



Inside this issue:

- Regulatory Report **3**
- FedEx Claims Process **3**
- Welcome Newest Supplier Members **3**
- No-Match Ruling Temporarily Halted **4**
- Inside the Indiana Court Decision **5**

**WineAmerica Fall
Board of Directors
& Membership
Meeting**

**November 7-9,
2007
Monterey, CA**

Register now at

www.wineamerica.org/meetings/fall.htm

From the President's Desk

August is normally a dull month in Washington D.C., but 2007 has to be considered an exception. Much happened: the TTB issued a Notice of Proposed Rulemaking on labels which could dramatically alter all wine labels; much lobbying work was done on behalf of specialty crops in the next Farm Bill; the Department of Homeland Security issued a rule on "no-match" letters which could decimate the agricultural work force; and a key Senator supporting our issues was tainted by scandal. Outside of Washington, in Indiana a Federal Judge ruled in summary judgment that certain very objectionable components of Indiana's direct shipping law were discriminatory and therefore unconstitutional.

On a very sad note, Larry Craig (R-ID) has been forced to resign from the Senate. His leadership on critical issues such as immigration reform, Ag-Jobs, and specialty crops is irreplaceable. I will also miss him as a friend of great humor and warmth who could easily see the dimensions of issues and make things happen in the often immovable Senate.

Farm Bill

As Congress reconvenes after its August recess, we are scrambling to make progress. The Farm Bill is due to be marked up in the Senate on September 17 with floor time shortly thereafter. Early indications from the Senate is that they are likely to provide specialty crops with approximately the same package which passed the House,

excellent in its coverage of the issues, but pretty skimpy in funding. Because the dynamics of the Senate are quite different than the House, (California, the biggest specialty crop producing state, only has two Senators rather than 11% of the total members) it will be challenging to get favorable treatment. We have tried to bring in Senators from a wide variety of states where specialty crops are important, although often not dominant, to work in support of our issues. Thus we are anxious to get as much support as possible from the New England and Mid-Atlantic States, along with Ohio, Missouri, and Colorado, the Northwest states, plus Florida and Texas. In several of these target states the profile of specialty crops is smaller than that of program crops, but our argument is that specialty crops are still extremely important to the agricultural economy and should be considered as part of a balanced Farm Bill. Nationally, specialty crops account for almost half of crop agriculture and should receive the kind of support which will help specialty crop farmers maintain their competitiveness in a world market.

TTB Rulemaking—Labeling and Advertising

The TTB has issued a notice of proposed rulemaking on nutrition and serving facts labeling. This notice represents a tremendous challenge for wineries. Currently the TTB is allowing comments until 10/29/07. WineAmerica has petitioned for an extension, but does expect

our petition to be granted. The notice, TTB Notice No. 73, can be accessed from the WineAmerica website: <http://www.wineamerica.org/issues/regulatory.htm>. As this is a most important potential change to the requirements for wine labels and will affect all wineries, it is crucial that letters and comments from as many wineries as possible be filed. For many wineries, especially small wineries, this rule may impose excessive burdens. Letters should be sent to:
Director, Regulations and Rulings Division
Alcohol and Tobacco Tax and Trade Bureau
P.O. Box 14412
Washington, DC 20044-4412

Or comments may be filed electronically by following instructions on the following site: <http://www.regulations.gov>.

Be sure to reference TTB Notice No. 73, Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages. Much anxiety has developed over this labeling proposal. WineAmerica is strongly urging member wineries that have concerns about the implications of this proposal to file comments especially if you have specific impacts. Some background information follows.

Key components of the proposal include:

(Continued on p.2)

From the President's Desk—Continued from p.1

- More accurate labeling of alcohol content. Under the proposal wineries would no longer be able to use the term “table wine” for wines between 7% and 14%. All wines would have to be labeled with specific alcohol content, percent by volume with a tolerance of 1.5% for wines under 14% and 1% for wines above 14% alcohol by volume.
- Serving Facts. TTB is proposing that all wines include a serving facts panel similar to the panel mandated for all non alcohol food packaging. The serving facts panel will require information about serving size, number of servings per container, calorie, carbohydrate, protein and fat content.

Analysis: Wine is uniquely a “produce like” product – a true reflection of the very variable grapes or fruit from which it is made. Therefore, each batch, which in many cases may be very small, less than 1,000 bottles, will have a unique composition. The new requirements will place a very expensive burden upon wineries in general and small wineries in particular.

