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October 17, 2003
Chief, Regulations and Procedures Division SENT VIA FACSIMILE, E-MAIL
Alcohol and Tobacco Tax and Trade Bureau AND FIRST CLASS MAIL
P.O. Box 50221 Fax No.: (716)434-8041
Washington, D.C. 20091-0221 e-mail: nprm@ttb.gov
(Attn: TTB Notice No. 4)

Re: Notice No. 4
Flavored Malt Beverages and Related Proposals (2001R-136P)

Dear Sirs/Madams:

Michael G. Garrity of the Garrity, Avignone, Banick & Whetstone Law Firm represents the Liquor Store Owners Association of Montana, a Montana non-profit corporation (Association). The membership of the Association consists of Montana's Agency Franchise Liquor Store Agents who operate the Montana State Liquor Stores in Montana under Agency Franchise Agreements with the State of Montana, Department of Revenue, as well as associate members of the liquor trade or industry.

The Association supports the Department of the Treasury and its Alcohol and Tobacco Tax and Trade Bureau (TTB) proposed amendments to its regulations relating to the production, labeling and composition of products marketed as flavored malt beverages. The TTB has correctly determined that the increased production and marketing of flavored malt beverages that derive their alcohol content primary from the addition of distilled spirits, and not from fermentation, requires regulator clarification under the Internal Revenue Code of 1986 (IRC) and the Federal Alcohol Act (FAA Act). The regulatory changes proposed by TTB will clarify the status of flavored malt beverages under the IRC and FAA Act, and provide guidance to the State regulatory and tax agencies that oversee the taxation and distribution of flavored malt beverages.

The State of Montana is characterized as an alcoholic beverage "control state" under its Montana Alcoholic Beverage Code (MABO), Section 16-1-101 through 16-1-143, MCA. Similar to the Department of the Treasury and the TTB's construction of IRC, the MABC uses the 0.5% alcohol by volume threshold as a dividing line between beverage products subject to one type of taxation or another. Section 16-1-106 (4), MCA. The MABC defines beer as a malt beverage containing not more than 7% of alcohol by weight and made by the fermentation of an infusion or decoction, or combination of both, of malt or barley with or without hops or other malted cereals. The MABC defines table wine as including cider

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and containing not more than 16% alcohol by volume. Wine is defined as an alcoholic beverage from normal alcoholic beverage fermentation of wheat or other agricultural products, without addition or extraction, that contains more than 0.5%, but not more than 25% of alcohol by volume. Generally accepted industry standards recognize that alcohol by natural fermentation generally does not exceed 14% of alcohol by volume. Accordingly, the addition of distilled spirits is required for increased alcohol content beyond the percentage of alcohol volume reached by natural fermentation.

TTB has correctly recognized that the rapid growth of the flavored malt beverage sector has left a void requiring clarification for Federal and State taxation and distribution of flavored malt beverages. TTB's proposed rulemaking will satisfy the need for regulatory clarification by classifying any beer or malt beverage containing 0.5% or more alcohol by volume that is derived from distilled spirits, or from distilled spirits in the form of flavors on other materials, as a distilled spirits product.

TTB's proposed definitions for beer and malt beverages requiring these products to be composed primarily of alcohol from fermentation and that limit contribution of alcohol from added flavors or added ingredients containing alcohol to less than 0.5% alcohol by volume conforms to the IRC and FAA Act, and is supported by the Association. The definitions of beer, ale, porter, stout and other similar fermented beverages in the IRC, as well as the definition of flavored beverages in the FAA Act, supports limiting the amount of alcohol in flavored malt beverages that is not "...made by the alcoholic fermentation... of malted barley with hops ...". It is consistent with the IRC and FAA Act to adopt a standard for flavored malt beverages that limits the alcohol content derived from alcohol flavoring and other materials to less than 1/2% alcohol by volume (0.5% alc/vol). Both the IRC and FAA Act contemplate that the alcohol content of malt beverages is derived from the natural fermentation of malt, hops or other products and not from the addition of distilled spirits. Accordingly, TTB's proposed rulemaking correctly classifies beer or malt beverage products containing 0.5% or more alcohol by volume that is derived from distilled spirits, or from distilled spirits in the form of flavors or other materials, as a distilled spirits product.

TTB's proposed rulemaking that requires malt beverages containing alcohol derived from added flavors or other ingredients must list the alcohol content of a flavored malt beverage on its label is appropriate and supported by the Association. Consumers are easily confused by the current brand names and labeling for distilled spirits and flavored malt beverages. The proposed rulemaking requiring labeling of the alcohol content and any additive containing alcohol best serve the consumer by identifying the alcohol content of the flavored malt beverage and that the alcohol content is derived from the addition of distilled spirits and not the natural fermentation process.

Flavored malt beverages currently on the market could be produced, labeled and distributed under TTB's proposed ruling. The Association believes that the proposed TTB rulemaking may require amendment of existing statutory definitions and/or new

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statutory definitions for the Montana Alcohol Beverage Code, and may require rulemaking by the Montana Department of Revenue. However, the Association believes that the State of Montana could implement TTB's proposed rulemaking upon adoption by TTB for purposes of taxation and distribution of flavored malt beverages. Industry representatives for flavored malt beverages are in the best position to estimate for TTB the time periods required by the industry for complying with production, labeling, and advertising requirements under TTB's proposed rulemaking.

In summary, the Liquor Store Owners Association of Montana supports the Treasury Department and TTB in the proposed rulemaking classifying any beer or malt beverage product containing 0.5% or more alcohol by volume that is derived from distilled spirits, or from distilled spirits in the form of flavors and other materials, as a distilled spirits product.

Sincerely,

GARRITY, AVIGNONE, BANICK & WHETSTONE

Michael G. Garrity

MGG/sjp

cc: Liquor Store Owners Association of Montana Board of Directors