

Small Winery Cooperative Wholesaler Report (October 2010)

BACKGROUND:

2007 Wisconsin Act 85 created sec. 125.545 (5), Wis. Stats., relating to the creation and organization of small winery cooperative wholesalers. The principal purpose of a cooperative wholesaler is to sell and distribute wine manufactured, blended, and bottled, by its members.

Wisconsin is one of 31 states that regulate the manufacture, distribution and sale of alcohol beverages through a three-tier system. Generally such regulation creates distinct separation between different segments of the alcohol beverage industry. The statutes regulating alcohol beverages contain the following statement of legislative intent:

“Section 125.01 Legislative Intent. This chapter shall be construed as an enactment of the legislature’s support for the 3-tier system for alcohol beverages production, distribution, and sale that, through uniform statewide regulation, provides this state regulatory authority over the production, storage, distribution, transportation, sale, and consumption of alcohol beverages by and to its citizens, for the benefit of the public health and welfare and the state’s economic stability. Without the 3-tier system, the effective statewide regulation and collection of state taxes on alcohol beverages sales would be seriously jeopardized. It is further the intent of the legislature that without a specific statutory exception, all sales of alcohol beverages shall occur through the 3-tier system, from manufacturers to licensed wholesalers to retailers to consumers. Face-to-face retail sales at licensed premises directly advance the state’s interest in preventing alcohol sales to underage or intoxicated persons and the state’s interest in efficient and effective collection of tax.”

Cooperative wholesalers are required to apply to the Department of Revenue (DOR) for an intoxicating liquor wholesaler permit and comply with other laws regulating liquor wholesalers. The Department of Revenue was authorized to issue not more than a total of 6 wholesalers’ permits to cooperative wholesalers applying for a wholesaler’s permit prior to December 31, 2008. DOR received applications from two small winery cooperatives for wholesaler’s permits prior to the 2008 deadline: the *Wisconsin Winery Co-op*; 30940 Oakridge Drive, Muscoda, WI 53573 and the *Badger State Winery Cooperative*; W12266 King Lane, Stockholm, WI 54769. After determining that the applications were complete and the cooperatives met all of the requirements of sec. 125.545, Wis. Stats., the

Department of Revenue issued wholesaler permits to *Wisconsin Winery Co-op* effective October 28, 2008 and to *Badger State Winery Cooperative* effective December 23, 2008.

The statutes contain a number of requirements for the creation of small winery cooperatives, including limiting cooperative membership only to small wineries. “Small winery” is defined as any winery that produces less than 25,000 gallons of wine in a calendar year. The cooperative wholesaler must be created and organized under chapter 185, the Wisconsin statute governing the incorporation of cooperatives. Chapter 185 requires the development of articles of incorporation and bylaws, and registration of the cooperative with the Wisconsin Department of Financial Institutions.

Small wineries may become members of a cooperative wholesaler only if the small winery holds a wine direct shipper’s permit issued by the Department of Revenue, and the small winery has been certified by DOR as a small winery. On an annual basis, DOR notifies Wisconsin wineries that have been certified as small wineries based on their calendar year production and bottling. The department also certifies out-of-state cooperative members as small wineries based on verification from the state alcohol beverage licensing authority issuing winery licenses or permits to the out-of-state winery. Members of the board of directors of the cooperative wholesaler representing a member winery shall be either an owner or employee of that winery. If the cooperative membership includes an out-of-state winery, at least one director shall be either an owner or employee of an out-of-state winery that is a member of the cooperative wholesaler. Section 125.545, Wis. Stats., also includes a prohibition on the cooperative wholesaler employing an individual who is an owner or an employee of a member of the cooperative. Instead, the owner or employee of a member winery may act as a volunteer to assist the cooperative wholesaler in the sale and distribution of wine to retailers and other wholesalers. At least once every six months, the board of directors must meet with a representative of the Department of Revenue and a representative of the University of Wisconsin Center for Cooperatives. The Department of Revenue is directed to issue reports stating whether the cooperative wholesaler is operating properly under state law, and detail any problem areas the cooperative wholesaler must correct. This is the first such report issued by the department.

To assist the department in the preparation of this report, the department created a Small Winery Cooperative Wholesaler Checklist including all of the requirements for the creation, organization, membership and operation of the cooperative wholesalers. The department requires each cooperative wholesaler to provide a completed checklist showing their compliance with all of the requirements for

establishing and operating a cooperative wholesaler. A copy of the checklist is included as Appendix A of this report.

