

Direct Shipping: No 50 Lane Super-Highway Yet

The good old days... when things were simpler



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We all hoped it would be simple—the wine industry would win in the Supreme Court and that victory would open up the whole nation for direct shipping. Well, win we did. But unfortunately, the legal arguments that struck down our opponent have wounded us too.

For example, reciprocal shipping, our comfortable old standby, has fallen prey to the criticism that it is a discriminatory privilege. Although not yet extinct, it is certainly on the endangered list.

And, while the states, one by one, are giving wineries the right to get direct shipping permits, the wineries' close cousins in the wine industry are getting shut out.

Négociants, brand builders or virtual wineries that have relied on reciprocal state privileges for retailers, or that have taken advantage of lax enforcement in those wine-friendly states, are now finding that the new direct shipping permits exclude them.

So today, a year down the road from the Supreme Court decision, we don't have the nationwide interstate highway for direct shipping that we dreamt of. Instead, each state is paving its own separate road, full of speed bumps, potholes, and toll booths. Even states that have allowed liberal direct shipping for

SHORT COURSE

- ▶ Direct shipping today has more markets—and much more complexity.
- ▶ Major markets, including Texas, New York, and Florida, have opened up.
- ▶ Privileges come with a price tag—lots of requirements for licensing.
- ▶ Reciprocal shipping is an unexpected casualty of the Supreme Court decision.
- ▶ More changes may be coming, including—possibly—direct shipping to retailers.

years are now rethinking the privilege.

Confronted by a confusing array of new requirements and costly permits to ship wine, many vintners are rightfully nostalgic for the “good old days” when things were—well, simpler.

In this installment of Compliance Watch, we tour the new direct shipping landscape with particular emphasis on the process of obtaining direct shipping permits in three important states, Texas, New York, and Connecticut. We'll also cover the new Michigan direct shipping law and courtroom defeats in Florida and

Ohio that have finally opened those major markets to direct shipping. Finally, we'll look down the road at what may lie ahead.

THE BIG THREE

Our nominee for the most improved state in the direct shipping game would be Texas. Years ago the Texas ABC (TABC) declared full-scale war on direct shipping, and if that didn't stop you, Texas' bewildering minefield of dry areas added an unmanageable level of risk. (Dry areas are scattered pockets where Prohibition is alive and well, and in Texas, they can be as small and randomly scattered as individual neighborhoods or voting precincts.)

Recently, with the nationwide tide

of public sentiment turning, Texas wineries finally convinced the state legislature to create a permit system that allows direct shipping up of to three gallons of wine per month per Texas consumer, up to a grand total of 35,000 gallons (or 14,721 cases) into the state per year.

Texas gets credit for opening its doors to direct shipping, but you've still got to jump through a few hoops to get in. To exercise this privilege, a winery must obtain a Texas sales tax account, post a tax security bond, and obtain a Texas direct shippers permit.

The first step is to apply for your Texas sales tax account with the Texas Comptroller of Public Accounts, which you can do on-line at www.window.state.tx.us/taxpermit/. If you prefer you can download the form AP-201 and fill it out the old-fashioned way.

Plan ahead: It takes two to three weeks to get your account number after filing, and you must have this account number before you file your application with the TABC for the direct shipping permit.

The second step is to get the Liquor Tax Bond [Form 2-51.3] issued by your surety company. (The same company that issued your TTB Wine Bond.) The bond form and instructions are on the TABC's Web site at <http://www.tabc.state.tx.us/>. The initial amount of the bond is \$1,000, but if your sales are high enough you may have to increase the bond amount later. If getting a bond is a problem, other forms of security are accepted.

Once you have those steps underway, you can start on the Out of State Winery Direct Shipper Permit application [Form L-106]. The application and

were fairly sure that person did not like you." Again, probe for details: Why did she think the other didn't like her; what was the task to be accomplished; how did she go about getting it done?