Specifics:

- While it is unfortunate that TTB is likely to prohibit the use of “table wine” as a substitute for actual alcohol content, it is somewhat understandable since there is a heightened concern about levels of alcohol consumption, potentially deleterious effects and potential for impaired or intoxicated driving. Table wine could represent a maximum alcohol range of 2:1. Nevertheless for many wineries this change will increase the burden of labeling and consequently the costs. Wineries who have been using the term “table wine” and wish to continue to do so should indicate their views on this matter by including a reference to the additional burden in their comment letters. Based on labels coming through WineAmerica it appears that the use of “table wine” is fairly common. While the 2:1 range is certainly possible, almost all wines labeled “table wine” are actually in the range 10% to 14% and therefore not far off from the tolerance of 1.5%. If TTB is

uncomfortable with retaining “table wine” designation an alternative suggestion for wineries who desire more flexibility would be to allow labeling of a range such as “alcohol 11-14% by volume.

- Serving facts. Is this in fact necessary? Calories are misleading. Wine typically has no fat or protein. Wine is not a product prepared to a recipe but reflective of the very variable fruit from which it was made. Since fresh and variable products like fruits and vegetables are typically not required to provide nutritional information labeling, it is reasonable to exempt wine from this requirement. The key information the consumer requires is presented by the alcohol content which is reasonably accurate, even if “table wine” is allowed to remain as a concept. People are generally aware that there are significant calories in alcoholic beverages, however the science indicates (references to the science can be taken from the WineAmerica comments on previous version of this rulemaking <http://www.wineamerica.org/docs/WAANPRM.pdf>) that alcohol changes body metabolism and therefore alcohol calories are not of the same nature as calories from other foods. Thus it is inherently misleading to list such calories in a quasi-scientific and quantitative manner. Most consumers have a pretty good idea about how they are affected by servings of wine and the basics of alcohol effects from wine. Everything is a trade off. Providing additional information through the serving facts panel will not, in reality, provide very much consumer benefit. Yet to require every batch, from every winery, every year, to have a modified and custom label in order to provide these facts will be a tremendous burden on wineries, especially small wineries. In addition, the inclusion of much virtually superfluous information will be aesthetically damaging to wine labels which are a key marketing tool for wineries.

If TTB is nevertheless determined to go ahead with a requirement for serving facts, the impact can be moderated or improved in a number of ways:

- Serving size designation. The TTB has proposed a serving size of 5 oz. for wines with alcohol range of 7-14%. This should be expanded to 7-16% because many ordinary wines are now a little higher in alcohol than 14%. If your winery typically has wines that are in the 14-16% range, it would be important for you to comment on that to the TTB.
- Nutrition Information; Costs. Many wines are made in small batches. Virtually no wines contain fat or protein. Requiring frequent and expensive testing for calories, carbohydrates, fat and proteins is largely a waste of money because such information on the label will provide very little useful consumer information. Wineries in their comments should provide some information about their overall production, the number of different lots which will be ultimately labeled, the number of bottles in these different lots, thus providing some indication of approximate overall costs per year. The TTB has indicated that laboratories are willing to provide testing at approximately \$250 per test. Published price lists are more than twice as expensive.
- Alternatives. It may be possible for the required wine information to be calculated based on residual sugar and alcohol content. This would be facilitated if the tolerances on calories and carbohydrates were harmonized with the alcohol tolerances. Making all tolerances 20% plus or minus would facilitate such an approach.
- It would be helpful to the aesthetics of all labels if the TTB allowed the information to be presented in linear manner as proposed for 50ml bottles.

Please contact Michael Kaiser (labels@wineamerica.org) if you have any questions on this issue. WineAmerica will be posting information as it is available on the website in the Regulatory Issues Section - <http://www.wineamerica.org/issues/regulatory.htm>.

Regulatory Report: TTB Suspends Approvals of New AVAs

Early last month, the TTB announced the suspension of approvals for new American Viticultural Areas (AVA). This includes all pending AVA's. The reason behind the suspension is to allow for a wholesale review of the entire AVA process, a system that has been in place since 1986. In recent years, there have been an increasing amount of approvals for sub-appellations, or appellations that are wholly contained within an existing appellation. The suspension occurred because of concerns regarding a specific pending AVA.

The Calistoga sub-appellation was proposed in 2005. The TTB delayed the approval of the AVA after it received two comments opposing the proposal. The issue surrounds two geographically named brands in Calistoga, which Napa Valley Vinters insists must change their brand names. Under current regulations, these brands – Calistoga Cellars and Calistoga Estate - would be eliminated by the sub-appellation approval. Earlier this summer the Congressional Wine Caucus became involved, sending a letter to the TTB requesting approval of the Calistoga AVA. The TTB's response was to suspend the approval process pending a review of

the entire system.

