

## **Government Affairs & Legal Update - January 2005**

### **A. FEDERAL**

TTB Publishes Final Flavored Malt Beverage Regulations: On December 28, 2004, the Alcohol & Tobacco Tax & Trade Bureau ("TTB") announced the results of its long-awaited rulemaking on the composition, labeling and advertising of flavored malt beverages ("FMBs"). The complex, 199-page "Final Rule," published in the January 3, 2005 edition of The Federal Register, contains many findings and subsidiary findings. Highlights include the following:

\* For beer/malt beverage products containing 6% alcohol by volume ("ABV") or less, TTB will require that a majority (51% or more) of the alcohol be derived from the fermentation of barley malt and other materials, with up to 49% coming from spirits-derived alcohol contained in added flavors. Current law does not place any limit on the amount of alcohol flavors can contribute to an FMB of this alcohol strength. This formulation issue was the most contested issue in TTB's FMB rulemaking, with many FMB producers favoring the majority (a/k/a "51/49") standard adopted by TTB, while others favored a 0.5% ABV limit on alcohol from flavors (a/k/a the "90/10 standard").

\* For products containing more than 6% ABV, the Final Rule retains the 1.5% ABV limit on flavors first announced in ATF Ruling 96-1. By doing so, TTB preserves the status quo and avoids the specter of 70° proof "malt beverages" deriving almost half their alcohol from spirits.

\* The Final Rule codifies the labeling and advertising rules first announced in ATF Ruling 2002-2. Thus, the regulations published in the Final Rule will continue to allow the use of distilled spirit brand names and cocktail names in the labeling and advertising of malt beverages, but prohibit false or misleading references to distilled spirit classes and types.

\* The Final Rule makes major changes in the "statement of process" (to be known as "formulas" under the new regulations) rules for beer/malt beverage products.

The effective date of all portions of the Final Rule is January 3, 2006.

### **Final Rule on Recordkeeping Under the Bioterrorism Act:**

On December 6, the federal Food & Drug Administration ("FDA") issued final rules under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (the "Bioterrorism Act"). The last of four rulemaking projects growing out of the Bioterrorism Act, the new recordkeeping regulations create a "one up, one down" recordkeeping requirement for all U.S. food and beverage producers (i.e., breweries) and handlers (i.e., wholesalers). Stated broadly, producers and handlers must be able to produce to FDA records showing their immediate ("one up") source for all food and ingredients, and showing their customers for all food and ingredients sold or distributed ("one down").

Most gratifying to the alcohol beverage industry is the recognition that the new regulations "do not require duplication of existing records if those records contain all of

the information required by this [rule]." Breweries and wholesalers already must maintain extensive records in order to comply with the requirements of TTB. As long as existing recordkeeping systems meet FDA's requirements, brewers and wholesalers need not create new recordkeeping systems in order to comply with the Bioterrorism Act.

#### TTB Announces New Advertising Enforcement Program:

On November 19, TTB issued Industry Circular 2004-6, announcing a new, more aggressive enforcement stance towards industry advertising. In recent years, TTB rarely has monitored alcohol advertising in the marketplace and, instead, has often relied on other industry members to bring allegedly noncompliant ads to its attention. Under TTB's new policy, the Agency will actively monitor and review advertisements in the marketplace. In addition, TTB plans to contact companies and request information on advertising in order to monitor compliance with the law. TTB will select companies based on factors "such as prior compliance history, advertising methods, and market impact, as well as random sampling factors."

#### TTB Administrator Retires; Successor Named:

In early December TTB Administrator Arthur "Art" Libertucci announced his retirement as the Administrator of TTB. Libertucci, who became TTB's first Administrator after more than thirty years at its predecessor, the Bureau of Alcohol, Tobacco & Firearms, retired on January 3. Libertucci's Deputy, John Manfreda, will succeed Libertucci as TTB Administrator.

#### CSPI Seeks FTC Action on Bud Light Ads:

Anti-alcohol group Center for Science in the Public Interest ("CSPI") has asked the Federal Trade Commission ("FTC") to investigate recent Bud Light television advertisements. In the ads, a group of men dressed as football officials steal Bud Light from a group of fans, then attempt to escape the police when confronted. CSPI claims the ads violate Beer Institute guidelines prohibiting beer advertisements that portray or imply illegal activity of any kind. Anheuser-Busch has rejected CSPI's charges, responding that the advertisements clearly represent "over the top humor" and therefore do not violate the Code.

## **B. THE COURTS**

#### Granholm v. Heald: Supreme Court Direct Shipping Proceedings:

On December 7, the U.S. Supreme Court heard oral arguments in a case that will decide whether states can allow in-state wineries to ship wine directly to consumers, but require out-of-state wineries to sell through the three-tier system. The case involves appeals of two U.S. Court of Appeals decisions. One, arising out of New York, held that the 21st Amendment to the Constitution allows discriminatory treatment of out-of-state wineries. The other, arising out of Michigan, held that the Constitution's Commerce Clause does

not allow states to favor in-state businesses, and that the 21st Amendment does not authorize such "protectionism."

At oral argument, the Justices asked hard questions of both sides. Questioning of the two attorneys arguing in favor of direct shipping suggested that several Justices, most notably Justice Kennedy, recognize the potential impact their ruling could have on the three-tier system. Questions aimed at the attorneys arguing for the states of Michigan and New York, however, focused on prior precedent and suggested that the discrimination inherent in their state laws could only be explained by a desire to protect local industries.

Although the outcome of a case cannot be predicted based on oral argument, many observers reported that the Court seemed to favor the direct shipping side. Whether these predictions prove accurate must wait until the Court issues a final ruling, likely in the Spring of 2005.

Costco v. Maleng:

On December 1 a federal district court in Washington rejected arguments that retailer giant Costco could not bring a federal antitrust lawsuit (under the Sherman Act) challenging a variety of state laws, including laws requiring minimum markups and the posting of prices. The ruling does not end the case, but allows Costco to proceed. In the same ruling, the Court ruled that Costco's claims under the Washington Constitution were barred by the 11th Amendment to the Constitution, requiring Costco to bring such claims in a Washington state court.

Hakki v. Zima Company: D.C. Class Action:

On December 10, the U.S. District Court for the District of Columbia remanded this class action lawsuit against the industry to the District of Columbia's court system. Like four other suits pending in other parts of the country, the Hakki lawsuit claims that alcohol beverage producers (the Hakki complaint names Bacardi, The Beer Institute, Brown-Forman, Coors, Diageo, Heineken, Kobrand [Alize Cognac], and Mark Anthony Brands [mike's hard lemonade]) deliberately target underage drinkers with their advertising and promotions. Each suit seeks massive damages, which would primarily profit the plaintiffs' lawyers who bring such suits.

In the December ruling, the Court rejected a Beer Institute argument that it was "fraudulently joined" in the action in order to keep the case in the D.C. court system. Without The Beer Institute, the fact that all other defendants reside outside the District would have allowed the defendants to remove the case to federal court. Examining the claims under District of Columbia law, the Court concluded that it was not impossible for the plaintiffs to make a case against The Beer Institute. As a result, The Beer Institute was not fraudulently joined and, as a proper party to the litigation, the District Court lacked jurisdiction over the case.

Leocal v. Ashcroft:

On November 9, the U.S. Supreme Court ruled that driving under the influence of alcohol ("DUI") was not a "crime of violence" under the Immigration and Nationality Act ("INA"). Under the INA, persons convicted of a "crime of violence" may be deported. Examining the intent of Congress in enacting the crime of violence language of the INA and historic understandings of what constitutes such a crime, the Supreme Court concluded that the INA did not authorize the deportation of persons convicted only of a DUI offense. Mothers Against Drunk Driving has expressed concern over the decision.

### **C. INTERNATIONAL**

#### Canadian Trade Sanctions:

On November 23, the Canadian Department of International Trade published a proposed list of U.S. goods that could be the subject of trade sanctions if the United States does not repeal the "Continued Dumping and Subsidy Offset Act," better known as the Byrd Amendment. The Byrd Amendment allows U.S. companies that bring trade remedy cases to benefit not only from the imposition of anti-dumping and countervailing duties, but also to receive direct payments from the U.S. government. On August 31, 2004, a World Trade Organization ("WTO") arbitrator ruled that Canada and several other nations could retaliate against U.S. goods because of the Byrd Amendment's preferential treatment of United States companies.

The Canadian list published on November 23 includes "beer made from malt" among the U.S. products that may be targeted with retaliatory sanctions. Also included on the list are grape wine, whiskies, rum and vodka. The Canadian government has stated that it would prefer that the U.S. repeal the Byrd Amendment over imposing retaliatory tariffs on U.S. goods.

#### WTO Ruling on Geographic Indications:

Although its report will not become public for several months, a confidential WTO panel ruling has both U.S. and European government trade representatives claiming victory. European law generally gives substantial protection to "geographic indications" (like "appellations" for wine) that apply to products produced in a particular area by a particular method. Although such designations are not unknown in the U.S. and elsewhere, U.S. law tends to favor trademark rights over the rights of companies claiming geographic indication protection. These legal differences have led to escalating transatlantic arguments over such famous names as Budweiser, Pilsner, Burgundy, Champagne and Parmesan cheese.

The recent WTO ruling arose from U.S. complaints that the European Union's system of protecting geographical indications was inconsistent with WTO obligations. According to press reports, the panel has ruled that the European system, as currently administered, discriminates in favor of European goods and therefore is inconsistent with WTO treaty obligations. On the other hand, the ruling reportedly affirms that geographic indication

protection, in itself, is not inconsistent with WTO obligations. Both sides accordingly are claiming victory.

#### D. THE STATES

##### Taxation:

\* On November 2, Alabama voters rejected a proposal (Statewide Amendment No. 7) that would have authorized a county to levy a tax on liquor and wine.

\* In December legislators rejected a Chicago, Illinois proposal to impose a "penny-a-sixpack" tax on beer.

\* Local press reports that a study committee appointed by Iowa Governor Tom Vilsack is proposing to raise excise taxes on alcohol to cover Medicaid costs. The proposal was presented to the Iowa Legislature in early December.

\* According to local press, Washington Governor Gary Locke has proposed increased alcohol taxes as a way to close the state's current budget shortfall.

##### Franchise Laws:

\* A pair of New Jersey bills (A.B. 3619 and S.B. 2170) would clarify that certain terms in agreements between suppliers and their wholesalers do not give either party a prohibited "interest" in the other. Practices authorized include restrictions on wholesaler ownership and management changes, quality control terms, required ordering and inventory methods, and modifications to agreements after consultation with "an advisory panel" of the supplier's wholesalers. The bills respond to regulations proposed last year by the New Jersey ABC that would have prohibited numerous terms contained in the current contracts between beer suppliers and their wholesalers. Both bills also authorize various customary trade activities that the ABC attempted to prohibit last year.

##### Direct Shipping:

\* A Florida bill prefiled on December 14 (S.B. 480) would authorize the shipment of wine by out-of-state shippers directly to Florida consumers. Like many similar measures introduced or enacted in other states in recent years, the bill would require shippers to obtain a Florida license, require adult signature and identification upon delivery, and collect sales and excise taxes on such shipments. Unlike other measures, however, the bill also would require Florida consumers to register with the state.

