

Congressional Hearing on Alcohol Regulation

By Bill Nelson, President, WineAmerica

Reacting to lobbying by the National Beer and Wine Wholesalers Association (NBWA) a Congressional subcommittee held a hearing March 18 to receive testimony on “Legal Issues Concerning State Alcohol Regulation.” The purpose of the hearing was ostensibly to decide whether federal courts should have the power to prevent states from enforcing protectionist and discriminatory state alcohol laws. There was virtually no advance notice of the hearing making it extremely difficult to respond to the complex issues being considered.

The NBWA lobbying is the result of concerns that large retailers and global brewers are preparing to crowd beer wholesalers out of the U.S. market. NBWA’s main tactic has been to argue that lawsuits following a landmark 2005 Supreme Court decision outlawing protectionist state direct-to-consumer shipping laws could eventually strip states of their power to regulate alcohol. This was echoed by several hearing witnesses who testified that total deregulation of domestic alcohol markets would lead to alcohol abuse. The example of recent problems faced by Great Britain in the wake of regulatory changes that greatly expanded hours of sale and allowed alcohol to be sold virtually anywhere at extremely low prices was offered up repeatedly. There was also a good deal of testimony that ongoing litigation was proving distracting and expensive for states.

Representative Mike Thompson (D-CA) countered that comparing alcohol regulation in the United States to the problems in Great Britain is like comparing “apples to lemons.” As the Supreme Court has made clear, state enforcement of the three-tier system is Constitutional. The Twenty-first Amendment gives states great power to promote temperance, collect revenue, and establish orderly markets.

Underlying the March 18 hearing is an NBWA request for sweeping federal legislation that would largely strip away the power of courts to enforce the commerce clause and federal antitrust protections against state laws that deal with “any matter involving” wine or other alcohol beverages. These federal limitations have been used by wineries and other parties to strike down discriminatory direct-to-consumer shipping laws and monopolistic pricing controls designed mainly to protect the profits of local businesses. Litigation has been a control against overreaching state laws that abuse regulatory power and should not be a power removed lightly. Representative George Radanovich (R-CA) referred to the problems of the proposed NBWA legislation in concluding at yesterday’s hearing “what they fear is nothing less than the U.S. Constitution and the antitrust laws.”

Whatever the validity of NBWA’s concerns, the solution they offer is bad policy. As Representative Lamar Smith suggested yesterday, the complex field of alcohol regulation is “not susceptible to quick solutions.” The language offered by NBWA is a quick, overly broad, and far reaching solution. Such a drastic change in the legal environment is certain to be problematic.

The scope of the proposed beer wholesaler legislation is so broad it's sure to lead to unintended consequences. As part of his testimony, Professor Darren Bush of the University of Houston Law Center offered clear evidence that Congressional grants of immunity from Federal antitrust laws and dormant Commerce Clause provisions always leads to unintended results. States will pass many peculiar laws that claim to "involve" alcohol and use that authority to favor in-state businesses.

New federal legislation is not needed to help states accomplish their legitimate regulatory goals. What the wholesalers are seeking and what the courts have increasingly denied is protection against competition. If states reined in their anti-competitive and protectionist tendencies they would have nothing to fear from litigation.

Federal Courts have always been the authority of last resort in the U.S., and a way of offsetting and limiting political overreach. The issues they have resolved in recent years are issues at the margin of alcohol law that do not threaten thoughtful regulation.