



WineAmerica Newsletter – July 2009

From The President's Desk

June was a month of great challenges for our Association. Several major issues were addressed by Congress: excise taxes, food safety legislation, proposed cuts to key Farm Bill sections, agriculture appropriations for research, and TTB user fees. Our political infrastructure got tested to its maximum. I am pleased to report that we performed extraordinarily well! A lot got done in June, most of it positive. WineAmerica successfully validated our political approach of continual grassroots contacts on behalf of America's wineries and grape growers with clear and reasonable messages bolstered by mobilizing specific contacts with key players as "crunch" time for decision making got close. WineAmerica's strong and vital role on behalf of America's wineries was confirmed both in the success of our grassroots mobilization effort, and our strategic voice in key negotiations.

The new Obama administration presented an ambitious agenda to Congress and, with strong majorities, Congress was inclined to act quickly on those initiatives: food safety, budget changes, and especially health care reform

among them. The interests of our membership, possibly even the viability of wineries throughout the nation was at risk.

Food Safety

Excellent work by the WineAmerica grassroots network delivered apparent success—for now—in the pending food safety bill. We were able to obtain an exemption for facilities fully regulated by TTB to the Food Safety Enhancement Act of 2009 (H.R. 2749) as part of the managers amendment correcting the bill between subcommittee and full committee level (Energy and Commerce) in the House. Achieving the exemption required overcoming considerable resistance on the part of important Democratic majority members who felt that an exception would open the floodgates to other groups. There was also a great deal of concern about regulation of products other than alcoholic beverages produced in TTB plants but not fully regulated by the agency such as flavorings, grape seed oil, and tartaric acid. A coalition of groups representing wine, beer and spirits producers had to make it clear that a perfectly acceptable—indeed, a more robust—regulatory scheme

already existed within TTB. We argued that that giving FDA authority over wine safety might undermine the robust TTB regime and create a confusing regulatory environment with conflicting and overlapping statutes. It might even have create a situation where wineries would be asked to perform unnecessary production operations, such as washing grapes prior to fermentation, that had no grounding in good policy. It was important for committee members and staff to recognize that alcoholic beverages, because of their composition, pose fewer food safety problems from pathogenic organisms.

Aside from our long term effort generating grassroots awareness about the possible negative effect food safety legislation could have on America's 6,000 wineries, WineAmerica played a key role in generating the critical arguments for the exemption. We explained the history and effectiveness of TTB regulation and ultimately drafted the bill's Rule of Construction which clarified how the bill would be interpreted to the benefit of wineries. Because the full committee acted within a week of the subcommittee, it was an

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important and difficult task within a very compressed period of drafting.

The amended food safety bill, H.R. 2749, sponsored by Representative Dingell (D-MI), exempts wine, beer and spirits producers from the bill's substantive and fee provisions and goes to the full House of Representatives with strong bipartisan support. It is expected to easily pass the House. Our efforts have led to a bill that will save

the Finance Committee dusted off a long dormant proposal to increase alcohol excise taxes from current levels to an "equivalence" of \$16 per proof gallon. Depending on how it's calculated, this would mean a revised table wine tax of between \$3.50 and \$4.16 per gallon compared with current levels of \$1.07. That scary proposition, along with a companion measure to tax sugary soft drinks, was first offered by the Center for Science in the Public Interest (CSPI) and the

costs. There is also evidence that moderate consumers are more affected by price increases than abusers who always seem to find a way to "get their alcohol" including turning to non-regulated sources like bootleg products and mouthwash. More importantly for WineAmerica, drastic increases in wine excise taxes would specifically harm wineries throughout the US. These wineries are a bright spot for otherwise troubled rural economies and significantly higher taxes would

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wineries \$500 per year as well as offer considerable relief from annoying regulations intended for food manufacturers.

While such dramatic successes are rare, it is important that the winery community recognize the critical role played by WineAmerica, their national trade association, in protecting their interests. *Members receiving this newsletter should use this argument on a peer-to-peer basis to recruit those wineries who do not contribute to the common good to join and support WineAmerica.*

Excise Tax

Less than two months ago, as the debate on health care reform gained momentum in the Senate,

Center on Budget and Policy Priorities, a think tank, in hearings on May 12. Their underlying logic was that it made sense to partially finance healthcare reform by taxing products which are detrimental to health—a so called "life style" tax options. These groups testified that alcohol beverages are a major cause of illness due to alcohol abuse and that excise taxes on them would be an appropriate compensation for detrimental health effects.

