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RECOMMENDATION BY BUREAU OF ALCOHOLIC BEVERAGES AND LOTTERY OPERATIONS TO DE-LIST ALL 50 MILLILITER SPIRITS PRODUCTS

During the recent legislative hearings on L.D. 56, *An Act to Include 50 Milliliter and Smaller Liquor Bottles in the Laws Governing Returnable Containers*, it became apparent that 50 ml spirits containers, commonly referred to as “nips” or “minis,” are not only generating a litter problem, they are being consumed in moving passenger vehicles and contributing to an increase in drinking and driving in Maine. The Bureau of Alcoholic Beverages and Lottery Operations (“the Bureau”) has considered this issue carefully and believes that the State Liquor & Lottery Commission (“the Commission”) should de-list all spirits packaged in 50 ml containers¹ effective January 12, 2018,² in order to ensure that revenues from spirits sales are achieved in a socially responsible manner.

The Commission’s Mission

The Legislature recently articulated how the State’s monopoly of the spirits business should operate: “The Legislature finds that it is in the public interest to seek efficiencies and maximize growth in the State’s wholesale spirits business while ensuring that growth in revenue from the business is achieved in a socially responsible manner.” 28-A M.R.S. § 90(1) (eff. June 14, 2013). The Bureau administers the wholesale purchase and storage of spirits for sale in Maine, 28 M.R.S. § 83-C (3), and the Commission monitors the Bureau’s operation of the State’s monopoly. 28-A M.R.S. § 81(1). In conducting this wholesale operation, all spirits supplied by suppliers for retail sale in the State become the property of the Bureau upon removal from the state-operated warehouse for shipment to an agency liquor store where, upon receipt, they become the property of the agency liquor store. 28-A M.R.S. § 83-C (3). As part of its monitoring of the Bureau, the Commission determines which spirits items to list and delist for the Bureau to purchase and transfer to the State licensed agency liquor stores. 28-A M.R.S. §§ 81(3) and (4). Consistent with the Legislature’s mandate, the Commission must make its

¹ At the Commission meeting on June 13, 2017, the Bureau submitted a spreadsheet with the 333 products currently listed by the Commission that are packaged in 50 ml containers and posted this spreadsheet on the Bureau website at <http://www.maine.gov/dafs/bablo/docs/50ml%20Data%20for%20June%202017%20Commission%20Meeting.pdf>.

² January 12, 2018, would be the last day of delivery for an agency liquor store.

decisions to list and delist products with an aim to grow revenue “in a socially responsible manner.” 28-A M.R.S. § 90(1).

Substantial Evidence of Increased Drinking While Driving

When the Legislature held public hearings on L.D. 56, legislators and members of the public shared their personal experiences of finding ever-increasing quantities of 50 ml spirits containers on roadsides throughout the State. Whether for or against the legislation or Democrat or Republican, no one who testified at the hearing denied that Maine was experiencing a substantial increase in the quantity of 50 ml containers along its roadways. Rep. Anne-Marie Mastraccio, a Democrat from Sanford presented the bill and testified that “many communities have seen a noticeable increase over the last few years in nip and other small bottles along the roadways all over Maine.” (Attachment 1.) Rep. Betty Austin, a Democrat from Skowhegan, spoke of the problem of “keeping our sidewalks, streets, and roads clear of . . . these small liquor bottles.” (Attachment 1.) Rep. Susan Austin a Republican from Gray testified that “over the last two years, it has become blatantly obvious that there are a tremendous number of nips on the roadside.” (Attachment 1.) Sen. Shenna Bellows, a Democrat from Manchester, recounted her experiences from roadside cleanups and proclaimed that “miniature liquor bottles or ‘nips’ are a real problem.” (Attachment 1.)

The negative impact on the environment of these discarded containers is substantial and evident, and while L.D. 56 will eventually provide an incentive for people to clean up this litter, it does nothing to address the underlying cause of this litter—those who consume and discard 50 ml spirits containers while driving. It is self-evident that discarded containers along roadsides come from occupants of vehicles. Consequently, the increasing multitudes of discarded 50 ml spirits containers are not just unsightly litter; they are concrete evidence of widespread drinking while driving and a strong indicator that the roadways of Maine are becoming increasingly more dangerous.