\* The Illinois Senate recently passed a Resolution (S.Res. 645) to create a task force to examine whether Illinois laws regulating the importation of alcohol beverages are in jeopardy due to preferential treatment granted to Illinois winemakers. The Resolution responds to the nationwide litigation campaign against discriminatory laws affecting the direct shipment of wine.

\* A raft of new Massachusetts bills (H.D. 1916, H.D. 2945, H.D. 3757 and S.D. 1650) would address the issue of direct wine shipments.

##### Trade Practice & Other:

\* A bill prefiled in the Alabama House last month (H.B. 26) would require wholesalers to offer free pricing services to retailers.

\* A draft bill currently circulating in California would amend the state's tied-house prohibitions to prohibit "scan payments" and other forms of wholesaler and supplier payments to retailers. The draft reportedly is being "shopped" by Southern Wine & Spirits. Under current California law, scan payments are treated like electronic coupons and therefore do not fall within current tied-house prohibitions.

\* On December 2, Illinois enacted legislation (former H.B. 6654) that requires distributors, importing distributors and manufactures to notify retailers of their monthly sales to the retailer.

\* On November 17 the Pennsylvania Senate rejected a bill (H.B. 2021) that would have authorized beer distributor sales on Sundays. The measure was opposed by tavern owners, who currently hold a monopoly on Sunday beer sales within the Commonwealth.

\* Pennsylvania legislation signed by the Governor on December 8 (former H.B. 2105) makes a variety of changes to the Commonwealth's alcohol beverage laws. Changes include: (1) defining "wine" within the Liquor Code; (2) authorizing the repackaging of beer by manufacturers at a facility owned or operated by an importing distributor; (3) broadening and clarifying the circumstances where a retail license can be suspended; and (4) prohibiting fireworks sales by licensees.

\* On November 2, South Carolina voted to amend the state constitution to remove its current requirement that all distilled spirits be sold in "minibottles."

\* In November the Texas Sunset Commission held hearings on proposed changes to the state's alcohol beverage laws. The Sunset Commission's report questioned the continued viability of the three-tier system, and criticized the Texas ABC's "inconsistent" approach towards trade practice issues.



## **Government Affairs & Legal Update - February 2005**

### **A. FEDERAL**

2005 Dietary Guidelines for Americans: On January 12 the U.S. Department of Agriculture released its long-awaited Dietary Guidelines for Americans. As in previous editions (the Guidelines are updated every five years), this year's edition contains a balanced description of the risks and potential benefits of alcohol consumption.

Joint Committee on Taxation Report: On January 27, the congressional Joint Committee on Taxation issued a report recommending that the federal tax code equalize the taxation of beer, wine and distilled spirits and replace current law with a system based solely on the alcohol content of the beverage. The Report recommended the retention of tax differentials that favor small breweries and wineries. The proposal is given little chances of success.

### **B. THE COURTS**

Goodwin v. Anheuser-Busch: California Class Action: On January 28 a Los Angeles Superior Court handed the industry a major victory by dismissing a class action case filed against Anheuser-Busch and Miller Brewing. One of five class actions currently pending against the industry, the Goodwin case, like the other four, alleges that industry advertising targets underage drinkers.

In granting the defendants' motion to dismiss the case, Superior Court Judge Peter Lichtman ruled that plaintiffs' claims under public nuisance, unjust enrichment, and the California Legal Remedies Act all should be dismissed. (Late last year the Court dismissed the plaintiffs' Unfair Competition Law claim.) Among the Court's conclusions: (1) the remedy for the harms complained of are within the sole jurisdiction of the California ABC; (2) California law specifically immunizes manufacturers of alcoholic beverages from product liability suits; (3) the plaintiffs failed to plead the "special injury" necessary to sustain a public nuisance claim; and (4) equity does not allow underage persons -- who purchased alcohol in violation of the law -- to recover for unjust enrichment.

Although the Goodwin opinion does not bind courts in the other four states where class actions remain pending, some of its reasoning may persuade other courts to dismiss. The plaintiffs have announced plans to appeal the dismissal.

### **C. THE STATES**

Taxation: With many state legislatures back to work and thinking about budgets, talk of alcohol excise tax or license fee increases have sprung up in many states. Among the states reportedly considering alcohol tax or fee increases are:

\* Alaska

- \* Kentucky
- \* Minnesota
- \* Missouri
- \* Montana
- \* Oregon
- \* South Carolina
- \* Tennessee (permit fees)
- \* Texas
- \* West Virginia

#### Direct Shipping:

\* A Connecticut bill introduced on January 12 (S.B. 122) would legalize the direct shipment of wine to in-state consumers. Like similar legislation promoted around the country by direct-shipping proponents, the bill would include safeguards designed to avoid deliveries to underage consumers.

\* Direct shipping proponents also have introduced new legislation in Indiana (H.B. 1094).

\* Maine lawmakers, too, will be considering direct wine shipment legalization bills (M.L.R. 357, M.L.R. 1136) in the upcoming legislative session.

\* As in past legislative sessions, this year New York lawmakers will consider legislation to legalize direct shipping of wine (A.B. 247). New York Governor Pataki has announced his support for liberalizing the state's current ban on out-of-state wine shipments.

\* Legislation recently introduced in North Dakota (H.B. 1325, S.B. 2179) would add that state to the slowly-growing list of "reciprocal" shipping states. If enacted, the "reciprocal" shipping law would allow wineries to ship to North Dakota if they are located in states that permit consumers to receive wine from North Dakota.

#### Trade Practice & Other:

\* Colorado lawmakers are considering several bills designed to crack down on underage drinking in the wake of several student drinking incidents. One bill (H.B. 1077) would institute a keg registration system similar to those in place in a growing number of states. Another (H.B. 1183) would increase penalties for those who distribute alcohol to minors.

\* Legislation introduced in Maine on January 3 (L.R. 819) would legalize certain limited partnerships between brewers and wholesalers. The bill is likely modeled after similar measures that Anheuser-Busch has promoted in other states.

\* A pair of Minnesota bills (S.B. 25, S.B. 171) would create several new intermediate classes of brewers and establish new licensing fees for such companies.

\* Mississippi lawmakers are considering legislation to prohibit drive-through sales of alcohol beverages (H.B. 395).

\* Other new Mississippi legislation introduced in January would privatize the wholesale sale of wine (H.B. 399, S.B. 2228). Under current law, most wine (except for

low-alcohol "light wine") is distributed by a state monopoly. Another measure (S.B. 2242) would privatize all alcohol sales, including distilled spirits.

\* Two pieces of Tennessee legislation (H.B. 12, S.B. 51) would impose registration requirements on consumers purchasing kegs of beer.

\* In Vermont, legislators are considering a measure to lower the drinking age from 21 to 18. Although the measure's promoter admits that any legislation stands little chance of success, he hopes to stimulate thinking on the subject.



## **Government Affairs & Legal Update - March 2005**

### **A. FEDERAL**

**STOP Underage Drinking Act:** On February 16 a group of Senators and Congressmen re-introduced the "Sober Truth on Preventing Underage Drinking Act" or "STOP Underage Drinking Act." Like bills by the same name introduced last year, the STOP Underage Drinking Act would create and fund a national underage drinking campaign based on the recommendations contained in 2003's National Institutes report to Congress.

The STOP Underage Drinking Act's proposed measures include:

- \* Encouraging the industry to further limit underage exposure to its ads, including an endorsement of third-party review of industry ads for compliance with voluntary advertising codes;
- \* Requiring a national "report card" on underage drinking coordinated by the Secretary of Health and Human Services and including many federal agencies;
- \* Funding a billion-dollar per year national media campaign against underage drinking;
- \* Granting funds to local groups in order to combat underage drinking; and
- \* Funding additional research into ways to fight underage drinking.

\* **AWOL Machine Ban Proposed:** A Colorado Congressman has introduced the Alcohol Without Liquid Machine Safety Act of 2005 (H.R. 613). The bill would ban devices, known as "alcohol without liquid" or "AWOL" machines, from sale in the United States unless and until the Food & Drug Administration determines that the machines are safe for human use. By allowing people to inhale alcohol, AWOL machines have generated considerable controversy, and have attracted a diverse group of industry critics including Diageo and the National Beer Wholesalers Association.

\* **TTB Announces Brewery Seminars:** TTB has announced that it will hold a series of training seminars directed at the brewing industry. The seminars will cover topics on recordkeeping, statements of process, bonds, tax payments, labeling, exports, and the suspension of the special occupational tax. Seminars are scheduled for April 26 in Portland, Oregon, April 28 in Seattle, Washington, and May 3 in Phoenix, Arizona.

\* **TTB Updates Pay.gov:** On February 24, TTB issued Industry Circular 2005-1. The Circular announces that the Pay.gov system for submitting tax payments and reports to the government now includes the Monthly Report of Processing Operation, Monthly Report of Production Operations, and Monthly Report of Processing (Denaturing) Operations. All apply to persons conducting distilling operations.

### **B. THE COURTS**

\* **Tomberlin v. Adolph Coors Company: Wisconsin Class Action:** On February 23 a group of lawfirms filed another class action lawsuit against the alcohol beverage industry

alleging that industry advertising and marketing practices target underage drinkers. The lawsuit is part of a series of suits brought by the Straus-Boise lawfirm of Northern Virginia. That same firm, along with associated local firms, already has filed cases in The District of Columbia, Colorado, North Carolina and Ohio. Like the Ohio lawsuit, the Tomberlin case names Anheuser-Busch, Miller Brewing, Coors, The Boston Beer Company, Heineken, Inbev/Labatt, Allied-Domeq, Bacardi, Brown-Forman, Diageo, Jim Beam and Kobrand.

## C. THE STATES

### \* Franchise:

o A Kentucky bill originally dealing with wine (S.B. 73) was amended by the Kentucky Senate to include provisions strengthening the state's 2004 beer "franchise" law. The amendments would require brewers and importers that acquire a brand to either continue using the brands' existing distributors, or pay those distributors "fair market value" to end the distribution relationship and transfer brand rights to another distributor. If the parties can not agree on fair market value, the bill would establish an expedited arbitration mechanism to determine the compensation due to the terminated distributor. Other provisions in the amendment would precisely define what distributors are covered by the law and give winners in a franchise dispute the right to recover their attorneys' fees.

o Taxation: In February reports emerged that the following states were considering alcohol excise tax increases:

+ Connecticut

+ Massachusetts

+ Montana - By a 9-2 vote, the Montana Senate Taxation Committee rejected the bill (S.B. 343) to increase the state's beer excise tax.

+ North Carolina

+ South Dakota

+ Direct Shipping:

# Legislation introduced in the Florida Senate last month would make Florida a "reciprocal" shipping state. Reciprocal wine shipping laws allow wineries located in a state with such a law to ship directly to consumers in another "reciprocal" shipping state. Governor Bush reportedly is sympathetic to the proposal.

# A report by the Maryland Wine & Grape Advisory Committee suggests that the state reconsider its strict laws against interstate wine shipments.

# Trade Practice & Other:

\* Like the federal government, many states are considering legislation to prohibit alcohol without liquid or "AWOL" machines. Last month lawmakers in Colorado and Iowa introduced legislation to ban the devices.

\* The Arizona House Committee of Commerce has passed a bill that would automatically suspend the drivers license of any adult found to have purchased alcohol for a minor.

\* A Connecticut lawmaker has introduced legislation that would require nutritional labeling on all alcohol beverage labels. The bill echoes calls from certain

"public interest" groups for the federal government to require "alcohol facts" labeling on alcohol beverage labels.