WISCONSIN WINERY CO-OP:

The *Wisconsin Winery Co-op* registered as a stock cooperative with the Wisconsin Department of Financial Institutions effective October 9, 2008. The principal office is located at 30940 Oakridge Drive in Muscoda, WI 53573, and their registered agent is Marion Weglarz. The members of the cooperative are: Bayfield Winery; Brigadoon Winery; Burr Oak Winery; DNA Vintners; Eagles Landing Winery; Grandpa Fro's Invention Farm & Country Winery; Hookstone Winery; Kerrigan Brothers Winery; LedgeStone Vineyards; Lil Ole Winemaker Shoppe; Maiden Wines; Munson Bridge Winery; New Glarus Primrose Winery; Red Oak Winery & Vineyard; Seven Hawks Vineyards; Sinnipee Valley Vineyard; Trout Springs Winery; Vetro Winery; Vines to Cellars; Weggy Winery; WineSitter Brew House; and Woodland Trail Winery. All of the cooperative members have been certified by the Department of Revenue as small wineries; producing less than 25,000 gallons of wine annually. More information about the Wisconsin Winery Cooperative can be found on the Cooperative web site at: <http://www.wisconsinwineryco-op.com/>. Representatives from the Department of Revenue met with the board of directors of the *Wisconsin Winery Co-op* on April 7, 2009, and February 1, 2010.

At the initial meeting between the department and the cooperative board, the department heard a report from the cooperative president on the creation and operation of the cooperative wholesaler. The cooperative sold 2633 cases of wine in 2009, approximately 23,697 liters. The department publishes statistics on the total number of liters of wine sold in the state and reports nearly 93 million taxable liters of wine sold in Wisconsin in 2009. This report can be found on the Revenue web site at: <http://www.revenue.wi.gov/ise/excise.html>.

In a question and answer session with cooperative officers, the department responded to questions from the board of directors regarding the requirements of state law relating to the donation of wine. The department distributed an overview of state law on the subject. This document is attached to this report as Appendix B. The department also responded to questions concerning the prohibition on the cooperative employing any owner or employee of a member winery, and the language of Act 85 permitting small wineries holding active winery permits on October 1, 2008 (when the law became effective) to continue to sell wine at wholesale until June 30, 2009. After that time, wineries were no longer permitted to engage in self-distribution of wine to retailers. Beginning July 1, 2009, all sales of wine to liquor retailers must be either through liquor

wholesalers holding permits from the department, or through membership in one of the two small winery cooperative wholesalers. To address the concern of small wineries that the loss of self-distribution would reduce sales of wine produced by small wineries, Act 85 contained a “duty to work in good faith” provision. The law provides that each wholesaler has an obligation to negotiate in good faith with any manufacturer and winery seeking to sell its products through the wholesaler. The law also required the department to make available a list of all liquor permit holders. The list of all liquor wholesaler permittees is available on the Revenue web site at: <http://www.revenue.wi.gov/ise/prmitlst.xls>.

In further discussion at the initial meeting, the department reminded the Board of the requirements to file all alcohol beverage tax returns on a timely basis, to avoid late-filing fees or penalties. The department has reviewed these returns and notes all returns have been submitted as required. The department’s review determined that the cooperative had complied with all of the requirements of sec. 125.545, Wis. Stats., and was operating properly under Wisconsin law.

BADGER STATE WINERY COOPERATIVE:

The *Badger State Winery Cooperative* registered with the Department of Financial Institutions as a membership cooperative effective December 19, 2008. The principal office is located at W12266 King Lane in Stockholm, WI 54769, and their interim president is Herdie Baisden. The members of the cooperative are: Apple Barn Orchard & Winery; Autumn Harvest Winery; Bauer-Kearns Winery; Danzinger Vineyards; Maiden Rock Winery & Cidery; Northleaf Winery; Staller Estate Vineyard & Winery; Tenba Ridge Winery; Valley Vineyard; Van Wychen Wines; and Whispering Winds Winery. Representatives from the Department of Revenue met with the board of directors of the *Badger State Winery Cooperative* on May 11, 2009, and April 26, 2010.

At the initial meeting between the department and the board of directors, the department heard a report from the cooperative president and treasurer on the creation and operation of the cooperative wholesaler. The cooperative sold 1225 cases of wine in 2009, approximately 11,000 liters. The department publishes statistics on the total number of liters of wine sold in the state and reports nearly 93 million taxable liters of wine sold in Wisconsin in 2009. This report can be found on the Revenue web site at: <http://www.revenue.wi.gov/ise/excise.html>.

