

Bureau Rulings

Subpart A – ALCOHOL

ATF Ruling 2002-2

Labeling and Advertising of Flavored Malt Beverages

Purpose

This Ruling interprets regulations in 27 CFR Part 7 regarding the labeling and advertising of flavored malt beverages. This Ruling also restates and amplifies the provisions of ATF Rul. 96-1, ATF Q.B. 1996-1, 49.

Background

Flavored malt beverages have been produced and marketed in the United States for many years. Recently the production and marketing of many flavored malt beverages has changed dramatically. Within the last 2 years, brewers and importers have begun to associate flavored malt beverages with well-known brands of distilled spirits. This association is made several ways: by using a distilled spirits brand name as the brand name of a flavored malt beverage; through the use of labeling and packaging that resembles packaging of well-known brands of distilled spirits; and by the use of specific distilled spirits terms in describing flavorings added to flavored malt beverages. Although the direct addition of distilled spirits is not permitted in the production of any malt beverage, ATF has permitted the addition of flavoring

materials that are alcohol based under the definition of malt beverage in the Federal Alcohol Administration Act (FAA Act). ATF Ruling 96-1 was issued in part to limit the contribution of alcohol to flavored malt beverages through this practice.

Sales of these newer types of flavored malt beverages have increased dramatically within the last year. As a result of these sales increases and widespread marketing campaigns, the media has given these products wide exposure. Another fact drawing media attention to these products is the impression given that these flavored malt beverages are made with distilled spirits or contain distilled spirits.

ATF believes the association drawn between distilled spirits and malt beverages through the use of well-known distilled spirits brand names and terms on labels of flavored malt beverages causes confusion for consumers, the media, and State regulatory and taxing organizations. ATF believes this practice is confusing and leads consumers to believe distilled spirits are present in these flavored malt beverages.

One of the practices ATF finds to be particularly misleading is the use of a distilled spirits brand name or the use of a distilled spirits class and type term to describe a flavor element that is part of a statement of composition on malt beverage labels. Examples of misleading labels would be:

- "[Distilled Spirits Brand Name] - Flavored malt beverage made with natural flavors containing vodka."
- "[Distilled Spirits Brand Name] - Flavored malt beverage with natural flavors containing genuine [Distilled Spirits Brand Name]."

ATF finds statements such as these to be misleading. The fact that the statement of composition draws particular attention to the apparent use of distilled spirits in a malt beverage leads consumers to believe the product is made with or contains distilled spirits. Distilled spirits used to manufacture flavors lose their class and type identity (such as rum or tequila) when blended with other ingredients to make a flavor extract. Accordingly, it is misleading to represent that a malt beverage contains a particular class or type of distilled spirits. Further, this type of statement in the statement of composition, together with the use of a distilled spirits brand name, misleads consumers into believing that the product is, or contains, distilled spirits. The misleading impression presented by these label statements and representations has caused many media outlets to identify distilled spirits as an ingredient in these flavored malt beverages. Further, ATF has been contacted by many State regulatory and tax agencies that are concerned about the proper classification and correct taxation of these products.

ATF also believes that other references to distilled spirits on a malt beverage label (i.e., "tastes like rum") may mislead consumers to believe that the named distilled spirit is an independent ingredient in the finished malt beverage product, or that the finished product is actually a distilled spirit as opposed to a malt beverage.

Examples of statements that will be presumed to be misleading include:

- "Tastes like rum,"
- "The flavor of brandy,"
- "Serve like a liqueur,"
- "Made by Old Sourmash Whisky Company, City, State."

As a result of these recent labeling practices, ATF has reexamined its policy regarding the labeling and advertising of flavored malt beverages. ATF is issuing this Ruling to clarify the labeling and advertising of flavored malt beverages under Part 7, to prevent consumer deception, and to provide consumers with accurate information about the composition and identity of flavored malt beverages.

Statutory Authority for Labeling and Advertising Regulations for Malt Beverages

Sections 105(e) and (f) of the FAA Act, 27 U.S.C. § 205(e) and (f), vest broad authority in the Director, Bureau of Alcohol, Tobacco and Firearms (ATF) to prescribe regulations with respect to the bottling, packaging, labeling, and advertising of wine, distilled spirits, and malt beverages. The FAA Act provides that these regulations shall prevent the deception of the consumer and provide the consumer with adequate information as to the identity and quality of the product. Regulations that implement the provisions of Sections 105(e) and (f), as they relate to malt beverages, are set forth in Title 27, Code of Federal Regulations, Part 7, Labeling and Advertising of Malt Beverages.

