative committees; prohibition against interest in other licenses
HB 845-Sonney	out-of-state licensed producer, supplier, importer, wholesaler, distributor or retailer of wine may ship	n/a	n/a	6% sales tax	report annually the total of wine shipped	n/a	n/a	
HB 1770-Petri	license available to licensed in and out-of-state producer, supplier, importer, wholesaler, distributor or retailer of wine	n/a	application, renewal and filing fee prescribed by board	6% sales tax remitted quarterly	monthly reporting of #, size, brand quantity/shipment and price of bottles	yes	yes, and written or electronic consumer acknowledgment of personal use	\$1000 bond required
Model DTC Bill from NCSL Task Force on Wine	license available to licensed wine producer, supplier, importer, wholesaler, distributor or retailer	24 cases per person per year	\$100/\$50	sales and excise taxes due on sale annually	annually	yes	n/a	