

**OFFICE OF POLICY AND LEGAL ANALYSIS**

**Date:** February 24, 2021

**To:** Veterans and Legal Affairs Committee

**From:** Janet Stocco, Legislative Analyst

**LD 307** **An Act To Expand the Market for Maine Liquor Manufacturers** (*Senator Luchini*) - Emergency

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**SUMMARY**

This bill provides that it is not a violation of Maine law for a licensed Maine liquor manufacturer—a distillery, small distillery, rectifier, brewery, small brewery, winery, small winery or bottler—to sell and ship its products directly to customers located in other states as long as the licensed Maine manufacturer complies with the laws of the state in which the customer is located.

**ADDITIONAL INFORMATION:**

- **State power to regulate importation and sale of liquor.** Section 2 of the Twenty-First Amendment to the U.S. Constitution grants each state authority to control the importation into and use of alcohol within its borders:

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Although one might theoretically interpret this language as granting states unlimited authority to restrict the importation into and sale of liquor within their borders, the U.S. Supreme Court has held that the Twenty-First Amendment does not authorize states to enact liquor laws that violate other provisions of the Constitution. *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2462 (2019) (noting a state could not prohibit the import of only some liquor based upon the race of the individual to whom the liquor would be sold).

For example, in *Granholm v. Heald*, 544 U.S. 460 (2005), the U.S. Supreme Court held that states may enact laws regulating the importation and sale of liquor in order to protect public health, but in doing so they may not favor in-State entities and discriminate against out-of-state entities in violation of the Commerce Clause (Art. I, §8, cl. 3) of the U.S. Constitution:

States have broad power to regulate liquor under §2 of the Twenty-First Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-State producers. If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.

*Id.* at 493. *See Tennessee Wine & Spirits*, 139 S. Ct. at 2474 (“[The Twenty-First Amendment] allows each State leeway to enact the measures that its citizens believe are appropriate to address the public health and safety effects of alcohol use and to serve other legitimate interests, but it does not license the States to adopt protectionist measures with no demonstrable connection to those interests.”).

- **Direct-to-customer liquor sales for customers located in Maine.** Under current law, a licensed Maine winery or small winery as well as an out-of-State winery with a federal wine manufacturing permit may obtain a “direct shipper license” to sell and ship its own wine products directly to a customer located in Maine. [28-A M.R.S. §1403-A](#). No provision of Maine law authorizes the direct shipment of spirits or malt liquor to Maine customers, however. Instead:
  - **Maine manufacturers:** The provision of Title 28-A governing licensure of Maine liquor manufacturers only explicitly authorizes Maine manufacturers to sell their products to customers for off-premises consumption *at the premises of its manufacturing facility*, [§1355-A\(2\)\(D\)](#); or, if the manufacturer is a small winery or small distillery, it may obtain a license to sell its products for off-premises consumption *at up to 2 additional locations* beyond the manufacturing facility, [§1355-A\(4\)\(B\)\(2\)](#); [§1355-A\(5\)\(B\)\(3\)](#); or, if the manufacturer is a brewery or a small brewery, it may sell growlers directly to customers for off-premises consumption *at their associated licensed on-premises retail location*, [§1355-A\(3\)\(C\)](#).
  - **Out-of-State manufacturers:** Other than a direct shipper of wine, the sale by an out-of-state company of liquor that will be shipped directly by mail order to a Maine customer is expressly prohibited. *See* [28-A M.R.S. § 2077-B\(1\)](#).

The bill does not alter these provisions of Maine law or in any way authorize any additional direct-to-customer sales and shipments of liquor to *customers located in Maine*. Instead, the bill provides only that Maine manufacturers may take advantage of other states’ laws permitting direct-to-customer sales of liquor *to customers located in those states*.