Labeling Requirements That Apply To the Class and Type Designation of Flavored Malt Beverages

Part 7 regulations require that all malt beverages sold, shipped, or otherwise introduced into interstate commerce bear labels that contain certain mandatory information. Section 7.22 provides that, among other information, malt beverage labels must contain a statement relating to the class, type, or other designation of the malt beverage. If a malt beverage product is not known to the trade under a particular designation, Section 7.24 requires that a distinctive or fanciful name, together with an adequate and truthful statement of composition of the product, appear on the label and that this information will be considered the statement of class and type.

Malt beverages made with flavoring ingredients are not considered to be "beer," "lager beer," "lager," "ale," "porter," "stout," or other designation provided in Part 7 as a class and type designation commonly applied to malt beverages. Section 7.24 requires these flavored malt beverages to bear a distinctive or fanciful name, together with an adequate and truthful statement of composition of the product, as the class and type designation. An example of a designation for a malt beverage flavored with natural lemon flavoring might be:

- "Hard Lemonade -- Malt Beverage with Natural Lemon Flavor."

ATF policy permits a bottler or importer to designate the specific flavor(s) that are indicated in the statement of composition of a flavored malt beverage. Alternatively, bottlers or importers may use the phrases: "made

with natural flavors" or "made with artificial flavors" in lieu of identifying specific flavors. Thus, a flavored malt beverage may be designated simply:

- "Hard Lemonade -- Malt Beverage with Natural Flavor(s)."

Brewers and importers have marketed flavored malt beverages for many years in the United States. Until recently, most of these products were designated by the flavor used in their production, were designated by a fanciful name, or, in some cases, were designated using a cocktail term. Examples are:

- "Cherry Ale - Ale with natural cherry flavor,"
- "Krazy Kola - Malt Beverage with natural flavors,"
- "Pina Colada Delight - Malt Beverage with natural flavors."

Labeling Requirements That Apply To Other Information Appearing on Labels of Flavored Malt Beverages

Section 7.28(e) provides that labels of malt beverages may contain information that is not mandatory under Part 7 if the additional information complies with the requirements of Part 7, and does not conflict with, or in any manner qualify, statements required by Part 7. Although there is no similar provision specifically authorizing additional information in advertising, Section 7.54(b)(1) prohibits any statement in advertising that is inconsistent with statements on the labels of malt beverages.

Regulations That Apply To Deceptive and Misleading Practices in the Labeling And Advertising of Malt Beverages

Section 7.29(a) prohibits containers, labels, or cartons of malt beverages from bearing any statement that is false or untrue, or that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific, or technical matter, tends to create a misleading impression. A similar provision exists with respect to advertising of malt beverages at Section 7.54.

Although there is no provision in Section 7.29 or 7.54 that specifically prohibits a malt beverage label, carton, or advertisement from resembling a distilled spirits product, ATF believes that the depiction of a malt beverage product as a distilled spirits product, or the likening of a malt beverage to a distilled spirits product is misleading, and creates a misleading impression as to the identity of the malt beverage.

ATF Ruling on labeling and advertising of flavored malt beverages that use distilled spirits terms or brand names, or that bear labels *that resemble distilled spirits labels*.

With regard to the use of distilled spirits terms and brand names on labels and in the advertising of malt beverages, it is:

Held, for brand names:

- The use of a brand name of a distilled spirits product as the brand name of a malt beverage is not in itself misleading.
- The use of a distilled spirits term found in the standards of identity in 27 CFR Part 5 such as whisky, rum, vodka, brandy, gin, and so forth, as the brand

name for a malt beverage is misleading. ATF will not approve labels where a distilled spirits term is used as the brand name for a malt beverage.

- The use of a coined term that is similar to or resembles a class and type of distilled spirits as part of the brand name for a malt beverage will be examined on a case-by-case basis to determine if it is misleading as to the identity of the product.

Held, for class and type statements including statements of composition and fanciful names:

- The use of a distilled spirits term found in the standards of identity in 27 CFR Part 5, or the use of a distilled spirits brand name, in the statement of composition or in the fanciful name for a flavored malt beverage is misleading as to the identity of the product. ATF will no longer approve labels where distilled spirits terms or brand names appear in the fanciful name or the statement of composition for a malt beverage.