It is unclear when the TTB may take action on revising the AVA approval program. It is likely they will publish an initial notice and then have a 60 or 90 day comment period. After soliciting comments they will issue a final rule. WineAmerica will keep our members posted on the status of this issue.

Update: FedEx Claims Process

Fortunately it doesn't happen often, but accidents do happen with wine shipments. If you are shipping with FedEx (or other carriers), make sure you know the claims process ahead of time.

If you or a customer comes across a shipment of wine with a broken bottle, do not throw away the package. In order to file a claim you must be able to show FedEx the broken bottle and damage to the case or other bottles in the package. Then you go on the website or call 1-800-go-fedex to initiate the claim.

If you have questions about the claims process and what's needed, please contact Jenny Mattingley at jmattingley@wineamerica.org.

New Limits on Small Business Expense Equipment Purchases

In May, President Bush signed the Small Business and Work Opportunity Tax Act into law. There is one portion that is important to wineries: the limit for Section 179 has been increased. Section 179 of the tax code allows businesses to expense equipment purchases. The limit has been increased from \$112,000 to \$125,000, with the phase-out amount increased from \$450,000 to \$500,000.

Welcome to the Newest WineAmerica Supplier Members:

Appellation America

Heartland Payment Systems

Universal Packaging

D&S Awards and Engraving

Group Martin, LLC

No-Match Ruling Temporarily Halted

In an effort to crackdown on illegal immigration, the Department of Homeland Security (DHS) recently announced a new rule that will require employers, including farmers, who get a letter from the Social Security Administration (SSA), reporting a mismatch between the employee's social security information and the government's records to investigate and resolve the matter within 90 days even if it means firing the worker. This "No Match" rule was issued by DHS during the week of August 13, and was expected to become effective September 14. Its implementation will have some serious negative consequences because it is a well known fact that the labor shortage in the Agriculture sector is a serious problem and this rule threatens to further reduce the employee pool as peak harvest times approach.

In response, several labor groups, including the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the American Civil Liberties Union, the National Immigration Law Center (NILC) and various local labor groups, jointly filed a lawsuit at the end of last month, seeking to permanently bar the implementation of the No Match rule. As a result, a federal judge in San Francisco issued an order on August 31, temporarily blocking the government from implementing the new rule. The judge's order also stopped SSA from sending notices last week to approximately 140,000 employers across the country notifying them of the new rule, which would impact approximately eight million workers. A hearing on the lawsuit is scheduled for October 1st.

As this point, the injunction should be viewed only as a temporary reprieve, and does not mean that the No Match rule will not be implemented. But it does buy employers a little more time to make sure their labor force is compliant.

The following is a summary of the key components of the No Match rule when it is actually implemented:

- Upon receipt of a no match letter from DHS or SSA, an employer will have to review the letter within 30 days to determine whether the employer properly recorded the listed employees' names and social security number (SSN) or alien documents. If the employer did not and made a clerical mistake, the employer is required to make the correction and file the corrected information with SSA or DHS within the 30-day time period. The employer must also verify the corrections with SSA or DHS within that same 30-day period.
- If the employer reported the information correctly on its I-9 or W-2 forms, employer must confirm that the employee provided accurate information. If the employee did report the information accurately, the employer must ask the employee to ascertain and correct the problem with the appropriate agency. While the employer does not have a duty solve the problem for the employee, it must inform the employee of the 90-day time frame within which the employee must provide verifiably legitimate documents.
- The employer and employee have 90 days from the receipt of the no match letter to complete this process.
- If during the 90-day period the employee provides corrected information, the employer is responsible for verifying the correction with DHS or SSA.
- If at the end of the 90-day period the employer cannot obtain verification from DHS or SSA that the document in question is acceptable, the employer will then have to take action to terminate the employee or face the risk that DHS may find that it had constructive knowledge that the employee is unauthorized.
- If at the end of the 90 days the employer cannot obtain verification, it has an additional three days within

which to complete a new I-9 Form for the employee, using the same procedures as if the employee were newly hired. In completing the form, the employer may not accept any document referenced in the written notice that is disputed. The employer must require that a document establishing identity or identity and work authorization contain a photograph.

- An employer that follows DHS' procedures will have a "safe harbor." It will not be considered by DHS to have constructive knowledge that it employed unauthorized workers, unless DHS could prove independently that the employer had actual or other knowledge that the employee in question was unauthorized to work. The safe harbor would be available even if the worker later were determined to be unauthorized, assuming the employer followed the DHS procedures and could prove that it did so.
- An employer that fails to follow the procedures set forth in DHS' rule will be considered by DHS to have constructive knowledge that it employed unauthorized workers. This will influence DHS' exercise of its prosecutorial discretion in deciding whether it will bring charges against employers that receive no match letters and do not follow up on them.
- Employers that re-verify documents listed in no match letters will be protected against discrimination allegations based on those activities.