\* Colorado is considering legislation (H.B. 1077) to require the registration of all kegs of beer purchased at retail. Another pending bill would increase penalties for furnishing alcohol to minors.

\* As in past years, the Indiana legislature is being asked to refine the state's definition of "grocery store." The measure aims at halting the licensing of convenience stores.

\* A surprising bill introduced in Maryland (H.B. 502) would allow employers to require their workers to take breath tests or face termination of employment. More ominously, the bill sets .02% blood alcohol content as the threshold for allowing employers to fire employees found to have alcohol in their system.

\* New legislation introduced in North Carolina would prohibit drivers from having any alcohol in their systems if a child under the age of 17 is riding in the car.

\* A Rhode Island bill introduced last month would ban DWI checkpoints. The bill's sponsor argues that allowing police to stop vehicles without "probable cause" to do so infringes on citizens' civil liberties.

\* Texas lawmakers, like those in many other states, are considering legislation (H.B. 193) to require the registration of all kegs purchased at retail.

\* Wisconsin lawmakers have introduced legislation that would allow members of the armed services to drink alcohol after their 19th birthday. The bill's supporters claim that allowing young men and women to go to war but prohibiting them from enjoying a beer makes no sense.

\* Legislation aimed at removing the current 6% ABV cap on beer has been introduced in North Carolina, one of only six states imposing such a strigent restriction on malt beverage alcohol content.

## Government Affairs & Legal Update - April 2005

### A. FEDERAL

Paperwork Relief for Small Businesses Act: On April 6, Representative Ron Lewis (R-KY) and Senator Jeff Bingaman (D-NM) introduced the Paperwork Relief for Small Businesses Act of 2005 (H.R. 1520; S. 720). If enacted, the Act would allow companies that pay less than \$50,000 per year in federal alcohol excise taxes to pay those taxes quarterly. Under current law, all excise taxpayers except for extremely small wineries must pay these taxes 25 times per year. As a result, the government receives tens of thousands of tax returns that represent far less than .1% of total excise taxes collected. The Brewers Association strongly supports the Paperwork Relief for Small Businesses Act. [On May 17, the Senate passed the Act as part of the 2006 Transportation Bill.]

TTB User Fee Proposal: The President's fiscal 2006 budget proposes that the Alcohol & Tobacco Tax & Trade Bureau ("TTB") impose \$29 million in new "user fees" on the alcohol beverage industry. Under the proposal, TTB would charge for "services" such as certificates of label approval ("COLAs"), statements of process ("SOPs"), basic permits and brewer's notices. The Brewers Association has joined with every other major alcohol beverage trade association in opposing the President's user fee proposal.

NCAA Beer Ad Ban Pushed: Last month alcohol industry critics increased their calls for the National Collegiate Athletic Association ("NCAA") to stop allowing beer advertisements during the broadcast of NCAA events. Supporters of the ban include the American Medical Association, the Center for Science in the Public Interest, and a coalition of college officials.

### B. THE STATES

#### Franchise:

- Σ A draft bill circulating in **New Jersey** reportedly has the blessing of the state's beer wholesalers and its largest brewer - Anheuser-Busch. Under current New Jersey law, brewers that supply more than 20% of a wholesaler's beer are covered under a general franchise law, but smaller suppliers' relations with wholesalers are not. Under the new law, large brewers (20% plus) would have more rights than small ones. For example, the law would allow large brewers to limit the compensation a wholesaler can seek to two-times the wholesaler's annual net profits earned on the brand (the formula in the A-B wholesaler agreement), but would deem that amount insufficient to compensate a wholesaler for the loss of a smaller supplier's brands.

Taxation: Reports from the states in April contained the following new excise tax news:

- In **Arkansas**, a bill (S.B. 930) to give small breweries a rebate on their state excise taxes died in the Senate Finance Committee. Opposition from Anheuser-Busch reportedly helped kill the bill.
- In **California**, a Senate committee tabled a proposal (S.B. 656) that would have allowed counties to impose their own drinks tax on the purchase price of beer, wine and distilled spirits sold at on-premise retailers. The bill would have allowed counties to impose up to 5% in taxes on top of existing state excise and sales taxes.
- Late last month the **Florida** House voted to abolish the state's per-drinks tax. The levy currently adds a per-drink charge on alcohol beverages sold at on-premise retailers, in addition to state excise taxes. A Senate committee also approved similar legislation.
- Early in April an **Indiana** Senate panel voted to increase alcohol taxes (H.B. 1120).
- **Louisiana's** Governor reportedly is considering alcohol excise tax increases in an effort to fund a teacher pay increase.
- Lawmakers in **Maine** are circulating a significant tax reform proposal that would include alcohol excise tax increases.
- Late in April the **Minnesota** Senate Taxes Committee voted against an alcohol beverage excise tax increase. One Minnesota law that did pass last month will adjust the state's licensing fees for small brewers (former S.B. 171).
- The **Ohio** House last month voted in favor of a significant tax increase on beer and wine.
- On April 20 the **South Carolina** House passed a bill to increase excise taxes on beer and wine (H.B. 3768).
- The **Texas** Senate's version of tax reform reportedly will propose an increase in alcohol beverage taxes.
- A rare proposal to increase the beer tax in **Wisconsin** reportedly has little chance of success.

Direct Shipping:

- On April 5 the **Arkansas** House approved a bill (S.B. 762) that will authorize local wineries to ship directly to consumers.
- A new **Texas** law (former S.B. 877) will legalize the direct shipment of wine to consumers by wineries located inside and outside the state. Quite notably, the law permits shipments even to consumers located in "dry" areas.

### Trade Practice & Other:

- A new **Arkansas** law (former H.B. 2632) requires the registration of kegs sold at retail in the state.
- Last month **Colorado's** governor signed into law a bill (former S.B. 34) banning "Alcohol Without Liquid" or "AWOL" devices from the state.
- A new **Connecticut** law (former H.B. 6071) authorizes brewers to sell beer in growlers and other sealed containers for off-premise consumption.
- A **Hawaii** bill (H.B. 121) that would allow brewpubs to sell beer in any recyclable container has passed both the House and Senate.
- **Maine's** legislature is considering a measure (L.D. 903) that would suspend driver's license privileges of any adult convicted of assisting minors obtain alcohol.
- The **Maryland** Senate last month passed a bill that would strengthen penalties imposed on persons who refuse a blood-alcohol test.
- A bill introduced in the **Michigan** House last month (H.B. 4641) would authorize brewpubs to sell beer to special event licensees.
- The Mayor of Duluth, **Minnesota** recently announced plans to begin enforcing an existing law that requires that Minnesota-produced beer be made available wherever beer is sold in publicly-owned or operated buildings.
- The **Montana** House and Senate last month agreed to send to the Governor a bill (H.B. 502) that eliminates background checks for off-premises beer and wine licensees.
- Early in April the **Montana** Senate voted in favor of a bill (H.B. 348) requiring the tagging and registration of kegs sold at retail.
- **New York** legislators are considering a measure (S.B. 4776) that would authorize the creation of a "brewery trails" program to promote local breweries.
- Another **New York** bill would allow the buying and selling of on-premises retail licenses (S.B. 4805).
- Yet another **New York** bill (S.B. 5055) introduced last month would exempt brewpub beer from the state's current brand registration requirements.
- As in other states, new legislation introduced in **Ohio** last month (H.B. 211) would ban "AWOL" devices.

- Last month the **Oregon** House passed legislation (H.B. 3015) that will conform the state's definition of "malt beverage" to the standards of the federal government. The bill became necessary after the Oregon Liquor Control Commission ruled that flavored malt beverages could not contain more than 0.5% alcohol by volume from added flavorings.
- On April 5, the **Tennessee** Attorney General's office issued an opinion concluding that certain state regulations restricting alcohol advertising were unconstitutional and could not be enforced.
- Last month a **Texas** Senate committee reported favorably on a bill (S.B. 1472) to authorize the provision of draft cleaning services to retailers, provided that the manufacturer bears the cost of the service.
- On April 11 the **Washington** Senate passed a bill (H.B. 1431) permitting licensees to conduct courses of instruction on beer and wine, and to furnish beer and wine in connection with those courses.



## **Government Affairs & Legal Update - May 2005**

### **A. FEDERAL**

**TTB User Fee Proposal:** The Brewers Association joined with eight other major alcohol beverage trade associations in a letter to the Chairman and Ranking Members of the House Appropriations Subcommittee for the U.S. Department of Treasury expressing strong opposition to the \$29 million user fee proposal included in the President's Budget for the Alcohol & Tobacco Tax & Trade Bureau ("TTB"). The letter emphasized the adverse impact user fees would have on small businesses and the inequity of forcing alcohol beverage suppliers to pay for government-mandated permits, label approvals and formula applications. To date, no user fee legislation has been introduced.

**TTB on Misleading Health Statements:** In response to the submission of several labels for malt beverages that contain ingredients generally associated with non-alcohol energy drinks (e.g., caffeine and ginseng), TTB recently issued a notice reminding industry members to avoid potentially misleading advertising for these products. TTB warned that advertising implying that the consumption of malt beverages will have a stimulating or energizing effect or will enable consumers to drink more of a product without feeling the effects of alcohol are misleading and that TTB may bring enforcement action against the responsible advertiser.

### **B. THE COURTS**

**Supreme Court Issues Direct Shipping Decision in *Granholm v. Heald*:** After months of anxious anticipation, on May 16 the U.S. Supreme Court issued its decision on the constitutionality of the Michigan and New York wine direct shipping laws in *Granholm v. Heald*. Stated briefly, the Court held that the Michigan and New York direct shipping statutes discriminate against interstate commerce in violation of the Commerce Clause, and that such discrimination is neither authorized nor permitted by the Twenty-First Amendment. While some commentators have tended to sensationalize the potential impact of the Court's decision, here are some down-to-earth points to consider:

- The decision reaffirms long-standing legal principles that the three-tier system is constitutional, but state laws that discriminate against out-of-state interests are constitutionally suspect under the Commerce Clause.
- The Court's decision does not mean that direct shipping is legal everywhere. Other discriminatory state laws remain in force until they are repealed, amended or deemed unenforceable by state authorities. And because the Court's decision hinges on discriminatory treatment, the direct shipping battle now moves back to the state legislatures to decide whether or not to permit direct shipping within their jurisdiction on an even-handed basis.
- The Court's reasoning – that state law may not discriminate against out-of-state entities in the regulation of alcohol – points to potential constitutional defects in other state regulatory schemes. In particular, this legal theory may influence the future of state laws that give only in-state entities self-distribution privileges or that offer tax credits to in-state producers.

Direct Shipping Suit Filed in Indiana: Within days of the Granholm decision, a lawsuit was filed in federal court in Indiana seeking to bar the state from enforcing its ban on direct shipping of out-of-state wine to Indiana residents.

### **C. THE STATES**

#### Franchise:

- In May, the New Jersey Assembly began consideration of A. 3619 (approved in June), a franchise bill that would negatively impact small brewers by effectively denying them the ability to: (a) give reasonable consent to wholesaler ownership changes; (b) establish quality, operational, marketing and sale standards designed to ensure that a wholesaler properly represents the brewer's products, brands, reputation and trade name; (c) promulgate reasonable ordering and inventory methods, and (d) establish clear compensation provisions for amicable separations from a wholesaler relationship. In addition, the bill would impose notice-and-cure requirements on brewers and require a brewer to compensate a wholesaler for a brand upon termination for good cause.
- The South Carolina House passed H.B. 3325, a bill intended to clarify that a distribution agreement between an in-state wholesaler and an importer of foreign beer is binding on the foreign brewer, its successor or assignee.
- The Governor of West Virginia signed into law a bill (H.B. 2478) that permits a brewer to require a wholesaler to submit profit and loss statements, balance sheets and other financial records in order to retain distribution rights for the brewer's products.

