



## **WineAmerica Newsletter – June 2010**

### **From The President's Desk**

#### **Wholesalers Promote H.R. 5034**

Wineries now face their biggest Congressional challenge in years to counter an all our barrage of wholesaler lobbying for H.R. 5034, the so called “CARE” Act, or as we less politely label it the “Wholesaler Monopoly Protection” Act. What they are proposing is nothing less than a dramatic shift of alcohol regulatory legal authority away from a system that balances Constitutional and federal authority with state power to a system where state authorities are in total control. This is an incredible overreach which would place direct shipping and other pro-competition requirements in jeopardy as states have previously and consistently shown a willingness to cater and pander to powerful local lobbies (wholesalers) against the interests of mostly out-of-state producers. Such

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protectionist tendencies led to the Constitutional Convention of 1789 after it became obvious that some federal constraints were necessary to temper chauvinistic state interests that were undermining economic union under the Articles of Confederation. To reinstitute that type of “economic Balkanization” for alcohol beverages would be an enormous step backward.

The wholesaler’s stated rationale is “stopping the erosion of state alcohol laws,” but this is utterly fatuous since states have ample authority to regulate alcohol so long as they comply with basic Constitutional restrictions. Many states have flaunted Constitutional protection of commerce by enacting wine direct shipping and other laws that clearly discriminate against out of state producers. These laws have been rightfully challenged and for the most part correctly invalidated. Such litigation is now winding down. States have also developed clever laws allowing monopolistic price fixing for alcohol which federal courts have invalidated because states have not demonstrated that their purpose is protect the public rather than enrich wholesalers. The “flood” of litigation that

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wholesaler's tout—in reality never more than a mere trickle—has not eliminated any “states’ ability to regulate alcohol,” nor would we support such litigation.

As we see it, the real underlying wholesaler motivation for this legislation is protection of their monopoly powers. Many states have provided beer distributors with a virtual lock on their “franchise” to distribute brands of beer they’ve ever been contracted to carry. In most states, there is no practical mechanism for either a large brewer or even a small craft brewer to sell their products to retailers or consumers without first going through the wholesaler they may have hired years ago when business conditions may have been quite different. Indeed, it is virtually impossible to change wholesaler regardless of performance or fit in these “franchise” states. This “locked-in” and preferential system is what wholesalers seek to use their considerable state power to preserve and enhance.

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**No federal Circuit Court nor the Supreme Court has ever declared an evenhanded state law unconstitutional that by design advanced temperance, tax collection or other Twenty-first Amendment core function.** In *Granholm v. Heald* the Supreme Court declared that:

“The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.” *Midcal*, supra, at 110. A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is “unquestionably legitimate.” *North Dakota v. United States*, 495 U. S., at 432. See also *id.*, at 447 (SCALIA, J., concurring in judgment) (“The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler”). *State policies are protected under the Twenty-first*

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*Amendment when they treat liquor produced out of state the same as its domestic equivalent.* The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers. The discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment (emphasis added).

Litigation following in the wake of *Granholm* has centered on whether regulation is legitimate or primarily aimed at discriminating in favor of local producers. That litigation is reasonable and has clarified the boundaries of an important Supreme Court decision.

### **Why State Regulation Without Federal Oversight is Dangerous**

While the wholesalers make much of their desire to protect states' ability to regulate alcohol by insulating state regulations from the Commerce Clause and other federal legislation, this is a smokescreen for advancing state legislation that merely protects their commercial interests. Without the tempering influence of federal court scrutiny, state legislators will always favor the in-state interest over the rights of out-of-state producers.

As Professor Laurence Tribe has explained, federal courts recognize "that state and local lawmakers are susceptible to pressures that may lead them to make decisions harmful to the commercial and other interests of those who are not constituents of their political subdivisions . . . The proper role of state lawmakers *is* to protect and promote the interest of their own constituents."

H.R. 5034 is essentially designed to endorse and foster discrimination against interstate commerce while making it next to impossible to seek redress in the only effective forum that has proven effective at tempering states' protectionist impulses, federal courts. This would be a drastic and disastrous shift in the law.

### **State of Play**

Wholesalers have proven successful in gaining Congressional support for H.R. 5034. To date, they have recruited 106 cosponsors. The wholesalers have made the bill superficially attractive for members of Congress by arguing that H.R. 5034 simply preserves the *status quo* and gives deference to state regulation that prevents abuse of alcohol. But wholesalers are large and steady campaign contributors and this has no doubt opened doors and ears to their message.

Congress should resist the Siren song. Wholesaler justifications are misleading and false. What the bill accomplishes is nothing less than emasculation of federal authority which will encourage states, responding to their wholesaler constituents, to pass discriminatory, anticompetitive, and retaliatory laws. Please continue to meet with your members of Congress. WineAmerica will remain engaged in the fight to expose this power play!

We are expecting H.R. 5034 to have a hearing in June before the full House Committee on the Judiciary.