"Have you ever had to go above and beyond the call of duty to get a job done?" What was the task, what obstacles had to be overcome, what sacrifices were necessary?

"Describe a time when you were faced with a work situation so stressful it truly challenged your coping skills." Get as much detail as you can. If the job requires substantial organizational skills, ask for past examples of project planning and completion. Ask about working on multiple projects at the same time. If the job requires excellent interpersonal skills, find out what types of personalities they find easiest to work with and difficult to work with. Ask if others have given them feedback on how they are to work with.

In assessing attitudes toward management, ask about some areas when perhaps they didn't agree with the supervisors. How did they handle it? Was there any fallout in the relationship? If the job for which you are hiring is a management job, ask about unpopular decisions the candidate has had to make. Find out how they came to the decision, who it affected and what the outcome was.

I like to hear from a candidate on the topic of an occasion when performance or conduct was criticized. Did she think it was deserved or not? Why? Get the details to help you make an assessment of the candidate's maturity relevant to the job you need filled.

And, I'd like to hear about times the candidate truly was excited about work. What was the project? Why was it so interesting?

SUMMARY

Behavioral and competency-based interviewing is a results-oriented discussion. You have to learn enough from the candidates to assess whether their previous job performance and conduct apply to the job under discussion.

Hiring employees is an important performance management function and a source of potential employment risk. Lower the risk. Prepare for the interview, and turn your interviews into high-quality information-gathering discussions

which lead to effective hiring and to retention of outstanding performers. ❁

RESOURCES

1. Behavioral Interviewing, Behavioral Technology, Inc. 1992.
2. Webster, Eleanore W., CMC, SPHR, "Interviewing Techniques," training materials, 2002.
3. Wood, Mark G., SPHR, "Interview-

ing and Selecting Exceptional People," supervisor training materials for the City of Surprise, AZ, 2005.

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the other required forms are available on the TABC's website.

Read and follow the instructions carefully—for instance, when listing the names of people, make sure to follow the order specified on the forms (Last, First, Middle). There's extra incentive to do it right the first time: Texas requires any corrections to be done by notarized affidavit.

You must enclose copies of your winery's TTB Basic Permit and your state winery license. If your winery is operated by a business entity, you will also need to submit a copy of your filed Articles of Incorporation, Articles of Organization, or Certificate of Formation for the entity. Fortunately, you do not need to qualify your entity with the Texas Secretary of State to get a direct shippers permit.

Finally, your completed application, the issued bond, your supporting documents, a list of brands and products you propose to ship to Texas consumers, copies of the approved Certificates of Label Approvals (COLAs), and a \$75 check should be sent to TABC headquarters for processing. If your filing is complete and correct, you can have your permit in two to three weeks. The TABC is e-mail friendly, so we recommend giving them your e-mail address to speed communications about your application.

THE NY RECIPROCITY RULING

In New York, another direct shipping newcomer, the permitting process is even more complex. New York added a unique and daunting requirement: The New York State Liquor Authority (SLA) requires the submission of a "reciprocity ruling" from your state's ABC. This requirement has stymied wineries in many states; if you can't get it, the party's over.

We suggest you contact your state ABC or a winery trade organization in your state before starting the process to see if such a ruling has been issued. If your winery is located in California, you can go straight to the following link to obtain a copy of California ABC's reciprocity ruling, which paradoxically satisfied New York even though California is now a "permit" state for direct shipping: www.abc.ca.gov/BP/NY%20Wine%20Reciprocity.pdf.

The reciprocal provision of the New York law limits the amount you can

ship into New York, based on what your state allows to be shipped to its residents. While the New York law permits wineries to ship up to 36 cases per year to a New York resident, if your state law allows a lesser amount to be shipped to consumers in your state, then you may not ship more than that to New York consumers. (See sidebar, *A Word About Reciprocity*.)

If you can satisfy the reciprocity requirement, you're ready to rumba.

