

Section by Section Analysis of the CARE Act (H.R. 5034)

SEC.1. SHORT TITLE.

TEXT:

This Act may be cited as the `Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010'.

COMMENT:

This is a self-explanatory section creating the title of the bill.

SEC. 2. PURPOSE.

TEXT:

It is the purpose of this Act to--

(1) recognize that alcohol is different from other consumer products and that it should be regulated effectively by the States according to the laws thereof; and

(2) reaffirm and protect the primary authority of States to regulate alcoholic beverages.

COMMENT:

Part 1 of Section 1 reaffirms an underlying purpose of the Webb-Kenyon Act: Alcohol is different from other consumer products. The consequences of excessive or underage consumption of alcoholic beverages are different and more damaging than that associated with most other products. Alcohol is a product that requires effective regulation. Part 1 also recognizes the national consensus, expressed both constitutionally through the 21st Amendment and statutorily, that effective alcohol regulation needs to be enforced primarily by the States to reflect and enforce local norms and standards.

Part 2 of Section 1 acknowledges the primary role of States to regulate alcohol within their borders as provided in Section 2 of the 21st Amendment.

Congress explicitly recognized the State's primary authority to regulate alcohol through the adoption of the STOP Underage Drinking Act of 2006 (Public Law 109-422).

SEC. 3. SUPPORT FOR STATE ALCOHOL REGULATION.

TEXT:

The Act entitled 'An Act divesting intoxicating liquors of their interstate character in certain cases', approved March 1, 1913 (27 U.S.C. 122 et seq.), commonly known as the 'Webb-Kenyon Act', is amended by adding at the end the following:

COMMENT:

This section simply indicates that the CARE Act amends the Webb-Kenyon Act. The Webb-Kenyon Act was actually passed twice, once in 1913 (before Prohibition) and again in 1935 (following repeal of Prohibition).

SEC. 3. SUPPORT FOR STATE ALCOHOL REGULATION.

TEXT:

(a) Declaration of Policy- It is the policy of Congress that each State or territory shall continue to have the primary authority to regulate alcoholic beverages.

(b) Construction of Congressional Silence- Silence on the part of Congress shall not be construed to impose any barrier under clause 3 of section 8 of article I of the Constitution (commonly referred to as the 'Commerce Clause') to the regulation by a State or territory of alcoholic beverages. However, State or territorial regulations may not facially or intentionally discriminate, against out-of-state or out-of-territory producers of alcoholic beverages in favor of in-state or in-territory producers unless the State or territory can demonstrate that the challenged law advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.

COMMENT:

This section restates Congressional policy regarding the authority to regulate alcohol, limits dormant Commerce Clause challenges to State alcohol laws and prohibits States from facially or intentionally discriminating against out-of-state or out-of-territory producers.

Subparagraph (a) restates existing policy that States have the primary authority to regulate alcohol.

Subparagraph (b) clarifies congressional intent regarding the extent to which State alcohol laws can be challenged under the dormant Commerce Clause (U.S. CONST. art. I, Sec. 8, cl. 3). The dormant Commerce Clause operates to limit the power of the States to regulate interstate and foreign commerce; however, Congress clearly has the authority to limit the kind of challenges under the dormant Commerce Clause.

Recently, private interests have filed numerous lawsuits under the dormant Commerce Clause in an attempt to judicially deregulate the alcohol industry. In just the last five years, over 25 States had to defend their State alcohol laws in court. Defending these lawsuits has strained resources of cash-strapped States. Furthermore, the numerous judicial decisions are often contradictory and confusing. This recently led 40 State Attorneys General to request Congressional action to address this unfortunate state of affairs by re-enforcing the State's ability to regulate alcohol.

Subparagraph (b) provides that Congress limits legal challenges to State alcohol regulations. Congress has exercised this authority in the past by limiting legal challenges of State laws regulating insurance and, more recently, State laws regulating hunting and fishing. See *Schutz v. Thorne*, 415 F.3d 1128 (10th Cir.2005). A challenge may be brought where it is alleged that a State alcohol law facially or intentionally discriminates against out-of-state or out-of-territory alcohol producers in favor of in-state or in-territory producers.

In addition, Subparagraph (b) incorporates an existing State defense. Specifically, a State may defend a State alcohol law that is facially or intentionally discriminatory against out-of-state or out-of-territory producers by proving that the challenged law serves a legitimate local purpose that cannot be served by a reasonable nondiscriminatory alternative.

Subparagraph (b) does not change the result reached in the 2005 *Granholm v. Heald* decision. Consistent with *Granholm*, the CARE Act prohibits facial or discriminatory alcohol laws against producers, while allowing physical presence requirements for wholesalers and retailers to ensure a transparent and accountable system of distribution and sale. By limiting the kinds of challenges under the dormant Commerce Clause, the bill carefully balances the federal interest in

preventing undue burdens on interstate commerce with the State's interests in effectively regulating alcohol.

SEC. 4. AMENDMENT TO WILSON ACT.

TEXT:

The Act entitled 'An Act to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases', approved August 8, 1890 (27 U.S.C. 121), commonly known as the 'Wilson Act', is amended by striking 'to the same extent' and all that follows through 'Territory'.

COMMENT:

The amendment to the Wilson Act prevents misunderstanding of congressional intent of the CARE Act and ensures that the CARE Act cannot be construed more narrowly than Congress intends.

The majority in the *Granholm* decision assumed that the language of the Webb-Kenyon Act was limited by the Wilson Act. In the CARE Act, Congress amends the Webb-Kenyon Act to clarify the limits of dormant Commerce Clause challenges to state alcohol regulations. The amendment to the Wilson Act will assure that the Wilson Act cannot be used in the future to read the CARE Act more narrowly than Congress intends.

The amendment to the Wilson Act does not change the result reached in *Granholm* decision because the CARE Act prohibits State alcohol laws from facially or intentionally discriminating against out-of-state or out-of-territory producers in favor of in-state producers.