Unfortunately, their argument significantly misses the mark. 95% of alcohol beverages consumers drink in moderation. There is a considerable body of evidence that such moderate consumption, especially of red wine, promotes health and reduces healthcare

have a devastating effect on their growth and even jeopardize continuation of many operations.

Our efforts to turn this issue around seem to have been successful. Strong support for wineries by key members of the Senate Finance Committee, Senators Cantwell (D-WA), Wyden (D-OR), Stabenow (D-MI), Schumer (D-NY) and others, seem to have changed the dynamics of the tax debate in our favor. It now appears very unlikely that alcohol excise tax increases will be included in the healthcare bill. The support of these Senators is a tribute to the many members of WineAmerica who reached out and made the case that tax increases would be counterproductive and seriously

harmful to their businesses.

This is not to say that the excise tax issue is dead. There is an unfortunate tendency for tax proposals to rise zombie-like in final legislation. We will remain vigilant. WineAmerica members are strongly encouraged to use

year that funding for Value Added grants was exclusively part of the appropriations process. Because the Hill is now hostile to so called “earmarks,” the Viticulture Consortium, Pierce’s disease research and pest management, and funding for Agriculture Research Service (ARS) grape

Small Fruits research received an additional \$0.254 million. Pierce’s disease management funds were increased slightly to \$22.983 million and Value Added Producer Grants were funded at \$18.867, the same as last year, although this year the full funding came from discretionary funds rather than

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their contacts with Senators and members of Congress to continue to stress the devastation that excise tax increases would reap. Our excise tax position paper and talking points are available on the WineAmerica website, www.wineamerica.org, under Federal issues.

We need to keep up the pressure to be sure that these taxes do not get implemented!

Agriculture Appropriations

The 2010 Agriculture Appropriations bill has taken its first step towards final passage with Committee approval in June of the House bill. This year’s bill was the cause of considerable angst since it had to be passed in an environment where the Administration had proposed cuts to Farm Bill approved funding for the National Clean Plant Network (NCPN), pest management and the Market Access Program (MAP). This was also the first

research buildings was also at risk. The good news is that full funding of Farm Bill programs was approved with the exception of the Environmental Quality Incentive Program (EQIP) which received some \$1.18 billion, a 12% increase over last year but still considerably less than the \$1.7 billion promised by the Farm Bill. Grape related research special grants within the National Institute of Food and Agriculture (NIFA), the new name for CSREES, received amounts identical to 2009: Viticulture Consortium (\$1.454 million), Pierce’s disease research (\$1.531), Northwest Small Fruits (\$0.307 million), Vitus Gene Discovery (Missouri, \$0.422 million) and Winegrape Foundation Block (Washington, \$0.233 million). Grape related buildings for ARS received \$3.654 million in Geneva, New York and \$3.0 million in Davis, California—not enough to begin construction, but a good step forward. ARS cooperative grants for Northwest

Farm Bill funds. MAP received its full Farm Bill allocation of \$200 million. These numbers are a major achievement in tough financial times. We will have to work hard to ensure that we do as well in the Senate and in the ultimate conference.

TTB User Fees

Another administration proposal which poses difficulties for wineries is the reinstatement of the Special Occupational Tax disguised as a TTB user fee. This proposal is now before the House Appropriations Committee where we are hopeful it will be rejected.

Immigration

Immigration reform remains a major concern for our Association as the status of many field and winery workers is in jeopardy. While other priorities seem to have put the issue on the back burner for now, support is building and we are hopeful that promised Presidential leadership on this issue will succeed in developing

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rational and workable legislation in the near future.

Conclusion

In challenging times, WineAmerica has shown its mettle, demonstrated the importance of carefully constructed grassroots efforts, leveraged its ability to articulate the policy concerns of American wineries and successfully managed a difficult political

environment to the advantage of its members. There is still plenty of work to do to solidify these partial victories.

Your contributions as dues paying members and active players in WineAmerica, including your contacts with members of Congress, are crucial to our success. Hopefully, we can continue to grow our organization

with new membership as more American wineries become aware of the importance of political action, and make room in their budget to contribute to their political success. We are optimistic that our victories will continue as the legislative process evolves.



