



ALCOPOPS:

A QUESTION OF CLASSIFICATION

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I. Background

The “designer drug phenomenon” is relatively well known among state legislatures. Designer drugs are compounds designed to mimic the effects of controlled substances, while possessing a slightly different chemical structure from the substance they attempt to imitate. Since controlled substances are identified by their precise chemical composition, the idea behind designer drugs is to alter that composition just enough to evade existing legal controls.

Producers of “alcopops,” or “flavored malt beverages” (FMBs) have taken a similar tact by engineering ostensibly malt-based alcoholic drinks that begin as fermented products, like beer, but are then processed to remove the aroma, color, flavor, and foam characteristic of traditional malt beverages.¹ Colorings and flavorings derived from distilled spirits are then added to the malt base to give the FMB its aesthetic and taste profile, which typically masks the flavor of alcohol and instead mimics punch, lemonade, or other soft drinks.² These products are often marketed under brand names and trademarks associated with premium liquors, although they contain no such ingredients.³ Despite this marketing approach and even though most of the original FMBs derived their alcohol content primarily from spirits in the added ingredients,⁴ producers have generally succeeded in persuading regulators that these products are the legal equivalent of beer, rather than distilled spirits (i.e., “hard liquor”).⁵ This is due at least in part to the fact that the finished drink is the product of a brewery and not a distillery.⁶

Whether an alcoholic drink is legally categorized as a malt beverage or a distilled spirit is significant for several reasons. Under federal law and in most states, it determines the rate of excise tax which the producer has to pay on the product. Spirits are generally taxed at a significantly higher rate than beer. Higher taxation, in turn, raises the retail price, which has been shown to reduce youth consumption of the product.⁷ Second, the categorization affects where and how products may be advertised. Hard liquor, for example, is generally not advertised on television, whereas beer and malt beverages are heavily promoted in this medium.⁸ Availability of the product is also affected by its categorization, as spirits are more tightly controlled and sold in fewer outlets. Beer and malt beverages, on the other hand, are

¹ See Flavored Malt Beverages and Related Proposals, 68 Fed. Reg. 14292, 14293, 14294 (March 24, 2003) (to be codified at 27 C.F.R. pts. 7, 25) (explaining how FMBs are produced).

² *Id.*

³ See *id.* at 14298-99. See also Press Release, Center for Science in the Public Interest, Beware the “Side Effects” of Alcopops, March 18, 2004, available at <http://cspinet.org/new/200403181.html> [hereinafter CSPI Press Release].

⁴ 68 Fed. Reg. at 14294-95 (noting that of 114 FMBs studied by the TTB, 105 derived at least 76% of their alcohol content from distilled spirits in added flavorings).

⁵ See James F. Mosher, *Flavored Alcoholic Beverages: An International Marketing Campaign that Targets Youth*, 26 J. OF PUB. HEALTH POL’Y 326, 335-336 (2005).

⁶ See *id.* at 335 (noting that differing production processes and “base” materials are used in different countries to suit the local regulatory climates); 68 Fed. Reg. at 14294, 96.

⁷ Mosher, *supra* note 5, at 336.

⁸ See Laura Bradford, *Soft Ads for Hard Liquor*, TIME, Sept. 2, 2002, at 40; *Malt-based Drinks Bypass TV’s Hard Liquor Ad Ban*, HOUS. CHRON., March 29, 2002, at 3; Stuart Elliott, *Facing Outcry, NBC Ends Plan to Run Liquor Commercials*, N.Y. TIMES, March 21, 2002, at C1.

widely available in grocery and convenience stores that cater both to children and adults.⁹ A fourth important difference is the manner in which the product must be labeled and what information the label must contain.¹⁰

The primary concern surrounding FMBs is the impression that they are designed for and marketed to underage consumers who have yet to develop a taste for alcohol.¹¹ While the industry admits that FMBs can bridge the gap between soft drinks and more well-established liquor brands, they reject the charge that FMBs are deliberately meant to entice underage drinkers.¹² Surveys indicate, however, that FMBs are particularly popular with teenage girls.¹³ Alcopops are also higher in calories than most soft drinks and beers and may therefore be even more likely to contribute to obesity.¹⁴ More recently, caffeine and active herbal compounds have been added to the formulae of some FMBs,¹⁵ and some believe these ingredients are yet another enticement to the youth market and may dangerously distort users' perceptions of how the alcohol in these drinks affects them.¹⁶

