

ASSEMBLY THIRD READING

AB 1088 (Blanca Rubio)

As Amended March 9, 2023

Majority vote

SUMMARY

This bill would extend a current exemption in the Alcoholic Beverage Control Act (Act) from January 1, 2024 to January 1, 2025. The exemption allows a licensed craft distiller to directly ship distilled spirits manufactured and produced by the licensee at its premises to a consumer, as specified.

Major Provisions

- 1) Reauthorizes, until January 1, 2025, a licensed craft distiller to directly ship distilled spirits manufactured and produced by the licensee at its premises to a consumer.
- 2) Provides that the amount shipped shall not exceed 2.25 liters per day and shall be solely for the consumer's personal use and not for resale.
- 3) Requires the licensee to maintain adequate records of the shipments and provide those records to the Department of Alcoholic Beverage Control (ABC) upon request.
- 4) Requires the licensee to require the common carrier to obtain the signature of any individual 21 years of age or older before delivering any distilled spirits shipped to an individual in this state.
- 5) Mandates that the containers in which the distilled spirits are shipped to be conspicuously labeled with the words: "CONTAINS ALCOHOL: SIGNATURE OF PERSON AGE 21 YEARS OR OLDER REQUIRED FOR DELIVERY."

COMMENTS*Background.*

Tied-House Laws. State and federal laws generally prohibit certain relationships among those who produce, distribute, and sell alcoholic beverages. The term "tied-house" is derived from a common practice in England whereby a bar or public house was "tied" – by ownership, contractual obligations, or other influences – to a specific manufacturer. In some instances, that model encouraged intemperance in alcohol consumption. This was because retailers would offer manufacturers generous favors, such as expensive business meals and gifts. In order to recoup these costs, aggressive product promotion was needed. Manufacturers sometimes used their influence to force tied houses to sell their products and exclude products from other manufacturers.

As a result, after the repeal of prohibition in 1933, California's current "three-tier" system was introduced. This body of law was initially created to: a) promote the state's interest in an orderly market; b) prohibit vertical integration and dominance by a single producer in the market place; c) stop commercial bribery and safeguard the public from predatory marketing techniques; d) discourage and/or prevent intemperate drinking.

DTC Shipping in California – Distilled Spirits. Today, the state boasts more than 160 craft distilleries (Type 74) licensed under the Act, giving California more distilleries than any other state. But prior to the establishment of the craft distillers license (Type 74) in 2015, no manufacturer of distilled spirits had the privilege of selling distilled spirits directly to a consumer. In 2015, AB 1295 (Levine), Chapter 640, Statutes of 2015, created the craft distillers license which, among other things, allowed a licensee to manufacture up to 100,000 gallons of distilled spirits per year and sell 2.25 liters directly to a consumer, if that consumer attended a tasting at the licensed premises. For reference, a typical bottle of distilled spirits is 0.75 liters. Therefore, a consumer can purchase three bottles of distilled spirits per day directly from a craft distiller at their licensed premises. If a craft distiller does not qualify to hold a craft distiller license, the licensee must obtain a distilled spirits manufacturer license, which does not have any off-sale privilege.

Subsequent legislation, AB 1164 (Skinner), Chapter 695, Statutes of 2018, increased the maximum production to 150,000 gallons and removed the requirement that a consumer needed to attend a tasting before being able to purchase distilled spirits directly from a licensee. Current law states that the sale of distilled spirits directly to a consumer must occur at the craft distiller's licensed premises. Thus, California law clearly states that it is prohibited for a licensed craft distiller to ship distilled spirits directly to consumers.

While a craft distiller did not have statutory authority to ship directly to consumers, at the beginning of the COVID-19 pandemic, ABC, as part of the Governor's First Notice of Regulatory Relief, temporarily allowed craft distillers to ship up to 2.25 liters per day to consumers. On June 3, 2020, the temporary privilege was extended as part of the Governor's

Eighth Notice of Regulatory Relief to December 31, 2021. On December 30, 2021, as part of the

Governor's Ninth Notice of Regulatory Relief, the temporary privilege was once again extended to March 31, 2022. There was no additional extension past the March 31, 2022 date. Therefore, licensed craft distillers no longer had the authority to ship directly to consumers.