Regulatory News: July 2009

by Michael Kaiser

TTB Introduces New Guidelines for Organic Labeling

There are new rules of the road for organic wines. Through a Memorandum of Understanding between the Agricultural Marketing Service of the U.S. Department of Agriculture (USDA) and the Alcohol & Tobacco Tax & Trade Bureau (TTB), organic claims for beverage alcohol products are evaluated by TTB implementing USDA policy. Because USDA recently changed its labeling policies for wines that contain both organic and non-organic grapes, TTB also recently introduced new guidelines for wines made with organic grapes.

Under these new guidelines, if a wine is labeled with a “Made with Organic Ingredients” statement but contains both organic and non-organic grapes, the label must indicate that the wine contains non-organic grapes. At least 70% of the wines ingredients must

derive from organic ingredients to bear a “Made with Organic Ingredients” statement. TTB has specified that the following statements are acceptable:

- “Made with Organic and Non-Organic Grapes”
- “Made with Organic (varietal) grapes and Non-Organic (varietal) Grapes”
- “Made with ___% Organic Grapes and ___% Non-Organic Grapes”
- “Made with ___% Organic (varietal) Grapes ___% Non-Organic (varietal) Grapes”

The new guidelines also require wines that contain a restricted “Organic Ingredients” statement (*i.e.*, less than 70% organic ingredients) to indicate the presence of any non-organic grapes and to indicate the percentage of organic ingredients on the label. For instance:

- “Ingredients: Organic Merlot grapes, Cabernet Sauvignon grapes, tartaric acid” and
- “55% Organic Ingredients”

The percentage statement must appear on the information panel in proximity to the “Organic Ingredients” statement. If a wine bears an “Organic Ingredients” statement in which no disclosure of non-organic ingredients is made, such as “Ingredients: Organic Grapes,” then 100 percent of the wines ingredients must be organic. It should also be noted that when a wine contains *only* organic ingredients, a percentage statement is prohibited. TTB claims this is necessary to avoid consumer confusion with products meeting the standard for “100% Organic Wine.”

TTB Holds Second Annual Industry Wide Expo

TTB recently held their second annual industry wide Expo June 24 to 26 near the National Revenue

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Center in Cincinnati. It was an educational event with gave us the opportunity to represent our members with TTB and the wider industry.

According to TTB, the goal of the Expo is to proactively reach out and provide information to the industries they regulate. TTB staff and invited speakers lecture on issues relating to wine, beer, spirits and tobacco production. The Expo has specific “educational tracks”

set up for each aspect of the industry. For wine this includes labeling, recordkeeping, tax payment and other compliance issues.

In addition to the educational sessions, TTB also has informational exhibits set up for more specific questions related to aspects of each particular industry. This allows industry members and industry representatives to have

greater access to TTB representatives.

The TTB Expo is an ideal way for the alcohol industry to forge a better working relationship with TTB. For more information about the topics presented at the Expo please visit this website:

<http://www.ttb.gov/expo09/presentation-pdfs.shtml> .



State Legislative Update – July 2009

Tennessee Now Open to Direct-To-Consumer Shipping

Beginning July 1 wineries will be able to obtain a direct-to-consumer shipping permit to ship to Tennessee consumers for a \$300 application fee, and a \$150 annual license fee. Permit holders will only be permitted to ship up to 1 case of wine per consumer in any given month and a total of 3 cases of wine per consumer per calendar year. Wineries will be responsible for sales and excise taxes. For more information visit the Tennessee ABC’s website at: <http://www.tennessee.gov/abc/>, although as of this writing applications are not yet available.

Maine To Be Open to Direct-To Consumer Shipping

Beginning September 4, Maine will also be open for direct-to-consumer shipping. Permitted wineries will be allowed to ship up

to 12 standard cases (the statute species 750 ml bottles) per address per calendar year. The initial license fee will be no more than \$200. Applicants will also be required to pay a \$100 registration fee. Additionally, permit holders will be required to pay a \$50 renewal fee to maintain the permit. Wineries will be responsible for all applicable taxes including sales tax and excise taxes. Winery permittees will also be required to file quarterly reports. Permit applications for Maine are not yet available.