II. Federal Regulation

Federal oversight of FMBs is provided by the Alcohol and Tobacco Trade and Tax Bureau (TTB), the successor agency to the Bureau of Alcohol, Tobacco and Firearms. Its jurisdiction arises, in part, from Chapter 51 of the Internal Revenue Code of 1986 (the IRC),¹⁷ which imposes excise taxes on alcohol, and the Federal Alcohol Administration Act (the FAA),¹⁸ which requires those who engage in the production, importation, or wholesale distribution of alcoholic beverages to obtain a federal permit and which regulates the labeling and marketing of alcoholic products.

The FAA defines "distilled spirits" as "ethyl alcohol, hydrated oxide of ethyl, spirits of wine, whiskey, rum, brandy, gin, and other distilled spirits, including all dilutions and mixtures thereof, for non-industrial use."¹⁹ "Malt beverages," which include beer, are those

⁹ See Mosher, *supra* note 5, at 33; Stuart Elliott, *Slightly Sweet Malt Beverages Get Some Heavy Marketing, With Young Drinkers the Targets*, N.Y. TIMES, March 6, 2002, at C10 (quoting the president and chief executive of a leading alcopop marketer, who notes that "'beer products are in eight times more outlets than spirits products' and are consumed 'exponentially more' often than liquor").

¹⁰ See 68 Fed. Reg. at 14294.

¹¹ See, e.g., Carolyn Marshall, *Drinks With Youth Appeal Draw Growing Opposition*, N.Y. TIMES, April 13, 2007, at A12; Richard Willing, *Lawsuits Target Alcohol Industry*, USA TODAY, May 14, 2004, at 3A; Elliott, *supra* note 9; Skip Wollenberg, *Critics Say Spiked Lemonade Aimed at Kids*, HOUS. CHRON., Oct. 8, 2000, at 4.

¹² See Mosher, *supra* note 5, at 332.

¹³ *Id.* at 335-36. See also Gayle Worland, *Teen Girls Drinking More, AMA Warns*, CHI. TRIB., Dec. 17, 2004, at 1.

¹⁴ See CSPI Press Release, *supra* note 3.

¹⁵ See, e.g., John Cloud, *This Ain't No Wine Cooler*, TIME, July 28, 2008, at 51.

¹⁶ *Id.*

¹⁷ 26 U.S.C. §§ 5001 – 5692.

¹⁸ 27 U.S.C. §§ 201 – 219a.

¹⁹ 27 U.S.C. § 211(a)(5).

made by the alcoholic fermentation of an infusion or decoction, or combination of both, in potable brewing water, or malted barley with hops, or their parts, or their products, and with or without other malted cereals, and with or without the addition of unmalted or prepared cereals, other carbohydrates or products prepared therefrom, and with or without the addition of carbon dioxide, and with or without other wholesome products suitable for human food consumption.²⁰

Federal statutory law does not contain a separate statutory definition for alcopops or FMBs, leaving this determination to be made by the TTB.

Even though the FAA's definition of "distilled spirits" includes, on its face, "all dilutions and mixtures" thereof,²¹ TTB regulations still allow FMBs to contain a significant amount of distilled spirits before they are categorized and regulated as such. The TTB divides malt beverages into two categories for the purpose of determining when the addition of spirits in flavorings and other ingredients changes the regulatory status of the finished product: those containing up to 6% alcohol by volume and those that exceed 6%. "Beer" in the first category may derive up to 49% of its alcohol content from "[f]lavors and other nonbeverage ingredients containing alcohol."²² If a beer or malt beverage contains more than 6% alcohol by volume, not more than 1.5% of the volume of the finished product may consist of alcohol derived from flavorings and other nonbeverage ingredients.²³

Products that exceed the preceding limitations will be treated by the TTB as distilled spirits and must comply with all laws that apply to that category. In a recent public notice, the TTB warned industry members that it has determined that some brewers continue to exceed the limits established by its new rule, that "[t]here are no tolerances that allow a producer to exceed those limitations," and that "serious consequences" may befall brewers who are found to be producing non-compliant products.²⁴ Because production of distilled spirits is only allowed at licensed, permitted distilleries,²⁵ brewers who produce FMBs that qualify as distilled spirits may be found in violation of the IRC and subject to penalties or "other appropriate enforcement actions."²⁶ Alcopops that qualify as distilled spirits will also be subject to a significantly higher rate of federal taxation, which will become due and payable on the date the non-compliant

²⁰ 27 U.S.C. § 211(a)(7).

