

MEMORANDUM

TO: Drafting Committee: Registration and Licensing of Direct-to-Consumer Sales of Wine and the Prevention of Illegal Sales Act

FROM: Steve Frost and Aaron Gary

DATE: March 26, 2020

RE: Summary of changes from March 13-14, 2020 drafting committee meeting

This memo summarizes the agreed changes to the Act draft resulting from the Drafting Committee meeting on March 13-14, 2020, and the items agreed for further study. The format for references to the February 13, 2020, draft is, for example, at 3-15 refers to page 3, line 15.

Section 2

- Change definition of “valid identification document” to recognize that some states prescribe acceptable forms of identification for alcohol purchases, and to add a legislative note to this effect. Investigate further the term “government-issued” at 3-9 in this definition and whether it is clear with respect to tribal IDs, military IDs, and other forms of identification.
- Investigate further excluding from the definition of “record” the term as used in sections 11 and 14. Investigate using the UCC article 9 (section 9-102) definition of “record” as the model
- Investigate further definitions of “common carrier” and “wine carrier,” in consultation with carrier industry.
- Investigate further adding a definition of “consumer” that would substitute for certain language in the draft (e.g., an individual who purchases wine for personal use and not for resale).

Section 3

- Change subsection (a)(4) to clarify language and consider whether similar provision is required under subsection (b).
- Change subsection (b)(1) to delete “and a description of the premises” at 6-9.

- Change subsection (c) to delete subsection (c)(4).
- Investigate further issuance of wine direct shipper license only to an out-of-state winery, while providing the same authorization to an in-state winery under its winery license issued by the enacting state. Ensure that substance of authorization for both in-state and out-of-state wineries is identical, although falling under different licenses, to conform to *Granholm*, except possibly with respect to reporting (discussed in section 12) and tax collection.
- Investigate further adding a provision that a wine direct shipper license may not be issued if the applicant has shipped wine or other alcohol beverages into another state in violation of that state's law, similar to the suspension/revocation language at 28-16 to 28-17.
- Investigate further reducing language in subsection (d)(1) and cross-referencing section 14(d), such as "appoint an agent as required under section 14(d)."
- Investigate further how subsections (a) and (b) fit together and whether clarification is needed.

Section 5

- Change subsection (c), at 10-14, so that instead of specifying a bracketed quantity, the act omits a specific amount (specifying only "[xx]"). A legislative note will indicate that the enacting state should insert the amount it determines to be appropriate and will also mention that some states do not impose any limit at all, in which case all of subsection (c) could be removed.
- Change subsection (e) to delete the requirement at 11-1 that the label indicates that the package contains alcohol for personal use and not for resale. Investigate further whether the act should include some mechanism, such as a statement by the consignor to the carrier, that the package contains wine being shipped DTC so that the carrier has a clear indication that any unique requirements imposed on the carrier under the act (as opposed to requirements for wine shipped through the three-tier system) apply with respect to the package.
- Change subsection (j), first sentence, at 11-21 to 11-22, to provide a safe harbor so that, for example, the wine direct shipper can rely on a statement by the buyer that the buyer is not purchasing for resale or for a purpose other than the buyer's personal use.
- Investigate further the age verification process in subsection (b) (and in section 6(a)(4) and section 18(b)(7)). Consider whether: the act should establish a uniform standard for age verification; each state should establish

its own standard or process for age verification (i.e. a shipping winery is required to complete age verification “using a process approved” by the enacting state); or each state should merely approve vendors of age-verification technology as meeting uniform standards set forth in the act. There was discussion of: various age verification technologies and vendors available now; not feasible to require winery to possibly have to use a different (state-approved) vendor in every state; any requirement to use age verification technology must be on the front-end at time of sale, not in the field at time of delivery; creating a “safe harbor” if a shipping winery has followed a state-approved age verification process; and, for repeat customers, age verification should only be required for the first sale (winery can rely on prior verification in subsequent transactions with the same customer). Also investigate further the concept of using a “valid identification document,” as defined, particularly in light of digital ID platforms.

- Investigate further the restriction in subsection (f) that a shipping winery cannot ship into an area that the state has identified as “dry.” Suggestions included: deleting this subsection from the act; making the subsection optional and adding a legislative note (including reference to the contrary provision in Texas law); and reversing the burden so that it would be up to the consumer (not the state and winery) to determine if the consumer is in a “dry” area and the consumer, not the winery, could be penalized for ordering wine to be shipped into a dry area.
- Investigate further the restriction in subsection (g) that wine shipped DTC must be delivered by a common carrier, even if shipped in-state. According to an observer, wine shipped DTC in-state in California is treated like wine sold in a winery tasting room. See further discussion under section 12.
- Investigate further adding a comment (but not an act provision) that some states (Ohio and Tennessee) impose a production limit for wine direct shippers and that a winery which produces more than a specified volume is not eligible for a wine direct shipper license. If a comment is included, it must also discuss cases addressing such a volume limit, including the case striking down a limit enacted with a protectionist intent.

