congressional hearing.[9] In 2004, FTC staff commented on proposed New York legislation involving the direct shipment of wine.[10]

The Proposed Legislation

Ohio law currently places several restrictions on the ability of its consumers to purchase wine directly from out-of-state manufacturers. First, consumers must obtain prior consent for such purchases from the Ohio Division of Liquor Control.[11] Second, consumers must pay all relevant taxes to the state at the time that such consent is requested.[12] Third, purchases from out-of-state wine manufacturers are limited to fifteen gallons per family household per three-month period.[13] Finally, consumers are prohibited from purchasing any out-of-state wine that Ohio retailers currently are licensed to sell.[14]

The United States Supreme Court decision in *Granholm v. Heald*,[15] issued on May 16, 2005, held that the laws of Michigan and New York that discriminated against out-of-state wine manufacturers and in favor of in-state wine manufacturers in the sale and shipping of wine within those states violated the Commerce Clause of the United States Constitution. Shortly thereafter, a settlement was reached in litigation challenging Ohio's direct-shipment restrictions.[16] As a result of that settlement, and until a legislative amendment or appropriate rule change is effected, Ohio consumers may purchase wine directly from out-of-state manufacturers.[17]

The proposed legislation, which is designed to bring Ohio law into compliance with the *Granholm* decision, would allow the direct shipment of wine to Ohio consumers from

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9 *See* Prepared Statement of the FTC Concerning "E-Commerce: The Case of Online Wine Sales and Direct Shipment," Before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce, United States House of Representatives (Oct. 30, 2003), *at* http://www.ftc.gov/os/2003/10/031030ecommercewine.htm.

10 Letter from FTC Staff to New York State Rep. William Magee *et al.* (Mar. 29, 2004) ("New York Letter"), *at* http://www.ftc.gov/be/v040012.pdf.

11 OHIO REV. CODE § 4303.25; OHIO ADMIN. CODE 4301:1-1-22(A), (C).

12 *Id.* at 4301:1-1-23(A)(4).

13 *Id.* at (A)(5).

14 *Id.* at (A)(3).

15 125 S. Ct. 1885, 1907 (2005).

16 *See Stahl v. Taft*, No. 2:03cv00597 (S.D. Ohio July 19, 2005) (agreed order and injunction).

17 *See* Ohio Division of Liquor Control Web site, *at* http://www.liquorcontrol.ohio.gov/DirectShipping.htm (providing relevant information and required tax form).

manufacturers inside or outside of Ohio if certain requirements are met. First, any manufacturer that ships directly to Ohio consumers must have a valid license or permit in at least one state for the manufacture and sale of wine.[18] Second, the individual ordering the wine to be delivered must be at least twenty-one years of age and personally sign a document acknowledging the wine's receipt at time of delivery.[19] Finally, the manufacturer must either collect from the consumer and pay all applicable taxes or notify the consumer that he or she is liable for the payment of such taxes.[20] Any violation of these requirements would be a first-degree misdemeanor.[21]

Competitive Effects of the Proposed Legislation

Based on extensive research in the area of direct shipping, FTC staff believes that the proposed legislation would enhance consumer welfare. By allowing interstate direct shipping, SB 179 likely would allow Ohio residents to purchase a greater variety of wines, as well as many wines at lower prices. In addition, SB 179 would allow Ohio to meet its other policy goals. States that have addressed the direct shipping issue typically cite underage drinking and tax collection as the primary concerns raised by direct shipping. By requiring manufacturers to comply with certain regulatory requirements, SB 179 would allow Ohio to prevent shipments to minors and to collect taxes on direct shipments.

A. The Proposed Legislation Likely Would Allow Ohio Consumers to Purchase a Greater Variety of Wines

SB 179 likely would substantially increase the variety of wines available to Ohio consumers. Through direct shipping, and particularly through the Internet, consumers can conveniently purchase many wines that are not available in nearby bricks-and-mortar stores. The Internet effectively expands the geographic market by allowing online vendors to compete nationally. Further, an individual online store may feature more products than many bricks-and-mortar retail locations, as bricks-and-mortar retailers may not have the demand or shelf space to justify keeping a large variety of wines in stock.[22] Moreover, smaller wineries may be unable to distribute their wines effectively through the three-tier (*e.g.*, manufacturer/wholesaler/retailer) system that is mandated in most states. As the Supreme Court recently noted in its *Granholm*

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18 SB 179 § 1, at 1-2.