²¹ See 27 U.S.C. § 211(a)(5) (emphasis supplied).

²² Materials for the Production of Beer, 27 C.F.R. § 25.15 (2005). See also Use of Flavors and other Nonbeverage Ingredients Containing Alcohol, 27 C.F.R. § 7.11 (2005). The TTB defines "beer" itself as "[b]eer, ale, porter, stout, and other similar fermented beverages (including saké and similar products) of any name or description containing one-half of one percent or more of alcohol by volume, brewed or produced from malt, wholly or in part, or from any substitute for malt." Meaning of Terms: Beer, 27 C.F.R. § 25.11 (2006).

²³ 27 C.F.R. § 7.11

²⁴ Alcohol Tax and Trade Bureau, Industry Circular No. 2008-3: Non Compliant Flavored Malt Beverages, July 23, 2008, http://www.tt.gov/industry_circulars/archives/2008/ic2008_03.html [hereinafter ATT Circular 2008-3].

²⁵ See 26 U.S.C. § 5171.

²⁶ ATT Circular 2008-3, *supra* note 24.

batch is finished.²⁷ Finally, distilled spirits labeled as beer or malt beverages are mislabeled under the FAA and may not legally be introduced into interstate or foreign commerce.²⁸

III. State Regulation

A. State Authority to Regulate Alcohol

States, under the 21st Amendment, have concurrent power with the federal government to regulate alcohol within their borders.²⁹ This includes a state's power to ban the sale of alcohol within its boundaries.³⁰ At the core of the state's powers are restrictions governing the time, place, and manner of alcohol sales and importation, and such restrictions are the most presumptively valid.³¹ Nevertheless, while a thorough discussion of the interplay between state and federal alcohol regulation is beyond the scope of this overview, legislators should be aware that a state's ability to regulate alcohol is still subject to limitation when it implicates other constitutional provisions³² or when it directly conflicts with a federal regulatory scheme.³³ The TTB has acknowledged, however, that states are free to impose their own labeling, advertising, tax, and classification schemes for FMBs.³⁴

B. States Without Specific Statutory Provisions Related to FMBs

Most state codes do not have provisions relating to alcopops or FMBs as such. Instead, FMBs are usually regulated and taxed either as beer or hard liquor. NAMS DL has not undertaken a state-by-state analysis of how beer and distilled spirits are variously defined. However, a 2005 Briefing Paper prepared by the director of the Center for the Study of Law and Enforcement Policy at the Pacific Institute for Research and Evaluation concludes that "in at least 34 states, current statutory definitions appear to require that [FMBs] that contain any distilled spirits alcohol should be treated as distilled spirits (except those with less than .5 percent alcohol, considered a trace amount found in some nonalcoholic beverages)."³⁵ The paper goes on to

²⁷ *Id.* See also 26 U.S.C. §§ 5001, 5006(c)(2).

²⁸ ATT Circular 2008-3, *supra* note 24. See also 27 U.S.C. § 205(e).

²⁹ See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984).

³⁰ *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 714 (1981).

³¹ See *Capital Cities Cable, supra*, 467 U.S. at 714.

³² See, e.g., *Bachus Imports, Ltd. v. Diaz*, 468 U.S. 263 (1984) (Commerce Clause), *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (First Amendment); *Wisconsin v. Constantineau*, 400 U.S. 433, 436, (1971) (due process); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 345-346, (1964) (Export-Import Clause).

³³ See, e.g., *Capital Cities Cable, supra*, 467 U.S. at 714 (Oklahoma law that required cable companies to delete all alcohol advertisements from broadcasts in the state, including those from broadcasts originating elsewhere, preempted by federal law regulating cable transmissions).

³⁴ Flavored Malt Beverages and Related Regulatory Amendments, 70 Fed. Reg. 194, 219-220, 230, (Jan. 3, 2005) (to be codified at 27 CFR Parts 7 and 25).

