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Pacific Institute
FOR RESEARCH AND EVALUATION
Felton, CA 95018

June 19, 2003

Chief, Regulations & Procedures Division
Alcohol & Tobacco Tax & Trade Bureau
Washington, DC 20091-0221

RE: TTB NOTICE NO. 4 FLAVORED MALT BEVERAGES (FMBs) & RELATED PROPOSALS

I am writing on behalf of the Division of Legal and Enforcement Policy Analysis in response to Alcohol and Tobacco Tax and Trade Bureau's (TTB's) request for comments regarding proposed changes in the regulation of Flavored Malt Beverages (FMBs). We support TTB's proposed rules concerning the production and classification of FMBs and urge the Board to reconsider its timeline for implementation and its proposed rules regarding labeling requirements. The results of the TTB study reviewed in Notice No. 4 clearly show that FMBs contain high levels of distilled spirits, accounting for most or all of the alcohol in these products. TTB's conclusion that classifying FMBs as malt beverages rather than distilled spirits violates Federal law is justified based on the clear language of the relevant statutory provisions. We agree that a maximum level of .5% distilled alcohol by volume is an appropriate limit consistent with the longstanding definition of alcoholic beverages.

We are, however, concerned that TTB would not take more assertive action to end the illegal classification of FMBs. FMB producers were notified by your predecessor agency in a ruling dated March 1996 that their products were misclassified as malt beverages under Federal law. This also served them with notice that the classification violated the laws of most States, a fact that several State Alcoholic Beverage Control agencies have confirmed in communication with the Board. Yet, despite undisputed knowledge of these violations of law, FMB producers continued for the next seven years to represent their products as malt beverages. Inexplicably, ATF and TTB took no steps during this time to implement ATF's 1996 determination. We urge your Board to order immediate compliance with Federal law. All FMBs with more than .5% alcohol derived from distilled alcohol should be reclassified as a distilled spirits without further delay. ATF and TTB's failure to act has been an enormous disservice to the American public and has caused serious damage to the nation's health. FMBs are a key part of the distilled spirits industry's strategy for competing with beer for the youth market. It is no mystery why distillers were willing to ignore both State and Federal law in their marketing. They

1 ATF Ruling 96-1, which included the following holding: "Held, a malt beverage under the FAA Act may only contain alcohol which is the result of alcoholic fermentation at the brewery."

gain huge advantages in the marketplace by presenting their products as malt beverages instead of distilled products.

Most notably they:

1. Pay beer taxes instead of liquor taxes, failing to pay millions of dollars in State and Federal excise taxes and permitting lower prices, a critical variable affecting youth consumption;
2. Evade State liquor distribution regulations, many of which restrict the sale of liquor at groceries and mini-marts, the locations most likely to supply young people; and
3. Gain access to electronic media outlets otherwise not available to them, marketing FMBs on radio and television, critical vehicles for reaching a youth market. Reports from the Center on Alcohol Marketing and Youth confirm that FMB producers overexpose young people to their advertising on radio and in magazines.²

Your delay in action has resulted in providing FMB producers with distinct advantages in reaching the youth market. FMBs are designed for the youth palate, and their advertising is filled with youthful imagery and themes. Perhaps most disturbing (and most beneficial to distillers), FMB marketing has substantially increased distilled spirits' brand awareness and loyalty among young people, a key goal of the producers. It is therefore not surprising that community groups across the country are reporting that FMBs are becoming increasingly popular as the teen party drinks of choice.

As your study and analysis clearly shows, these benefits have occurred as a result of illegal behavior by the manufacturers - their misrepresentation that FMBs are malt beverages under State and Federal law when they clearly should be classified as distilled spirits. It is therefore puzzling that TTB at this time would give producers one year or more to reclassify their products. The law is clear and should be enforced. The producers have known of the violation for seven years. TTB should not condone this continuing violation of law. We also urge TTB to conduct an investigation of the producers' illegal behavior to determine whether it amounts to consumer fraud and to assess potential liability for payment of back taxes at the federal distilled spirits excise tax rates.

For these same reasons, we also strongly oppose TTB's conclusion that the use of spirits brand names on the labels of FMBs is not inherently misleading. Names such as Smimoff and Bacardi connote specific types of hard liquor and are designed to build brand loyalty among underage consumers. This is an integral part of the illegal marketing strategy perpetrated by the FMB producers. We urge you to restrict the use of liquor brand names to products which actually contain the named liquor and are manufactured, labeled and distributed in accordance with State and Federal law. This is particularly important during the period that TTB allows these products to continue to be on the market classified as a malt beverage.

2 Center on Alcohol Marketing to Youth (CAMY), Radio Daze: Alcohol Ads Tune in Underage Youth. Washington, DC: CAMY, April 2, 2003 () CAMY, OverExposed:
Youth a Target of Alcohol Advertising in Magazines. Washington, DC: CAMY, September 24, 2002 () .

Alcohol problems among our nation's young people constitute a public health crisis. Alcohol-related motor vehicle crashes are a leading cause of death and injury among those under 21 years of age. Alcohol use among teens is a key factor in sexual assaults, other forms of violence, unwanted pregnancy, family disruptions, vandalism, and poor school performance. Given the seriousness of the problem, it is distressing that TTB is not taking immediate action to insure that FMB producers are obeying the law, correcting seven years of ATF and TTB inaction.

We urge you to act immediately to enforce Federal law and fulfill your mandate to protect the public from illegal alcohol marketing practices. This rule does nothing more than enforce existing alcohol categories so that States, consumers and media outlets will understand the nature of the products and treat them accordingly.

We thank the TTB for permitting us to comment on these important public policy matters.

Sincerely,

James F. Mosher, JD
Director
Division of Legal and Enforcement Policy Analysis