We will keep you informed as the process moves forward.

Inside the Indiana Court Decision

Last week a federal circuit court judge struck down parts of Indiana's direct shipping law as unconstitutional. This is a good ruling for wineries as it removed onerous provisions of the law.

Background

The case, *Baude v. Heath*, was filed last year after the new Indiana shipping law was implemented. The case centered around three specific issues:

1. The ban on wineries who have wholesaling rights to apply for a permit (this means that wineries in states where self-distribution is allowed under their winery law or who hold self-distribution permits from other states are excluded from getting a IN direct shipping permit).
2. The requirement that a customer must make a first transaction with the winery in person before the winery can then ship directly to them.
3. As a side note, the in-person requirement in Kentucky's direct shipping law was taken to court at the end of last year and a judge struck down that provision as unconstitutional.

The Ruling

The judge refused to consider claim regarding the use of a wholesaler in Indiana in the last 120 days because the appropriate arguments were not made. The plaintiffs implied that the preclusion falls disproportionately on out-of-state wineries, but the judge decided that they didn't show how this was so. Because anyone can apply for an Indiana Farm Winery Permit (the holders are exempt from the 120 day ban) then an out-of-state winery could obtain the Farm Winery Permit if they wanted to get around the 120 day ban.

Another interesting argument that the judge dismissed dealt with the plaintiffs' claim that because Indiana wineries have access to the market through tasting rooms, farmers markets, and off-site locations, out-of-state wineries should have the ability to reach the same consumers via direct shipments. This is an interesting point because a similar argument is being employed in a case in New Jersey (with a major difference that there is no law allowing direct shipping in New Jersey as there is in Indiana). Specifically, in Indiana the Farm Winery permit allows wineries to sell on premises, at farmers markets, and at three additional locations. The permit is available to all wineries, not just those in Indiana. The plaintiffs claim that the Supreme Court in *Granholm* found a physical premises requirement unconstitutional because the cost of doing business is prohibitive for geographically distant wineries. The judge declared these to be unrelated rights and stated that the Supreme Court decision dealt with the bricks and mortar issue because it directly related to the challenged New York statutes on direct shipping. The judge stated that any winery can get a direct shipping permit in Indiana and the establishment of a physical presence in the state does not determine the ability to ship directly to consumers. Furthermore, the judge noted that three other wine sales cases came to a similar conclusion: *Jelovsik v. Bresden* in TN, *Hurley v. Miner* in DE, *Cherry Hill Vineyard v. Baldacci* in ME.

The judge did, however, find the first two portions of the challenged law on wholesaling rights and the in-person transaction to be unconstitutional.

The judge found that in many states, such as California, Oregon and Washington, wineries receive the right to self-distribute as part of their winery permits or through specifically designated permits. This would then preclude a vast majority of wineries from being eligible for the Indiana direct shipping permit and constitutes a barrier to trade that is unacceptable.

In terms of the face to face restriction, the judge found that the state was unable to prove that less discriminatory means for keeping wine out of the hands of minors didn't work and the in-person requirement was the only way to achieve this goal. Therefore the in-person first sale requirement is unconstitutional because it is another barrier to trade.

The judge also enjoined the state from enforcing the unconstitutional provisions of the law. This means that Indiana now has a pretty workable direct shipment law - \$100 permit fee, wineries can ship up to 24 cases per year per consumer (or 3,000 cases per year total), and may not sell more than 500,000 gallons per year in the state. It is unclear whether the legislature will choose to act next year and revise the law or let it stand as is.

WINEAMERICA MONTHLY NEWSLETTER -SEPTEMBER 2007-

WineAmerica
1212 New York Avenue NW
Suite 425
Washington, DC 20005

Phone: 202-783-2756
Fax: 202-347-6341

Email: info@wineamerica.org

www.wineamerica.org

Staff Contacts

Bill Nelson, President
bnelson@wineamerica.org

Jennifer Montgomery
Dir. of Grassroots & Political
Affairs
jmontgomery@wineamerica.org

Jenny Mattingley
Dir. of Communications &
Membership Services
jmattingley@wineamerica.org

Michael Kaiser
Manager of Regulatory Affairs
labels@wineamerica.org

Nikki Jones
Office Manager
yjones@wineamerica.org