#### Taxation:

- In May, State Senator Gloria Romero introduced S.B. 656 to allow counties in California to increase alcohol beverage taxes by up to 5%.
- Legislation to vary the excise tax on malt beverages based on alcohol content has been introduced in the North Carolina General Assembly (H.B. 1360).
- In Ohio, the Governor and the state legislature are in a beer tax tussle between a proposal to double the beer tax from 18 cents to 36 cents and another to eliminate the tax on alcohol altogether.
- In May, South Carolina rejected a proposal to apply sales and use taxes on beer.
- In an effort to reach a deal to provide for public school funding and a reduction in property taxes, Texas continued to debate a new excise tax on alcohol.

#### Direct Shipping:

State responses to the Granholm decision (see above) have taken on a variety of forms:

- Arkansas' legislature recently approved a bill (S.B. 762) that would permit in-state native wineries to direct ship wine to consumers both within and outside of the state.
- California is considering legislation to repeal its reciprocal direct shipping policy and replace it with an open-door policy permitting any winery or wine club in any state to ship directly to California consumers.
- In May, the Indiana Alcohol and Tobacco Commission ("ATC") created a stir when it sent letters to the state's 31 wineries warning them that they are prohibited from shipping

wine directly to in-state consumers. The ATC permitted the practice for many years, but apparently revised its enforcement policies in light of the Granholm decision.

- In New York, the state legislature is considering legislation (passed in June) to permit the direct shipment of wine into and out of the state. Governor Pataki's proposed bill would require shippers to obtain a valid photo identification and signature before delivering wine to a customer, and registration of licensed wineries with the state Tax Department. In addition, out-of-state wineries applying for a license to ship into New York would have to be located in states that provide reciprocal rights to New York wineries.

- In May, the North Carolina House approved H.B. 1429, a bill that eliminates the application fee for a wine shipper permit for any winery holding a federal basic wine manufacturing permit.

- North Dakota approved legislation to allow a winery in a reciprocal state to ship up to three cases of wine per month to an adult consumer in North Dakota without permits, taxes or fees. The legislation is effective July 1, 2005.

#### Trade Practices & Other:

- AWOL Legislation: In May, Maine's House of Representatives and Florida's House of Representatives passed bills to ban Alcohol Without Liquid or "AWOL" machines.

- The Arizona legislature approved a bill (H.B. 2647) permitting manufacturers and importers of beer, wine and liquor to offer samples at supermarkets, warehouse stores and other licensed retail premises.

- In California, the state Assembly approved A.B. 417, which increases the number of permitted participants in a beer tasting conducted by an incorporated beer manufacturer's trade association to 200.

- On May 19, the California Senate approved S.J.Res. 12, which recommends that the U.S. Congress oppose any effort to impose user fees on the wine industry in California and nationwide (seeabove).

- During May, the California Senate also approved A.B. 1752, a bill clarifying that a beer manufacturer does not include a person who brews beer for personal or family use.

- Colorado's governor signed into law H.B. 1236, a bill permitting a brew pub licensee to have an interest in other on-premise retail licenses, a racetrack license, and a public transportation system license.

- The Connecticut House is considering a bill that would make it illegal for a parent or legal guardian to allow minors to possess or consume alcohol on their property.

- On May 5, Hawaii amended its brew pub license law to allow brew pubs to sell malt beverages in recyclable containers, rather than just glass containers, and to permit brew pubs to sell malt beverages in brewery-sealed containers to class 2 restaurant licensees (former S.B. 121).

- The Illinois State Senate passed a bill (S.B. 610) that would enable a distributor to store alcoholic beverages for up to 30 months at a location other than its licensed premises. To do so, the distributor must have the approval of the Illinois Liquor Control Commission, comply with federal basic permit requirements, not sell any products from the non-licensed location, and handle storage in accordance with any applicable distribution agreement.

- The governor of Kansas signed into law S.B. 13, which classifies as confidential all information received by the Kansas Alcoholic Beverage Control Division from returns, reports, license applications, registration documents or investigations.
- The Kansas legislature also approved a bill to allow Sunday sales of beer.
- Montana's governor signed into law S.B. 325, a bill that revises the state's trade practice law to permit a brewer, beer importer or wholesaler to give a retail licensee tap handles, menus, apparel, coasters, glassware, cups, napkins, and other functional advertising materials that do not exceed \$300 in value in any one calendar year. The new law also allows a retail licensee to receive permanent or temporary decorative advertising matter as well as illuminated, neon or electrical signs, lamps, or lighted clocks, up to a total of six for each brand of beer within any one calendar year.
- The Nevada Senate approved legislation that would allow grocery stores to serve alcoholic beverage samples on their premises to individuals of legal drinking age (S.B. 233).
- The Assembly of the New York Legislature approved A.B. 914, a bill to repeal the current limitation on the retail sale of beer on Sundays.
- The New York Assembly also approved S.B. 2322, legislation that would allow breweries to pour samples at off premise licenses.
- The New York Senate passed a measure (S.B. 4776) that would authorize the creation of a "brewery trails" program to promote local breweries.
- In North Carolina, the House Commerce Committee approved a bill to require the tagging of beer kegs for the purpose of tracking down a retailer or consumer who supplies beer to underage youth.
- On May 4, the North Carolina House of Representatives passed H.B. 392, raising the alcohol limit on beer to 15%. The measure is now in the Senate Commerce Committee.
- Oklahoma's Senate is considering legislation to prohibit the sale of 3.2% beer at a flat rate or at a price lower than the regularly charged price.
- On May 17, Oregon modified its definition of malt beverage to incorporate the new federal standard for flavored malt beverages (former H.B. 3015).
- The Oregon Liquor Control Commission voted unanimously to deny a request to permit beer and wine sales in state liquor stores.
- Legislation to permit beer sales between the hours of noon and five on Sundays (S.B. 188) was introduced in Pennsylvania.
- The House in Rhode Island passed H.B. 6250, a bill to permit a retail Class A license holder to conduct beer and wine samplings with or without the participation of a wholesaler or supplier.
- The South Carolina Senate approved a bill to establish a mandatory 30-day suspension of a person's driver's license if that individual is convicted three or more times for selling beer or wine to a minor.
- Texas adopted legislation on May 18 that will allow a beer manufacturer or distributor to provide coil cleaning services to beer retailers (former S.B. 1472).
- The Texas legislature also passed a bill removing container restrictions on beer and permitting dual licensing at breweries.
- Also in Texas, a House committee approved legislation that would require alcohol beverage manufacturers to file a price nondiscrimination agreement governing their sales to wholesalers with the Texas Alcoholic Beverage Commission, and to provide written

notice of price changes to wholesalers at least 45 days before the effective date of the price change. Manufacturers that violate these requirements would be subject to civil penalties ranging from \$10,000 to \$100,000 per day.

- Even though the Texas Alcoholic Beverage Commission completed a "sunset" review this year, the state legislature is debating whether a second legislative review is necessary based on concerns that the most recent sunset review focused too much on disputes among retailers and distributors and not enough on law enforcement issues (H.B. 2544 and S.B. 421).

- The Washington Senate revised legislation that will allow spirits, beer and wine restaurant licensees to sell malt liquor in kegs or other containers that hold four gallons or more that are registered with the state and sent it back to the House for further consideration (H.B. 1430).

- The Washington Brewers Guild announced in May that it would seek legislation to create a Washington Craft Beer Commission for the purpose of promoting excellence in Washington-brewed craft beers, enhance the health of the state's brewing industry, and build up the community of brewers.

- The Washington legislature is working on legislation (S.B. 5682) to allow beer or wine sampling by grocery licensees.





## Government Affairs & Legal Update - June 2005

### A. FEDERAL

TTB Extends Deadline for Labeling Comments: In April, the Alcohol & Tobacco Tax & Trade Bureau ("TTB") published an advanced notice of proposed rulemaking to consider several potential changes to the federal labeling rules, such as the use of nutrition labeling, ingredient lists, and information panels on alcohol beverage labels. In response to requests by several industry representatives and organizations, TTB extended the deadline for submitting comments from its original submission deadline in June to September 24, 2005.

USDA Rejects Proposal for Hops Limits: For more than two years, the U.S. Department of Agriculture ("USDA") has debated the merits of a proposed marketing order intended to raise hop prices by limiting the amount of hops that growers could bring to market. In June, however, USDA ended proceedings on the proposed hops marketing order on the grounds that there was neither a demonstrated need to place market limits on U.S.-produced hops nor evidence that a marketing order would have a positive economic impact on the U.S. hops industry.

AMA Proposes Alcohol Content Taxation: In June, the American Medical Association announced that it will press federal, state and local taxing authorities to tax beer, wine and spirits based on their alcohol content, rather than their alcohol beverage classification.

### B. THE COURTS

*Interior Cabaret, Hotel, Restaurant & Retailers Association v. Fairbanks Northstar Borough*: On June 21, the Alaska Supreme Court heard oral arguments in the *Interior Cabaret* case, which challenges a 5% tax that applies to alcohol beverages sold outside of the city limits of Fairbanks and North Pole but not to alcohol beverages sold within the cities' limits.

### C. THE STATES

#### Franchise:

Near the end of June, a **California** bill (A.B. 417) originally drafted as a limited change in state sampling laws was amended to propose a California beer franchise law. Among other provisions, the amendments would require all beer suppliers to possess "good cause" and act in "good faith" when terminating a wholesaler and would require exclusive territorial appointments by suppliers (subject to a grandfathering position). The amendments reportedly are supported by the California Beer and Beverage Distributors and Anheuser-Busch, but opposed by most other suppliers.

On June 20, the **New Jersey** Assembly passed a comprehensive beer franchise law (A.B. 3619) that many regard as the most pro-wholesaler franchise legislation proposed to date. Among its provisions, the bill, along with its Senate companion (S. 2170), would require "good cause" for wholesaler terminations, would limit brewers' ability to object to changes in wholesaler ownership or management, and would require that most terminations be preceded by notice and an opportunity to cure deficiencies. Moreover, the bill would require brewers to pay wholesalers "compensation" even if a termination is justified by good cause (*i.e.*, the wholesaler breached its contract) and would almost completely prohibit small brewers and importers from imposing standard quality control provisions in their contracts. It is supported by the Beer Wholesalers Association of New Jersey and Anheuser-Busch.

In June, a bill (H.B. 1636) was introduced in the **Pennsylvania** General Assembly that would eliminate the state's current requirement that franchise territories granted by a brewer to one wholesaler must be geographically contiguous.

On June 7, **South Carolina's** governor signed into law H.B. 3325, a bill that makes a distribution agreement between an in-state wholesaler and an importer of a foreign brewer's beer binding on a successor importer of beer produced by that foreign brewer, its successor or assignee.

#### **Taxation:**

In order to solve its budget dilemma, **Maine** lawmakers approved L.D. 1595, a tax reform bill that includes a 50 cent per gallon increase on the excise tax for beer and \$1.00 per gallon tax increase for wine and hard cider.

