

Testimony of Nate Cloutier

Before the Joint Standing Committee on Agriculture, Conservation, and Forestry  
January 22, 2023

***Neither for Nor Against LD 2091, "An Act Regarding Businesses' and Consumers' Use of Returnable, Reusable, and Refillable Containers for Food, Beverages, and Non-Food Items"***

Senator Ingwersen, Representative Pluecker, and distinguished members of Committee on Agriculture, Conservation, and Forestry: My name is Nate Cloutier, and I am submitting comment on behalf of HospitalityMaine, representing more than 1,300 restaurant and lodging establishments of all sizes across the state. HospitalityMaine is neither for nor against LD 2091, "*An Act Regarding Businesses' and Consumers' Use of Returnable, Reusable, and Refillable Containers for Food, Beverages, and Non-Food Items*". Were this not already agency policy for restaurants, we would be opposed to this legislation.

LD 2091 would direct the Department of Agriculture, Conservation, and Forestry (ACF) to develop rules which permit businesses to allow consumers to bring their own containers for the bulk purchase of food and other items. It also directs the department to ensure that rules explicitly allow a business owner to sell the business's products to consumers in the State in returnable, reusable, or refillable containers and packaging supplied by the business owner or a 3<sup>rd</sup> party in accordance with applicable national or global health and safety standards.

HospitalityMaine has been at the table throughout the conversation of environmental reform, including per- and polyfluorinated substances) PFAS, Extended Producer Responsibility (EPR), plastics, and more. The hospitality industry, made of restaurant and lodging establishments, plays a vital role in Maine's economy, contributing substantially to employment and revenue in the state. As such, our member businesses take their role in being good stewards of the environment seriously.

This proposal is a unique idea but comes with potential consequences. Restaurants, unlike other retailers, are licensed under the Center for Disease Control's (CDC) Health Inspection Program (HIP). In 2021, HIP adopted a policy related to reusable packaging, section 3-304.17 of the 2017 FDA Food Code for retail food establishments. As of writing this testimony, I am not aware of any of our members utilizing reusable containers as outlined in the Refilling Returnables Policy; and as has been our position in the past, we are concerned this legislation could expose businesses to potential regulatory, financial, and legal liabilities. We will explain our concerns in greater detail below:

- Businesses that do not want to participate in this should not be required to participate. In speaking with some of our members about this proposal over the course of my tenure, they've expressed concerns that if this were a mandate, it would increase the likelihood of food borne illnesses and cross contamination. They did not think the risk was worth the potential benefit, which may be why this is not commonplace in the restaurant setting.

- If this were to be enacted, even businesses that choose to participate should have the right to refuse individual containers on a case-by-case basis.
- The bill directs ACF to ensure the rules are “in accordance with applicable national or global health and safety standards”. This language is vague and does not give clear direction to the department.
- Beyond the yet to be determined safety standards, what is considered clean and sanitary containers will inevitably vary from person to person. I have Tupperware in my cupboard at home that is clean and sanitary to me. I personally would not be comfortable bringing it into the restaurant setting as it has visible wear and tear and stains from spaghetti sauce being reheated in the microwave. How are businesses to determine if containers are clean and safe on a consistent basis?
- If a customer happens to get sick at a business due to a contaminated container, they’re likely to first blame the business instead of their own container. We would not be completely comfortable with this legislation unless businesses were exempted from possible regulatory and legal recourse. We still maintain that the policy opens Pandora’s Box for bad actors to nefariously jeopardize a restaurant or any business’s standing.

The pandemic put our members on high alert regarding the importance of sanitation and customer safety. Restaurants and hotels were some of the cleanest places one could be during the pandemic. Each time an outside container makes contact with equipment in the restaurant or business, the equipment will have to be cleaned and sanitized. Placing the burden on service staff, and now employees not in the service setting, to ensure the cleanliness of equipment foreign to the restaurant, with the health and safety of all staff and customers at risk, is a tall task.

As an association, we’ve grappled with the complexities of EPR rules. It has been a long and complicated process that has been met with understandable delays. We will continue to work with DACF, DEP, and relevant departments on legislation that is already in development. When the impact of EPR is in full effect, it will no doubt be a learning curve for restaurants. We would recommend giving these businesses the time to breathe with new programs and other mandates before introducing new ideas such as these.

Thank you for your time. I would be happy to answer any questions you may have.

Janet T. Mills  
Governor

Jeanne M. Lambrew, Ph.D.  
Commissioner



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## State of Maine Health Inspection Program

### Refilling Returnables Policy

The Health Inspection Program (HIP) has provided the following guidance for licensees when establishments choose to refill returnable containers in their operations. The current 2013 Maine Food Code section 3-304.17 prohibits this however, HIP recently adopted, as policy, the requirements for the reusable packaging section 3-304.17 of the 2017 FDA Food Code for retail food establishments, which will replace sections 3-304.17 and 4-603.17 of the Maine Food Code.