- **Direct-to-customer liquor sales for customers located in other States.** The bill authorizes Maine manufacturers to sell their products directly to customers located in other states, if those sales are authorized by the law of the state where the customer is located and if the manufacturer complies with the state laws governing those sales. Each state has a slightly different approach to these sales:
  - Some states (for example, AL) prohibit the direct shipment of all liquor to consumers.
    - Delaware, by contrast, allows licensed out-of-state manufacturers and retailers to take orders from Delaware customers for the direct shipment of beer or wine; however, the direct shipper must ship the product to a Delaware wholesaler, who must deliver the product to a Delaware off-premises retail licensee, who may then deliver the product to the customer. Similarly, while an out-of-state winery may take an order for wine from an individual in Mississippi, the wine must be shipped to a licensed off-premises (package) retailer, from which the customer must pick up the wine product.
  - Many states (for example, ME and MA) authorize the direct shipment of wine—but not other liquor—to customers by licensed in-State or out-of-State wineries that have obtained an additional direct shipping license or permit.
  - Some states (for example, VT) authorize the direct shipment of wine or malt liquor to customers in the state by the licensed in-state or out-of-state manufacturer of the malt liquor or wine if the manufacturer has obtained an additional wine direct shipping license or permit.
  - A few states (for example, KY and NH) authorize the direct shipment of spirits, wine or malt liquor to customers in those states by in-state or out-of-state licensed manufacturers (both KY

and NH), wholesalers (NH), or retailers (NH) that have obtained an additional direct shipper license.

## ISSUES RAISED & AMENDMENTS PROPOSED AT PUBLIC HEARING

**International sales.** A committee member inquired whether the bill affects the ability of licensed Maine manufacturers to sell their products to customers in other countries like Canada. As drafted, the bill only addresses sales to customers “in another state.” For more information on the requirements for exporting liquor to Canada, see: <https://www.ttb.gov/itd/international-affairs-resources-for-canada>.

**Potential commerce clause issue.** At least one individual who testified expressed concern that challenges may be brought to the bill under the dormant commerce clause of the U.S. Constitution.

**Proposed amendment from Maine Grocers & Food Producers Association.** The Association proposed amending the bill to a resolve that would establish a study involving representatives of different stakeholder groups to assess: consumer demand for direct-to-consumer sales, opportunities for meeting that demand, and whether to include licensed Maine retailers in making direct-to-consumer sales. The Association further noted that it believes unauthorized direct-to-consumer sales of spirits (and malt liquor?) are currently being made by out-of-state entities to Maine customers.

### **Issues raised by BABLO**

- **Reporting Requirements / Consistency with §1403-A.** BABLO noted that the bill does not require either reporting or tracking of direct shipments of liquor made by Maine licensed manufacturers to customers located in other states. By contrast, [§1403-A\(11\)](#) provides that a licensed Maine winery that has a direct shipper license—allowing it to ship its products directly to customers within Maine—must file an annual report with BABLO disclosing both “the total number of cases of wine shipped to recipients in the State and . . . shipments made outside the State.”

Proposed amendment: BABLO requests that the bill be amended to require that licensed Maine manufacturers that ship their products directly to customers in other states report these sales / shipments to BABLO.

- **Taxes.** BABLO noted in its written testimony that it is unclear under the bill what types of taxes apply to sales of liquor by licensed Maine manufacturers directly to customers in other states.
  - **Sales tax:** Retail sales of liquor for off-premises consumption that take place “in this State” are generally subject to a 5.5% sales tax under [36 M.R.S. §1811\(1\)\(D\)](#)—suggesting that the question whether liquor sold by a licensed Maine manufacturer that is shipped directly to a customer in another state is subject to Maine sales tax depends on a legal determination whether the sale “took place” in Maine.

Nevertheless, the law is clear that regardless of where such a sale is considered to have taken place, these sales would be exempt from Maine sales tax pursuant to [36 M.R.S. §1760\(82\)](#):

[N]o tax on sales or use may be collected on or in connection with:

...

Sales of tangible personal property when the seller delivers the property to a location outside this State or to the United States Postal Service, a common carrier or a contract carrier hired by the seller for delivery to a location outside this State, regardless of whether the property is purchased F.O.B. shipping point or other point in this State and regardless of whether passage of title occurs in this State. This exemption does not apply to any subsequent use of the property in this State.

- **Excise tax on malt liquor and wine.** 28-A M.R.S. §1652 establishes the excise tax applicable to malt liquor and wine. The wording of this statute is somewhat difficult to decipher. Although §1652(1) provides that “[a]n excise tax is imposed on the privilege of *manufacturing* and selling malt liquor in the State”—suggesting that the tax is imposed on all malt liquor manufactured in Maine—the final sentence of §1652(1) states: “The Maine manufacturer or importing wholesale licensee shall pay an excise tax . . . on all malt liquor *sold in the State*”—suggesting that only malt liquor that is considered to have been “sold in Maine” is subject to the excise tax. By contrast, the provisions in §1652(1-A) & (2) governing excise taxes on low-alcohol spirits products, fortified wine, sparkling wine, hard cider and all other wine products imposes the tax on these products when they are “manufactured in or imported into the State”—without reference to the state in which these products are eventually sold.