The **Ohio** General Assembly approved a two-year budget plan that did not include Governor Taft's proposal to double taxes on beer and wine.

**Tennessee** Governor Bredesen vetoed S.B. 2002, legislation that would have increased taxes on beer and tobacco, on the grounds that the tobacco tax provisions threatened to compromise the state's payments under the Tobacco Master Settlement Agreement.

#### **Direct Shipping:**

During June, the **Connecticut** Legislature passed a bill (S.B. 122) to allow out-of-state wineries holding the appropriate permit to direct ship up to 5 cases of wine per adult resident every 60 days. In addition, in- and out-of-state "farm" wineries making less than 100,000 gallons per year are permitted to sell and ship up to 15 gallons of wine in original sealed containers directly to licensed Connecticut retailers.

**Louisiana's** House rejected legislation (H.B. 754) that would have barred native wineries from shipping directly to consumers.

In **Michigan**, the House Regulatory Reform Committee approved a bill (H.B. 4959) that would ban the direct shipment of wine to any Michigan resident. In addition, the legislation would prevent a brewer who manufactures less than 200,000 barrels a year from obtaining a specially designated merchant license.

**Minnesota** passed legislation (S.B. 664) to allow in- and out-of-state wineries to ship up to two cases of wine (a maximum of 9 liters per case) per year to residents of legal drinking age.

On June 30, the **New York** Legislature delivered its direct shipment legislation to Governor Pataki for his signature. As passed, A. 7379 allows out-of-state wineries to obtain an out-of-state shipper's license if they are located in states that provide reciprocal direct shipping rights to New York wineries. Licensed wineries may ship 36 cases of wine per year, per customer. Common carriers must obtain proof of age and the signature of the recipient. The act will take effect 120 days after the governor signs the bill into law.

### **Trade Practices & Other:**

The **Connecticut** legislature passed H.B. 6608, which requires manufacturers, wholesalers and out-of-state shippers of beer to post prices per brand on a monthly basis by bottle, can, case, and keg or barrel or fractional unit. Posted prices may include special pricing to be offered during select portions of the up-coming month.

Effective June 29, small brewery licensees in **Maine** who obtain a federal basic permit for distilling, rectifying, blending and bottling spirits are eligible for a small brewer distiller license, which permits the production of up to 30,000 gallons of distilled spirits per year.

In **Minnesota**, brew pubs now are eligible for off-premise retail licensing if their total off-premise sales per year do not exceed 500 barrels and their total sales do not exceed 3,500 barrels per year (former S.B. 664).

The **New York** Senate approved S. 7675, a bill that would extend the brand label registration fee exemption to beer produced in small batches and sold to both on- and off-premise customers or for beer used for sampling.

In June, the **New York** legislature approved legislation (S.B. 4776) to dedicate state tourism dollars to promote an Empire State brewery trail. The initiative would offer "I Love NY Beer" guides, preplanned vacation itineraries and "brewery passport" booklets to encourage tourists to visit New York breweries.

On June 28, eleven members of the **Ohio** General Assembly introduced legislation (H.B. 306) that would prohibit volume or quantity discounts for alcohol beverages at wholesale or retail.

In **Ohio**, the state House passed H.B. 140, a bill that would allow brewers and beer wholesalers to conduct samplings and provide consumer product instruction at retail premises without an additional permit.

A new **Oklahoma** law (former S.B. 518) prohibits "happy hour" practices in connection with "low point" beer (*i.e.*, 3.2% ABW beer).

The **Pennsylvania** House approved S.B. 462, a bill that would allow brewers and beer distributors holding the necessary permit to sell beer to consumers on Sunday and permit brewers to deliver their product to authorized wholesalers on Sunday.

On June 18, the **Texas** governor signed into law legislation (S.B. 1472) permitting a brewer or beer distributor to provide carbon dioxide filters to beer retailers for draught systems that use carbon dioxide or a carbon dioxide and nitrogen blend.

The **Texas** Alcoholic Beverage Commission amended its regulations to permit the display of a bottler's principal place of business on a malt beverage label in lieu of the place of bottling. This change went into effect on June 9, 2005.

The **Vermont** legislature approved H.B. 48, a bill permitting nonprofit organizations to sell wine and beer at auction for fundraising purposes.

The **Virginia** Department of Alcoholic Beverage Control removed certification and chemical analysis requirements for new beer and wine products proposed for sale in Virginia. In addition, on- and off-premise beer retailers may use resealable "growlers" for the sale of beer.







## **Government Affairs & Legal Update - July 2005**

### **A. FEDERAL**

Congress Passes Quarterly Excise Tax Filing and Repeals SOT. On July 29, the House and Senate passed H.R. 3, the Transportation Equity Act, which includes two measures that will benefit brewers and other alcohol beverage industry members. First, H.R. 3 includes the Brewers Association's proposal to allow breweries, wineries, distilleries and importers that are liable for \$50,000 or less in federal alcohol excise taxes per calendar year to pay on a quarterly basis rather than bi-monthly. The quarterly filing provision will go into effect on January 1, 2006. Second, the transportation bill permanently repeals the special occupational tax ("SOT") for producers and marketers of alcohol beverages. Last year, Congress took the first step toward repeal by temporarily suspending payment of the SOT from July 1, 2005 through June 30, 2008.

Before reaching final agreement on H.R. 3, the House and Senate had struggled with an amendment by Senators Lautenberg (D-NJ) and DeWine (R-OH) that would have automatically re-allocated road-building funds into safety programs if states did not pass higher-risk impaired driver laws, for example laws mandating the use of breathalyzer ignition locks by drunk drivers with a blood-alcohol level of 0.15 or greater. In the end, the H.R. 3 conference committee agreed to take the House's "carrot" approach of encouraging states to strengthen initiatives against drunk driving. The bill provides grant funding to assist states in lowering alcohol-related fatalities and encourages states to require the use of ignition interlock devices by individuals whose licenses have been suspended for driving under the influence. In addition, if a state does not approve an open container ban, H.R. 3 requires the diversion of federal highway funds for that state into highway safety programs.

The President is anticipated to sign H.R. 3 into law in the near future.

Senate Appropriations Committee Rejects TTB User Fee Proposal. In late July, the Senate Appropriations Committee declined to include the President's TTB user fee proposal in the FY 2007 Transportation, Treasury and HUD Appropriations bill ("FY 2006 Treasury Appropriations bill") that it approved for full Senate consideration. The House Appropriations Committee also excluded the TTB user fee proposal from its version of the FY 2006 Treasury Appropriations bill, H.R. 3058, which passed the full House on June 30. Victory on one front does not mean the battle is over, however. Treasury has circulated legislative language to establish TTB user fees in the House and Senate for consideration.

TTB Declares "Russian Imperial Stout" Is a Generic Malt Beverage Type. In response to a petition by Stone Brewing Co., TTB declared that "Russian Imperial Stout" and "Imperial Russian Stout" have lost their geographic significance and may be used as a generic malt beverage class and type designation by U.S. brewers.

### **B. THE COURTS**

*Stahl v. Taft, Ohio Direct Shipping Case*: In the aftermath of the Supreme Court's decision in *Granholm v. Heald*, an Ohio federal district judge in July declared Ohio's restrictions on the direct shipment of wine unconstitutional. Based on the district court's ruling, Ohio now permits the direct shipment of any quantity of wine to in-state residents so long as the purchaser pays the applicable state excise tax.

## C. THE STATES

### **Franchise:**

During July, the **California** Senate continued to struggle with the beer franchise provisions added to A.B. 417 (*see* June Monthly Update for more details). The full Senate will likely consider A.B. 417 after its summer recess.

The **New Jersey** legislature also is wrestling with the most pro-wholesaler franchise bills proposed to date, A.B. 3619 and S. 2170 (*see* June Monthly Update for more details).

### **Taxation:**

Two bills that would increase taxes or impose new fees on brewers appear to have stalled in the **Oregon** legislature. First, H.B. 2533 proposes to increase beer taxes on manufacturers or importers by five cents for amounts below 200,000 barrels and by 10 cents for amounts at and above 200,000 barrels. Second, S.B. 1049 would allow local governments to impose additional fees on brewers based on the amount of monthly retail beer sales in their area.

In **South Carolina**, alcoholic beverage license fee increases went into effect on July 1. Initial application fees for alcoholic liquor, beer and wine licenses increased by \$100. All biennial license fees increased by \$200, and local operation permit fees went up \$50.

In July, the **Texas** Senate approved tax legislation (H.B. 3A) that would increase alcohol taxes by 20 percent, while the Texas House did not include any alcohol tax increases in its tax bill, H.B. 3. Both tax bills have been referred to conference committee in order to resolve their differences.

Effective July 1, 2005, **Virginia** is imposing higher alcoholic beverage fees, including manufacturing and retail license fees for beer (former H.B. 1500). Brewery licenses for example are now \$2,150 and \$4,300 respectively. License application fees have risen to \$65 and criminal history record searches are now \$20 each. Applications to solicit the sale of wine and beer or spirits are now \$165 and \$390 respectively. Keg registration permits increased from \$50 to \$65. Warehouse permit fees are now \$260.

### **Direct Shipping:**

On July 13, the Governor of **Connecticut** signed the legislature's direct shipping bill (S.B. 122) into law. Connecticut's new law allows out-of-state wineries to obtain a permit allowing them to direct ship up to 5 cases of wine per adult resident every 60 days.

The **Louisiana** legislature passed a bill (H.B. 508) that will prohibit native wineries from selling or shipping their products directly to in-state retail licensees. H.B. 508 went into effect on July 13.

H.B. 4959's proposed ban on all direct shipping in **Michigan** may not be a sure thing after all. Strong opposition from WineMichigan, a trade association for in-state wineries, appears to be making an impact as several legislators now are stating that they are open to alternate proposals.

Governor Pataki signed **New York's** direct shipping bill, A. 7379, into law on July 13. It will go into effect on August 12.

### **Trade Practices & Other:**

Child Protection Restrictions on E-Mail Lists: New laws in **Michigan** and **Utah** will impact how companies market alcohol beverages to consumers via e-mail. Both states have established child protection registries whereby parents and guardians may register e-mail addresses, mobile phone numbers, fax numbers, and instant messaging user names to prohibit their use by marketers of alcohol beverages and other "age-restricted" items. Effective in August 2005, Michigan and Utah will require e-mail marketing senders to match their mailing lists against each state's child protection registries on a monthly basis and to cease using any contact information contained in the state registry. Senders must pay a per e-mail address fee to conduct their "match" comparison. Violators of these requirements could face civil and criminal penalties.

Effective July 1, 2005, brewpub licensees in **Alaska** temporarily may sell unlimited amounts of beer to in-state wholesalers. As of December 31, 2005, however, brewpub sales to wholesalers will be limited to 15,000 gallons or the amount sold to wholesalers in calendar year 2001, plus 10% (former H.B. 15).

Following the path of the **California** Senate, the California House approved S.J.Res. 12, a resolution recommending that the U.S. Congress oppose the imposition of TTB user fees (*see* **FEDERAL** above).

On July 18, the **California** governor signed into law A.B. 111, which authorizes the issuance of a permit to on-sale beer or wine licensees to hold events on property adjacent to the licensed premises and owned or controlled by the licensee.