The department responded to questions from the board regarding the requirements of state law relating to the donation of wine to non-profits and charitable events. The department distributed an overview of state law on the subject. See Appendix B. The department also responded to questions concerning the

requirement in sec. 125.545 (2) (c), Wis. Stats., prohibiting the cooperative wholesaler from employing any owner or employee of a member winery, and the sec. 125.65 requirements applying to wine salespersons, to obtain a permit for wholesale sales for future delivery. The department responded with the following clarification: individuals soliciting sales for the small winery cooperative wholesaler (both salespersons and the winery owner/employer) should obtain the winery salesperson's permit for their sales of a small winery member's wine through the cooperative wholesaler. The salesperson must be an employee/owner of the winery, not the cooperative wholesaler. The application for a salesperson's permit (Form AB-121) can be found on the DOR web site at: <http://www.revenue.wi.gov/forms/excise/ab-121f.pdf>. The fee for this permit is \$20.00 for a permit which expires every two years.

In response to questions posed at the department's meeting with the cooperative board relating to the payment of invoices to the cooperative. The department clarified the meaning of sec. 125.545(4), Wis. Stats., prohibiting members of a cooperative wholesaler from selling the winery's wine directly to a retailer. DOR advised that invoices should be made out to the wine cooperative and receipts deposited into the cooperative's account. A winery employee who has a salesperson's permit to solicit wine sales on behalf of the cooperative may accept cash payment for the wine. Such payments should also be deposited in the cooperative's account.

The department explained the language of Act 85 permitting small wineries holding active winery permits on October 1, 2008 (when the law became effective) to continue to sell wine at wholesale until June 30, 2009. After that time, wineries were no longer permitted to engage in self-distribution of wine to retailers. Beginning July 1, 2009, all sales of wine to liquor retailers were required to be either through liquor wholesalers holding permits from the department, or through membership in one of the two small winery cooperative wholesalers. A list of all liquor wholesaler permittees is available on the Revenue web site at: <http://www.revenue.wi.gov/ise/prmitlst.xls>.

The department reminded the Board of the requirements to file all alcohol beverage tax returns on a timely basis, to avoid late-filing fees or penalties. The department has reviewed *Badger State Winery Cooperative's* returns and found that all returns have been submitted as required. The department's review determined that the cooperative had complied with all of the requirements of sec. 125.545, Wis. Stats., and was operating properly under Wisconsin law.

OTHER ISSUES:

Additional topics discussed at department/cooperative meetings include the requirement for the semiannual meetings between the Board of Directors of the cooperative wholesaler and the department. The department was asked about the requirement that the board meets in person with an employee of the department. The cooperatives expressed concerns about difficulty in complying with the requirement that the board meet in person with the department semiannually. Directors are located across the state, and are unpaid volunteers, making it difficult to schedule the semiannual meetings and get the attendance of a quorum of the board. Another inquiry asked whether the statutes authorize the meeting to occur using telephone conference calls, video conferencing, webinars, or other types of technology, allowing meetings to occur without requiring travel. The department responded that the president could not replace the board as a whole, that a quorum of the board was necessary to conduct the statutorily required meetings, and that the requirement for an “in person” meeting would not authorize the meeting to occur using technology to replace the in person meeting.

2009 Assembly Bill 859 was introduced to repeal the requirements for semiannual meetings and the filing of reports on the operations and sales activities of the cooperative wholesalers. The legislation was approved by the Assembly Committee on Rural Economic Development and passed in the State Assembly on April 20, 2010, but was ultimately not approved by the State Senate.

The department finds that the cooperative wholesalers are operating properly, and in compliance with the requirements of Wisconsin’s alcohol beverage laws. A question can be asked whether there is a continued need for the semiannual meetings between the department and the cooperative boards. At this time, the department issues liquor permits to more than 2000 alcohol beverage producers, wholesaler/importers, and shippers. There are no requirements that the department meet with any of these liquor permittees prior to renewing their permits. The requirement for semiannual meetings with the two cooperative wholesalers is unique, and given the cooperative’s record of compliance with alcohol beverage laws, and successful operation to date, the department suggests that the meeting requirement be discontinued.

APPENDIX A

Small Winery Cooperative Wholesaler Report (checklist)

Creation and Organization

- Cooperative is organized under Chapter 185 of the Wisconsin statutes.
 - Articles of incorporation filed with the Wisconsin Department of Financial Institutions (DFI), and copy filed with the Wisconsin Department of Revenue (DOR).
 - Bylaws adopted and copy filed with DOR.
 - Annual meeting held – date: _____
 - Agent and principal office located in Wisconsin at:

 - Board of Directors elected: (Name and titles) _____

 - Directors are owners/employees of small winery members.
- All wineries qualify as small wineries (e.g. produce and bottle less than 25,000 gallons of wine in a calendar year).