BABLO has resolved the ambiguity in this language by focusing on §1652(2-A), which provides that every brewery and winery must pay “excise taxes . . . on malt liquor and wine that the brewery or winery removed from areas required to be bonded by the Federal Government.” That is, each Maine manufacturer must report all malt liquor or wine products that it removes from its manufacturing facility (bonded area) on the excise tax forms it submits to BABLO—regardless of where the products are ultimately sold. BABLO indicates that it will then adjust the amount of excise tax due by giving the Maine manufacturer a credit for all wine or malt liquor sold to an out-of-state wholesaler for resale outside of the State. BABLO testified that it does not believe a credit would be due under current law if the Maine manufacturer sold malt liquor or wine directly to a customer—rather than a wholesaler—outside of the State, however.

\* **Proposed amendment:** BABLO suggests clarifying in the bill whether excise taxes should be paid by a licensed Maine manufacturer of malt liquor or wine that engages in direct-to-customer sales of malt liquor or wine to customers located outside of the State.

- **“Excise tax” on spirits.** The State spirits tax or consumer’s tax on spirits is established in §1651 and must be sufficient (1) “to pay all spirits-related expenses of the bureau”, (2) to fund the Liquor Operation Revenue Fund in the Maine Municipal Bond Bank at a level equal to the funding amount in the previous year, and (3) to cover the premium tax in §1703, which is used to fund substance use disorder prevention and treatment services. Under §1651(1), this tax amount is incorporated into the “retail price” of spirits products established by the State Liquor and Lottery Commission; however, under §1651(3) certain spirits sales are not subject to this tax:
  3. **Applicability of tax.** Taxes on spirits imposed by the State do not apply to sales of spirits by manufacturers, bottlers and rectifiers holding licenses issued by the bureau:
    - A. To any instrumentality of the United States;
    - B. To any vessel of foreign registry;

C. To industrial establishments for use as an ingredient in the manufacture of food products; or

D. For use as an ingredient in the manufacture of commodities which by reason of their nature cannot be used for beverage purposes.

28-A M.R.S. §606(5) & (6), in turn, provide that BABLO sets the price—presumably a price different than the retail price established under §1651(1)—at which agency liquor stores sell spirits to government instrumentalities and the price at which agency liquor stores sell spirits “not for consumption within the State” that are purchased by airlines and ferry services.

In its testimony, BABLO expressed concern that it is unclear whether the tax in §1651 applies to sales of spirits by a Maine manufacturer directly to a customer in another state. BABLO suggested this might depend on whether such a sale is considered to have taken place in Maine.

★ Proposed amendment: BABLO suggests clarifying in the bill whether §1651 applies to sales of spirits by licensed Maine manufacturers directly to customers in other states.

- **Staffing.** BABLO also expressed concern that allowing direct-to-consumer shipping in other states is a significant change in Maine law, which will require BABLO to oversee this new type of sale by as many as 24 Maine distilleries, 12 Maine large breweries and 134 Maine small breweries. (BABLO did not anticipate increased oversight or staffing expenses associated with allowing Maine wineries and small wineries to make direct-to-consumer sales in other states, however, noting that Maine wineries already have the ability to make such sales to Maine customers and are already reporting direct-to-consumer sales in other states to the bureau under §1403-A.)

Note: the degree of oversight required likely depends on whether Maine excise taxes or reporting requirements apply to these sales.

## TECHNICAL ISSUES

- **Excise tax laws.** Regardless of how the committee resolves the question whether Maine excise taxes should apply to sales by Maine manufacturers directly to consumers in other states, the committee may want to consider addressing the internally inconsistent current language of 28-A M.R.S. §1652(1), (1-A) and (2) to clarify whether Maine excise taxes apply to sales of malt liquor and wine by Maine manufacturers who sell their products to out-of-state wholesalers.

## FISCAL IMPACT

Not yet determined; but BABLO testified it may need additional staff to provide oversight of these sales.