**Connecticut** approved legislation (H.B. 6608) allowing brewers, beer wholesalers and out-of-state shippers to augment their monthly price posting with additional prices applicable for a specified portion of the following month.

In July the **Connecticut** legislature also passed a bill (H.B. 6752) requiring the Department of Consumer Protection to present the General Assembly by February 1, 2006 its recommendations on restructuring the state's current alcohol beverage permit system so that businesses engaged in similar activities would be eligible for the same type of permit and proposing a corresponding fee structure. Any restructuring plan also must preserve the three-tier system. In addition, the bill provides that brewpubs cannot be open to the public on days or during hours when alcoholic liquor sales are prohibited under state law or when their manufacturing permit is suspended.

**Missouri** approved S.B. 402, a bill prohibiting adults from allowing minors to consume alcohol beverages on their property unless they are the minor's legal guardian and penalizing a "minor in possession" if the minor is visibly intoxicated or has a blood alcohol content of more than .02.

In July, **Nevada** passed legislation (S.B. 457) that will allow a wholesaler, supplier, or retailer injured by any person who violates the state's three-tier rules governing the import and sale of alcohol beverages to bring a civil action for monetary damages.

**Nevada** now allows grocery stores to obtain a permit for serving alcohol beverage samples to consumers (former S.B. 233).

The **New York** State Assembly approved a bill extending the brand label registration fee exemption to beer produced in small batches and sold to both on- and off-premise customers or used for sampling.

During late July and early August, the **North Carolina** legislature passed a measure (H.B. 392) increasing the allowable alcohol content for malt beverages from 6 percent to 15 percent. Any malt beverage with greater than 6 percent alcohol by volume will be required to indicate its alcohol content on the label. Unless signed into law earlier, the bill will take effect on August 15. The Governor is not expected to veto the bill.

On July 6, **Pennsylvania's** governor signed into law H.B. 462, which allows authorized brewers and beer distributors to sell beer to consumers on Sundays and permits brewers to deliver their product to authorized wholesalers on Sundays.

Effective July 7, **Rhode Island** will no longer require prior approval for manufacturer's coupons/promotional programs.

**Texas** approved legislation (S.B. 1255) eliminating the requirement that a brewer must own its own brewing facilities and revising state law to allow an entity that held a brewer's or nonresident brewer's permit or sold its brand in Texas as of May 1, 2005 or a successor to such entity to contract with another brewer or nonresident brewer permittee for use of their brewing facilities for brewing services. This legislation also repeals the state's capacity restrictions for beer containers.

The **Texas** Legislature also authorized the issuance of promotional permits (former H.B. 2526), effective September 1 of this year. Holders of promotional permits will be able to contract with brewers, distillers, wineries, and other manufacturers to engage in marketing activities to enhance the sale of alcohol beverages in Texas.





## Government Affairs & Legal Update - August 2005

### A. FEDERAL

President Signs Quarterly Excise Tax Filing and SOT Repeal into Law. On August 10, President Bush signed H.R. 3, the Transportation Equity Act, into law. With this action, the Brewers Association's proposal to allow breweries, wineries, distilleries and importers that are liable for \$50,000 or less in federal alcohol excise taxes per calendar year to pay on a quarterly basis becomes law. As the quarterly filing provision goes into effect on January 1, 2006, bi-monthly filings are required until that time. Also, the special occupational tax ("SOT") for producers and marketers of alcohol beverages is permanently repealed.

TTB Comment Period Closing on Notice 41, *Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages.* Monday, September 26<sup>th</sup> is the last opportunity for public comment on a proposal that could have far-reaching and costly effects for small brewers. The proposal calls for additional labeling information in the areas of ingredient, allergen, alcohol, calorie and carbohydrate content and a definition and visual depiction of a "standard drink." TTB is also considering whether to make such information mandatory or voluntary. BA members should have received an Action Alert requesting they submit comments. If you did not, please email [pete@brewersassociation.org](mailto:pete@brewersassociation.org) to receive all the details. **Please act on this most important issue before the deadline.**

TTB Issues Industry Circular 2005-2: *Alternating Proprietors at Brewery Premises.* In the Circular ([http://www.ttb.gov/publications/ind\\_circulars/ic2005\\_2.pdf](http://www.ttb.gov/publications/ind_circulars/ic2005_2.pdf)) dated August 12, TTB issued guidance to brewers and others regarding the qualification and operation of alternating proprietorships at breweries. In addition, this circular announces that all previous approvals of alternating proprietorships will not be valid as of September 1, 2006, and that all alternating proprietors must resubmit for approval their application for alternative methods of operation by that date. These include applications to alternate premises, to conduct other business on brewery premises (alternating brewery proprietorship), to prepare or store records and reports for another brewer, and to conduct any other activity that allows or expedites the operation of alternating brewery premises.

User Fee Issue May Resurface. In July, the Brewers Association was part of an alcoholic beverage coalition that helped kill a Senate Appropriation panel's consideration to legislate new fees on already required submissions for label approval, permits, statements of formulation and other TTB requirements. Concern remains, however, that the issue may appear again as part of the budget process. In an effort to preempt this, BA member breweries in the districts of Senators and Representatives who sit on the Budget Committees have been asked to contact their legislators to express their concern with this proposal which disproportionately affects small businesses by imposing what are essentially new taxes.

### B. THE COURTS

*Bainbridge v. Florida Division of Alcoholic Beverages*: In granting the plaintiff's motion, which was unopposed by the defendant, the U.S. District Court in Tampa recently found Florida's direct shipment law in violation of the Commerce Clause. In yet another instance of *Granholm*-related fallout, these statutes were found to discriminate against out-of-state wineries by prohibiting them direct shipment rights while allowing that privilege to in-state vintners.

Direct Shipping Suit Filed in Pennsylvania: An Indiana winery has filed suit in the U.S. District Court in Philadelphia against the Pennsylvania Liquor Control Board. The suit seeks to have the state's ban on direct shipping of wine lifted based on the Supreme Court's *Granholm* decision.

A-B Settles *Maris* Lawsuit: Anheuser-Busch has agreed to pay the Maris family \$120 million in an out of court settlement, bringing to an end the lawsuit brought by Maris Distributing Co. eight years ago against the brewer for termination of its distribution agreement.

## C. THE STATES

### Franchise:

In **California**, beer franchise provisions (sometimes referred to as "beer monopoly" provisions) previously appearing in A.B. 417 were removed from that bill with the intent of amending them into legislation fast-tracked for a vote before the current session ended. Among other provisions, the amendments would require all beer suppliers to possess "good cause" and act in "good faith" when terminating a wholesaler; would require exclusive territorial appointments by suppliers (subject to a grandfathering position); and restrict the existing right of self-distribution by small brewers. The proposal was withdrawn on September 2, and is not expected to be considered until the next legislative session begins in January, 2006. The Brewers Association joined with the California Small Brewers Association in opposition to this initiative which threatens access to market and consumer access to beer.

Beer franchise legislation passed in June by the **New Jersey** Assembly remains under consideration in the Senate. Several meetings between small brewers, wholesalers and legislators have taken place with the goal of fashioning a bill acceptable to all sides. As the legislation now stands, it would require "good cause" for wholesaler terminations, would limit brewers' ability to object to changes in wholesaler ownership or management, and would require that most terminations be preceded by notice and an opportunity to cure deficiencies. Moreover, the bill would require brewers to pay wholesalers "compensation" even if a termination is justified by good cause (*i.e.*, the wholesaler breached its contract) and would almost completely prohibit small brewers and importers from imposing standard quality control provisions in their contracts. It is supported by the Beer Wholesalers Association of New Jersey and Anheuser-Busch.

The Garden State Craft Brewers Guild continues to monitor this initiative. The Brewers Association and a coalition of other large brewers and importers joined the Guild in offering compromises that are still under consideration. Action is likely in the next several weeks.

In **Wisconsin**, a proposal was advanced by wholesaler interests that would threaten the ability of small brewers to self-distribute. Although the initiative never took the form of a bill, wholesalers and brewers are informally discussing their positions and concerns and are attempting to reach a workable solution. This situation was also the impetus for the reformation of the Wisconsin Small Brewers Association. Here, as in California and New Jersey, the Brewers Association is committed to assisting Wisconsin small brewers and consumer access to craft beer.

### **Taxation:**

**Oregon** House Resolution 18, proposing an amendment to the state Constitution to give counties the authority to levy a statewide, uniform tax on the manufacture or importation of malt beverages, died in committee at session's end.

### **Direct Shipping:**

On the last day of August, **California** Governor Arnold Schwarzenegger signed legislation that allows the state's vintners to ship unrestricted amounts of wine to residents in states that also allow interstate shipping. It also allows consumers to buy wine for personal use directly from wineries in states that also allow interstate shipping.

### **Trade Practices & Other:**

On August 23, **New York** Governor Pataki signed former Senate Bill 4776, which provides for the development of a brewery trails program to encourage small business development and tourism, as well as to promote the history of New York State breweries.

In early August, the **North Carolina** legislature passed a measure (H.B. 392) increasing the allowable alcohol content for malt beverages from 6 percent to 15 percent, with an additional provision that any malt beverage with greater than 6 percent alcohol by volume will be required to indicate its alcohol content on the label. Governor Easley signed the bill into law on August 13.

The **North Carolina** Governor also signed legislation that brings the law governing the commercial transportation of alcohol beverages into line with that controlling the amounts of alcoholic beverages that may be purchased without a permit.

A newly minted **Oregon** law allows malt beverage manufacturers who have a privilege tax liability of less than \$1,000 in the previous year to deposit with the Oregon liquor Control Commission monies equal to that liability in lieu of posting the required bond.

Pennington County Commissioners have filed a petition with the **South Dakota** Secretary of State's office to let voters decide on imposing a consumption fee of 1 percent on the gross sales of alcoholic beverages. The measure would appear on the November, 2006 ballot and would help counties pay for law enforcement and treatment programs associated with alcohol abuse.

Recently filed with the **Texas** Secretary of State was a provision (former H.B. 937) previously passed by the legislature and signed by the Governor that, among other things, allows the holder of a nonresident seller's or manufacturer's agent's permit to conduct alcohol beverage product tastings.

## Government Affairs & Legal Update - September 2005

### A. FEDERAL / NATIONAL

Brewers Association Submits Comments on TTB Notice 41, *Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages*. Monday, September 26<sup>th</sup> marked the end of public comment on a proposal calling for additional labeling information in the areas of ingredient, allergen, alcohol, calorie and carbohydrate content and a definition and visual depiction of a "standard drink." Thanks to all members who submitted their individual comments.

The Brewers Association comments may be accessed at:

[http://www.beertown.org/govt\\_affairs/pdf/BA\\_Comments\\_TTB\\_Notice\\_41.pdf](http://www.beertown.org/govt_affairs/pdf/BA_Comments_TTB_Notice_41.pdf)

Extended TTB Deadlines for Businesses Affected by Hurricane Katrina. TTB Industry Circular 2005-3 outlines agency policy with regard to excise taxpayers affected by Hurricane Katrina. The circular only applies to taxpayers in the Katrina hurricane disaster area - taxpayers in the Hurricane Rita counties in Texas are not eligible for the deadline extensions covered by this document. Katrina counties cover all of Louisiana and Mississippi, parts of Alabama and some counties in Florida.

