

# WINE BUSINESS INSIDER

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## Opportunities, Challenges Ahead: Overcoming DTC regulation Key to Growing Lucrative Sales

Direct to Consumer sales are growing faster than other channels in the wine industry, which is obviously a huge opportunity for growth. But the strategies that stimulate these purchases come with complex federal and state regulations and tech-savvy consumers who favor online purchases. You may have to learn a whole new set of rules – and with TTB cutbacks, it's up to you to stay informed and be in compliance.

Here's an update on regulations and technology from last week's **Ship-Compliant Direct Shipping Seminar & Users Conference**, where reports showed the DTC channel achieved 11.5 percent gains in both volume and sales over the past 12 months ending April 2011, surpassing overall industry growth.

It's all very complex. Direct shipping legislative updates, TTB and ABC regulatory issues, and social media and third party marketing legal issues top the list of roadblocks wineries must overcome to be successful in the DTC channel.

### Direct Shipping Legislative Updates

**Steve Gross**, director of state relations at the Wine Institute, outlined legislation that has recently been enacted or updated and occurred in 2010/2011.

#### **IOWA**

1. Unlimited shipments
2. \$25 annual fee
3. \$5,000 bond requirement
4. Annual payment of excise taxes only
5. New Permit Statute became effective July 1, 2010

#### **NEW HAMPSHIRE**

1. \$100 license for wineries (\$500 for retailers)
2. Increased the amount of wine shipped to 12 cases annually
3. Requires winery to only file reports in months in which wine was shipped.
4. Requires the Commission to provide notice to carriers of prohibited shippers
5. Retailers are included
6. New statute became effective January 1, 2011

**VIRGINIA**

1. Ability to use a fulfillment house reinstated
2. Must designate fulfillment house on permit and provide a copy of permit

**MASSACHUSETTS**

1. Court overturns existing statute in 2008. The ruling prevented over half of all interstate U.S. wineries to ship to MA consumers.
2. Appeals Court upheld decision in 2010. No Appeal by state.
3. Any winery under 30,000 gallons can get a permit
4. If a winery is more than 30,000 gallons, it cannot have had a Massachusetts wholesaler in previous six months to qualify for license
5. Household aggregate limit of 26.67 cases annually
6. Monthly reports, tax and license
7. No carriers have approved the shipment of off-site inter-state orders state as of September 21, 2010
8. Legislature failed to pass corrective legislation in 2010

**FLORIDA**

1. Unlimited shipping to consumers
2. Wineries must file monthly shipment report to DBPR, along with monthly excise taxes
3. Consumers to file sales/use tax
4. Five dry counties prohibit shipments
5. Legislative effort to restrict shipments was defeated again in 2011

**INDIANA**

1. Became a permit state in 2006
2. 24-case annual-per-household limit from aggregate of wineries; 3,000 cases per winery total
3. Despite some changes by court, still excludes wineries that have had an Indiana wholesaler in 120 days prior to application
4. \$100 permit required
5. Sales and excise taxes to be paid
6. \$1,000 bond requirement for corporations and LLCs
7. Initial on-site visit required
8. Aggregate rules clarified; winery to obtain "representation" from consumer at time of purchase
9. HR 1132 study will include removal of winery visit and wholesaler exclusion rules

## MARYLAND

1. Wineries may ship up to 18 cases annually to a single Maryland delivery address
2. Permit costs \$200
3. \$1,000 bond, may be waived after three years of timely tax filing
4. Quarterly reporting, sales tax and excise payments
5. Use of approved carriers
6. Effective date July 1, 2011

