

UTAH DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
1625 South 900 West, P.O. Box 30408, Salt Lake City, Utah 84130-0408 | (801) 977-6800

FLAVORED MALT BEVERAGE RECLASSIFICATION

Effective October 1, 2008, flavored malt beverages (FMBs) are classified as liquor, not beer in Utah regardless of the amount of their alcohol content.¹ FMBs may only be sold in state liquor stores and package agencies, and by on-premise retailers licensed to sell liquor products. FMBs may no longer be sold by off-premise beer retailers such as grocery and convenience stores, on-premise beer retailers, or by limited (beer and wine) restaurants.

Utah defines an FMB as a beverage (1) that contains at least .5% alcohol by volume; (2) 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 federal law 27 C.F.R. Sec. 25.55; (3) to which is added a flavor or other ingredient containing any alcohol, except for a hop extract; and (4) 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 that is not exempt under Subdivision (f) of 27 C.F.R. Sec. 25.55.²

By contrast, a traditionally produced beer is defined as a product that: (1) contains at least .5% of alcohol by volume, but not more than 4% of alcohol by volume or 3.2% by weight; (2) is obtained by fermentation, infusion, or decoction of malted grain; (3) may or may not contain hops or other vegetable products; and (4) is referred to as beer, ale, porter, stout, lager, or a malt or malted beverage (other than an FMB).³

Beginning August 1, 2008, a manufacturer or supplier that wants to sell an FMB in Utah on or after October 1, 2008, must file a report with the Utah Department of Alcoholic Beverage Control (DABC) listing each FMB it wants to sell. Otherwise, the product may not be sold in the state.⁴ A copy of the report form is attached and is also available on our website at www.abc.utah.gov. The FMB will then go through the DABC's normal procedures for selecting products it chooses to list and delist.

A manufacturer of a malt beverage may submit evidence that a particular product is not an FMB and should be classified as "beer" not "liquor." However, the product must meet all of the following criteria in order to be exempted:

- (1) does not exceed 4% alcohol by volume or 3.2% alcohol by weight;*
- (2) is obtained by fermentation, infusion, or decoction of a malted grain;*

¹Utah Code Sections 32A-1-1-5(2), (3), (5), (28) and 32A-1-803(1).

²32A-1-105(19).

³32A-1-105(5).

⁴32A-1-803(3).

(3) is produced by processing, filtration, or another method of manufacture that is generally recognized as a traditional process in the production of beer as described in 27 C.F.R. Sec. 25.55; (4) does not have added to it a flavor or other ingredient containing any alcohol, except for a hop extract; and (5) is not one 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 it is exempt under Subdivision (f) of 27 C.F.R. Sec. 25.55.⁵

A copy of an exemption request form is attached and may be downloaded on our website at www.abc.utah.gov. In any case where a manufacturer is seeking an exemption, the DABC will require that the manufacturer provide a copy of the statement of process or formula filed with the United States Alcohol and Tobacco Trade and Tax Bureau pursuant to 27 C.F.R. Sec. 25.55. The DABC will review the request, and if approved, the product may be distributed by beer wholesalers and sold as “beer” in Utah by off-premise and on-premise beer retailers. If disapproved, the manufacturer may appeal the decision to the Utah Alcoholic Beverage Control Commission.

On October 1, 2008, the DABC will begin posting on our website at www.abc.utah.gov a list of all FMBs that have been approved for sale as “liquor” in this state. These will appear as a separate category on the DABC’s regular price list which is updated monthly. The DABC will also post a separate list of those products that have been exempted and may be sold as “beer” in Utah. This list will be updated at least quarterly.

Because FMBs are classified as “liquor” products:

- the mark-up is set by statute at 86% above the landed case cost to the DABC⁶
- FMBs may not be sold, shipped, or transported to anyone in Utah other than the DABC, military installations, and a DABC licensed liquor warehouse facility⁷
- the DABC may order FMBs directly from the manufacturer or supplier
- FMBs may be represented by local industry representative licensees authorized by the manufacturer or supplier or represent the products⁸
- FMB samples may be furnished to the DABC for testing and analysis only in accordance with the procedures outlined in Utah Code Section 32A-12-603(4)(c)
- local industry representatives may sample FMBs only in accordance with procedures outlined in 32A-8-505(6)

GENERAL MALT BEVERAGE LABEL & PACKAGING APPROVAL

⁵32A-1-803(5).

⁶32A-1-122(2). *The mark-up is 47% for brewers producing less than 30,000 proof gallons in a calendar year and that apply to the DABC for a reduced mark-up.* 32A-1-122(4).

⁷32A-8-505(2) and 32A-9-101.

⁸32A-8-501 to -505.