To access the Circular: [http://www.ttb.gov/publications/ind\\_circulars/ic2005-3\\_oct11.pdf](http://www.ttb.gov/publications/ind_circulars/ic2005-3_oct11.pdf)

Beer Institute Establishes Independent Review Board. A new Code Compliance Review Board will become effective January 1, 2006, with the charge of investigating public complaints about brewer advertising that fails to comply with BI's advertising and marketing standards. The Board will be composed of five members familiar with alcohol policy issues and advertising practices, but from outside the beer and brewing industry. This mirrors the third-party review system recently enacted for distillers through the Distilled Spirits Council of the United States (DISCUS).

### B. THE COURTS

Direct Shipping Suit Filed in Arizona: A suit was filed on September 2 by a Michigan winery and a handful of Arizona residents in U.S. District Court alleging that the state of Arizona's regulations governing shipments of wine are discriminatory and in violation of free commerce.

Class-Action Lawsuit Tossed in Colorado: A class-action suit brought against Adolph Coors Brewing Co., several other brewers and distillers and the Beer Institute has been thrown out by a District Court Judge in Jefferson County, Colorado. The suit alleged that the defendants "deliberately and recklessly" targeted minors in advertising campaigns and "actively, deliberately, and in a concerted manner sought to maximize their profits by

attempting to establish brand loyalty among underage consumers...” In dismissing the suit, the Judge cited the inability of the plaintiffs to substantiate their claims with facts. Defendants were awarded reasonable attorney fees and court costs.

## C. THE STATES

### Franchise:

Beer franchise legislation supported by the Beer Wholesalers Association of **New Jersey** and Anheuser-Busch which passed the State Assembly in June, has now passed through committee in the Senate. It is expected that a special session of the legislature will be called in the next several weeks and that this bill will be called for a vote by the full Senate.

Although meetings have been held between supporters and opponents (including representatives of the Garden State Craft Brewers Guild, several other large brewers and importers), there has been no progress in amending the provisions which small brewers have expressed concern with – the requirement to show "good cause" for wholesaler terminations, a limitation on brewers' ability to object to changes in wholesaler ownership or management, and the requirement that most terminations be preceded by notice and an opportunity to cure deficiencies. The bill would also require brewers to pay wholesalers "compensation" even if a termination is justified by good cause (*i.e.*, the wholesaler breached its contract) and would prohibit small brewers and importers from imposing standard quality control provisions in their contracts, if these standards are in conflict with brewers who are more than 20% of a wholesaler's portfolio.

In early September, **North Carolina** Governor Mike Easley signed former H.B. 1500 into law. Among other provisions, the act clarifies where a franchise agreement is recognized to exist in situations where a supplier acquires the right to manufacture or distribute another supplier's brand for which a wholesaler has a franchise agreement.

### Taxation:

Vetoed by **California** Governor Arnold Schwarzenegger, A.B. 417 would have allowed flavored malt beverages to continue being taxed at the same rate as beer. The Governor, however, believes the issue deserves further study and admitted his veto had more to do with the fact the legislation came before him at the last minute and had not received what he felt was a proper evaluation by the legislature.

### Direct Shipping:

**Florida** Senate Bill 144, introduced on September 8, provides for the direct shipment of wine from out of state.

In **Michigan**, legislation (House Bill 4959) originally seeking to amend the Liquor Control Code to completely ban directly shipping wine to any person in the state, was amended to allow a winery to ship a maximum of 500 cases per year to Michigan residents. However, the legislation now seeks to revoke the current right of Michigan wineries to sell directly to retailers and restaurants. The amended passed the House and has been referred to the Senate Government Operations Committee.

The application fee for a **North Carolina** wine shipper permit was eliminated with the Governor's signature on H.B. 1429. In-state and out-of states wineries holding a federal manufacturing permit may now apply to the state free of charge for authorization to ship wine.

In early September, **Ohio** Senate Bill 179 was introduced, which would allow any wine manufacturer (both in- and out-of state) to deliver wine directly to consumers in the state as long as age, tax and licensing requirements have been met. The bill has been assigned to committee.

### **Trade Practices & Other:**

On September 15, the **Michigan** House overwhelmingly approved HB 5067, prohibiting the possession, sale and use of Alcohol Without Liquid (AWOL) machines. The bill now moves to the Senate.

**New York** Governor Pataki has signed legislation (former A.B. 7675) into law that clarifies that the existing exemption from payment of the \$150.00 brand label fee applies to beers which are sold or offered for sale to retail customers or used for the purpose of sampling. The NY ABC had been interpreting legislation passed in 2000, which exempted small size batches totaling 1,500 barrels or less annually, as applying only to beer served on the premises of the brewer.

**Ohio** House Bill 333, prohibiting the sale, purchase and use of alcohol vaporizing devices (AWOL), was introduced on August 30.

Two pieces of legislation became effective on September 1 in **Texas**, both of which increase penalties to those providing alcohol to minors. H.B. 1357 automatically suspends the violator's driver's license for 180 days upon conviction, while H.B. 2868 establishes civil liability for those 21 and older (other than parent or guardian) for damages caused by the acts of an intoxicated minor when that adult knowingly provided alcohol to the minor.

**Utah's** Attorney General has called on the state's ABC to work with the legislature to remove flavored malt beverages from grocery store shelves and restrict their availability to the state-run wine and liquor stores.

## Government Affairs & Legal Update - October 2005

### A. FEDERAL / NATIONAL

Federal Trade Commission Submits Comments on Alcohol Labeling. The Federal Trade Commission (FTC), the federal agency responsible for consumer protection issues, submitted comments on the Tax and Trade Bureau's (TTB) Notice 41 (Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages) in favor of a proposed requirement that alcoholic beverage labels disclose both alcohol and nutrient content per serving. The comments specifically recommended that the TTB's beverage alcohol labeling regulations should be modified to require disclosures regarding the serving size and the number of servings per container, and, for each serving, the quantity of pure alcohol, calories, fat, saturated fat, and carbohydrates. Citing benefits to consumers and competition, the FTC also recommended that TTB, in consultation with public health agencies, establish the alcohol content in a standard "drink."

### B. THE COURTS

U.S. District Court Judge Rules Massachusetts Direct Shipping Laws Unconstitutional. A federal judge threw the direct shipping issue squarely back on the Massachusetts state legislature when he ruled that current state law was in violation of the Constitution based on the Supreme Court's *Granholm v. Heald* ruling. Legislators now must decide if they will allow or completely prohibit the direct shipment of wine to residents (see Direct Shipping section below).

Free Speech Lawsuit Related to Direct Shipping Issues Filed in Minnesota. The Minnesota chapter of the Institute for Justice has filed suit in U.S. District Court challenging the state's "discriminatory advertising and Internet speech ban" that prohibits all wineries—in-state and out-of-state—from accepting orders online from Minnesota residents and prohibits Minnesota wineries from advertising their direct shipping services to consumers, even though direct shipping of wine is legal.

### C. THE STATES

#### Franchise:

**New Jersey** franchise legislation (Assembly Bill 3619) remains pending since reported out of committee in late September. Small brewers have expressed concern with provisions in the bill which include the requirement to show "good cause" for wholesaler terminations, a limitation on brewers' ability to object to changes in wholesaler ownership or management, and the requirement that most terminations be preceded by notice and an opportunity to cure deficiencies. The bill would also require brewers to pay wholesalers "compensation" even if a termination is justified by good cause (*i.e.*, the wholesaler breached its contract) and would prohibit small brewers and importers from imposing

standard quality control provisions in their contracts, if these standards are in conflict with brewers who are more than 20% of a wholesaler's portfolio.

On October 27, the **Wisconsin** Assembly State Affairs Committee voted AB 787 out of committee and to the full Assembly for a vote. The bill, championed by the Wisconsin Beer Distributors Association, would impose certain access to market restrictions on brewers (specifically, restricting their ability to sell beer directly to retailers once certain production ceilings are surpassed) and requiring the assignment of exclusive territories to wholesalers. An amendment that would have addressed small brewers' access to market concerns failed narrowly prior to the full committee vote.

### **Taxation:**

LR 2720 has been filed in the **Maine** legislature seeking to raise the excise tax imposed on beer and wine, but with an exception for those beverages produced by microbreweries.

### **Direct Shipping:**

House Bill 247 was introduced in the **Florida** legislature, authorizing the direct shipment of wine into the state for personal consumption or vendor resale. Considers Internet sales to be the same as sales made at a vendor's licensed place of business. Two companion bills have also been introduced in the Senate.

Two bills relating to the direct shipment/importation of wine were introduced in the **Maine** House of Representatives in mid October. No action has occurred to date.

A **Massachusetts** bill allowing for the direct shipment of wine that was introduced in January has moved to the Joint Committee on Consumer Protection and Licensure. The bill allows for the direct shipment of a maximum of two cases per month to an individual by out-of-state licensed producers, importers or wholesalers after they obtain a Massachusetts out-of-state shipper's license.

The **Pennsylvania** Liquor Control Board (PLCB) issued an advisory notice prohibiting Pennsylvania wineries from shipping to homes or licensed establishments within the Commonwealth. In order to ship to Pennsylvania customers, wineries must now obtain a Direct Wine Shipper License and ship their products to one of the PLCB's Wine and Spirits Stores.

**Wisconsin** Assembly Bill 687, introduced in late September, would eliminate the quantity limitation on wine shipments to individuals from out-of-state wineries shipping under reciprocal agreements.

### **Trade Practices & Other:**

The **City of Boston** Licensing Board approved a rule requiring retailers to provide the names and addresses of all keg purchasers to the Boston Police Department on the day the kegs are purchased. The ordinance is an extension of a current keg registration law, which requires keg purchasers to give storeowners their names and addresses.

A new **Kansas** statute authorizes microbrewery licensees to obtain microbrewery packaging and warehousing facility licenses. This would allow for the transfer of beer between the facilities and from the packaging/warehouse facility to a licensed wholesaler.

A law passed earlier this year by the **Montana** legislature which requires retailers to attach identification tags to beer kegs and keep track of who is buying them, went into effect on October 1.

**Ohio** HB 140, authorizing those involved in the manufacture or distribution of beer or other intoxicating liquor to conduct consumer product instruction, or provide sample servings of their products, at a retail permit holder's premises without having to obtain a retail liquor permit, has been sent to the Governor's desk.

**Utah** Attorney General Mark Shurtleff announced he will ask state alcohol regulators to investigate the marketing and distribution of flavored malt beverages. His concerns include the possible targeting of underage drinkers and tax avoidance issues.



## Government Affairs & Legal Update - November 2005

### A. FEDERAL / NATIONAL

TTB Suspends Special (Occupational Tax). On the last day of October, the Alcohol and Tobacco Tax and Trade Bureau published a notice of a temporary rule amending its regulations relating to special (occupational) tax, to reflect a 3-year tax suspension. The amendment to the Internal Revenue Code of 1986 provides that, during the period from July 1, 2005, through June 30, 2008, the rate of special (occupational) tax on certain occupations will be zero. The occupations affected by the 3-year tax suspension are: manufacturers of non-beverage products who claim tax drawback; proprietors of distilled spirits plants, alcohol fuel plants, bonded and tax-paid wine premises, and breweries; and wholesale and retail dealers in distilled spirits, wine, and beer. The requirements to register annually and keep prescribed records remain in effect.