19 *Id*. at 2.

20 *Id*.

21 *Id*. at 3.

22 According to a trade association that participated in the E-Commerce Workshop, domestic wineries produce approximately 25,000 wine labels, and even in a large market like Illinois, only slightly more than 500 of these labels are ave s briug

decision, "many small wineries do not produce enough wine or have sufficient consumer demand for their wine to make it economical for wholesalers to carry their products. This has led many small wineries to rely on direct shipping to reach new markets."[23]

More importantly, the total number of varieties available online likely surpasses the total number available in bricks-and-mortar stores that are within a reasonable distance of a particular consumer. Consumers are likely to value having a variety of wines from which to choose. One of the most popular wine magazines, *The Wine Spectator*, reviews over 10,000 different wines annually.[24] Further to this point, a Nobel laureate in economics testified at the E-Commerce Workshop that "the value to consumers of direct wine shipments com[es] primarily from access to wines that are not available in their communities."[25] Thus, direct shipping can give consumers convenient access to many more wines, including popular labels and smaller labels from around the country.

As part of its analysis of the impact on consumers of interstate direct shipping bans, FTC staff conducted a study of wine prices and availability [illegible]

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between the lowest online and average offline prices fell by 26% during that time, according to another estimate.[40]

C. States That Permit Interstate Direct Shipping of Wine Generally Report Few or No Problems with Direct Shipments to Minors

Although direct shipping can provide consumers with important benefits, policymakers have expressed concern that direct shipping might exacerbate the problem of underage drinking. As FTC staff has recognized in its Wine Report and in other documents, underage alcohol use is a significant national concern.[41] In the context of the direct shipping of wine, however, the evidence shows that states that permit such shipping generally report few or no problems with shipments to minors.

FTC staff contacted officials from several states that allow interstate direct shipping and asked them whether they had experienced problems with shipping to minors. These states generally reported few, if any, problems with direct shipping to minors.

Study, which found that when transportation costs are included, lower-end wines – those most likely to be purchased by minors, to the extent that they seek to purchase wine – are more expensive when purchased over the Internet than through offline stores.[47] Similarly, several state officials also commented that, based on their experience, minors were much more likely to buy alcohol through offline sources than over the Internet.[48] Further, in *Granholm*, the Supreme Court rejected the arguments of New York and Michigan that their interstate direct shipping bans were justified by their concerns over underage drinking. Citing the FTC Wine Report, the Court found it unsurprising that "[s]tates currently allowing direct shipments report no problems with minors' increased access to wine," reasoning that (1) minors are less likely to consume wine, as opposed to other forms of alcohol; (2) minors who decide to disobey the law have more direct means of doing so; and (3) direct shipping is an imperfect avenue of obtaining alcohol for minors, who generally want instant gratification.[49]

Of course, efforts should be made to prevent underage purchases of alcohol, both online and offl for example, reports that they "have also not, as yet, had any problems with the collection of excise tax[es]."[50] North Dakota reports that "[t]axes are collected. [There are n]o problems to date that we are aware of."[51] To the extent that states have problems with out-of-state suppliers, they have addressed such problems in less restrictive ways than banning all interstate direct shipping.[52]

Furthermore, as discussed in both the FTC Wine Report[53] and the *Granholm* opinion,[54] to the extent[546] that out-of-state manufacturers fail to comply voluntarily with tax (or any other) regulations, states can report problems to TTB, which has the authority to revoke a manufacturer's federal license – necessary to operate in any state – for violating state law, or utilize the Twenty-First Amendment Enforcement Act,[55] which provides state attorneys general the power to bring civil actions in federal court for injunctive relief against out-of-state manufacturers that violate state liquor laws.

Finally, regardless of whether a state permits or prohibits interstate direct shipping, there is no reason to believe that legalizing direct shipping would increase tax evasion. It is unlikely that states would increase illegal interstate direct shipping by creating procedures that would allow out-of-state suppliers to ship legally and pay taxes. If suppliers who currently ship illegally continue to ship illegally, then the level of tax evasion would remain unchanged; howev28 539.04 Tm(55), if