³⁵ Briefing Paper, James F. Mosher, Dir. of the Ctr. for the Study of L. and Enforcement Pol'y at the Pac. Inst. for Res. and Evaluation, Flavored Alcoholic Beverages and the Youth Market: Are State Laws Being Violated?, Feb. 2005, at 3, available at <http://www.cslep.org/publications/FABbriefingpaper.pdf>. Note that NAMS DL takes no position on Mr. Moser's legal conclusions and includes this information as a possible basis for further inquiry and to demonstrate that the legal status of FMBs remains open to varying interpretations.

assert that this “misclassification” cumulatively costs the affected states hundreds of millions of dollars in uncollected tax revenue.³⁶ States wishing to take further action on alcopops may therefore want to consider the definitions already in their codes to determine if they would support administrative action to classify these beverages as distilled spirits, rather than beer.

One state that has taken this approach is California. On April 8, 2008, the California Board of Equalization (the Board), which oversees the state’s taxation of alcoholic beverages, approved regulations “to clarify” the definition of “distilled spirits” under the Alcoholic Beverage Tax Laws.³⁷ Under the new rules, “distilled spirits” include “any alcoholic beverage, except wine ... which contains 0.5 percent or more alcohol by volume derived from flavors or other ingredients containing alcohol obtained from the distillation of fermented agricultural products.”³⁸ The Board then went a step further and created a presumption that “any alcoholic beverage, except wine” fits this new definition.³⁹ To rebut this presumption, a manufacturer must file a sworn report that states its product does not meet the definition of distilled spirits and that specifies the source of its alcohol content; should the Board obtain information that casts doubt on the accuracy or veracity of such a report or for purposes of verification, the Board may also require the manufacturer to submit the statement of process or formula that it filed with the TTB.⁴⁰ A listing of exempt products is to be maintained on the Board’s website,⁴¹ and taxpayers who rely on that list will be afforded a “safe harbor” from further tax liabilities.⁴² These rules, however, are for tax purposes only.⁴³

The Oregon Liquor Control Commission tried a similar approach, which was originally supposed to have taken effect on January 1, 2005.⁴⁴ Industry members then filed suit for judicial review,⁴⁵ and in May 2005, the rules were overturned by new legislation that incorporates the current federal standard.⁴⁶

C. State Statutes Targeted at FMBs

At least nine states have separate statutory definitions that appear to be geared toward alcopops or similar drinks. The consequences of these provisions and their applicability to the malt-based alcopops currently favored by manufacturers, however, varies from one jurisdiction to the next.

³⁶ *Id.* at 4, 9.

³⁷ See Cal. St. Board. of Equalization, Special Notice No. L-195-A, New Regulations Will Cause Certain Non-Wine Alcoholic Beverages to Be Taxed as Distilled Spirits (2008) [hereinafter Notice L-195-A].

³⁸ CAL. CODE. REGS. tit. 18, § 2558 (2008).

³⁹ *Id.* at § 2559 (emphasis supplied). This includes traditional beer products. Notice L-195-A, *supra* note 37.

⁴⁰ CAL. CODE. REGS. tit. 18, § 2559.1 (2008).

⁴¹ *Id.* at § 2559.3.

⁴² *Id.* at § 2559.5.

⁴³ Notice L-195-A, *supra* note 37.

⁴⁴ See *Diageo Seeks Overturn of Oregon’s FMB Rule*, MOD. BREWERY AGE, Oct. 25, 2004, available at http://findarticles.com/p/articles/mi_m3469/is_/_ai_n11842167?tag=artBody;col1.

⁴⁵ *Id.*

⁴⁶ OR. REV. STAT. ANN. § 471.001 (West 2008).