Kansas Direct Shipping Application Now Available

Beginning July 1, Kansas will formally transition to a permit state for off-site sales. Kansas shipping permits will be necessary for off-site shipments to Kansas consumers. Wineries without the permits will be allowed to ship to

consumers who made the purchase on-site at the winery subject to excise tax, annual reporting and the filing of a consent to Kansas tax audits. Wineries seeking permits for off-site sales must pay a \$50 license fee, a \$50 registration fee and post a bond for \$750. Additionally, license holders will be required to pay a \$10 renewal fee after each calendar year to maintain the permit. The license allows wineries to ship up to 12 cases of wine per consumer per year. Wineries will be responsible for remitting annual sales and excise tax. For more information please visit the Kansas ABC at: <http://www.ksrevenue.org/abcspecialorder.htm>. The application form can be found at: <http://www.ksrevenue.org/pdf/forms/abc800.pdf>



A Peek at the Food Safety Bill Negotiations

by Cary Greene

As mentioned at the beginning of this newsletter, the House Energy & Commerce Committee approved a markup of the Food Safety Enhancement Act of 2009 (HR 2749) on June 17. Among other provisions, the bill contains a \$500 annual food facility registration fee which would pay for the Food and Drug Administration's (FDA) regulation of food safety. While the original bill made alcohol producers subject to HR 2749's requirements, including the \$500 annual fee, the June 17 markup exempted wineries, breweries and distilleries from the fee as well as most of the bill's substantive requirements. The bill would require alcohol producers to register annually with FDA rather than, as is current practice, only one time.

The extraordinary grassroots support of our members and substantial lobbying efforts over the last six months won over the Congressional advocates we needed for the final push. With the table set, we worked at the center of the action, together with other alcohol beverage trade groups, to find language that would overcome Congressional concerns. There was considerable skepticism of the alcohol beverage industry's motivations for seeking an exemption, as well as concern that creating an exemption for alcohol beverages would open the door to other groups demanding bill exemptions. We worked through

the weekend between the subcommittee markup June 10 and full committee action on June 17, to develop language that met with our needs and satisfied the Committee's concerns.

But even after two meetings and numerous phone calls with Committee staffers to offer the technical and legal justifications for our exemption and how to achieve it, we still were unsure what the Committee's final language would look like and whether it would work. We needed it to clearly state that the bill *did not* apply to wine, beer and spirits, but (to satisfy Committee concerns) *would* govern products made by alcohol beverage producers over which FDA exercises primary jurisdiction—including flavors, grape seed oil, and cream of tartar. Luckily, when the final language emerged, it was largely beneficial.

This is a tough issue for some wineries, because wines less than 7 percent alcohol by volume are treated in some measure as fruit juice and labeled in accordance with FDA rules. While TTB controls production of under 7 wines, under 7s can be sold and distributed without approved COLAs, and need not be distributed by federal basic permitted wholesalers. The Committee was concerned that products like these would "slip through the cracks." In trying to deal with these legal margins

before the June 17 markup, the Committee offered language that could have significantly complicated the regulatory environment for wine. We needed to walk a fine line to ensure that our members were protected, and the final language largely achieves that.

Through diligent effort, we avoided major pitfalls and were able to play a significant role in crafting language that established a sensible compromise. Much of the negotiation was lawyerly. Bringing a full team to the table that included lobbying and technical firepower gave us credibility both with the Committee staff as well as with far larger alcohol beverage trade associations. One obvious sign of WineAmerica's contribution, some of the language we crafted ended up in the final bill.

Because of its potential effect on imports, the bill may be referred to the House Ways & Means Committee before being sent to the full House. As the bill moves toward passage on the House floor, we will turn our attention to the Senate, where a food safety bill containing similar fees will be considered by the Health, Education, Labor and Pensions Committee. We will keep you apprised as the process continues to move forward.



WineAmerica Signs Brief in Massachusetts Direct Shipping Capacity Cap Appeal

by Cary Greene

In our December 2008 newsletter, we discussed the impact of a recent Massachusetts decision, *Family Winemakers of California v. Jenkins*, in which a federal district court determined that a state legislature may not use facially neutral capacity caps in direct-to-consumer shipping laws as a subterfuge for protectionist goals. See Cary Greene, *Court Invalidates Massachusetts Direct Shipping Capacity Cap Law* (Dec. 2008). Firmly rooted in the Commerce Clause's

case, but not parties to the lawsuit. Through this mechanism, we hoped to support the Family Winemakers of California as they fight to invalidate this discriminatory Massachusetts law.

