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General Affairs Committee  
September 21, 2012

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[LR586]

The Committee on General Affairs met at 1:30 p.m. on Friday, September 21, 2012, in Room 1510 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LR586. Senators present: Russ Karpisek, Chairperson; Bob Krist, Vice Chairperson; Dave Bloomfield; Lydia Brasch; Colby Coash; R. Paul Lambert; Tyson Larson; and Amanda McGill. Senators absent: None.

SENATOR KARPISEK: Okay. It's a little after 1:30. We will get started. Welcome to the General Affairs Committee. For the record, my name is Senator Russ Karpisek of Wilber, and I am the Chair of the Committee. Committee members that may or may not be joining us as we go through the day today, we should have Senator Brasch from Bancroft, but she's not here, and so Senator Bloomfield has kind of switched spots with her. Senator Bloomfield from Hoskins; Senator Coash of Lincoln, Vice Chair; Senator Krist of Omaha; Josh Eickmeier, our legal counsel; Senator McGill of Lincoln; Senator Schumacher...that's not right. (Laugh) And Senator Larson of O'Neill; and Senator Lambert of Plattsmouth. Katie Chatters is helping us today as our committee clerk. Christina is on vacation, a well-deserved one, I'm sure. If you're planning on testifying today, please pick up a sign-in sheet that is on the table at the back of the room at either entrance. Please fill out the sign-in sheet before you testify. When it's your turn to testify, give your sign-in sheet to a page or to the committee clerk. This will help us make a more accurate public record. If you have handouts, please make sure you have ten copies for the page to hand out to the committee members and staff. When you come up to testify, please speak clearly into the microphone. Please tell us your name and spell your first and last name regardless of how common it is. Also please tell us whom you're representing, if anyone. Please turn off your cell phones, pagers, or anything else that makes noise. Please keep your conversations to a minimum or take them into the hallway. We appreciate your cooperation on that. Today's interim study falls under the committee's catchall LR586. During last session's debate on LB824, flavored malt beverage bill, I promised Senator Christensen that I would hold an interim

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study hearing on the definition of flavored malt beverages as part of the committee's catchall interim study. Senator Christensen also entered one at the advice, I'm told, of someone that I would not keep my word. So I am keeping my word today. I hope we don't have to go down that road again this year. I will now ask Senator Christensen to come up and start us off. Senator Christensen. Welcome. [LR586]

SENATOR CHRISTENSEN: Thank you, Mr. Chairman and members of the General Affairs Committee. I'm Senator Mark Christensen, M-a-r-k C-h-r-i-s-t-e-n-s-e-n. I represent the 44th Legislative District, and I'm here to introduce LR594...LR586, I guess it is, an interim study to examine the definition of flavored malt beverages in Nebraska. I would first like to thank the committee for taking time to examine the issue closer. Your willingness to continue discussing the definition of flavored beverages from last session is greatly appreciated. As you recall, Senator Karpisek's LB824 from last session changed the definition of beer to include flavored malt beverages included the definition of flavored malt beverages. That new definition is based on the portion of alcohol content of the beverage that come from flavors or flavoring with alcohol in them attained from distillation. As you remember, I was part of the opposition to putting these beverages under the beer definition which would tax them at the same level as beer. I believe they are different enough products to deserve their own category for taxation. I decided to introduce the study resolution to further the discussion of how best to describe in statute what is arguably a new class of alcohol products that do not fit neatly into the traditional categories of beer, wine, and spirits. During the debate of LB824, I was approached by Diane Riibe of Project Extra Mile to consider an amendment that would use the federal language to define flavored malt beverages primary by the process used, not by the volume of alcohol, and to discuss a potential cap on the maximum amount of alcohol that could be in a flavored malt beverage before it would be considered a spirit for the purpose of taxation. It is my hope that this study will provide us with constructive examination of the issues we're trying to provide the best state policy to discourage underage drinking and consider regulatory scheme...and a consistent regulatory scheme. Sorry. So again, I'm thankful for your willingness to

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provide another opportunity for testimony regarding flavored malt beverages. With that, I would like to let those from Project Extra Mile speak more specifically to the federal language and other details. Are there any questions? [LR586]

SENATOR KARPISEK: Thank you, Senator Christensen. Any questions for Senator Christensen? Seeing none, thank you. Can I see a show of hands of how many people intend to testify today? Three. Thank you. Welcome. [LR586]

DIANE RIIBE: Good afternoon, Senator and committee members. My name is Diane Riibe, D-i-a-n-e R-i-i-b-e, and I'm the executive director for Project Extra Mile. We really have nothing new for the committee. We'd like to rather just submit the documents we have here for the record and allow that record to stand. Thank you. [LR586]

SENATOR KARPISEK: Thank you. Oops, we have a question, Ms. Riibe. Senator Krist. [LR586]

SENATOR KRIST: In that federal language, just so we could exchange for the record which we've seen and will take under advisement again, is it fair to characterize throughout the United States that how something is actually distilled or brewed or prepared is indeed the taxation base or the classification that leads to a taxation base? [LR586]

