

DEPARTMENT OF REVENUE
CLEARINGHOUSE RULE NUMBER 08-065
SECTION 227.19(2) AND (3), STATS., REPORT

Basis and Purpose of the Proposed Rule

This proposed rule order is necessary to meet the requirements of 2007 Wis. Act 85:

- Providing the requirements for registration of wine collectors, the sale of wine held by the collector to other wine collectors, and the advance notice to be provided to the department before a sale.
- Specifying the procedure for the creation and organization of small winery cooperative wholesalers.
- Listing the requirements for the members of the cooperative.
- Detailing the activities authorized for small winery cooperative wholesalers.

Public Hearing

A public hearing was held on August 26, 2008. One person presented oral testimony at the hearing. The department received a number of other comments that are summarized below.

Summary of Public Comments and Agency Response

The department received comments from Marion Weglarz, owner of Weggy Winery, 30940 OakRidge Drive, Muscoda, WI 53573.

Mr. Weglarz raised several concerns regarding the rule, including the following:

- An objection to the requirements for the cooperative bylaws found in Tax 8.05 (4) (b) 2, 3., and 4., stating that requirements relating to the rights and responsibilities of cooperative members, the process to elect a board of directors, and the plans for a membership meeting, are items customarily addressed in bylaws, and therefore, requiring such provisions by rule is unnecessary.
The department believes that specifying the provisions of cooperative bylaws in the administrative rule is in keeping with the requirement in sec. 125.545 (6) (b) that "The department shall promulgate rules to administer and enforce the requirements (relating to the creation and organization of a cooperative wholesaler.)"
- An objection to the Tax 8.05 (4) (b) 1. provision which requires that the bylaws provide "reasonable membership requirements ... and that new members meeting such requirements be admitted."
Wis. Stats., Sec. 185.11 specifies the rules relating to membership in a cooperative. The department believes s. 185.11 and the provisions found in s. 125.545 (3) (b) 4. Which states: "A cooperative wholesaler shall work with all of its

members on evenhanded terms,” provides the authorization for the department to require that any winery wishing to join a cooperative must be allowed to join the cooperative.

- A request to require wine distributors to report on the origin of the wine they sell. Mr. Weglarz seeks to obtain information about the proportion of wine sold in Wisconsin that is “Wisconsin” wine vs. Wisconsin sales of wine manufactured in other states or foreign nations.

It is unclear what is meant by “Wisconsin” wine. A number of wineries holding WI winery permits manufacture wine in the state by importing bulk wine from other states and foreign countries yet bottle and label the wine in Wisconsin, while some wineries holding WI winery permits bottle wine made exclusively from grapes and fruits grown and fermented in Wisconsin. No labeling standard establishing “Wisconsin” wine, currently exists. The department believes such a labeling standard to be beyond the scope of an administrative rule regarding the creation and operation of a cooperative wholesaler.

- The difficulty small wineries face in finding distributors for wine manufactured by small wineries. A request was made that the department assign a distributor to provide distribution service to a winery that has been rejected by three distributors.

The department has no legal authority to compel two companies to do business with each other, and contends this request is also beyond the scope of the rule, and would require a statute change.

- A concern that the language of Tax 8.05 (4) (c) was too restrictive, specifically that the cooperative should be allowed to purchase marketing “services”, as well as “materials.”

The rule was amended to include “services”

- A request that the cooperative wholesaler be relieved of the requirement to file monthly liquor tax returns, in addition to the twice yearly “... detailed report of operations and sales activities ...”, required in sec. 125.545 (5) (a), and the biennial report required with the application for renewal of a wholesaler’s permit, required in sec. 125.545 (5) (b). Mr. Weglarz contends that these reports are redundant and result in additional cost for professional services for the cooperative, thereby imposing further hardship on the Wisconsin winery industry.

This request would require a statute change. Wis. stats., sec.139.06 (1) (b) requires holders of Wisconsin wholesaler’s permits to file monthly liquor returns with the department and pay any tax due. The statute provides no exception for a cooperative wholesaler.

- The department received questions from several winery owners asking if a winery could be a member of more than one cooperative.

The statute authorizing the creation and organization of the small winery cooperative wholesaler (Wis. stats., sec. 125.545) contains no prohibition on a winery joining more than one cooperative.

- The department also received a question concerning the purpose of Tax 8.05 (3) (d). Wis. stats., sec. 125.545 (3) (b) provides that the department may not issue more than a total of 6 wholesalers' permits to cooperative wholesalers. In the event that the department receives applications for more than 6 cooperative wholesalers, Tax 8.05 (3) (b) provides criteria the department would use in selecting which applications to approve.

- Representative Gary Tauchen raised several issues regarding Tax 8.03, the requirements for the registration and sales activities of wine collectors. He requested that the rule provide guidance regarding collectors' ability to donate wine to non-profits and charitable organizations.

The statutes currently provide an exception to alcohol beverage license and permit requirements for "... awarding of alcohol beverages in original, unopened packages, containers or bottles as a prize, in a raffle conducted by an organization licensed to conduct the raffle under ch. 563, to any person who has attained the legal drinking age."

By adopting Senate Amendment 1 to Senate Substitute amendment 1 to Senate Bill 485, later signed into law as 2007 Wisconsin Act 85, the Legislature rejected an effort to amend the statutes to further address wine collector donations to charitable organizations. As a result, the department believes addressing such donations in the proposed administrative rule is beyond the scope of the department's rule-making authority.

- Rep. Tauchen also expressed concern with the requirement in Tax 8.03 (3) (c) that a wine collector provide purchase invoices to verify that the collector has held the wine for at least eight years, stating that collectors may not always have original purchase invoices.

The department believes the specific language in the proposed rule already addresses Rep. Tauchen's concern. See: "A wine collector conducting a sale under this subsection shall provide purchase invoices or any other information as required by the department to verify that the requirements in s. 125.06 (11m), Wis. stats., have been met." (Emphasis added.)

- Finally, Rep. Tauchen noted that collectors may take possession of wine at a later time than their purchase of the wine, and suggested further clarification was needed in the rule.

The department believes the definition of "Purchase" found in the Uniform Commercial Code in sec. 401.201 (32), Wis. stats., provides sufficient clarification of the meaning of "purchased" as used in Tax 8.03 (3) (a) 2., and that no further change is necessary.

- The Federal Alcohol and Tobacco Tax and Trade Bureau (TTB) notified the Department that sec. 125.545 (3) (b) 2., Wis. stats., was in violation of the prohibition on consignment sales found in the Federal Alcohol Administration Act, 27 U.S.C. §205(d).

To address this conflict with federal law, the department amended the rule to define "purchase on consignment" as requiring the cooperative wholesaler to

provide cash or credit for the purchase of wine for a period of not more than 90 days after the purchase.

- The Wisconsin Federation of Cooperatives requested clarification that cooperative profits returned as patronage payments to cooperative members would not violate the prohibition on compensation to winery owners and employees acting as cooperative volunteers. The department does not believe such payments violate the compensation prohibitions found in Tax 8.05 (4) (d).

Legislative Council Staff Recommendations

All Legislative Council staff recommendations have been incorporated in the proposed rule order.

Regulatory Flexibility Analysis

The proposed rule order does not have a significant economic impact on a substantial number of small businesses.