After some lengthy conversations, we agreed to sign the *amicus* brief if it limited its scope to affirming the District Court's decision and its commitment to the Commerce Clause. We also offered our opinion that an *amicus* that challenged the Constitutionality of

While signing the *amicus* has allowed WineAmerica to make its voice heard with respect to a particular set of facts, *i.e.*, the series of decisions that led the Massachusetts legislature to pass a discriminatory direct shipping capacity cap law, we thought it worth a bit of explanation regarding why we were insistent that the *amicus* brief be limited. WineAmerica has long supported laws that afford wineries maximum flexibility in the sale and marketing of their products,

Capacity caps, should only be employed where they are rooted in legitimate policy goals or where they are the best that can be achieved.

commitment to fair interstate markets, the *Family Winemakers* decision, like *Granholm v. Heald* before it, protects out-of-state goods from discrimination.

With the *Family Winemakers* case recently being appealed to the First Circuit Court of Appeals—a federal court immediately below the Supreme Court—by the state of Massachusetts, we were asked to sign an *amicus curiae* brief drafted by the Wine Institute. As you probably know, an *amicus curiae* brief or *amicus* brief is a type of filing submitted by individuals or associations interested in the outcome of a

capacity caps generally would be highly problematic. Ultimately, we signed on to the brief. The *amicus* argues that with respect to the Massachusetts law: (1) the capacity cap is protectionist; (2) it discriminates against interstate commerce; and (3) it is not justifiable from a policy perspective. We signed on the Wine Institute brief, together with several state winery trade associations, because we agree with these three principle arguments. The brief is now in the record being considered by the First Circuit in the *Family Winemakers* case.

including through direct shipping. From a policy perspective, limitations, such as capacity caps, should only be employed where they are rooted in legitimate policy goals or where they are the best that can be achieved. As a general rule, WineAmerica does not believe limitations like capacity caps are all that useful when it comes to direct shipping. Most of the direct shipping laws that include capacity caps, as in Massachusetts, are the result of legislative subterfuge meant to favor in-state interests with little real policy justification.

From a Constitutional perspective,

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however, there may be times when capacity caps are appropriate. There is ample federal precedent for using size-based distinctions as a means of giving smaller players the regulatory flexibility to operate profitably in the competitive marketplace.

Constitutionally, these measures are justifiable because they are rooted in minimizing the regulatory impact on small entities and, as a result, ensuring that the nation's primary economic engine—small business—can be profitable.

For instance, there may be reasons for encouraging capacity caps in the case of self-distribution. As a general rule, wholesalers are not generally

willing and able to competently distribute small brands. Self-distribution can be an effective way for small wineries to reach retailers interested in selling their products. On the other hand, there may be good policy and business reasons for a three-tier system as it relates to large producers who, through scale and other factors, can interest wholesalers with their products.

We believe that capacity caps are useful and Constitutional in some contexts, particularly where they are grounded in good policy. We also believe that capacity caps are unconstitutional where they are used, as in Massachusetts, as a facially neutral subterfuge for in-state favoritism.



Positive Response Received from New FedEx Campaign

by Adam Graytock

Recently, in a constant effort to provide more value to our members, WineAmerica was able to improve our agreement with FedEx in order to gain better shipping discounts. The discount program offers up to 50% on shipments and reduces the adult signature fee by 53%. This new agreement was directed towards both enticing new wineries to join WineAmerica, and convincing current members to enroll in the discount program to lower their shipping costs.

In the last two months WineAmerica and FedEx have been involved in a vocal campaign to promote the new discount program through the use of direct mailing materials and email. The results from this campaign have turned out to be very positive, as we

have seen both new wineries joining the organization and current members requesting the materials to apply for the discount rates. The enthusiastic response from this endeavor will no doubt help in improving our relationship with FedEx and allow us to continue our goal of providing invaluable benefits to our members.

If you have not already enrolled in the FedEx discount program through WineAmerica, or have any questions regarding the program, we encourage you to contact us so that you can start saving on your shipping orders. More information about the program can also be found in the Members Only section of our website at <http://wineamerica.org/membersonly/fedex.cfm>.