- Use of a cocktail term as the fanciful name of a malt beverage is not misleading if there is no misleading impression about the identity of the product, based on the overall labeling and advertising of the product.

Held, for all other labeling and advertising statements:

The use of any distilled spirits terms found in the standards of identity in 27 CFR Part 5 or of distilled spirits brand names appearing in any other place on a malt beverage label or in an advertisement for a malt beverage will be presumed to be misleading.

Use of cocktail terms on a label or advertisement for a malt beverage is not in itself misleading if there is no misleading impression about the identity of the product, based on the overall labeling or advertising of the product.

Effect on new and existing Application for and Certificate/Exemption of Label/Bottle Approval forms:

Section 7.20 requires labels of malt beverages to be in compliance with the provisions of Part 7. Upon the effective date of this Ruling, new applications for certificates of label approval (ATF Forms 5100.31 (COLAs), Applications for and Certificate/Exemption of Label/Bottle Approval) must be in compliance with Part 7 regulations, including the provisions of this Ruling.

While this Ruling does not cancel or revoke existing certificates, ATF is undertaking action to revoke COLAs that are not in compliance with this Ruling. Industry members are offered the opportunity to immediately voluntarily surrender for cancellation all COLAs for labels not in compliance with the requirements of this Ruling and, thereby, avoid the formal revocation process.

In order to allow an opportunity to use up current label stocks, ATF may grant temporary COLA approval to cover currently approved labels that do not comply with this Ruling. Brewers and importers may submit new applications for COLAs to ATF for temporary approval of labels that do not comply with this Ruling. These labels must be identical to approved labels that have been returned for cancellation. ATF may grant temporary COLA approval for these labels for a period of

time ending not later than September 30, 2002.

ATF Ruling 96-1 is amplified:

ATF issued Ruling 96-1, ATF Q.B. 1996-1, 49, to clarify the application of the malt beverage definition in the FAA Act to flavored malt beverages. This Ruling was intended to limit the alcohol contribution derived from the use of alcohol flavoring materials and to specify the information that is required to be submitted on a statement of process for a flavored malt beverage under 27 CFR Section 25.67.

Prior to issuing Ruling 96-1, ATF determined that some brewers producing flavored malt beverages were using alcohol flavoring materials to such an extent that, in some cases, a substantial portion of the alcohol content in the flavored malt beverage was derived from the flavoring material rather than from the fermented malt base. As a result of this practice, ATF issued Ruling 96-1 to place a limit on the use of alcohol flavoring materials in malt beverages over 6 percent alcohol by volume and to specify exact requirements for submission of statements of process for these products.

This Ruling reminds brewers and importers of the provisions of ATF Ruling 96-1, and stresses the importance of compliance with the findings in that Ruling. Consequently, ATF is restating and amplifying ATF Ruling 96-1:

- A malt beverage under the FAA Act may only contain alcohol which is the result of alcohol fermentation at the brewery. Pending enforcement of this requirement, ATF announced that it might engage in further rulemaking.

- Pending the completion of rulemaking, ATF will allow the continued production or importation of fermented beverages that contain alcohol not solely the result of fermentation at the brewery if: (1) they are flavored malt beverages that contain not more than 6 percent alcohol by volume in the finished product; or (2) they are flavored malt beverages that contain in excess of 6 percent alcohol by volume in the finished product and derive not more than 1.5 percent of their overall alcohol content from alcohol added through the use of alcohol flavoring materials.

- Pending the completion of rulemaking, ATF will continue to approve statements of process and applications for certificates of label approval meeting these criteria. Statements of process submitted under Section 25.67 for flavored malt beverages that include the use of any alcohol flavoring materials shall explicitly indicate:

1. The volume and alcohol content of the malt beverage base.
2. The maximum volumes of such alcohol flavoring materials proposed to be used.

3. The alcohol strength of such flavoring materials.
4. The overall alcohol contribution to the finished product provided by the addition of any alcohol flavoring materials.
5. The final volume and alcohol content of the finished product.

ATF reminds brewers and importers of the requirements of Ruling 96-1 with respect to the information required on statements of process for flavored malt beverages. ATF receives many proposed statements of process that do not comply with these requirements. In the future, ATF will not approve any statements of process for flavored malt beverages made with alcohol flavoring materials unless they are prepared in compliance with Ruling 96-1.

Date: April 8, 2002.

Bradley A. Buckles,

Director.