DIANE RIIBE: I wouldn't be the person to know that answer, Senator. I do know what Nebraska statute indicated and that's where that discussion arose. [LR586]

SENATOR KRIST: Okay. Thank you. [LR586]

SENATOR KARPISEK: Thank you. Any other questions? Seeing none, thank you. Anyone else with Project Extra Mile, or...? Okay. Do we have anyone else who wish to testify? Welcome. [LR586]

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MICK MINES: Thank you, Mr. Chairman, members of the committee. For the record my name is Mick Mines, M-i-c-k M-i-n-e-s. I'm a registered lobbyist for Diageo and Mark Anthony Brands. These are two international leaders in the flavored malt beverage industry. Their respective brands of flavored malt beverage include Smirnoff Ice and Mike's Hard Lemonade. Flavored malt beverages are not new and are not a new class of beverage. You'll remember Champale and Malt Duck in the '70s. And in the '80s, Seagram's Coolers and Gallo, Bartles and Jaymes Coolers were popular and they now come in flavored malt versions. Flavored, as we discussed and as you approved last session, flavored malt beverages are flavored beer. The brewing process of flavored malt beverages begins with the beer base, a variety of ingredients and flavors, including fruit flavors, that are added and provide a different taste experience than traditional hops and malt. Many flavorings are built into an--now this is important--it's an ethyl alcohol because it's a very practical and effective carrier in extraction and solvent or, in our case, it's a preservative of the flavorings. Flavoring products like vanilla extract, almond flavoring that all of us buy in the grocery store contain distilled alcohol. To be clear, there's a distinct difference between ethyl alcohol and liquor. Flavored malt beverages contain a small amount of ethyl alcohol, not liquors like gin, rum, and whiskey. In fact, federal law prohibits liquors from even being present on brewery premises. Flavored malt beverages are distributed by beer wholesalers, sold by beer wholesalers. They're popular with customers on beer occasions and consumed chilled typically directly from the bottle. Most flavored malt beverages have an alcohol content of about 5 percent just like regular beers, Budweiser, and Coors. Federal alcohol regulations actually limit the maximum alcohol contribution to flavors to the alcohol in the product. For instance, a 12-ounce bottle of a 5 percent by alcohol, by volume flavored malt beverage may contain no more than one-quarter ounce of alcohol in its flavorings. That's less than a teaspoon. Like the federal government and virtually every other state, Nebraska law recognizes that alcohol has many nonbeverage uses and exempts these uses from alcohol beverage requirements, even if that flavoring alcohol eventually ends up as an ingredient in a food or beverage product. The Nebraska Liquor

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Control Act specifically exempts flavoring extracts from the definition of alcoholic liquor. LB824, that you're all familiar with, was approved last April and signed into law by the Governor, specifically defined flavored malt beverage in the Nebraska Liquor Control Act. And it eliminates confusion over the meaning of that term, thus ensuring that flavored beers are classified as beer, not spirits. For too long, opponents of flavored malt beverages have wrongly accused the industry of targeting underage drinkers. The Federal Trade Commission disapproved this old adage in a 19...or a 2003 report. I didn't make copies. I just want to show you that anytime there's a congressional request for a report the Federal Trade Commission takes it very seriously. In 2003, quoting from their alcohol marketing and advertising report, the commission's investigation of flavored malt beverages found no evidence of targeting underage consumers in the marketing of FMBs. Adults 21 to 29 appear to be the intended target of the FMB marketing, and the products are popular among adults, including those over 27. Flavored malt beverage ads were placed in compliance with the industry's 50 percent placement standard. Then again in 2008, the same Federal Trade Commission report to Congress, taken very seriously, entitled "Self-Regulation in the Alcohol Industry" concludes that alcohol beverage industry advertising efforts were not targeted at youth. Responsible drinking is a valued and enjoyable part of celebrations in everyday life for most people who choose to drink. My clients, Diageo and Mark Anthony Brands, understand that creating a positive role for alcohol in society is fundamental to their company's purpose and their long-term viability in business. Thank you, and I'd be glad to answer any questions.

[LR586]

SENATOR KARPISEK: Thank you, Mr. Mines. Any questions? Senator Krist. [LR586]

SENATOR KRIST: Thank you, Senator Karpisek. Same question. Are you aware of throughout the United States taxation or categorically taxing a product based upon brewing, distilling, mixing, any of those parameters? [LR586]

MICK MINES: No. If we're going to consider, and I assume there will be intent next

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session, to consider another category for flavored malt beverages due to whatever category it might be, there's one state in the country that does this, Utah. They have three categories. Two other states, I think it's California and Maine, they tax at different rates but not on the brewing process. They just tax because it is a flavored malt beverage. The rest of the 46 states, 47 states are just like us. [LR586]

SENATOR KRIST: Follow on, are you aware of the practice within the wine industry where alcohol is added to increase the alcohol content and to speed along the process? [LR586]

MICK MINES: I have heard of that. I'm not familiar with how that works but, yes, I have heard of that. [LR586]