1. Connecticut

Connecticut defines a “liquor cooler” as “any liquid combined with liquor, as defined in this section,^[47] containing not more than seven per cent of alcohol by volume.”⁴⁸ Liquor coolers are taxed at over 10 times the rate for beer.⁴⁹

2. Hawaii

In Hawaii, a “cooler beverage” includes a “malt beverage cooler containing beer and added natural or artificial blending material such as fruit juices, flavors, flavorings, colorings, or preservatives, and which contains less than seven per cent of alcohol by volume.”⁵⁰ The tax rate for coolers is 85 cents per wine gallon, which is more than draft beer (54 cents per wine gallon) but less than beer sold in containers holding under seven gallons (93 cents per wine gallon).⁵¹

3. Illinois

Illinois has the distinction of being the only state to regulate “alcopops” as such. An alcopop, according to its code, is:

a flavored alcoholic beverage or flavored malt beverage that includes (i) a malt beverage containing a malt base or beer and added natural or artificial blending material, such as fruit juices, flavors, flavorings, colorings, or preservatives where such blending material constitutes .5% or more of the alcohol by volume contained in the finished beverage; (ii) a beverage containing wine and more than 15% added natural or artificial blending material, such as fruit juices, flavors, flavorings, or adjuncts, water (plain, carbonated, or sparkling), colorings, or preservatives; (iii) a beverage containing distilled alcohol and added natural or artificial blending material, such as fruit juices, flavors, flavorings, colorings, or preservatives; or (iv) an alcohol malt beverage containing caffeine, guarana, taurine, or ginseng, where the beverage constitutes 0.5% or more of alcohol by volume.⁵²

⁴⁷ Liquor is defined as “any beverage which contains alcohol obtained by distillation mixed with drinkable water and other substances in solution” CONN. GEN. STAT. ANN. § 433 (West 2008).

⁴⁸ *Id.*

⁴⁹ *Id.* at § 433.

⁵⁰ HAW. REV. STAT. § 244D-1 (2008).

⁵¹ *Id.* at § 244D-4.

⁵² 235 ILL. COMP. STAT. ANN. § 5/6-35 (West 2008).

Such products may not be advertised, promoted, or marketed toward children,⁵³ nor may a malt beverage with an alcohol content of 0.5% or more by volume which contains caffeine, guarana, taurine, or ginseng be sold unless each individual container of the beverage is imprinted with the phrase “contains alcohol” and the alcohol content of the beverage.⁵⁴ This definition, however, is not incorporated into Illinois’ Liquor Control Act of 1934, nor does it affect the rate at which alcopops are taxed.

4. Indiana

Indiana appears to have the most detail definition for this type of category, classifying a “flavored malt beverage” as one that is “made from a malt beverage base that is flavored with aromatic essences or other flavorings in quantities and proportions that result in a product that possesses a character and flavor distinctive from the malt beverage base and is distinguishable from other malt beverages.”⁵⁵ Furthermore, “[t]he label, packaging, container, and any advertising or depiction of the alcoholic beverage disseminated, broadcast, or available in Indiana do not contain any of the following words, or a derivative, version, or non-English translation of the following words,” which include various types of beer, cider, framboise, lambic, draft, liquor, bitter, or brew.⁵⁶ Nevertheless, the phrase “flavored beer” may appear once on the label in type not taller than two millimeters.⁵⁷ A flavored malt beverage “is not distributed in aluminum or other metal containers,” nor does it create “foam that gives the appearance of beer when the alcoholic beverage is poured from its container.”⁵⁸ Despite this exhaustive description, however, flavored malt beverages and beer are in many respects treated the same way under Indiana law,⁵⁹ including the rate of excise tax applied,⁶⁰ and the manner in which they are allowed to be sold by a retailer or dealer.⁶¹ The main difference appears to be that flavored malt beverages can only be sold at retail by those with a liquor dealer’s permit or a wine dealer’s or retailer’s permit.⁶² Also, a person that holds both wine and liquor wholesaler’s permits under Indiana law may not hold a beer wholesaler’s permit; possess, sell, or transport beer; or sell more than 1,000,000 gallons of flavored malt beverages during a calendar year.⁶³ Finally, wholesale beer purchases within the state must be made with cash, while liquor, wine, and flavored malt beverages may be purchased from distillers or wholesalers of wine or liquor on 15 day’s credit.⁶⁴

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ IND. CODE. ANN. § 7.1-1-3-16.7 (West 2008).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *See id.* at §§ 7.1-3-2-4, -5, 7.1-3-6-10, 7.1-3-9-11, 7.1-3-13, 7.1-3-25-2, 7.1-4-7-5, 7.1-5-5-7.

⁶⁰ *Id.* at § 7.1-4-2-1. *See also* §§ 7.1-4-2-2, -8, 7.1-4-8-1, 7.1-4-10-1, 7.1-4-11-4.