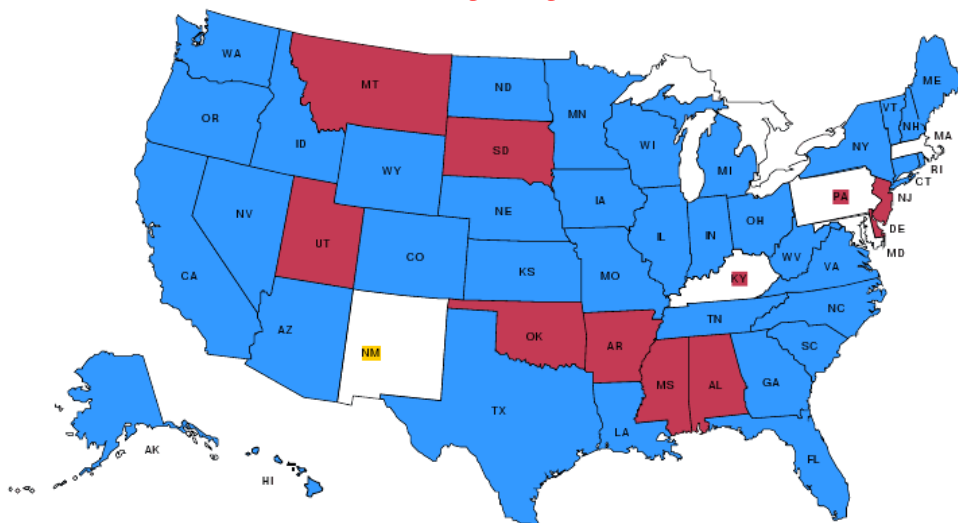
## NEW MEXICO

1. \$50 annual permit
2. Two cases per month, per consumer
3. Annual excise tax
4. Monthly Gross Receipts Tax (sales tax)
5. Retailers are included (retailers remain under old reciprocity statute under new law)
6. Effective date July 1, 2011

## TENNESSEE

1. New statute as of 2009
2. \$300 non-refundable one-time fee, \$150 renewal
3. Three cases per winery, per consumer, annually
4. Annual sales and excise tax collection and reports
5. Legislation making entire state "wet" for wine shipments signed by Governor, in effect now

## Direct-to-Consumer Wine Shipping As of 6/28/11



Blue – Limited Direct/Permit  
Yellow – Reciprocal

Red – Prohibited

Gross said that it was the toughest year the wine industry has weathered in regard to the legislature in Florida, and there is still much work to be done there. Maryland also posed a challenge. Now that legislation is in place, shippers must also be approved--something Gross is optimistic will happen. He indicated that was standard operating procedure when a state opens up.

"There's so much behind the scenes that the public is really not aware of. We know what states are at risk and what states are about to open up," **Jason Eckenroth**, Ship Compliant CEO and founder said. "There are two key ways for wineries to grow their customer base: 1) New markets open up and 2) Increased on-premise sales by generating a bond with consumers, which creates loyalty."

Gross said that it's both a good thing and a bad thing that New Mexico recently opened up its borders to direct shipping. All 13 reciprocity states will have been converted to non-reciprocity states as of July 1, 2011.

Massachusetts, New Jersey and Pennsylvania still have legislation pending in 2011.

"If you had asked me at beginning of the year if I would be tackling wine shipping in Pennsylvania at the beginning of the year, I would have laughed; but a lot has changed in Pennsylvania," said Gross. "State agencies are now indicating that they would like to work with us to create a DTC shipping bill."

Gross and the Wine Institute will work to continue to improve existing shipping laws by:

1. Removal of onerous paperwork requirements
2. Simplification of reporting and frequency of reports
3. Streamlining permitting and registration procedures

## TTB and ABC Regulatory Issues

**Susan Evans**, executive liaison for industry matters, said the TTB is doing less with more related to its work with the wine industry.

Label applications received to date have increased 15 percent over the same time last year. Currently the TTB has approximately 13,300 label applications pending review, and cycle times have doubled in comparison to this same time period in fiscal year 2010. Electronic applications that took 13 days a year ago now take 31 days, and paper applications that took 19 days are taking 51 days.

Seven rulemaking activities are underway:

1. Serving facts and final rule: Mandating that a serving facts statement be placed on alcohol beverage labels.
2. Allergens: Requiring that allergens be placed on alcohol beverage labels.
3. Part 9 Revision: Instituting regulations that cover AVA rules, such as how to apply for one and how one is processed.

4. Other-Than-Standard Wine Petition: Requesting that TTB change the labeling regulations related to products not made from standard winegrapes and be required to label "imitation wine." Currently there is no forecasted date for completion.
5. American Appellation of Origin: Designating that regulations be amended to limit the use of American appellations to wines produced entirely from U.S. grapes.
6. Addition of grape names: Addition of approximately 50 new grape names to the TTB registry
7. Use of certain terms on wine labels: Adoption of new label designation standards originally intended to address estate grown versus estate-bottled terminology on wine labels

"The two most important issues facing the industry as a whole are that you must learn rules about how to use small producer's tax credits, understand the rules and be sure you are suing appropriately, and be sure you are keeping accurate records for any label claim you make," said Evans. "As TTB has fewer resources to have face to face contact, you must take responsibility for yourself to ensure you are in compliance."