SENATOR KRIST: So by definition if we're going to consider a separate category for distilled malt beverages, etcetera, etcetera, anything you put alcohol in would have to be considered for a different category. [LR586]

MICK MINES: That's...well, yes, you certainly could. [LR586]

SENATOR KRIST: And one final. Isn't it true that soda pop also has a degree of alcohol added? [LR586]

MICK MINES: Some of...exactly. Some of the sodas like Cherry Coke, or some of the other highly flavored, do contain ethyl alcohol in order to preserve that flavoring. [LR586]

SENATOR KRIST: So we've got a new tax base then? [LR586]

MICK MINES: Absolutely, Diet Coke. [LR586]

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SENATOR KRIST: Thank you. [LR586]

SENATOR KARPISEK: Thank you, Senator Krist. Senator Avery should be excited about that. (Laughter) [LR586]

SENATOR KRIST: Absolutely. [LR586]

SENATOR KARPISEK: Mr. Mines, you talked a little bit about the alcohol content. [LR586]

MICK MINES: Right. [LR586]

SENATOR KARPISEK: I know there...Senator Nelson on the floor last year said that he had no doubt that you got high faster drinking, I guess, liquor. Maybe you're not the person to ask but I've been around you and you may be. (Laughter) But what...I think the misconception there is that there's more alcohol in these drinks. [LR586]

MICK MINES: Right. [LR586]

SENATOR KARPISEK: Okay. And again, can you tell us about...there are some FMBs that are higher than the 5 percent. [LR586]

MICK MINES: There are. [LR586]

SENATOR KARPISEK: But is it because of this process or is it because there are some beers that are also much higher? [LR586]

MICK MINES: Well, I think there are beers that have a higher alcohol content, obviously. But the flavored malt beverages by definition are not allowed to enhance the liquor...enhance the alcohol content with liquor. That's...they just can't do that. You

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know, there are hundreds and hundreds of flavored malt beverage products. However, the ones that are virtually ubiquitous are those like my clients that are at 5 percent, Smirnoff Ice, Mike's Hard Lemonade, they're at about a 5 percent alcohol content just like your favorite beer. [LR586]

SENATOR KARPISEK: We did have a list on the floor last year, too, of the different ones. [LR586]

MICK MINES: We did. [LR586]

SENATOR KARPISEK: There were some that were lower than 5 percent. [LR586]

MICK MINES: Oh, absolutely, yeah. But I think the industry, or at least when people talk about flavored malt beverages being high in alcohol content, they pick on a few brands that by way have been...are not carried in Nebraska rather than focus on what the vast majority of this market is, and that's a beverage that is equal to the same alcohol content as beer. [LR586]

SENATOR KARPISEK: Thank you. Any other questions? Seeing none, thank you. [LR586]

MIKE MINES: Thank you. [LR586]

SENATOR KARPISEK: Welcome, Mr. Rupe. [LR586]

HOBERT RUPE: Welcome. Thank you. My name is Hobert Rupe, H-o-b-e-r-t R-u-p-e. I'm the executive director of the Nebraska Liquor Control Commission, and primarily I was just going to be answering questions without going through the process, but I'll...one thing that sort of came up and I'll look at where the statute this past year. As you're aware, back...this started actually before I was the director. I was a lawyer back



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then at the time. How do we process these? Nebraska has a...we have a...if you receive your alcohol from the brewing process, you're a beer. If it's from the venting process or fermentation of fruits, you're a wine. And the distillation and sort of catchall was the distilled side of it. We weren't the only state dealing with this. A lot of other states were and more importantly so was the federal government. TTB, the Trade and Tax Bureau, at that time they were still BATF, introduced a proposal for how they were going to regulate and tax them. Because remember, these items are subject to a federal tax as well as a state tax. The original proposal was going to be a 99.5...you know, basically we're going to treat the distilled spirit to have more than one-half of 1 percent from distilled spirits. That's not what they adopted. They adopted what's commonly called the 49/51. They said, okay, we're going to look at these products. So long as most of the total alcohol content, whether it's coming from flavorings or from the brewing process, so long as 51 percent or more comes from the brewing process, and--I think this answers the question--the total out BAC is 6 percent or less, we're going to treat that in the same category as the beer for taxation. And that's what was adopted last year by this Legislature. We had done a policy. We were challenged in court and the court said we had to do a rule. We did a rule adopting that process, and the court said you didn't have the authority, it needs to go to the Legislature. That's why we came last year...the year before to the Legislature on the issue. And the key thing I want you to remember is the commission is going to regulate and tax however this Legislature sees fit. The reason we were trying to go along with the federal guidelines since that is because there's also another statute that says we're going to try to be not inconsistent with the federal laws whenever possible, and also for the distribution chain, because Mr. Mines was correct. Most of these products are sold as a beer. I mean, the original name for the category wasn't flavored malt beverages, it wasn't alcopops. It was actually malt alternatives. They were sold and marketed as something that would be at a beer location, roughly the same alcohol as beer, and for some people who might not like the bitterness of beer. So that's (inaudible) the products were designed and that's why the commission was looking to sort of regulate consistently with the feds. And I think that's important to remember is that there is a cap on much...how high of alcohol they can be.