More troubling, however, is that these 50 ml containers are more than evidence; they appear to be a contributing factor to increased drinking and driving in Maine. While correlation does not prove causation, in the past two years there has been a rise in convictions for operating under the influence (“OUI”) of alcohol, which correlates with the increase in sales of 50 ml spirits containers. Thanks in large part to education efforts and hard work by advocacy groups like Mothers Against Drunk Drivers (“MADD”), Maine experienced a steady decline in convictions for liquor OUIs each year from 2006 through 2014 going from 5,548 convictions down to 3,462 convictions. (Attachment 2.) In the past two years, however, Maine has experienced a sudden spike in convictions with 3,539 in 2015 and 3,735 in 2016. (Attachment 2.) The table and graph appearing in Attachment 2 illustrate this past decline and recent spike. Notably, traffic convictions overall continue to decline, but liquor OUI convictions are now rising; today the percentage of traffic convictions that are liquor OUI convictions is at its highest in this 11-year period. (Attachment 2.)

What the Bureau finds most disturbing about this recent spike is how closely it tracks the recent explosion in the sales of 50 ml spirits products. In 2007, only 511,331 50ml bottles were sold statewide accounting for only 6.2% of the total 8,246,058 liquor bottles sold in Maine. (Attachments 3 and 4.) By 2016, however, the number of 50ml bottles sold had skyrocketed to

8,420,669 representing 46.4%—almost half—of the total 18,157,727 spirits bottles sold in Maine. (Attachments 3 and 4.) And so far this year,³ over 5 million 50 ml bottles have been sold representing an astounding 54.5% of the spirits bottles sold in Maine.⁴ (Attachment 4.) The table and graph in Attachments 3 and 4 illustrate the exponential rise in the sale of these small bottles. As is apparent from the graph in Attachment 5, the explosion of sales in 2014, when the 3 million bottle barrier was first broken, occurred one year prior to the increase in liquor OUI convictions in 2015 that broke a 7-year-long streak of steady declines in such convictions.⁵ (Attachment 5.) And as the sales of 50 ml spirits bottles increased in 2016, so did the number of convictions. (Attachments 3, 4, and 5.)

Furthermore, 50 ml spirits products are purchased almost exclusively from convenience stores where consumers typically purchase the food and drink that they consume in their automobiles as opposed to supermarkets where consumers predominately purchase products they consume in their homes. Although the two supermarket chains with the most agency liquor store licenses, Hannaford's and Shaw's, sell seven times more spirits than the two convenience store chains with the most agency liquor store licenses, Circle K and Big Apple, these two convenience store chains sell 49 times more 50 ml bottles than these supermarkets. (Attachment 6.) This was not always the case. In 2012 these convenience stores were selling only 5 times more 50 ml bottles than these supermarkets. (Attachment 6.) The graphs in Attachment 6 illustrate the disproportionate degree to which consumers purchase spirits in 50 ml bottles from convenience stores. This fact, together with the increased volume of 50 ml bottles found on Maine's roadways and the recent increase in liquor OUIs, strongly suggests that Maine is experiencing an increase in the amount of spirits that are being consumed in vehicles.

The 50 ml Spirits Bottle Uniquely Facilitates Drinking While Driving

A correlation between the increase in the sale of spirits in 50 ml containers and an increase in drinking and driving should come as no surprise when one considers the characteristics and design of the actual 50 ml container. Recognizing the dangers and catastrophic consequences of drunk driving, the Legislature has outlawed certain conduct to deter drinking and driving. OUI is, of course, a crime. 29-A M.R.S. § 2411. But the Legislature has also made illegal the consumption of alcohol and the mere possession of an open alcoholic beverage container by a vehicle operator or passenger. 29-A M.R.S. § 2112-A(2). An "open alcoholic beverage container" is defined as "a bottle, can or other receptacle that contains any amount of alcohol, and that is open or has a broken seal, or the contents of which are partially removed." 29-A M.R.S. § 2112-A(1)(B). The consumption of alcohol by an operator or passenger or the presence of an open container in a moving motor vehicle can provide a law enforcement officer legal justification to stop the vehicle. *See State v. Fournier*, 1998 ME 57 ¶ 5, 708 A.2d 280.

³ As of June 16, 2017.

⁴ Despite comprising 54.5% of the number of bottles year to date in 2017, the 50 ml spirits business represents only 7.2% of the total dollar sales for that same period of time. (Attachment 4.)

⁵ Because of the delay in time between an arrest for OUI and an eventual conviction for the crime, one would expect a lag of between 6 to 12 months for any increase in OUI convictions resulting from an increase in sales of 50 ml spirits bottles.

