



# The Florida Senate

Interim Project Report 2000-65

September 1999

Committee on Regulated Industries

Senator Tom Lee, Chairman

## REVIEW OF THE MALT BEVERAGE CONTAINER SIZE RESTRICTIONS

### SUMMARY

The question of whether to revise the malt beverage container size restriction statute requires balancing the benefits of increased competition and consumer choice against potential detrimental effects on established businesses and their employees. Because of the costs of introducing new container sizes, the large domestic breweries likely will act deliberately in introducing new sizes, and some existing sizes may be discontinued. This will mitigate the potential detrimental effect on distributors. The report recommends that the container size restriction should be repealed to open the marketplace to competition and broaden consumer choice.

### BACKGROUND

Subsection (6) of section 563.06, F.S., restricts the size of individual containers of malt beverages sold or offered for sale by vendors at retail in Florida to four sizes only, 8, 12, 16, or 32 ounces. This restriction does not affect malt beverages packaged in any individual container of 1 gallon or more or malt beverages packaged in bulk, in kegs, or in barrels.

The subsection was enacted in 1965 and has remained substantively unchanged since. With increasing competition and the advent of microbreweries, which often prefer to use 22-ounce bottles, it is time to review the size restriction statute.

### METHODOLOGY

The objective of this project is to determine whether the container size restriction serves a broad public purpose, and, accordingly, whether it should be left unchanged, be amended, or be repealed. To make these determinations, staff attempted to establish the legislative intent for the restriction, researched current

business practices, discussed these practices and the issues they raise with interested parties, toured a beer distributor's facility, and researched container size restrictions in other states.

### FINDINGS

#### Legislative History and Intent

The only evidence of legislative intent would be legislative documents from the time when subsection (6) of section 563.06, F.S., was enacted in 1965. The Bureau of Archives and Records Management in the Florida Department of State has no legislative records prior to 1969. Therefore, there is no authoritative evidence available for establishing legislative intent.<sup>1</sup>

#### Open Competition and Consumer Choice

The current container size restriction prohibits bottle sizes preferred by many microbreweries and by some foreign breweries. The expense of using additional bottle sizes keeps some of these products out of the Florida market, thereby limiting consumer choice.

Microbreweries generally prefer cost-efficient 22-ounce bottles, which currently are prohibited in Florida but are in common use in other states. All three of the largest American breweries, Anheuser-Busch, Inc., Miller Brewing Company, and Adolph Coors Co., market products in 22-ounce bottles in other states.

As for foreign breweries, many of them use metric-sized bottles, such as 341 milliliters (11.531 ounces), 650 milliliters (21.979 ounces), 750 milliliters (25.361

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<sup>1</sup> An article in June 20, 1999, *Florida Times-Union*, suggests that Florida's container size restriction may have been enacted because legislators "were mad at Miller Brewing Co. for building a plant in Georgia instead of Florida and in effect outlawed a 7-ounce bottle sold by Miller."

ounces) or 1 liter (33.814 ounces), which currently are prohibited in Florida. Additionally, Belgian breweries use bottles holding approximately 11.2 ounces, with a variety of measures indicated on different labels. An Internet search revealed Belgian labels with the following sizes indicated: 11.2 fluid ounces (Lucifer Golden Ale); 33 centiliters (Hoegaarden Wit); both 330 milliliters and 11.2 fluid ounces (Blanche de Bruges); and both 330 milliliters and 11.18 fluid ounces (Blanche des Neiges). There were also a number of Belgian beers in 25 centiliter bottles, which hold 8.454 ounces. These bottle sizes also are currently prohibited in Florida.<sup>2</sup>

As to the effect of the container size restriction on consumer choice, it has been argued that, despite the restriction, Florida already has a large variety of malt beverages from which to choose. Currently, there are 772 brands of beer registered for sale in Florida, based on information from the Division of Alcoholic Beverages and Tobacco. This is only a fraction of the nearly 4,300 brands that potentially would be available if the restriction statute was repealed, though it cannot be determined how many new brands would be introduced in Florida if the statute was repealed.<sup>3</sup> Additionally, during the course of this study, a number of letters and phone calls were received from consumers complaining about the current statute and its effect of denying them the choice of certain microbrewery and European beers.