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Some states charge higher rates for certain higher alcohol content. Nebraska used to do that ourselves. We used to have two categories for wine. We used to have a light wine category and a heavy wine category. If it was more than I think 13 or 14 percent, it got taxed at the higher rate. Now we currently have just a one wine tax. And so right now we have three taxation categories for those processes. There's also farm wineries, but that's separate from everything else. Those three. That's 35 cents for beer, 95...no, 31 for beer, 95 for wine, and \$3.75 for distilled spirits. So I think, and to answer your question, there are products which might contain minute amounts of alcohol which aren't regulated. That's sort of the .05 argument. To be considered an alcoholic beverage, it must have more than one-half of 1 percent, basically one proof or more, must be alcohol and if the content is below that, it's not even considered an alcoholic beverage and not regulated. With that sort of brief history of, you know, the last 15 years or longer, I would be happy to answer any questions. [LR586]

SENATOR KARPISEK: Senator Coash. [LR586]

SENATOR COASH: Thank you, Chairman. Hobie, I want to clarify just something I heard you say. I just want to make sure I heard it right. With that 6 percent benchmark that you mentioned... [LR586]

HOBERT RUPE: Yes. [LR586]

SENATOR COASH: ...did you say that it was the federal government says that if these beverages have over 6 percent, then the feds will tax them as a distilled spirit? [LR586]

HOBERT RUPE: Yes. So will we. [LR586]

SENATOR COASH: What will Nebraska... [LR586]

HOBERT RUPE: That's what we did last year. Last year, Section 4 in LB824: flavored

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malt beverages means a beer that derives not more than 49 percent of its total alcohol content from flavors or flavorings containing alcohol obtained by distillation, except in the case of a malt beverage with an alcohol content of more than 6 percent by volume, not more than 1.5 percent of the volume of the malt beverage may consist of alcohol derived from flavorings, or other nonbeverage ingredients contained in it. So that's basically the federal standard. We incorporate the federal standard. [LR586]

SENATOR COASH: So Mike's Hard Lemonade, for example, came out with a product of 7 percent alcohol. [LR586]

HOBERT RUPE: They're going to have to be 98.5 percent of the total alcohol has to come from the brewing process. [LR586]

SENATOR COASH: Say that... [LR586]

HOBERT RUPE: 98.5 percent is going to have to come from the brewing process because... [LR586]

SENATOR COASH: How is it going to be taxed then if it's...if Mike's comes out with a super hard alcohol that's above 6 percent, walk me through how will the feds and the state tax that? [LR586]

HOBERT RUPE: Yeah. It will be taxed as a beer so long as 98.5 percent of its total alcohol hasn't been come from the brewing process. [LR586]

SENATOR COASH: Okay. [LR586]

HOBERT RUPE: If anything...if it's less than that, they're going to kick it over to the distilled side. [LR586]

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SENATOR COASH: So it can be higher than 6 percent as long as it's coming from brewing. [LR586]

HOBERT RUPE: Yeah. One thing, you know, people throw around the idea, you know, 5 or 6 percent for beers and that's traditionally where most beers, that most people drink. You've got some mad scientists out there in the craft brewery area which have created some super yeast which they've gone up to almost 20 percent alcohol by volume. But it's purely from the brewing process. It's purely, you know, from the natural fermentation, not from the distillation process. The key thing is...and so, there are higher alcohol beers, you know. But they obtain that higher alcohol content through the normal brewing process. [LR586]

SENATOR COASH: Okay. Another question: We've talked about this before but there's a product out there that I...that Four Loko product. [LR586]

HOBERT RUPE: Yes, Four Loko. [LR586]

SENATOR COASH: That's a flavored malt beverage, right? [LR586]

HOBERT RUPE: Flavored malt beverage because I believe it's almost all its alcohol comes from the brewing process. [LR586]

SENATOR COASH: Okay, but that's pretty high alcohol. [LR586]

HOBERT RUPE: Yes. I believe some of those are up to 8 or 9 percent. [LR586]

SENATOR COASH: But something happened that we don't...you don't see it out on the shelves. [LR586]

HOBERT RUPE: The FTC had an issue with an additive, a caffeine additive. There are