⁶¹ *Id.* at § 7.1-5-10-22.

⁶² *See id.* at §§ 7.1-3-3-5, 7.1-3-10-5, 7.1-3-13-3, 7.1-3-14-1, 7.1-3-15-1.

⁶³ *See id.* at § 7.1-3-13-3(d).

⁶⁴ *Id.* at § 7.1-5-10-12.

5. Maine

Maine has a separate “low-alcohol spirits product” category, which means “a product containing spirits that has an alcohol content of 6% or less by volume.”⁶⁵ Such beverages may be sold by wine licensees and are treated the same as wine under the state’s Liquors title, except for the amount of taxes and premiums applied.⁶⁶ The taxes and premiums for low-alcohol spirits amount to \$1.44 per gallon, versus 35 cents per gallon for “malt liquor.”⁶⁷ Any beverage with added spirits, moreover, does not qualify as malt liquor.⁶⁸ The Maine Attorney General’s Office maintains a list of beverages qualifying as low alcohol spirits on its website.⁶⁹

6. Michigan

While Michigan has a separate category for low-alcohol drinks with added colorings and flavorings, its applicability to an alcopop produced by a brewery is unclear. A “mixed spirit drink” means:

a drink produced and packaged or sold by a mixed spirit drink manufacturer or an outstate seller of mixed spirit drink which contains 10% or less alcohol by volume consisting of distilled spirits mixed with nonalcoholic beverages or flavoring or coloring materials and which may also contain 1 or more of the following: (a) Water. (b) Fruit juices. (c) Fruit adjuncts. (d) Sugar. (e) Carbon dioxide. (f) Preservatives.⁷⁰

Noticeably absent from the definition is any mention of a malt base or fermented alcohol. “Beer,” on the other hand, is defined in Michigan as “any beverage obtained by alcoholic fermentation of an infusion or decoction of barley, malt, hops, or other cereal in potable water,”⁷¹ while “spirits” are “alcohol obtained by distillation, mixed with potable water or other substances, or both, in solution, and includes wine containing an alcoholic content of more than 21% by volume, except sacramental wine and mixed spirit drink.”⁷² Of these three categories, most modern FMBs sold in the United States seem least likely to be categorized as mixed spirit drinks, a perhaps ironic or unintended consequence of the 1998 definition. NAMS DL was

⁶⁵ ME. REV. STAT. ANN. tit. 28-A, § 2(16-A) (2008).

⁶⁶ *Id.* at § 13.

⁶⁷ *See id.* at §§ 1365, 1652, 1703. Note however, that 2007 Me. Laws, c. 629, § E-1 raised the excise tax on malt liquor from 25 cents to 54 cents for those manufacturers producing at least 100,000 barrels per year. The enforcement of this new tax has been suspended, however, pending the outcome of a “People’s Veto” question appearing on the November 4, 2008 statewide ballots. *See* MainBusiness.com, Secretary of State Certifies People’s Veto Petitions, Aug. 18, 2008, <http://mainebusiness.maintoday.com/newsdirect/release.html?id=6065>.

⁶⁸ ME. REV. STAT. ANN. tit. 28-A, § 2(18).

⁶⁹ Maine.gov, Re-classified Flavored Malt Beverages, http://www.maine.gov/dps/liqr/news/reclassified_beverages.html (last visited Sept. 24, 2008).

⁷⁰ MICH. COMP. LAWS ANN. § 436.1109(4) (West 2008).

⁷¹ *Id.* at § 436.1105(6).

⁷² *Id.* at § 436.1111(14).

unable to find additional clarification from an authoritative source as to which products are considered mixed spirit drinks under Michigan law.

7. South Dakota

South Dakota has a taxing statute that includes a category similar to that enacted in Michigan. “Diluted beverages,” for tax purposes, are:

alcoholic beverages prepared from the admixture of spirits or wine with water, dairy products, fruit juices, or vegetable juices, to which may be added natural flavors, artificial flavors, sweetening agents, or food additives to produce a beverage distinct and unique from the spirits or wine. In no case does the term, diluted beverages, include beverages which contain in excess of twelve percent alcohol by weight.⁷³

Although this definition seems to be somewhat more inclusive than Michigan’s, South Dakota’s definitions of “distilled spirits” and “malt beverage” also seem broad enough to encompass FMBs.⁷⁴ NAMS DL could find no authoritative source of clarification, so the categorization of FMBs under South Dakota law remains uncertain.