### **Beer Prices May Increase**

It has been argued that competition resulting from a repeal of the container size restriction may increase the cost of beer. The premise for this argument is that market segment competition is so fierce that if a smaller brewery, microbrewery, or foreign brewery introduces a new container size into the Florida market, the three large domestic breweries would all be compelled to

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<sup>2</sup> It has been pointed out that American bottle sizes are not permitted in some of these foreign markets. In those markets, it is the American breweries that must face the decision of either bearing the expense of additional bottling lines or not participating in those markets.

<sup>3</sup> According to an article in the July 25, 1999, issue of the Milwaukee Journal Sentinel A.C. Nielsen and Miller Brewing compiled figures indicating that in 1998 there were nearly 4,300 varieties of beer available for sale in U.S. supermarkets and other retail outlets.

match this new container size immediately. Then, to recover the cost of additional bottling lines, the domestic breweries would have to increase prices. As is discussed later in this report, it defies economic sense to think that the large domestic breweries would react to every new bottle size in such a fashion.

### **Consumer Protection**

An argument has been made that multiple container sizes can be confusing to those who shop for the best value on a unit price basis. For example, a 12-ounce bottle and a 341-milliliter bottle appear to be the same size, but the 341-milliliter bottle contains only 11.531 ounces. Unwitting consumers may purchase less product than was thought.

### **Encouraging Moderation**

An argument has been made that the current container size restrictions encourage moderation by prohibiting container sizes greater than 32 ounces. If true, a logical extension of the argument would be that eliminating restrictions on container sizes smaller than 32 ounces (and particularly those smaller than the common 12-ounce size) also would encourage moderation.

Container sizes larger than 32 ounces may promote excessive drinking or send the wrong message to young people. To avoid these negative effects, the safe course would be not to allow such large sizes.

### **Effect on Major Domestic Breweries**

Statistics obtained from Modern Brewery Age indicate that in 1997, the market shares for the national beer market were: Anheuser-Busch, 46%; Miller, 22%; Stroh, 12%; Coors, 11%; Pabst, 3%; and all others, 6%. Stroh Brewery Company recently went out of business. Miller Brewery Company and Pabst Brewery Company purchased its brands, and presumably its market share as well. As Pabst does not have a substantial market share in Florida (according to a distributors' representative), Anheuser-Busch, Miller, and Coors likely command an even higher combined market share in Florida than is indicated by these national figures.

The core brands of the three large domestic breweries enjoy strong brand loyalty, and they do not appear to be in the same market segment as the microbreweries' and foreign breweries' beers. As such, it seems likely that the major domestic breweries would face competition

and a risk of loss of market share only with their specialty brews or the beers they import.

As for specialty brews and imports, there is a greater likelihood that domestic breweries may lose market share, but because of cost considerations, it is unlikely that they would be hasty in introducing new sizes.

A representative for Anheuser-Busch stated that the company presently does not have a position on the container size issue. A representative for Miller said that it does not yet have an official position, but that historically, Miller has favored repeal of the container size restriction. The representative for Coors did not comment.

### **Effect on Other Breweries**

It has been reported that the bottle size restriction also hampers Florida microbreweries' entry into other states' markets because it requires those breweries to incur the expense of two bottling lines, one for a size allowed in Florida and the other for the 22-ounce bottles that are popular in other states. Any brewery that manufactures an additional product specifically for the Florida market will incur increased costs.