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very few things that caffeine can be added to. They ruled that it was...they went about 95 percent of the way to a total...to a recall on them. What Nebraska did was once I got the letter from the FTC, was made aware of it, I had a meeting with the Nebraska Beer Wholesalers Association and the Nebraska Beer Wholesalers and said, you know, this thing has now been identified as being outside of normal production by the FTC. I'm putting an immediate moratorium on the importation of those products and you've got 30 days to get them off your shelves. Subsequently, because of the issue and as quickly as they were able to reformulate, I can only guarantee that they had it in their pocket waiting for the action to happen, Four Loko reformulated, taking the caffeine out of it. And now last I checked, there still is some issues with the FTC under a couple...under primarily...they're selling a 23-ounce can and trying to say it's a single serving. It's not, by any stretch of the imagination. But because it's a nonresealable can, it's a carbonated beverage, people would drink them all, and basically they're drinking almost the equivalent of five or six beers when they're drinking that. So a drink equivalency, just to...is a 12-ounce, 5 percent beer; 5 ounces of 12 percent wine; and an ounce and a half of 80 proof, or an ounce of 100 proof whiskey. Those are roughly considered the same equivalent effect on the body. And these cases...and so there's still some problems. The FTC is still looking at Four Loko. I would be the last person to sit here and defend Four Loko. I believe they are complete outlier. They are...yeah, I'm...it's going to be a cold day in Hell before I would defend their marketing practices. [LR586]

SENATOR COASH: I just remembered that. I didn't know if that had a bearing on this discussion, doesn't sound like it does. [LR586]

HOBERT RUPE: Yeah, but it was mostly about the caffeine. [LR586]

SENATOR COASH: Thank you. [LR586]

SENATOR KARPISEK: Senator Krist. [LR586]

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SENATOR KRIST: Thank you, Chair. Hobie, pretty much the same question, actually have two for you. The first one is the way we're taxing as I understand the piece of legislation last year, and I think I do pretty well, we harmonized. We basically joined in the federal regulation definition... [LR586]

HOBERT RUPE: Yes. [LR586]

SENATOR KRIST: ...by putting us in that line. There's good evidence substantiating that that is a good thing to do. We saw two of those last year, Senator Mines brought to our attention and again today the same thing. So that's what we did, is that not correct? [LR586]

HOBERT RUPE: Yes. We are in harmony with TTBs regulations of these products. [LR586]

SENATOR KRIST: Okay. [LR586]

HOBERT RUPE: And the important part about that...I mean, and one reason why being consistent with the federals is good for the state of Nebraska is, I don't have inspectors who can go out there and pull production records. The feds do and the feds have. And some places have gotten fined for being outside, in violation. You know, it's sort of at that level at the production, you know, the best agency to monitor that who has the most resources is the Trade and Tax Bureau. And that's...now we're sort of, you know, relying upon their interpretations by adopting their interpretation. [LR586]

SENATOR KRIST: Okay. And then the follow-on is the question I've asked before. We're basically putting categorically if it's brewed, if it's distilled, if it's whatever, within a percentage up to a certain amount of alcohol, that's where we categorize it. [LR586]

HOBERT RUPE: That's where we categorize. We're treating these that if they are within

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our definition now of 6 percent or less and no more than 49 comes from flavoring, we're going to tax and distribute them as a beer. If they're out over that, they're going to be a spirit. [LR586]

SENATOR KRIST: Okay. One last follow-on. If some were successful in taxing them more than what they're currently taxed, that is putting them in a higher tax bracket, how much would that add to a bottle of the spunky substance? [LR586]

HOBERT RUPE: Oh, it probably...I couldn't sit there and look at what the tax on it is. I mean, you are more than...you're more than...I would say times ten, you know, because beer is taxed at a relatively low rate, I think 31 cents, and spirits is taxed at \$3.75 a gallon. [LR586]

SENATOR KRIST: So we're adding a couple...maybe a dollar to the bottle? [LR586]

HOBERT RUPE: Conceivably, yes. I think if I remember correctly, most people would say you would about two and a half to three bucks to a six-pack. [LR586]

SENATOR KRIST: And for the record, do you think that that would be a deterrent for a younger person to buy a bottle, given today's economy? [LR586]

HOBERT RUPE: I'm not sure. I'm not positive that the...and other people would have a better idea of this so I'm just speaking anecdotally now. If I were to say what category are most younger people using illegally, you still have beer as number one. But the one that I would be more concerned about on the rise are the flavored vodka wines. Those are appealing to kids because they're sweet and...but they're able to afford the 25 bucks for a bottle of that. [LR586]

SENATOR KRIST: Thank you. [LR586]

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SENATOR KARPISEK: Thank you, Senator Krist. Senator Bloomfield. [LR586]

SENATOR BLOOMFIELD: I was going to go back to your Four Loko. Is there any reason we can't just tell them to get the heck out of the state? [LR586]

HOBERT RUPE: Well, we could do it. I mean, the issue right now is, you know, they're in compliance with...you know, they are selling a product which is a beer. I mean, there are other products, same alcohol level that, I mean, for instance Hurricane, a flavored malt beverage...or not flavored malt beverage, it's a high gravity beer, is 9 percent, it's a beer. There are products out there which, you know, are designed to go through a certain marketplace. You know, in this case here, the problem with Four Loko is at least or initially was the caffeine was having the big problem because caffeine will mask some of the normal effects that alcohol is having on the body. Basically you're putting a depressant on your nervous system in alcohol, and then you're counteracting that by the addition of the stimulant in the caffeine. And so where we have pretty strict rules and set rules for how does a bartender recognize a visibly intoxicated individual? Those are predicated upon, you know, the slurred speech; the bloodshot, watery eyes; the problems with gait and control because of the depressive factor that alcohol is having on the nervous system. I talked to a bartender about this system. Somebody who is on, drinking one of these, presents entirely different. They might be the same BAC but they're not presenting traditionally like a normal person who might be intoxicated. So that was one reason why the caffeine, beyond the fact that it was illegal from the FTC's standpoint being included in the product, was causing problems from an alcohol industry because it was masking normal things that normal bartenders are trained to look for to not serve somebody who has had too much to drink. [LR586]