THE TWO-STEP TAX DANCE

Like Texas, New York requires tax registrations for direct shippers. The good news is that a bond or other security is not required and the tax applications can be processed concurrently with your direct shipper's application. The bad news is the New York Two-Step requires some fancy footwork.

To get your direct shipping license, you will need a Certificate of Authority to Collect Sales Taxes issued. But wait! The New York Department of Taxation and Finance (DTF) will not issue the

Certificate unless the SLA approves your application for a direct shipper's permit.

That sounds like a Catch-22, but here's how you can handle it: You wait for the SLA to tell the DTF that it has "conditionally approved" your direct shippers license. Then, DTF issues your tax certificate and you send a copy of the tax certificate to the SLA to complete the process of getting your direct shippers license issued. Needless to say, if you want to get your license quickly you should facilitate the communication between the SLA and DTF.

YOUR MOVES IN THE DANCE

Out-of-state wineries file an Application for Registration as Sales Tax Vendor [Form DTF-17] and an Application for Registration as a Distributor of Alcoholic Beverages [Form TP-215] with the DTF. The forms are available on-line at www.tax.state.ny.us/; use the "Locate Forms by Number" feature to find the forms. The Application for Registration as a Distribu-

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tor of Alcoholic Beverages [TP-215] has a number of specific checkboxes for out-of-state wineries applying for a direct shipper's license. You may need the assistance of your accountant or tax professional to answer some of the questions on these forms. The DT-17 can be filed electronically, but not the TP-215, so we recommend submitting both forms together by mail to the DTF. Keep a set of copies of these forms because you will need them in the next step.

After completing the tax forms, it's time to tackle the Application for an Out-of-State Direct Shipper License, which is available from the SLA's website, www.abc.state.ny.us/. Currently, there is a link to the form on the home page. The form requires you to provide several attachments.

In addition to the seven-page application, wineries must submit copies of their winery basic permit from TTB, their state winery license, copies of the tax applications described above, and a check for \$125. While a list of brands to be sold in the state is also required,

COLAs need not be enclosed. Here's another new twist: You must also state that you have notified New York wholesalers of your intention to ship direct to consumers.

The tax forms are submitted to the Department of Taxation and Finance and the Out-of-State Direct Shipper License application and required items are sent to the State Liquor Authority main office in Albany, NY. Processing can take several weeks.

Once you have your New York shipper's license, you will need to use an approved common carrier to deliver your wines to New York residents. As of this time, UPS and Federal Express are approved carriers.

THE HIGH PRICE OF TWO-FOR-ONE IN CONNECTICUT

Connecticut has decided to bundle the privilege of direct shipping together with the privilege of three-tier distribution. That means, if your winery already holds an Out-of-State Shippers License for the purpose of ship-

ping to wholesalers in Connecticut, you're good to go; you may ship up to five cases every two months directly to consumers in that state. But here is the wrinkle: Because of the high price of the Connecticut OOS license, most smaller wineries arrange for their Connecticut wholesalers to hold the license and register the brands, which means the winery does not hold the requisite license to ship directly.

If a winery currently sells into Connecticut by these indirect means, the winery will have to redo the licensing and registrations currently held by its wholesaler so that the winery holds the license, in order to get the extra privilege of direct shipping. You'd better hope for high sales—the license costs \$1,000 annually and each label costs \$100 to register for a three-year period. There is also a \$100 processing fee. Many smaller wineries may find these costs exceed the profits of their sales in Connecticut.

While tax registrations are required in Connecticut, you start the process by filing the Application for Out-of-

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A Word About RECIPROCITY

IS RECIPROCITY STILL VALID? According to the Supreme Court, reciprocity discriminates against states without similar laws and should not be a prerequisite for direct shipping. We predict that eventually, all reciprocal states will switch to other kinds of laws. For now, however, reciprocity remains a factor in direct shipping.

Many states still use reciprocity as the basis of their direct shipping privileges, having not yet adopted a new permit process. California abandoned reciprocity for a permit-based system on January 1, 2006. But, New York, in a strange move, inserted a reciprocity requirement into its new permit law.