### **Distributors' Cost Study**

The Florida Beer Wholesalers Association, Inc., and the Beer Industry of Florida, Inc., have hired a warehouse management expert to opine as to the effect repeal of the container size restriction statute would have on distributors' costs of operation. The written report was due by August 23, 1999, but is not yet available to legislative staff. There will be a joint meeting of the two organizations at the end of August to review the report. Neither organization will take an official position prior to the meeting.

At least two factors affecting distributors' total revenue are beyond the distributors' control. The first factor is the decision of what new products to market. The second is the price variables on those products, which could mean a lot of variation in revenue among products. Therefore, the cost study focuses exclusively on the cost side of the equation and does not consider any potential increases in revenue associated with new container sizes or new products.

### **Effect on Distributors**

According to distributors, their contracts with breweries require them to stock, and make their best efforts to sell, whatever products the brewer supplies. Sound business practices dictate that distributors store products in an organized, orderly arrangement. To deliver the freshest beer possible to market, it must be shipped on a first-in, first-out basis. Also, the current practice of pre-selling beer necessitates a well-ordered warehouse. In the past, industry practice was to load a variety of products on each delivery truck. The driver then would travel the route, performing both sales and delivery. Under the current practice of pre-selling, salespeople sell the beer in advance, and warehouse workers load onto the delivery trucks exactly what has been pre-sold.

Those loading the delivery trucks must be able to find and get access to the exact beer needed based on brand, container type and size, packaging, and date. Optimally, each row in the warehouse will consist of identical beer, in the identical type and size container, in identical packaging, and all brewed on the same date, for example, all 12-packs of Budweiser in 12-ounce cans, all brewed on July 9, 1999. This system cannot be used effectively for some brands or packages, however, as too few are stocked to make up a full row. For example, there may be inadequate demand to stock a full row of a malt liquor brand or a specialty brew. These products must be placed in partial rows or mixed rows.

If the container size restriction is repealed or made less restrictive, each new brand, container type or size, or package must be incorporated into this system. Assuming that no existing brands, container types or sizes, or packages are discontinued simultaneous with new products being introduced, this would require, at least initially, more warehouse space either for creation of new full rows or for expansion of the less organized partial or mixed rows. If a distributor has limited warehouse space available, this may require expanding the warehouse or building a new one. Some distributors may not have sufficient real property to be able to do either. Additionally, distributors may have increases in other expenses, such as expenses for personnel and trucks or other delivery vehicles.

The actual effect a change to the container size statute would have on distributors depends on many indeterminate factors, including:

- C how many new breweries will enter the Florida market;
- C how many small breweries, microbreweries, or foreign breweries currently operating in the Florida market will expand their operations;
- C how many new container sizes will these breweries introduce;
- C how will these breweries' products be distributed in Florida; and, most importantly,
- C how will the three large domestic breweries, Anheuser-Busch, Miller, and Coors, react to the change in the statute and to new container sizes introduced by other breweries (i.e., how quickly will they introduce new container sizes, how many new container sizes will they use, what brands will they market in these new sizes, and will they discontinue any existing sizes in favor of new ones).

It has been argued that competition is so fierce for each segment of the beer market that if a small brewery, a microbrewery, or a foreign brewery introduces a new container size into the Florida market, the three large breweries will be compelled to match this container size quickly to avoid jeopardizing their market share. Because of the high costs of re-tooling existing bottling lines or building new ones, plus the costs of personnel, transportation and advertising, it seems more likely that the three large breweries would act deliberately and introduce a new container size only if it would be profitable or if there was clear evidence that it was necessary to maintain or expand market share. A representative for Miller said that, while he did not know what his company would do if the container size statute was repealed, he was sure that it would not attempt to match each new bottle size that is introduced. The economics simply would not allow this.

Rather than striving to match every container size of every competitor, a more likely scenario is that the large domestic breweries might introduce the 7-ounce and the 22-ounce bottles, which are popular in other states. These new sizes might replace the current 8-

ounce and 16-ounce containers. Therefore, the effect of repeal on distributors is likely to be considerably less than some have feared.