Section 6

- Change to delete requirement in subsection (b), at 14-8 to 14-9, that wine shipped DTC may not be delivered to a location licensed to sell alcohol beverages.
- Change subsection (e) to replace requirement that a carrier may not accept wine for shipment from a consignor on the “violator list” with the restriction that the carrier may not accept such a shipment if it has received notice that the consignor is a violator. Create a process modeled after the New

Hampshire rule under which notice is given to the carrier of an illegal shipment and the carrier is given 15 days to stop accepting packages from the illegal shipper identified in the notice. The “violator list” under the act will be retained but will only serve an informational purpose.

- Investigate further age verification process and signature requirement under subsection (a), at 13-31 to 14-4 (as discussed under section 5).

Section 7

- Change subsection (b) to delete language at 16-10 to 16-11 that wine shipped DTC cannot be transported to a location licensed for the sale of alcohol beverages.
- Change to add a subsection clarifying that act does not prohibit DTC retail shipping in states in which it is authorized by other law.
- Investigate further adding a general scope provision at the beginning of the act. Consider placing the substance of section 7(d) in that scope provision, stating generally that the act does not apply to wine distributed through the three-tier system.
- Investigate further subsection (b), at 16-10, that wine cannot be resold or used for a commercial purpose. Consider adding language that the wine cannot be resold unless permitted under other law, and adding a comment that, although states generally prohibit the sale of alcohol without a license, the act does not prohibit the recipient of the DTC wine shipment from reselling the wine if the enacting state offers a license, or has a license exemption, for auction sales, for wine collector sales, or for other special-circumstance sales.
- Investigate further moving subsection (b) to a different or new section.

Section 8

- Change subsection (b)(1) to delete “and a description of the premises” at 17-5.
- Investigate further deleting subsection (c)(3), a result of which is to allow a winery to also be a fulfillment provider servicing other wineries.
- Investigate further shortening subsection (d)(1) by using a cross-reference, as discussed under section 5.

Section 10

- Investigate further whether the link between the fulfillment provider and the licensed winery, as set forth in section 10(b), (d), and section 5(h), (i), is sufficiently clear and complete.

Section 11

- Change subsection (e) to modify “if authorized by the [Commission]” at 21-12 to 21-13 to automatically allow the licensee to keep electronic records but to allow the Commission to prescribe the digital format.

Section 12

- Change subsections (a), (b), and (c) by bracketing as optional “quarterly” at 21-25, 22-22, and 23-15, or by substituting “[insert timeframe],” with corresponding changes elsewhere in the section and a legislative note.
- Change subsection (d) by replacing “including” at 24-4 with “and.”
- Change subsection (e) to specify that no report is required if there is no reportable activity during the reporting period.
- Change section to require state to maintain the confidentiality of the reports under section 12.
- Investigate further exempting from the reporting requirements in-state DTC shipments. According to an observer, some states do not require separate reporting for in-state shipments; instead, the in-state DTC sale is treated like a winery tasting room sale, with no requirement for such detailed reporting as the purchaser’s identity, brand sold, etc.

Section 13

- Change subsection (a) by deleting this entire subsection.
- Change subsections (b) and (d) to simply require the out-of-state wine direct shipper to pay the taxes imposed by the enacting state, and insert brackets and a legislative note directing the enacting state to include a cross-reference to the applicable provision of the state’s excise tax statute that would apply to the out-of-state winery.

Section 14

- Change subsection (b) to delete “copies of these” at 27-4 to 27-5 and bracket as optional “10” at 27-5.

- Change subsection (f) to replace “50” at 28-4 with “[xx]”.
- Investigate further whether to delete, bracket, or modify (such as tying it to imposition of a forfeiture) the second sentence of subsection (c) at 27-8 to 27-10 relating to reimbursing inspection expenses.
- Investigate further replacing subsection (d) with appointment of agent language from different uniform act. A Commissioner will provide language from another act that is the proposed replacement.

Section 15

- Change subsection (a)(4) to replace the term “caused” at 28-20 with “been grounds for.”
- Change subsections (c) and (f) to remove brackets designating these provisions as optional.
- Investigate further whether subsection (a)(2), allowing license suspension or revocation for shipping into another state in violation of that state’s law, should be bracketed as optional.
- Investigate further issues of reporting licensee’s DTC violations in the enacting state to other states, reporting suspensions / revocations of wine direct shipper license to other states, and suspending, revoking, or denying a license application because the winery violated a different state’s law or had its wine direct shipper license revoked in a different state. Also consider how this would link with section 3.

Section 16

- Change subsection (a), at 30-15 to 30-16, to reflect that the license or permit might have been issued by the state or by a political subdivision of the state.
- Change subsections (c) and (f) to remove brackets designating these provisions as optional.
- Change to delete subsection (g) because the conduct under subsection (a) is not a violation of the act for purposes of section 17.
- Investigate further deleting section 16 from the act.
- Investigate further subsection (h)(3) and providing notice to carrier in addition to adding person to “violator list.”

Section 17

- Investigate further all penalty and other provisions in this section.

Section 18

- Change to add legislative note related to subsection (b)(6), to clarify that the enacting state's existing tax law governing such matters as due date for tax returns, form of tax filing, remedies for delinquents taxes, etc., will generally govern the tax obligations arising under the act.
- Investigate further adding to subsection (b) at 34-20 a reference that the state may adopt rules “[pursuant to the state’s administrative procedure act].”
- Investigate further subsection (b)(7) related to age verification process (as discussed under sections 5 and 6).