8. Utah

Utah’s “Malted Beverage Act,” enacted in March 2008,⁷⁵ is perhaps the most comprehensive legislative approach to FMBs to date. Under the new law, a “flavored malt beverage” is one:

- (a) that contains at least .5% alcohol by volume;
- (b) that is treated by processing, filtration, or another method of manufacture that is not generally recognized as a traditional process in the production of a beer as described in 27 C.F.R. Sec. 25.55;
- (c) to which is added a flavor or other ingredient containing alcohol, except for a hop extract; and
- (d)(i) for which the producer is required to file a formula for approval with the United States Alcohol and Tobacco Trade and Tax Bureau pursuant to 27 C.F.R. Sec. 25.55; or
- (ii) that is not exempt under Subdivision (f) of 27 C.F.R. Sec. 25.55.⁷⁶

⁷³ S.D. CODIFIED LAWS § 35-5-3 (2008).

⁷⁴ See *id.* at §§ 35-1-1, -9.2.

⁷⁵ 2008 Utah Laws Ch. 391 (S.B. 211).

⁷⁶ UTAH CODE ANN. § 32A-1-105(20) (West 2008).

As of October 1, 2008, these beverages will be regulated as liquor, and manufacturers wishing to distribute such products within the state must have a Utah brewery license or a certificate of approval from the Utah Department of Alcoholic Beverage Control (the UABC) and must file a report with the UABC listing each flavored malt beverage that it wishes to sell.⁷⁷ The UABC may also require the manufacturer to provide it with the statement of process or formula the manufacturer filed with the TTB, and the UABC will have the authority to determine whether a particular beverage should be classified as “beer” or “liquor” under state law.⁷⁸ A listing of approved products in each classification will also be maintained on the UABC’s website.⁷⁹ The UABC additionally has authority to approve or deny the labeling or packaging of a flavored malt beverage, which must comply with various guidelines designed to ensure the product is clearly distinguishable from a non-alcoholic drink.⁸⁰ Unless otherwise specifically authorized, the possession of liquor without an approved label is illegal.⁸¹ Because flavored malt beverages are considered liquor, they may only be sold in state liquor stores and package agencies or by on-premise retailers licensed to sell liquor products.⁸² They are also subject to a statutory markup of at least 86% over UABC’s “landed case cost,” versus at least 64.5% for beer that contains more than 4% alcohol by volume (which is also treated as liquor under Utah law).⁸³ Finally, Utah places various restrictions on the advertising of liquor, which will apparently apply to flavored malt beverages as well.⁸⁴

9. Virginia

Virginia has a “low-alcohol beverage cooler category,” which means:

a drink containing one-half of one percent or more of alcohol by volume, but not more than seven and one-half percent alcohol by volume, and consisting of spirits mixed with nonalcoholic beverages or flavoring or coloring materials; it may also contain water, fruit juices, fruit adjuncts, sugar, carbon dioxide, preservatives or other similar products manufactured by fermenting fruit or fruit juices.⁸⁵

⁷⁷ *Id.* at § 32A-1-803.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *See id.* at § 32A-1-806.

⁸¹ *See id.* at § 32A-12-218.

⁸² *See id.* at §§ 32A-1-107, 32A-2-101, -103, 32A-3-101, -106, 32A-4-101, -106, -201, -206, -401, -406, 32A-5-101, -107, 32A-6-101, -105, 32A-7-101, -106, 32A-12-201, -202, -208, -212, -214, 32A-12-301.

⁸³ *See id.* at §§ 32A-1-05, 32A-1-122. The markups for liquor and heavy beer fall to 47% and 30%, respectively, for certain low-volume manufacturers who apply to the Department for a reduced markup. *Id.* at § 32A-1-122. Utah’s 13% sales tax on wine and liquor was repealed in 2007. 2007 Utah Laws Ch. 284, § 45 (S.B. 205) (enacted March 14, 2007).

⁸⁴ *See* UTAH CODE ANN. § 32A-12-401.