### Effect on Retailers

If the container size restriction is repealed, the exact effect on retailers is difficult to predict. The larger retailers will continue to stock what sells, which they foresee being pretty much what they stock now. An article in the July 25, 1999, issue of the *Milwaukee Journal Sentinel* entitled "Beer successes, failures come down to numbers," highlights the ability of retailers to quickly and accurately determine what brands of beer are selling by using a procedure called "brand category management." This procedure involves collecting and analyzing sales data by computer. The procedure is becoming more prevalent as supermarkets and convenience stores are bought out or otherwise consolidate.

One of the uses of brand category management is to identify brands that are selling slowly, so they can be dropped from the retailer's product mix. One result of this practice is that consumers may find fewer varieties available at their neighborhood supermarkets and convenience stores.<sup>4</sup> The article quotes the director of category management for SuperValu Inc., the nation's largest supermarket wholesale supplier, as saying that "One likely result of the increased use of category management is a winnowing of [microbrewery] beers." A logical result of more widespread use of brand category management would be a general reduction in shelf space for the beers of microbreweries and foreign breweries, and the specialty brews of the three large breweries, which products would be supplanted by even greater concentration on the large breweries' core brands.

Accordingly, it seems likely that any increase in competition resulting from a change in the container size restriction will occur at specialty retailers and at

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<sup>4</sup> The article notes that, according to figures compiled by A.C. Nielsen and Miller Brewing, in 1998 there were nearly 4,300 varieties of beer available for sale in U.S. supermarkets and other retail outlets; however, 190 of those varieties accounted for 80.1% of sales. If only the quick selling brands are stocked, this is obviously only a small fraction of the brands available.

the smaller chain supermarkets and convenience stores that do not rely on brand category management.

A representative of the Florida Retail Federation said that the bigger retailers, such as supermarkets, are not opposed to a change. They set aside a certain amount of space for beer display and will continue to stock what sells. They expect to continue to stock pretty much what they do now, and they do not care whether the container size restriction is changed.

A representative of the Independent Beverage Dealers Association similarly reported that consumers will drive what retailers carry. If consumers establish a demand for a product, retailers will supply it.

A representative of the Florida Restaurant Association said that the Association will be discussing the issue in September and will not have any position until then.

### Container Size Restrictions in Other States

According to information provided by the National Conference of State Legislatures,<sup>5</sup> only 26 states, including Florida, have limitations on malt beverage container size. Of these 26 states, 13 have minimal restrictions such as a minimum container size or only keg or barrel limitations. The remaining 13 states, including Florida, have varying restrictions.<sup>6</sup> With some

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<sup>5</sup> The staff of the National Conference of State Legislatures does not independently research the law on this issue in all 50 states, but relies on information obtained from Modern Brewery Age, an industry research organization.

<sup>6</sup> The provisions are as follows: Alabama, a maximum of 16 ounces *except* in several counties that permit larger sizes by local law; Colorado, cases of 24-7, 35-7, 36-7, 48-7, 24-8, 36-8, 38-8, 24-11, 12-12, 24-12, 48-12, 24-15, 24-16, 12-32, and 12-40 ounces; Florida, bottles and cans of 8, 12, 16, and 32 ounces only; Hawaii minimum case size is 12 containers and 216 ounces, *except* by special permission in Honolulu County; Idaho, specifically lists 11, 12, 22, 24, 32, and 64-ounce containers *and* also indicates that 7 and 8-ounce sizes, as well as any size between 7 and 63 ounces are permitted; Kansas, containers of 6.5, 7, 8, 10, 11, 11.5, 12, 15, 16, 17, 24, 25.6, or 40 ounces; 1 quart; 2 or 5 liters; ½, 1, 2 ½, 3 7/8, 5 1/6, 7 3/4, 15 ½, or 31 gallons; Minnesota, containers of 6, 7, 8, 10, 12, 16, 24, 25 3/5, 32, 64, 128, 144, and 288 ounces and 3 7/8, 7 3/4, 15 ½, and 31 gallons only; Missouri, cases of 24-7, 35-7, 36-7, 12-10, 24-10, 12-12, 24-12, 24-16, 12-24, 12-25.6, 6-32, 12-32, 4-

of the provisions, it is difficult to ascertain the effect.