SENATOR BLOOMFIELD: It just kind of appeared to me that if...you know, they came in with the caffeine, but we said don't do that so they put it in a 23-ounce can and (inaudible). [LR586]



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HOBERT RUPE: They were always in a 23-ounce can. Yeah, they were always in a 23-ounce can. It's a big, bright, ugly bottle. I know the FTC is working with them on some of the signs and I think there's an AAG, the NAG, National Association of Attorneys General, has a working group working to try and get them to address some of those concerns. [LR586]

SENATOR BLOOMFIELD: Okay, thank you. [LR586]

SENATOR KARPISEK: Can you tell me then the difference between that and a rum and Coke? You're mixing caffeine with alcohol. [LR586]

HOBERT RUPE: You are to a certain extent. You know, the problem with these products was you're drinking one can of that, you're drinking the equivalent of five beers in a 24 ounces. And you're not recognizing, you're not seeing the symptoms and so it would, because of the high amounts of caffeine, you would then be blending...you know, it would increase the danger to the person consuming. They don't feel that they're getting intoxicated, or they don't recognize the signs of intoxication. And so they might over...they would continue to overconsume. There were some big problems with Four Loko. Like I said, I'm not going to defend Four Loko ever. [LR586]

SENATOR KARPISEK: And I won't either. I'm just trying to ask what the difference is between that and a Jager Bomb or a... [LR586]

HOBERT RUPE: Yeah. Well, for a couple of things. Most of the Jager Bombs and, you know, rum and Coke are being sold at a licensed establishment where you've got a bartender who is also there. You know, the problem with the Four Loko was they were being drunk at parties outside of, you know, a licensed establishment which were then...there wasn't additional oversight or to keep track if something was going on. You know there was caffeine...I mean, Irish coffees, there's coffees...I mean, there's some that's been there. But these were high amounts of caffeine. These are like energy drink

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types of caffeine. These weren't like a Diet Coke of caffeine, higher levels. [LR586]

SENATOR KARPISEK: Senator Coash. [LR586]

SENATOR COASH: Back to what we're here about. Are there...is there an example of a product out there that is kind of served like a beer? I mean, Mike's Hard Lemonade is served in a bottle like a beer would be, but you keep saying, if they go over the 6 percent and maybe it's not from brewing, then all of a sudden they're taxed at a higher...they're taxed like...is there an example of a product or are all of these manufacturers keeping their processes under the level so that they can continue to sell like beer? [LR586]

HOBERT RUPE: Shockingly enough, I'm not the target audience for Mike's Hard Lemonade. I think Mike's Harder. They have a product called Mike's Harder which might be over 6 percent, in which case they would then have to use the higher brewing level. [LR586]

SENATOR COASH: But it's okay if it's over 6 percent as long as it's from brewing. I'm just trying to think, is there a product out there that is the outlier to what we already have established that's been pushed up into that higher tax bracket (inaudible)? [LR586]

HOBERT RUPE: It might not answer specifically but I'll tell you an example. Do any of you like hard ciders? They are technically a wine under our definition because the alcohol there has come from the fermentation of fruit juices. So they, about 5 percent, sold very similar to a beer. I mean, there's kegs of hard cider on tap, but because it is...the source of alcohol comes from fruit juice and not from the brewing processes of grains as a beer does, Nebraska treats that as a wine. You have to have a wine license to sell it. And so that's something that's 5 percent but charges a higher rate. [LR586]

SENATOR COASH: So are they...these are like Woodchuck Cider, that kind of stuff?

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[LR586]

HOBERT RUPE: Woodchuck Cider. Woodchuck would be one, Angry Orchard. [LR586]

SENATOR COASH: So if you go find some of that in a bar...usually see that with the other beer, so the licensees who sell that have to have a...? [LR586]

HOBERT RUPE: No...probably if it's on tap...well, if they're off-sale it would be a D; if they're on-sale, it would be an I. [LR586]

SENATOR COASH: Which is different than the regular? [LR586]

HOBERT RUPE: I or a C, yeah. [LR586]

SENATOR COASH: Then is that product distributed like the beers, like through the beer distributors? Because it does come in kegs. [LR586]

HOBERT RUPE: Well, the funny story there was, I know, was when Angry Orchard first came into the state we had some beer wholesalers who had to then go get spirit and wine wholesale licenses in order to sell it. So they had to get additional licenses on top of their beer license because although it's sold in a similar method, you know, cases, six-packs, kegs, because it's a wine, if you had just a beer only wholesale license, you would have...so we made...I think five or six beer wholesalers had to go get additional X class licenses on top of their T's, because it's treated as a wine. [LR586]

SENATOR COASH: Okay. So there are some...I'm...but as far as the flavored malt beverages, type of beverage, are there some of those...do we know of any outliers that are being taxed like...? [LR586]

HOBERT RUPE: No. I think most of them would reconstitute and be at the 98.5 federal.