This policy provides guidance for HIP inspections, including a variance approval process for HIP establishments that are refilling returnable food containers.

For more information, please contact your Health Inspector or the HIP main line at 207-287-5671.

#### **I. 3-304.17 Refilling Returnables. (2017 FDA Food Code)**

3-304.17 Refilling Returnables.

(A) Except as specified in ¶¶ (B) - (E) of this section, empty containers returned to an eating establishment for cleaning and refilling with food shall be cleaned and refilled in a regulated Food Processing Plant.

(B) A take-home food container returned to an eating establishment may be refilled at an eating establishment with food if the food container is:

- (1) Designed and constructed for reuse and in accordance with the requirements specified under Part 4-1 and 4-201.11, 4-202.11 of the Maine Food Code.
- (2) One that was initially provided by the eating establishment to the consumer, either empty or filled with food by the eating establishment, for the purpose of being returned for reuse.
- (3) Returned to the eating establishment by the consumer after use.
- (4) Subject to the following steps before being refilled with food:
  - (a) Cleaned as specified under Part 4-6 of the Maine Food Code,
  - (b) Sanitized as specified under Part 4-7 of the Maine Food Code; and
  - (c) Visually inspected by a food employee to verify that the container, as returned, meets the requirements specified under Part 4-1, 4-201.11, and 4-202.11; *and*
  - (d) Stored and handled in accordance with Part 4-9 of the Maine Food Code.

(C) A take-home food container returned to an eating establishment may be refilled at an eating establishment with beverage if:

- (1) The beverage is not a Potentially Hazardous Food (PHF) Time/Temperature Control for Safety Food (TCS) as defined in the Maine Food Code,
- (2) The design of the container and of the rinsing equipment and the nature of the beverage, when considered together, allow effective cleaning at home or in the eating establishment,
- (3) Facilities for rinsing before refilling returned containers with fresh, hot water that is under pressure and not recirculated are provided as part of the dispensing system,
- (4) The consumer-owned container returned to the eating establishment for refilling is refilled for sale or service only to the same consumer; and
- (5) The container is refilled by:

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- (a) An employee of the eating establishment, or
- (b) The owner of the container if the beverage system includes a contamination-free transfer process as specified under §§ 4-204.13(A), (B), and (D) of the Maine Food Code that cannot be bypassed by the container owner.

(D) Consumer-owned, personal take-out beverage containers, such as thermally insulated bottles, non-spill coffee cups, and promotional beverage glasses, may be refilled by employees or the consumer if refilling is a contamination-free process as specified under §§ 4-204.13(A), (B), and (D) of the Maine Food Code.

(E) CONSUMER-owned containers that are not food-specific may be filled at a water vending machine or system.

## II. Variance and Approval Process

- (A) All eating establishments that provide refilling returnable services per this policy, must first submit a completed variance form for HIP's review and approval.
- (B) Once HIP receives the variance form, the inspector will conduct an inspection of the eating establishment to review policies and procedures to ensure proper ware-washing techniques for cleaning, rinsing, sanitizing and storage of reusable takeout containers.
- (C) If a third-party system of reusable containers is used by the establishment, the establishment must have a contract with the third-party company that allows inspection by HIP of the third-party facility and any remote drop-off locations utilized for the temporary storage of the used reusable containers to ensure sanitary conditions. A copy of the contract with the third-party company is to be submitted to HIP at the time the variance is submitted. The contract must specify that the third-party company agrees to inspection of its facility and any remote drop off locations. The inspector will inspect the third-party facility to review their policies and procedures to ensure proper ware-washing, rinsing, and sanitizing, in addition to the cleanliness of facility and the storage of the reusable takeout containers. If remote locations are utilized by the third-party company for the drop off of used reusable containers, the drop off locations must be kept clean and be protected from pests.
  - (1) The eating establishment will bear the additional inspection fee cost, if over two inspections occur within the establishment's annual license year.
  - (2) If the third-party inspection is a failed inspection or does not comply with the Maine Food Code, and the eating establishment and third party are unwilling to correct the violations, then HIP will inform the establishment that they will not be approved to use the third-party refillable returnable services.
  - (3) The inspector will note all Maine Food Code violations for the third-party facility on the licensed eating establishments inspection report and provide the inspection report to the owner or person in charge.
- (D) The inspector will provide the inspection report to the owner and inform HIP management of their recommendations.
- (E) HIP management will review the inspector's recommendations. The variance form will be approved or disapproved by signature and provided to the inspector and the licensed eating establishment.