⁸⁵ VA. CODE ANN. § 4.1-100 (West 2008).

Such beverages are generally treated like wine under Virginia’s Alcoholic Beverage Control Act (ABC Act), “except that low alcohol beverage coolers shall not be sold in localities that have not approved the sale of mixed beverages pursuant to § 4.1-124,” and they may only be sold for on-premises consumption by mixed beverage licensees.⁸⁶ Nevertheless, Virginia amended its ABC Act in 2005 to incorporate the federal definition of beer, thereby assuring a broad range of alcopops favorable treatment under the law.

D. States Adopting the Federal Standard

Indeed, in response to intensive industry lobbying, a number of other states – including Maryland,⁸⁷ Minnesota,⁸⁸ Missouri,⁸⁹ Tennessee,⁹⁰ and Washington⁹¹ – have followed the example of Oregon and Virginia and codified the current federal standard.

IV. The Future of FMB Regulation

Legal battles over the status of FMBs are likely to continue and arise in other jurisdictions. Competing groups in Nebraska, for example, have been grappling with the classification issue since at least 2003, when the Nebraska Liquor Control Commission (LCC) reacted to federal findings on FMBs⁹² by notifying wholesalers that it intended to treat the beverages as hard liquor.⁹³ The industry, however, succeeded in delaying implementation of the rule, and legislation was introduced in 2005 to codify the federal standard.⁹⁴ While that legislative effort was unsuccessful, the Attorney General issued a 2006 opinion finding the statutory standard ambiguous and stating that the LCC had authority to classify the products.⁹⁵ Eleven days later, the LCC classified the products as beer, sparking a grassroots campaign by an organization called Project Extra Mile to have the new rule overturned and FMBs classified as spirits.⁹⁶ Eventually the group filed a lawsuit, the court found that proper rulemaking procedures had not been followed, and the case was remanded to the LCC for further proceedings.⁹⁷ On July 31, 2008, the LCC held a public hearing, during which it decided to extend the public comment period before rendering a decision.⁹⁸ A decision remains pending as of this writing.

⁸⁶ *Id.*

⁸⁷ 2008 Md. Laws Ch. 702 (S.B. 745) (became law without the governor’s signature on May 24, 2008).

⁸⁸ MINN. STAT. ANN. § 297G.01(8a) (West 2008).

⁸⁹ MO. ANN. STAT. §§ 311.490, 312.200 (West 2008).

⁹⁰ TENN. CODE ANN. § 57-5-101 (West 2008). Note, however, that Tennessee law caps the alcohol content of beer at 5% by weight. *Id.*

⁹¹ WASH. REV. CODE ANN. § 66.04.010 (West 2008).

⁹² *See supra* note 4.

⁹³ Bob Curley, *Long Fight to Regulate Alcopops Faces Key Hearing in Nebraska*, JoinTogether.org, July 18, 2008, <http://www.jointogether.org/news/features/2008/long-fight-to-regulate.html>.

⁹⁴ *Id.* See L.B. 563, 99th Leg., 1st Sess. (Neb. 2005).

⁹⁵ *Id.* See also 06011 Op. Neb. Att’y Gen. (2006), available at http://www.ago.state.ne.us/agopinions/details.htm?searchStr=1&_search_id=2031.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Nebraska Commission Delays Alcopop Decision, JoinTogether.org., Aug. 6, 2008, <http://www.jointogether.org/news/headlines/inthenews/2008/nebraska-officials-consider.html>.

NAMSD's research indicates that at least 18 different bills seeking to regulate alcopops have been introduced into the legislatures of at least nine different states during 2008. Some of the bills seek to liberalize legal controls, while others seek to regulate alcopops more closely. One leading alcopop manufacturer spent over \$1 million lobbying federal lawmakers and agencies during the first two quarters of 2008 alone.⁹⁹ Given alcopops' profitability to the alcoholic beverage industry and their particular appeal to young drinkers, more action can be expected in courts, legislatures, and before administrative bodies.

⁹⁹ *Diageo Spent \$550,000 Lobbying Government in 2Q*, THOMSON FIN. NEWS, Aug. 14, 2008, available at WL 14:29:22; *Diageo North America spent \$460K lobbying in 1Q*, THOMSON FIN. NEWS, June 27, 2008, available at WL 21:43:34.