In 2022, AB 920 (Aguiar-Curry, Statutes of 2022) was signed into law. Although similar to some of the prior regulatory relief that was temporarily available through March 2022 because of the COVID-19 pandemic, the bill contained key differences that will expire on January 1, 2024. The bill allowed a holder of a craft distillers license (Type 74) to directly ship distilled spirits manufactured or produced by the licensee at its premises to California consumers. The amount shipped must not exceed the equivalent of 2.25 liters in any combination of prepackaged containers per day per consumer. This quantity shall be solely for the consumer's personal use and not for resale. Additionally, the craft distiller must require the common carrier to get the signature of an individual 21 years of age or older.

AB 1088 would continue to allow, until January 1, 2025, a licensed craft distiller in California to directly ship distilled spirits manufactured and produced by the licensee at its premises to a consumer. There is no similar privilege in the bill for manufacturers of spirits distilled outside the state.

Granholm v Heald, 544 U.S. 460 (2005). In the 2005 *Granholm v Heald* case, the Supreme Court of the United States ruled that laws in New York and Michigan that permitted in-state wineries to ship wine directly to consumers but prohibited out-of-state wineries from doing so were unconstitutional. After making its way through the courts, the two separate cases were ultimately

decided by the U.S. Supreme Court. In a 5-4 opinion delivered by Justice Anthony Kennedy, the Court held that both states' laws violated the commerce clause by favoring in-state wineries at the expense of out-of-state wineries and did so without the authorization of the 21st Amendment. State authority to engage in such economic discrimination was not the purpose the 21st Amendment. Prior to this decision, it was widely assumed that in-state manufacturers could be given more privileges compared to out-of-state manufacturers.

AB 1088, in providing an in-state manufacturer with a privilege not given to an out-of-state manufacturer, could result in possible lawsuits under the Granholm decision, even if this privilege is temporary.

According to the Author

According to the author's office, "on average, online sales and direct-to-consumer shipping now account for 30% of craft distillers' revenue. Most of California's family-owned craft distilleries are slowly recovering from the COVID-19 pandemic. AB 1088 simply extends the flexibility afforded to the aforementioned small distillers for an additional year, providing the proper opportunity for in-person tasting rooms to recover the revenue and foot traffic lost during the pandemic. Additionally, it will allow for future conversations regarding the development of a permanent direct-to-consumer shipping solution that will appease the industry as a whole."

Arguments in Support

This bill is supported by the California Artisanal Distillers Guild, which argues "If this bill doesn't pass, craft distillers will continue to lose employees and some will go out of business due to lost revenue combined with reduced tourism numbers and the tough economy." This bill is also supported by numerous distillery businesses.

Arguments in Opposition

This bill is opposed by Alcohol Justice, which argues "Direct shipping promotes reflexive – instead of planned – consumption" and that "The bill fundamentally undermines the three-tier system, allowing all producers to also be distributors and retailers."

FISCAL COMMENTS

According to the Assembly Committee on Appropriations analysis, "Minor and absorbable costs to the ABC for enforcement if this business model first authorized during the COVID-19 pandemic is continued for one more year. However, ABC notes it could incur significant legal costs of an unknown amount if the bill is challenged in court given the decision in *Granholm v. Heald* (2005) 544 U.S. 460, which ruled laws in New York and Michigan allowing in-state wineries, but not out-of-state wineries, to ship wine directly to consumers were unconstitutional.

VOTES

ASM GOVERNMENTAL ORGANIZATION: 20-0-2

YES: Santiago, Lackey, Aguiar-Curry, Berman, Bryan, Megan Dahle, Davies, Garcia, Gipson, Jones-Sawyer, Low, McCarty, McKinnor, Jim Patterson, Quirk-Silva, Ramos, Robert Rivas, Blanca Rubio, Ta, Villapudua

ABS, ABST OR NV: Cervantes, Mathis

ASM APPROPRIATIONS: 15-0-1

YES: Holden, Megan Dahle, Bryan, Calderon, Wendy Carrillo, Dixon, Mike Fong, Hart,
Lowenthal, Mathis, Papan, Pellerin, Sanchez, Weber, Ortega
ABS, ABST OR NV: Robert Rivas

UPDATED

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