### Conclusions

The current container size restriction statute limits consumer choice. There are many malt beverage products sold in other states that are not available in Florida, and the container size restriction is one barrier to the entry of these products into the Florida market. It is impossible to determine how many of these brands would come to Florida if the container size restriction relaxed to permit additional sizes less than 32 ounces.

If the statute is modified to permit the sale of new brands and container sizes are introduced, it is likely that the total consumption of malt beverages in Florida will remain relatively constant. Because of their large market share and brand loyalty, the three large domestic breweries' core brands likely will continue to compete primarily among themselves. Any increase in competition arising from the availability of new products is likely to occur among the specialty brews, microbrewery beers, and import beers sold by specialty retailers.

The three large domestic breweries likely would proceed deliberately in introducing new sizes, beginning with the 7-ounce and 22-ounce bottles already popular in other states. These containers might replace the 8-ounce and 16-ounce containers now being sold in Florida.

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64, 6-96 ounces; New Hampshire, bottles and cans in cases of 36-6, 48-6.3, 24-7, 32-7, 35-7, 36-7, 40-7, 48-7, 24-8, 36-8, 48-8, 24-10, 24-11, 24-11.39, 24-111/2, 12-12, 24-12, 48-12, 12-16, 24-16, 12-25, 12-25.6, 12-32, 21-38.43, 12-40, 3-128, 4-128, 6-128, 2-144 ounces and in 2 1/4 gallon or 288 ounces *except* as otherwise specifically authorized; Tennessee, any size beer container not listed with the Tennessee Department of Revenue as being sold in Tennessee on January 1, 1973, or within 3 years prior, is prohibited; Vermont, on premise retailers are limited to a maximum of 64 ounces for service of one customer; Virginia, novel or unusual containers prohibited *except* upon special permit. Beer may be sold only in original containers approved by the Bureau of Alcohol, Tobacco and Firearms; and Wisconsin, Secretary of Revenue has authority to prescribe size and form of containers, not to exceed 1.75 liters (69.1752 fluid ounces).

Because the increase in competition and the introduction of new container sizes would be limited, a change would not be expected to affect beer prices significantly. The impact on breweries and distributors would be more gradual and less detrimental than some have feared. The impact on most retailers would be negligible, though specialty retailers may benefit by being able to supply products to meet consumer demand for malt beverages not now available in Florida.. As the demand for container sizes and brands stabilized over time, some sizes and brands may be discontinued in Florida, perhaps with some new sizes replacing current sizes.

The restriction statute should not be repealed entirely however. To do so would allow new containers in excess of the current 32-ounce limitation, which would be inconsistent with state policy of encouraging moderation and might send the wrong message to young people. Accordingly, the statute should be modified to allow any container size of 32 ounces or less.

Although changes to the size restriction statute could be made gradually by authorizing a select, limited number of additional container sizes on a trial basis, this option is not recommended. Opening the Florida market to 7-ounce and 22-ounce containers would result in most, if not all, of the impact of a full repeal on existing breweries and distributors, without the optimization of consumer choice to be had with a repeal.

**RECOMMENDATIONS**

The malt beverage container size restriction statute, subsection 563.06(6), F.S., should be amended to permit the sale of malt beverages packaged in containers containing not more than 32 ounces.

**COMMITTEE(S) INVOLVED IN REPORT** *(Contact first committee for more information.)*

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**MEMBER OVERSIGHT**

Senators Betty Holzendorf and Donald Sullivan