### B. THE COURTS

Last month the **Pennsylvania** Liquor Control Board (PLCB) issued an advisory notice prohibiting Pennsylvania wineries from shipping to homes or licensed establishments within the Commonwealth. On November 7<sup>th</sup>, Commonwealth Court in Harrisburg granted the Pennsylvania Wine Association a restraining order in connection with this action. The PLCB ruling was in response to a federal lawsuit brought by an Indiana winery objecting to the ability of in-state wineries to direct ship to customers while out-of-state establishments were barred from shipping directly to Pennsylvania residents.

**Indiana** wineries are facing a similar situation as those in Pennsylvania, where the state Alcohol and Tobacco Commission warned that state's wineries that any in-state shipments would result in a misdemeanor. Reacting in the same manner as their colleagues to the east, an injunction has been requested and granted in Superior Court to prevent the state from enforcing its ruling.

**Michigan** wineries were cheered by the November 1 ruling of a Detroit U.S. District Judge which held that out-of-state wineries should have the same rights to ship directly to Michigan consumers as do in-state wineries. Michigan's Attorney General had asked the court to move in the opposite direction and ban all direct shipping, something in-state wineries opposed.

### C. THE STATES

#### Franchise:

Following passage by the state Assembly in June, **New Jersey** franchise legislation (Assembly Bill 3619) was passed by the Senate in early December and is expected to be signed by Acting Governor Richard Codey. Provisions in this bill of concern to small

brewers include a requirement to show "good cause" for wholesaler terminations, a limitation on brewers' ability to object to changes in wholesaler ownership or management, and the requirement that most terminations be preceded by notice and an opportunity to cure deficiencies. The bill also requires brewers to pay wholesalers "compensation" even if a termination is justified by good cause (*i.e.*, the wholesaler breached its contract) and prohibits small brewers and importers from imposing standard quality control provisions in their contracts, if these standards are in conflict with brewers who are more than 20% of a wholesaler's portfolio.

**Wisconsin** small brewers and the state's wholesalers finally achieved an acceptable compromise on legislation that had been vehemently opposed by brewers because it would have imposed serious obstacles to their future growth through requirements for separate warehouse facilities and by severely curtailing the self-distribution rights they currently enjoy. Under the compromise Assembly Bill 787, small brewers would be allowed to make direct deliveries to retailers under certain circumstances and would be able to continue to make festival deliveries. Additionally, brewers with an annual production below 50,000 barrels can sell any amount of beer directly to retailers, while those above that production threshold may sell up to 1,000 barrels yearly before the separate warehouse provision is triggered. Finally, brewers would be required to grant exclusive territories to wholesalers.

The Wisconsin Craft Brewers Guild deserves recognition for their effective work on this issue and the Brewers Association is proud to have assisted in this effort through the grassroots letter writing campaign of American Homebrewers Association members.

### **Taxation:**

Proposed legislation in **Maine** (LR 2720) raising the excise tax on beer and wine was rejected by the Legislative Council.

### **Direct Shipping:**

The **Maine** Legislative Council has accepted for consideration proposed legislation allowing the importation of wine.

On November 21, **Massachusetts** Governor Mitt Romney vetoed legislation (HB 4498) that would have limited the ability of out-of-state wineries to ship directly to Massachusetts consumers. The bill called for prohibiting direct sales by wineries that produce more than 30,000 gallons of wine a year and who have been represented by a Massachusetts wholesaler for the past six months. According to Romney, the legislation was anti-consumer, creating "artificial barriers to protect Massachusetts wholesalers at the expense of a free market." A push to override the veto is expected when the Legislature reconvenes for the new session.

On November 16<sup>th</sup>, Senate Bill 2284 was introduced in the **Massachusetts** legislature. The bill provides for the direct shipment of wine into or within the Commonwealth by

any duly licensed wine producer after meeting certain permitting and registration requirements.

**Michigan** House Bill 4959, which would allow a winery to ship a maximum of 1,500 cases per year to Michigan residents, was passed by the Committee on Economic Development, Small Business and Regulatory Reform and sent to the full Senate. Legislation has already passed the State House allowing for a maximum of 500 cases to be direct shipped and it is uncertain whether the Senate version would be acceptable to that body.

Also in **Michigan**, a package of four bills (Senate bills 625-628) allowing for the direct shipment of wine to retail customers and providing for the regulation of those shipments and shippers, also moved into the Senate Committee on Economic Development, Small Business and Regulatory Reform.

Legislation introduced in **Pennsylvania** (SB 996) would allow the direct shipment of up to eighteen liters of wine per month via mail or internet orders to those of legal drinking age in the Commonwealth. The bill is currently before the Senate Law and Justice Committee.

The **Washington** State Liquor Control Board has proposed legislation allowing out-of-state wineries to direct ship to consumers. The state's wineries are supportive.

### **Trade Practices & Other:**

A **Chicago** City Council member has proposed expanding the city's current ordinance that prohibits the sale of 16 oz. or less individual cans or bottles of beer to include any size individual can or bottle.

The **Michigan** Senate unanimously passed legislation on November 30 banning AWOL (alcohol without liquid) devices. Companion legislation passed the House in September.

Legislation is under consideration in both **New Hampshire** and **Wisconsin** that would lower the drinking age to eighteen for active duty members of the military.

**Ohio** House Bill 140, signed into law November 17, allows alcohol beverage manufacturers to conduct product samplings at retail locations without the need to obtain a special permit.

**Ohio** House Bill 209 is currently awaiting the Governor's signature or veto. This legislation allows manufacturers and wholesale distributors of beer or intoxicating liquor to provide to other manufacturers or wholesale distributors travel, lodging, food, and beverages and to provide to liquor permit holders food, beverages, and recreational activities. All such activities were formerly prohibited.

Legislation pending before an **Ohio** House committee (HB 211) would prohibit the sale, purchase and use of alcohol vaporizing (AWOL) devices.

A proposed ordinance in the city of **Madison, Wisconsin** would make it illegal to purchase more than one keg at a time unless the purchaser holds a special \$10 permit and registers the purchase.

## Government Affairs & Legal Update - December 2005

### A. FEDERAL / NATIONAL

TTB Issues Request for Comments. The Alcohol and Tobacco Tax and Trade Bureau is considering amending the regulations concerning the use of the word “pure” on labels or in advertisements of alcohol beverage products. Notice 53 was published in the December 7 edition of the Federal Register and may be read in full by linking to:

<http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-23680.pdf>

In early December, the Center for Science in the Public Interest (CSPI), a **Washington, DC**-based interest group with unabashed anti-alcohol leanings, issued the results of a survey stating that 71% of Americans support a 5 cent/drink increase in federal alcohol excise taxes. CSPI suggested that the results were proof that raising alcohol taxes to meet budget deficits was preferable to cutting funding for existing programs. “Cutting social programs such as Medicaid, Medicare, and food stamps is an absolutely unconscionable way to cut the deficit so long as lawmakers are leaving billions in alcohol tax increases off the table,” said George Hacker, Director of CSPI’s Alcohol Policies Project.

### B. THE COURTS

Judge Rules on Some Issues of Costco Suit. In a ruling handed down just before Christmas, U.S. District Judge Marsha Pechman concluded that Washington state’s current system discriminates against out-of-state suppliers in the matter of direct shipping, by allowing only in-state wineries and breweries that privilege. The ruling was prompted by an early December request by Costco lawyers to buy directly from out-of-state suppliers. However, Judge Pechman stayed the judgment until April 14 to allow the state legislature time to consider how to rectify the issue, either by allowing all suppliers to direct ship or by denying that right to both in-state and out-of-state manufacturers. Other issues under scrutiny, such as mandatory minimum markups and bans on volume discounts and credit sale requirements, will be the subject of a March trial.

### C. THE STATES

#### Franchise:

Acting **New Jersey** Governor Richard Codey signed franchise legislation (Assembly Bill 3619) on December 15<sup>th</sup> containing several provisions detrimental to small brewers, including; a requirement to show "good cause" for wholesaler terminations; a limitation on brewers' ability to object to changes in wholesaler ownership or management; the requirement that most terminations be preceded by notice and an opportunity to cure deficiencies; a requirement that brewers pay wholesalers "compensation" even if a termination is justified by good cause (i.e., the wholesaler breached its contract); and a

prohibition on small brewers and importers from imposing standard quality control provisions in their contracts, if these standards are in conflict with brewers who are more than 20% of a wholesaler's portfolio.

Unfortunately, the attempts made by New Jersey small brewers and several other large brewers and importers to amend this legislation, which was supported by the Beer Wholesalers Association of New Jersey and Anheuser-Busch, were unsuccessful.

### **Taxation:**

The Garrett County, **Maryland** commissioners have asked the state legislature to repeal the county's beer tax of 2 cents on every bottle and can sold.

A legislative proposal in **Wyoming** would give citizens of counties and municipalities the option of raising excise taxes on beer, wine and liquor in order to fund local alcohol and drug prevention and treatment programs.

### **Direct Shipping:**

**Florida** Senate Bill 944, providing for the direct shipment of wine from out of state to Florida residents, began undergoing Committee consideration on December 14.

Proposed legislation in **Kentucky** (B.R. 988) would allow certain out of state wineries to ship wine to Kentucky residents if the purchase was made in person at the winery. It would also remove provisions currently allowing small wineries to sell and transport wine directly to retail license holders.

Legislation passed in **Massachusetts** will allow wineries that produce 30,000 gallons of wine or less to ship directly to a consumer, a package store or restaurant, and/or to a wholesaler. Wineries that produce more than 30,000 gallons must either go through a wholesaler or direct ship their product to consumers, but not both. Shipments to retail outlets are capped at 250 cases annually.

On December 15<sup>th</sup>, **Michigan** Governor Jennifer Granholm signed legislation (House Bill 4959/Senate Bill 625) allowing both in-state and out-of-state wineries to ship a maximum of 1,500 cases per year to Michigan residents. There is some concern that a constitutional challenge may be in the offing, as the new law does nothing to address the current disparity between the ability of in-state wineries to direct ship to retailers while denying that right to out-of-state businesses. However, the statute does contain language stating that should the particular section of state liquor control code governing direct shipping to retailers be found unconstitutional, it would be repealed and replaced with a provision prohibiting all direct shipments to retailers.

The **New York** State Liquor Authority approved United Parcel Service as the first shipping company permitted to carry wine from other states directly to New York

residents. Although Governor George Pataki had signed legislation allowing the direct shipment of wine into law last summer, many small out-of-state wineries had essentially been denied that ability because no practical means existed to ship, other than through cost prohibitive business arrangements with retailers or wholesalers.

### **Trade Practices & Other:**

New legislation in **Massachusetts** would ban the possession and use of Alcohol Without Liquid (AWOL) machines.

**Michigan** House Bill 5516 was introduced on December 15<sup>th</sup> and allows for brewpubs to have an ownership interest in a microbrewery as long as the combined annual barrelage of both facilities is less than 30,000 barrels.

Proposed legislation in **New Hampshire** would legalize the purchase and consumption of alcohol by members of the armed forces who are at least 18 years old.

A **Wisconsin** bill (A.B. 839) has been introduced which creates an exception to existing law, allowing an alcohol beverage manufacturer or rectifier to sell, or provide free taste samples of, alcohol beverages that are manufactured or rectified on the premises directly to consumers for consumption on or off the premises where sold.

Proposed legislation was introduced on December 9<sup>th</sup> in the **Wyoming** House of Representatives (HB 4) that would allow winery permit holders to direct ship not more than 18 liters to any single household in the state annually.