**Lori Ajax**, district administrator-trade enforcement unit, California ABC, echoed Evans, saying that ABC offices are processing more with less resources. Recently enacted legislation at the state level includes:

#### **Type 86 - Instructional Tasting License**

1. Winegrowers and other qualified suppliers are authorized to conduct "instructional tasting events" at off-sale retail locations holding a Type 86 license.
2. There are many unique aspects and restrictions to this law so it is important to read the full text of the law (Section 23396.6 and 25503.56 B&P Code) and the department's industry advisory ([www.abc.ca.gov](http://www.abc.ca.gov)).

#### **Type 82 - Direct Shippers Permit**

1. Any person currently licensed in this state or any other state as a winegrower who obtains a wine direct shipper permit may sell wine directly to a resident of California.
2. To date, there are approx 505 direct shippers' permits issued to winegrowers outside the state; the majority are from Washington and Oregon.

#### **Type 14 - Public Warehouse License**

1. Intended for the storage of alcoholic beverages for the Type 14 licensee
2. If Type 14 licensee intends to hold additional licenses, storage must be physically delineated and business operations separate and distinct.
3. Winegrower License (Type 02) has the statutory authority for a Type 14 to receive, store and ship wine to their customers without the need of a duplicate Type 02 license (Section 24041 B&P Code).

The Internet Type 20 License is pending legislation. Currently 17/20 licensees are required to act as a wholesaler. AB623, sponsored by Family Winemakers, will attempt to enable Internet Type 20 licensees to sell direct to consumers.

## Social Media and Third Party Marketing Legal Issues

Navigating federal, state and, now, technical legal issues for the wine industry has become a monumental task for all entities involved.

"Working with the ABC was the toughest job I ever had. I was advising trade practices because we are dealing with laws written in the 1930s, rewritten in the 1950s and some rewritten in the 1960s," said **Jerry Jolly**, consultant and former ABC director. "Trade practice questions are highly specialized, very unique and very frustrating for everyone involved. We are dealing with antiquated laws and an industry involved with light speed types of marketing."

Most administrators agreed that what is going on in the economic environment in conjunction with new technology is reaching beyond the statutes as they are written.

"The challenge is to find a set of operating parameters that fits into the broadest of categories," said John Hinman, Hinman & Carmichael.

Third party service providers are currently expanding the realm of wine sales and acting in a variety of capacities. In his presentation at ShipCompliant, Hinman asked: "Who are third party service providers? Sellers or an advertising medium and technological administrator?"

Many of the issues that come with answering that question can be solved by simply sending the customer to licensee for fulfillment, Hinman said.

Hinman suggested wine businesses adopt the following best practices to navigate third party marketing and sales strategies:

1. Licensee accepts the order and processes the credit card and is responsible for proper fulfillment.
2. Licensee is advertising and soliciting orders in an advertising medium – advertiser is not the seller. Distinction of who is doing the solicitation must be clear in all materials and in the advertising contract.
3. Advertiser earns a flat fee not a percentage of sales.
4. Always keep in mind that the licensee is the one who has a license at stake in the transaction, not the advertiser.

**Suzanne DeGalan** of **Hinman & Carmichael** said that social media is still media. General Copyright laws, Trademark laws, Privacy rights, and First Amendment issues still apply. Federal advertising standards for wine still apply, including:

1. No false or misleading statements
2. No disparagement
3. No statements inconsistent with labeling
4. No misleading health claims

She offered these best practices:

1. If content is on your own blog, add appropriate disclaimers and other language to your Terms of Use.
2. If content is on third party platform such as **Facebook** or **Twitter** utilize these sites' Terms of Use.
3. Monitor your social media for offending material.
4. When appropriate, work with the social media site to remove offending material.

DeGalan stressed that adhering to federal advertising rules is extremely important. It is the wineries responsibility to ensure that employees, consumers and their own brand advocates are complying with state and federal guidelines when interacting in the online space related to the licensed winery. As the social media landscape becomes more developed, so will the regulations around it and wine. [wbi](#)