Membership

- Provide list of members to DOR. _____
- Changes in membership since last meeting with DOR.
- Members are eligible (hold WI winery permit or out-of-state winery permit, and WDS permit).
- Cooperative does not employ any member winery owner or member winery employee.
- Membership fees and charges are even-handed and do not prefer in-state wineries over out-of-state wineries.
- Members selling only through cooperative after July 1, 2009 (No direct sale to retailers).
- Since last meeting with DOR, how many wineries solicited the Cooperative for membership?

- How many members were added? _____
- How many were denied membership? _____

APPENDIX B

Misc Laws on Donations of Alcohol Beverages

125.02(20) – defines “sale” – transfer with consideration or transfer without consideration if made to evade law, or any shift, device, scheme, etc. - includes solicitation for future delivery.

125.04(1) – NO PERSON (person includes individuals, assns, corporations, LLC’s, etc) may sell or engage in any other activity for which this chapter provides a license w/o holding the appropriate license.

125.04(3), (5) – License application must be filed with clerk, published in paper (public notice), public hearing, board approves/denies; licensee have to meet certain statutory requirements.

125.06(10) – no license required for raffles of alcohol if organization has raffle permit – Ch. 563. Also, s. 125.06(11) provides no license is required for sale of (sealed) alcohol at an auction by a charitable organization to raise money for the charitable organization.

125.09(1) – prohibits “consumption” of alcohol in unlicensed public places – i.e., businesses that do business with public (jewelry stores, hair salons, etc.)

125.315 – prohibits the “giving” of fermented malt beverages to evade law (i.e., business – credit union, barbershop, jewelry store, etc. gives away beer to customers without a fermented malt beverage license).

125.32(3m) – retailers may only purchase and possess alcohol from licensed wholesalers and no person may possess any alcohol beverages on the premises except those authorized by law for sale on the premises (i.e., I can’t bring a bottle of wine onto a licensed premises).

125.32 (6) – retailers may only purchase and possess alcohol from licensed wholesalers and no person may possess any alcohol beverages on the premises except those authorized by law for sale on the premises (i.e., a person can’t bring a bottle of wine onto a licensed premises).

125.66 – sale without license – penalty up to \$10,000/9 months or both.

125.67 – “giving away” or using other means to evade law prohibited (example – commercial transaction); same penalty as above.

125.68(2m) – no licensee may allow another to use his/her license to sell alcohol beverages (example: I can’t let someone drive my car using my driver’s license; those privileges are given to me and I can’t assign them to someone else).

125.69(3) – wholesalers must charge same price to all retailers purchasing alcohol in similar quantities (wholesaler can’t discount wine to charitable license holder and then charge other licensees a different price).

125.69(4) – retailers must only obtain alcohol by bona fide sale from licensed Wisconsin wholesalers; “gift” is not bona fide sale. However, a liquor salesperson may give a “Class A” licensee a sample of a brand of liquor (wine) if the retailer has not previously purchased that brand from the permittee – s. 125.65(1).

125.69(6) – retailers must only purchase/possess alcohol from licensed wholesalers. (I.e., a retail licensee can’t get product from another retailer).

125.70; 125.33 (2)(o) – manufacturers, rectifiers. Brewers and wholesalers may provide, free of charge, taste samples at Class B premises to persons of legal drinking age who are attending the trade show of a bona fide national or statewide trade association that derives income from membership dues of Class B licensees; any product brought to the premises under this provision must be removed at the close of the trade show.

Statutes regulating the use and sale of alcohol beverages are intended to regulate and restrain or restrict, but not to encourage or promote, the sale of liquor. They should be construed liberally in order to effectuate their purpose (48 CJS Intoxicating Liquor, Sec. 191). These are “temperance” laws.

Liability – QUESTION TO ASK: Do non-licensed entities/businesses (i.e., charities, jewelry stores, hair salons, etc., etc.) who traffic in alcohol ask their insurance companies about the potential liabilities they may incur through their trafficking in these products, and what protection will their insurance provide in such instances?

Once licensed, the licensee must comply with ALL other state alcohol laws applicable to the license they hold – server training requirements, closing hour, underage on licensed premises, licensed operators (bartenders), purchase and invoice and inspection requirements, etc. with the privilege of serving alcohol also comes with it the RESPONSIBILITY of complying with state law and local ordinances. Failure to do so subjects them to criminal and civil penalties.