When California's system changed, New York actually stopped approving permits for California wineries for several weeks until it decided that California was still "reciprocal" enough for its purposes. New York was also very concerned because California's law allows an unlimited number of cases, but New York has 36-case per consumer limit. New York feared that its own reciprocity requirement would allow California wineries to ship unlimited amounts to New York residents. (It does not.) New York is not currently approving direct ship-

ping permits for Washington wineries because Washington has no "reciprocity agreement" with New York, even though Washington is a true-blue reciprocal state. Go figure!

For its part, Washington has stopped granting new direct shipping approvals to California wineries because California is no longer a "reciprocal state." (California wineries with existing approvals may continue to ship to Washington.) This moratorium may be lifted later this year if a pending permit bill in Washington becomes law as expected. The enactment of that legislation will hopefully also enable Washington wineries to get direct shipping permits from New York--if New York finds the two permit laws comparable enough.

If a winery in the reciprocal state can get a permit in the other state, it seems both still have the "reciprocal" privilege of shipping. New York is unique, with reciprocity in its new permit law. This oddball requirement is most likely unconstitutional, but until invalidated in court, New York will reserve the right to satisfy itself that your state treats New York wineries equally well before issuing you a direct shipping license.

State Shipper's License and the Application for Brand Label Registration with the Liquor Control Division of the Department of Consumer Protection. The Application for Out-of-State Shipper's License is not available online but the brand registration form is available at www.dcp.state.ct.us/licensing/liquor.htm. Along with the forms and fees, you must send the Liquor Control Division a copy of your TTB basic permit, your state winery license, and copies of the COLA's for the labels being registered. You must also appoint a resident agent for service of process in Connecticut.

After the application is approved by the Liquor Control Division, the winery files for its tax registration with the Connecticut Department of Revenue Services. The tax registration package includes the Business Taxes Registration Application [Form REG-1], Addendum D, Alcoholic Beverages Tax [Form REG-1 Addendum D], a Surety Tax Bond [Form OR-131] in the amount of \$500, and the fee of \$50. While the REG-1 form is available online (www.ct.gov/drs/cwp/view.asp?a=1509&q=266240), you must request the surety bond form from the Department of Revenue Services.

We suggest submitting this application to the Department of Revenue Services by overnight mail rather than attempting on-line registration. Once approved by Department of Revenue Services, all of the licenses and registrations will be mailed to you.

MICHIGAN ON THE VERGE

After a contentious legislative battle, Governor Granholm signed into law on December 15, 2005 a new direct-to-consumer wine shipping law. The law took effect immediately and provided that a winery anywhere in the United States may obtain a direct shippers permit to ship up to 1,500 cases of wine annually to Michigan consumers. (There is no limit per consumer, only a single annual limit for total direct shipments into the state as a whole.) The state is in the process of developing the necessary forms, tax collection procedures, and approval of common carriers before shipments can actually be made. As of press-time, no forms, procedures, or fees for the direct shipper license had been announced, and shipments have not started.

FLORIDA CAPITULATES

Florida was one of the original felony

states, but in the case of *Bainbridge vs. Turner*, the state failed to demonstrate why its felony penalty for interstate, direct-to-consumer wine shipments is required to facilitate tax collection from out-of-state wineries but not from in-state wineries. As a result, the Court ordered Florida to open the state to direct shipping.

At first, the Department of Business and Professional Regulation countered with the position that other laws prohibited direct shipping. However, on February 16, 2006, Florida announced that out-of-state wineries may legally ship wine to consumers in wet counties in Florida. There are currently five dry Florida counties: Lafayette, Liberty, Madison, Suwannee and Washington.

Wine may only be shipped to adult consumers, and persons 21 or older are required sign for delivery. There are no limits on quantity and, for now, no permit is required. (However, there are currently four bills pending before the Florida legislature, any of which, if enacted, would establish a direct shipping permit in that state.)