### **New Jersey Direct Shipping Bill Nears Final Hurdle**

A solid shipping bill, already passed by the New Jersey Senate, is close to being considered in the state Assembly. A press conference on June 1 brought together UnCorkNJ, a statewide grassroots organization, New Jersey wineries, WineAmerica, and

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the Wine Institute to urge passage of A-1702. It appears that the legislation has strong support within the Assembly, but is being held up by a key opponent. Free The Grapes and UnCorkNJ have been instrumental in marshalling consumer letters. We are cautiously optimistic that this legislation will advance and become law.

### Food Safety Bill

Yes, food safety, you may remember this issue. The House passed its version of the legislation H.R. 2749 that exempts alcohol beverages from onerous Food & Drug Administration (FDA) fees and regulation in July 2009. We made the case that alcohol safety is already amply regulated by the Alcohol & Tobacco Tax & Trade Bureau (TTB). Since then, we have been occupied with getting the same exemption in the Senate. Because the Senate was not willing to accept the House language on our exemption, we have struggled to find alternative language that was acceptable for our coalition. We appear to have accomplished this, but we won't know for sure until the full Senate takes up the legislation. The debate on Financial Regulation has kept this from happening. We should have more visibility on this issue soon.



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## Vintage and Fortified Petitions

By Cary M. Greene

WineAmerica has obtained a copy of an April 30 petition, submitted by the Director General for Agriculture & Rural Development of the European Commission (EC), to change Alcohol & Tobacco Tax & Trade Bureau (TTB) rules to allow wines using a country appellation—including “American” wines—to bear a vintage date. This is something that WineAmerica has been advocating for some time. *See* Cary Greene, *Vintage Dates and American Appellation Wines*, at 3 (January 2010 Newsletter). In fact, we've been drafting our own petition, and have met with TTB to gauge their openness to implementing rule changes almost identical to what the EC has now officially proposed.

WineAmerica will continue to pursue the vintage dating issue and will encourage the TTB to begin the rulemaking process as soon as possible. A change in the rule is critical to many of our members.

Along similar lines, a petition has reportedly been submitted that will allow Port- and Sherry-style wines to use the term “fortified wine,” currently prohibited by TTB rules. While we haven't yet reviewed the petition, WineAmerica has been advocating this rule change for some time. *See* Cary Greene, *What to Call a Wine When You Can't Say Port?*, at 5 (October 2009 Newsletter). Indeed, following a meeting with TTB last October to gauge their openness to a regulatory change, we submitted a letter that preemptively responded to some of the concerns TTB raised regarding it.

We are glad to know that others share our conviction that “fortified wine” is “accurate and gives consumers adequate information to know they are purchasing a Port-, Sherry-, Madeira- or similar style wine.” Once we have a chance to review the petition, we'll assess the best way to ensure TTB issues appropriate rules.

Hopefully, our efforts will help make these regulatory proposals a reality.



WineAmerica  
1015 18<sup>th</sup> Street NW  
Suite 500  
Washington, DC 20036

PHONE: 202-783-2756  
FAX: 202-347-6341  
EMAIL:  
[info@wineamerica.org](mailto:info@wineamerica.org)

#### Staff Contacts

**Bill Nelson**, President  
[bnelson@wineamerica.org](mailto:bnelson@wineamerica.org)

**Cary Greene**  
Vice President &  
General Counsel  
[cgreene@wineamerica.org](mailto:cgreene@wineamerica.org)

**Jennifer Montgomery**  
Dir. of Grassroots &  
Political Affairs  
[jmontgomery@wineamerica.org](mailto:jmontgomery@wineamerica.org)

**Michael Kaiser**  
Manager of Regulatory  
Affairs  
[labels@wineamerica.org](mailto:labels@wineamerica.org)

## Announcing the WineAmerica Fall 2010 Board of Directors and Membership Meeting

*Please mark your calendars for the 2010 Fall  
Meeting*

**November 8-10, 2010**

Hampton Inn and Suites at Shelton  
Vineyards  
Dobson, NC

**About Dobson:** The Town of Dobson was founded in 1850 as a consequence of a geographical division of Surry County by the North Carolina General Assembly. A central site was needed for a new County Seat, and the courthouse was completed in 1853. The Town was named in honor of William Polk Dobson, a prominent Surry County citizen, State Senator, farmer, lawyer, and member of the State constitutional convention of 1835. He was a cousin of President James Knox Polk.

From 1853 forward, Dobson has served as the host community for Surry County Government and has served as the retail, commercial and employment center for central Surry County.

Dobson became the host community for Surry Community College in 1964. The College officially serves both Surry and Yadkin counties, offering a variety of degree and diploma programs, as well as providing four-year educational opportunities. Surry Community College offers the most complete viticulture and enology program on the east coast other than Colgate University. With proximity to Interstate Highways 74 and 77, Dobson provides a southern gateway to the Blue Ridge Mountains and the Blue Ridge Parkway, and is at the heart of the Yadkin Valley Wine Region.

Dobson is a 90 minute drive from the Charlotte Douglas International Airport and a 70 minute drive from Piedmont Triad International Airport in Greensboro.

***Registration and meeting information coming  
soon!***

***If you have preliminary questions about the  
meeting please contact Michael Kaiser at  
[mkaiser@wineamerica.org](mailto:mkaiser@wineamerica.org)***