Unfortunately, the 50 ml spirits bottle is an alcohol delivery system that enables those who drink while driving to evade Maine’s prohibition against open containers in motor vehicles. The 50 ml quantity is essentially a shot⁶ of spirits that a driver or passenger can consume in a single swig. Today’s drivers need not fear getting caught with an open container while nursing a bottle. They can now purchase a sleeve of 50 ml bottles and simply “drink and discard” or “chug and chuck” each container one at a time without there being an open container in the vehicle for more than a few seconds. Furthermore, unlike larger bottles, which can be difficult to conceal in a vehicle and are readily visible when jettisoned out a window, the 50 ml design is ideal for avoiding detection during a police stop. It fits easily in pants pockets and can be swiftly crammed into seat crevices. Moreover, its small profile makes its flight from a vehicle window difficult to detect. Drivers who consume their spirits from 50 ml bottles have little fear of being caught and cited for an open container violation.

No Substantial Negative Impact to the State’s Spirits Revenues

Opponents to the Bureau’s proposal to delist 50 ml spirits containers will likely complain that, if adopted, the proposal will cause the State to experience a substantial decrease in spirits revenues. They will likely argue that the State will lose the over 4 million dollars that this sector of the spirits business is now generating annually. (Attachment 7.) A reasoned examination of the issue, however, mitigates these unfounded fears.

It is important to remember that the Bureau’s proposal does not in any way prohibit the sale of any type of spirits. It proposes delisting a particular type of delivery system—the 50 ml container—not a type of spirits. Many consumers who now purchase their favorite spirits in 50 ml containers are not likely to simply give up drinking those beverages when the 50 ml containers are no longer available. Instead, they will likely transition to a larger container, moving from one revenue generating product to another revenue generating product, thereby eliminating, or at least substantially mitigating, any loss of revenues. To the extent that the unavailability of 50 ml containers causes consumers to refrain from alcohol because it is less convenient to drink while driving, that will be a positive outcome, no matter what the resulting loss of revenues to the State might be.

In addition, the operational requirements imposed by L.D. 56 would lead to a myriad of start-up and ongoing costs for the Bureau that would diminish the level of revenues that the State currently receives from the sale of 50 ml products. As indicated in Attachment 7, the Bureau estimates the following costs: implementation costs of \$760,000 in FY2018; costs of \$878,854 in FY2019, which period would include 6 months during which the containers would be redeemable; and ongoing annual costs of \$1,615,466 beginning in FY2020. (Attachment 7.)

More Effective Litter Eradication

An additional benefit to delisting spirits sold in 50 ml containers will be a more effective way to eradicate the litter targeted by LD 56. First, de-listing of 50 ml containers will have an

⁶ A shot in the contemporary United States is commonly interpreted to be 1 ½ U.S. fluid ounces, which equals 44 ml.

immediate impact. Shortly after they are delisted, these bottles will no longer be available for retail sale. Under L.D. 56, on the other hand, only containers sold on or after January 1, 2019, will be redeemable for a deposit. Second, the complete absence of 50 ml containers is by far a more effective way to ensure that such containers do not end up on Maine's roadsides than simply making the discarded bottles redeemable for 5 cents. Third, to the extent that consumers who littered after drinking from 50 ml containers continue to discard their spirits containers, they will be discarding fewer containers at fewer locations and each of these larger containers will have the more lucrative 15-cent redemption value.

Delisting Products Bottled in 50 ml Containers is the Socially Responsible Solution

The Bureau is mindful that up to this point it has consistently recommended that the Commission list products bottled in 50 ml containers in response to consumer demand—a demand that has grown steeply in recent years and without any active promotion by the Bureau. The Legislature's consideration of LD 56, however, has shone light on the potential negative side of the 50 ml business and caused the Bureau to engage in a closer examination of consumer behavior surrounding the purchase of 50 ml products.

The Commission's duty is not just to ensure the growth of revenue from the sale of spirits, but to do so "in a socially responsible manner." At first glance there may appear to be a trade-off—safer roads but a loss of spirits revenues. But as explained above, a closer examination of consumer behavior shows that there will be no significant loss of revenues. Consumers will continue to purchase spirits even if they are no longer bottled in containers that facilitate drinking and driving, and the State will continue to collect revenue from the sale of these spirits. Public safety demands that we no longer list spirits in containers that facilitate drinking and driving. Safer roads are priceless.

June 23, 2017

/s/ Gregory R. Mineo
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