Effective October 1, 2008, any beer, heavy beer, and flavored malt beverage may not be sold in Utah unless the label and packaging of the beverage has been first approved by the Utah Department of Alcoholic Beverage Control (DABC).⁹ Approval will be granted if:

- (1) the label complies with the federal label requirements of 27 C.F.R. Parts 7, 13, and 16; and
- (2) the label and packaging clearly give notice to the public that the malted beverage is an alcoholic beverage (which may be satisfied by including any of the following terms: beer, ale, porter, stout, lager, lager beer, or another class or type designation commonly applied to a malted beverage that conveys by a recognized term that the product contains alcohol).¹⁰

To obtain approval, the manufacturer or supplier must submit a completed “Application for Label and Packaging Approval Form” to the DABC. A copy is attached and also available on our website at www.abc.utah.gov. The following must accompany the form:

- (1) payment of an administrative **fee of \$30.00** made payable to the “Utah Department of Alcoholic Beverage Control” for each application for label and packaging approval;
- (2) a copy of a federal certificate of label approval (COLA) from the Department of Treasury, Tax and Trade Bureau (Form TTB F 5100.31) for each brand and label;
- (3) a complete set of original labels for each size of container. This requires all band, strip, front and back labels appearing on any individual container. Original containers will not be accepted. If original labels cannot be obtained, the following are acceptable:
 - (a) color reproductions that are exact size; or
 - (b) TTB F 5100.31 with the exact size label if printed in color.¹¹

Because heavy beer and flavored malt beverage products may be sold only by the DABC to consumers and on-premise retailers in Utah, label approval for these products need not be applied for until the DABC has decided to list the product for sale in Utah. Any listing will be contingent on label and packaging approval.¹²

An application for approval is required for any revision of a previously approved label.¹³ An application for approval is required for any revision to packaging that significantly modifies the

⁹ “Packaging” means the outer packaging that is visible to a consumer such as a carton, case, or other wrapper of a container. *See* 32A-1-802(2).

¹⁰32A-1-804.

¹¹32A-1-805(2) & (3) and Commission Rule R81-1-27.

¹²R81-1-27.

¹³32A-1-805(5).

notice that the product is an alcoholic beverage. An application for approval is not required for any revision to packaging that relates to subject matter other than the required notice that the product is an alcoholic beverage such as temporary seasonal or promotional themes.¹⁴

The DABC will notify the manufacturer within 30 days after the day on which the application is submitted whether approval has been granted or denied. The time may be extended by the DABC based on unusual circumstances. A manufacturer may appeal any denial to the Utah Alcoholic Beverage Control Commission.¹⁵

The DABC may revoke a previously approved label and packaging approved by the department prior to October 1, 2008, that does not comply with the label and packaging laws. The manufacturer will be notified at least five (5) business days before any revocation and may present written argument or evidence in opposition to the revocation. The manufacturer may appeal any revocation to the Utah Alcoholic Beverage Control Commission.¹⁶ The department may delist any heavy beer or flavored malt beverage product listed by the department prior to October 1, 2008, that does not comply with the label and packaging laws. Any heavy beer or flavored malt beverage product listed by the department prior to October 1, 2008, that did not receive prior label and packaging approval need not submit an application for label and packaging approval if the label and packaging comply with the labeling and packaging laws.

FLAVORED MALT BEVERAGE LABEL AND PACKAGING APPROVAL

In addition to the above general label and packaging requirements for all malted beverages, a flavored malt beverage (FMB) that is labeled or packaged in a manner that is similar to a label or package used for a nonalcoholic beverage must meet the following additional requirements:

- (1) The label on the FMB shall bear a prominently displayed label or a firmly affixed sticker that includes:
 - (a) the statement “alcoholic beverage” or “contains alcohol”; and
 - (b) the alcohol content stated as a percentage of alcohol by volume or by weight which may not be abbreviated.¹⁷
- (2) Any packaging of the FMB shall prominently include, either imprinted on the packaging or imprinted on a sticker firmly affixed to the packaging the statement “alcoholic beverage” or “contains alcohol”.
- (3) The statement “alcoholic beverage” or “contains alcohol” required on the label and

¹⁴R81-1-27.

¹⁵32A-1-805(4).

¹⁶32A-1-805(6).

¹⁷32A-1-806.

packaging must appear:

- (a) in capital letters and bold type;
 - (b) in a solid contrasting background,
 - (c) on the front of the container and packaging;
 - (d) in a format that is readily legible;
 - (e) separate and apart from any descriptive or explanatory information; and
 - (f) in a type size no smaller than 3 millimeters wide and 3 millimeters high for containers and packaging.¹⁸
- (4) The alcohol content statement required on the label must appear:
- (a) in capital letters and bold type;
 - (b) in a solid contrasting background;
 - (c) in a format that is readily legible; and
 - (d) separate and apart from any descriptive or explanatory information.¹⁹

The DABC may reject a label or packaging that appears designed to obscure the required information.

In determining whether or not an FMB is “labeled or packaged in a manner similar to a label or package used for a nonalcoholic beverage”, the DABC may consider in addition to other factors one or more of the following:

- whether the coloring, carbonation, and packaging of the FMB is similar to those of a nonalcoholic beverage or product, or can be confused with a nonalcoholic beverage;
- whether the FMB possesses a character and flavor distinctive from a traditional malted beverage;
- whether the FMB is prepackaged, contains high levels of caffeine and other additives, and marketed as a beverage that is specifically designed to provide energy;
- whether the FMB contains added sweetener or sugar substitutes; or
- whether the FMB contains an added fruit flavor or other flavor that masks the taste of a traditional malted beverage.²⁰

¹⁸R81-1-27.

¹⁹R81-1-27.

²⁰32A-1-806(4).