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Because the key thing by being in line with the feds, they don't want to have to pay a higher tax if they don't have to. And so by adopting the federal taxation code, they're going to be in compliance with the feds so then they'll be in compliance with us. So they're being treated as a beer because they're 98.5 percent, so. I misunderstood the question so I went the other way. I apologize on that, Senator Coash. [LR586]

SENATOR COASH: No, I get it. I get it. Thank you. [LR586]

SENATOR KARPISEK: Can you once again for us talk about the federal regulations. I've heard today two different things and if I hear it again, after you straighten it out one more time, it won't be good. We need to tell the truth. We need to say what's really true, not just say what we want to say to make things appear the way they aren't. So, Hobie, can you one more time tell us are we or are we not following federal regulations with the new LB824? [LR586]

HOBERT RUPE: We are. [LR586]

SENATOR KARPISEK: Thank you. When we talk about these additives, are they always fruit flavors or lemon-lime? [LR586]

HOBERT RUPE: For the most part, I believe they are. Most of them are extracts. I mean, to be honest with you, there are so many different flavors out there, but for most of these what you're doing, you're doing a lemon-lime or a fruit to add to the flavor of one of these products. So you're, you know...and you're also not adding in the other flavorings. You're not adding in the hops which makes the bitterness. So you're actually already starting...if you don't add the hops into a beer, you're already starting with a sweeter base because it's malt based. And then if you're adding flavorings from it, you're taking it over toward the sweeter side. [LR586]

SENATOR KARPISEK: But aren't there maybe hops, distilled hops that can be added

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for a more hoppy beer? [LR586]

HOBERT RUPE: You don't add distilled hops, you just add more hops. Hops are a flower. You know, some of your American style light beers have very few, you know, ounces of hops per barrel, where your hop, your beer has...it's based upon the beer guy. I mean, I believe...is Mr. Spilker's brewery in your district? I'm not sure how many gallons of hops he adds to that Hoplua but it's hoppy. But it's usually flowers or flower extract. [LR586]

SENATOR KARPISEK: You hit on a little bit, too, about the flavored vodkas. Do you track different, I'm sure, beers, spirits, those sort of things, how much is being sold? [LR586]

HOBERT RUPE: We keep track of it but not breaking it down by category. For the taxation purposes, we keep track of...just as you're aware, just (inaudible) beer is taxed at a different time than spirits and wine. Beer, because it's considered perishable and has a shelf life, it's taxed...state tax accrues when it lands at the Nebraska wholesaler. At that point in time, the Nebraska wholesaler remits the tax on that. Spirits and wine, they're taxed when they're sold from the wholesaler, when they go from the wholesaler to the retailer because they have a longer shelf life, they can stand there, and it's on tax-free. You know, they're in the bonded warehouse. So what we do is, monthly we keep track and so we keep track of...we get technically four different types of tax rates. We get the beer, we get the wine, we get distilled spirits, and then we get the farm winery, which is a, you know, a special reduced tax rate. But it's minimal, a number of gallonage. And so we keep track of that every month when we do it. And in fact I would point anyone who might be interested to our Web site where we keep...where all the last year's tax records of how many gallons we brought in, but we don't keep a track whether this is a gallon of bourbon, whether this is a gallon of vodka. My...as I said, most of the anecdotal evidence is by talking with law enforcement officers and the NSP. They were seeing a lot more, you know, when they are making an MIP arrest, a lot of

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times the kids will have some of these flavored vodkas, but that's just, you know, what I've heard from the people out there on the field. [LR586]

SENATOR KARPISEK: And can you tell us between a vodka and a FMB what the spirit ratio is or what the proof is? [LR586]

HOBERT RUPE: Your traditional vodka is now...flavored vodkas are usually about 70 proof, which would be about 35 percent alcohol. A traditional vodka is usually about 80, which is about 40 percent alcohol. A flavored malt beverage, you know, traditionally, most of the large market shares are about 5 percent. So you're looking at about 5 percent alcohol for Mike's Hard Lemonade versus 35-40 percent for vodka. [LR586]

SENATOR KARPISEK: So that's a big difference. [LR586]

HOBERT RUPE: Yes. And that's...you know, because people forget, distilled spirits. When you're going to make a distilled spirit, it's almost 100 percent...it's almost 200 proof. I mean, pretty close if there's no impurities. And then they cut and blend that with other products, primarily water, to get that down to the area where they want. You know, so that's where you get like a vodka between 70 and 80 proof, which is 35-40 percent. [LR586]

SENATOR KARPISEK: And are those flavored vodkas, are they sweetened? [LR586]