Wineries are required to file a monthly report and pay excise taxes on direct wine shipments. The form and other information is available at

www.state.fl.us/dbpr/abt/hot_topics/wine_shipment_into_florida.shtml. In addition, consumers receiving shipments are responsible to pay Florida's Sales/Use taxes. It has been recommended that wineries provide consumers the required form [Form DR-15MO] for reporting and paying sales taxes. The form is available at www.myflorida.com/dor/forms/2005/dr15mo.pdf.

OHIO REVERSES ITS PROHIBITION

In July 2005, the U.S. District Court declared Ohio's discriminatory shipping laws to be unconstitutional. As a result, Ohio is currently allowing direct shipments of wine, pending action by its legislature. There are no quantity restrictions, and no license is required of out-of-state wineries. However, Ohio consumers who purchase wines are required to pay sales taxes and excise taxes on direct wine shipments.

OTHER STATES TO WATCH

As of press-time, direct shipping leg-

islation is pending in numerous other states. If your winery is shipping to, or wants to ship to, consumers in Washington, Colorado, Indiana, Illinois, Massachusetts, Maine, and Arizona watch for the headlines announcing changes in those states.


WHAT'S AROUND THE BEND?

The Supreme Court decision shook up the status quo and gave state legislatures a new mandate—to treat domestic and out-of-state wineries the same. Now, in every state where in-state wineries have retail privileges, lawmakers must either rescind those privileges or extend them to out-of-state wineries.

Because each affected state has complete and sovereign discretion in resolving its situation, we seem to be heading for as much regulatory complexity in nationwide direct shipping as we now have in winery compliance for national sales to wholesalers. Ouch!

Meanwhile, more changed condi-

tions lie further down the road. Costco's recent partial victory against the Washington Liquor Control Board has raised major new questions. In every state where wineries sell direct to retailers, it now appears that non-discrimination principles will force legislatures back into the same kind of soul-searching. State legislatures may either have to restrict in-state winery privileges to the detriment of their own wine industry, or invite out-of-state suppliers to sell to in-state retailers—effectively eliminating the middle tier of distribution.

That's an exciting but sobering thought. Our advice: Remain seated with your seatbelt fastened until the ride has come to a complete halt. And don't hold your breath. 

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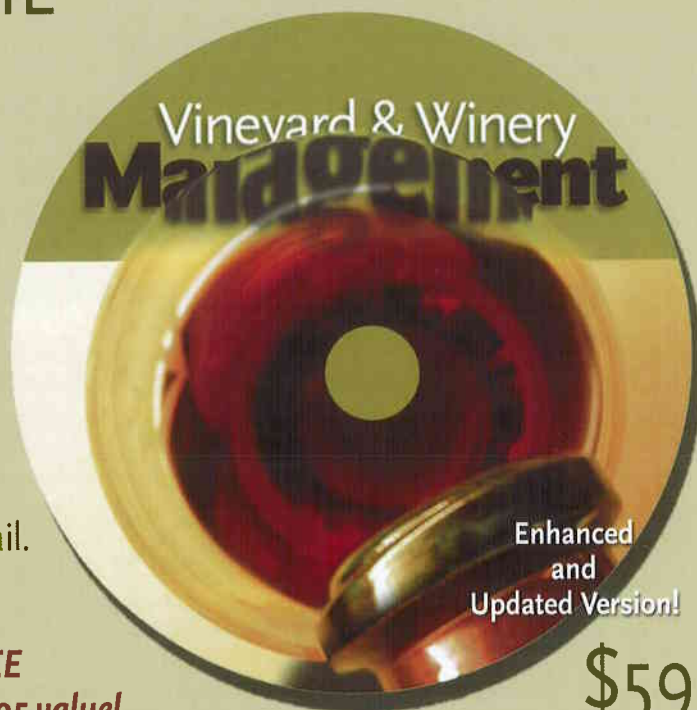
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