HOBERT RUPE: Yes. [LR586]

SENATOR KARPISEK: I haven't had one. [LR586]

HOBERT RUPE: I (inaudible). I'm not the target audience for it either. They're usually made...the first one of those was about two years ago, one that really hit big. You always had some flavored...you always had flavored liqueurs. You had the Schnapps,

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which was flavors. And then you had some of the other stuff, but really the big market share, if I'm sort of being asked to look at where the growth is from the market that we regulate, is in the flavored vodkas. You had like cake and now they have whipped cream. I mean they have all sorts of weird flavors in those vodkas. [LR586]

SENATOR KARPISEK: All right. Senator Coash. [LR586]

SENATOR COASH: Hobie, one of the things we...when we had discussions about these products we always...usually a marketing discussion about how these products are marketed and their target market. Does the commission have any type of enforcement or authority over marketing? [LR586]

HOBERT RUPE: We have certain...we have a certain rules and regs regarding marketing. You can't use a child or underage individual as a marketing ploy. You can't use obscene or offensive, although anytime you're looking at marketing those, you're also looking at First Amendment rights. The feds, TTB has a labeling mechanism where they sort of will approve labels for marketing. So in other words, if I'm going to sell Hobie's Hootch, before I can sell it I need to submit my label for label approval to the feds or TTB. Some states also do that. We have considered looking about maybe sort of, you know, tagging along with that method just so we know what's going on. But, you know, when it goes beyond just the labels and the selling of it, the marketing of it, that generally that will fall to the FTC whether it's, you know, marketing. Most of your major manufacturers have signed on to voluntary codes. I can't remember off the top of my head if I have those and I can send them to you if you want, where a certain...where they sort of agree that only a certain percentage...that only a certain percentage of the market that that is targeted at is going to be under the age of 21. So that's why you won't see them trying to advertise during, you know, during the family hour and that kind of stuff but you'll see late night. When you'll see magazines, you're not going to see them in Seventeen, but you might see it in Vogue because the target audience in Vogue is supposedly older than 17. [LR586]

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SENATOR COASH: But at the state level... [LR586]

HOBERT RUPE: The state level we don't have anything specifically, no, other than if somebody brings in an obscene or they're using a child. I can tell you that one time I did have to get involved with that, was a local manufacturer was utilizing a 17-year-old model, and I informed them that they were in violation, they ceased and desisted right away. But that's the only time I have ever had to get involved with it from a marketing aspect. [LR586]

SENATOR COASH: But do...so you do have some statutory authority to do... [LR586]

HOBERT RUPE: We have some authority because you can't use minors to advertise your products and that's what it was. There's a rule there that says you can't use minors. [LR586]

SENATOR COASH: Okay. Thank you. [LR586]

SENATOR KARPISEK: Any further questions? Seeing none, thank you, Mr. Rupe. [LR586]

HOBERT RUPE: Thank you. [LR586]

SENATOR KARPISEK: Anyone else? Welcome. [LR586]

JUSTIN BRADY: Welcome. Senator Karpisek and members of the committee, my name is Justin Brady, J-u-s-t-i-n B-r-a-d-y. I'll fill out a sheet and get it to you. I come before you today as the lobbyist representing the Nebraska Liquor Wholesalers Association only to clarify one more lie that just went out of this hearing room. According to an individual behind me, she claims this body never gave public notice for this meeting and



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is complaining that it wasn't done properly. I would ask legal counsel or anybody else to say whether or not there was public notice for this hearing. [LR586]

JOSHUA EICKMEIER: We do...we are required to post public hearing notices outside the hearing room. We also post them outside of our office, the Chair's office, so if there's any questions about what the plan...what the hearing is going to cover. This particular item was originally discussed as mentioned in the introduction by conversation between Senator Karpisek and Senator Christensen that we would do this specifically under the...what we call a catchall. Every year what we do is we have a general language that's called interim study to examine issues under the jurisdiction of the General Affairs Committee. That way if an issue comes up during the interim, for example, that is after the period when you can introduce an interim study, the committee is not basically...their hands aren't tied, they can still address those issues. So that was, I believe, the understanding going forward and the notice that was given was under that...under that description. Is that...? [LR586]

JUSTIN BRADY: That's my understanding. I just figure anytime any information leaves here specifically that's false, it should be corrected right now as opposed to just go out to the public to let it know that no public notice was given when it was given weeks and if not months in advance. And I know anybody contacted your office or the Clerk's office, they don't even have to contact your office, could have gotten the information of what the hearing was about or any of your members. So sorry to not have commented specifically on the hearing, but just wanted to...I'll be happy to try to answer any questions. [LR586]

SENATOR KARPISEK: Any questions? Seeing none, thank you. [LR586]

JUSTIN BRADY: Thank you. [LR586]

SENATOR KARPISEK: Anyone else want to testify? Senator Christensen, we usually

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don't close in these but would you like to...you'll waive anyway. We want to make sure that we give you the proper authority to do so. Thank you, everyone, for coming and we'll see you in a few short months. [LR586]