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NATIONAL BEER WHOLESALERS ASSOCIATION
Alexandria, Virginia 22314-2944

David K. Rehr
President

August 6, 2003

Chief, Regulation & Procedures Division
Alcohol, Tobacco Tax & Trade Bureau
P.O. Box 50221
Washington, D.C. 20091

Re: Tax and Trade Bureau Notice #4

Dear Chief, Regulation & Procedures Division:

On behalf of our membership, the National Beer Wholesalers Association (NBWA) appreciates the opportunity to comment in support of the proposed standard for flavored malt beverages published in the Federal Register on March 24, 2003, by the Alcohol and Tobacco Tax and Trade Bureau (TTB) pursuant to the rules governing TTB's notice of proposed rulemaking.

NBWA represents more than 1,850 independent beer wholesalers operating throughout the United States. Our members constitute the middle tier of the three-tier beer distribution system established by the 21st Amendment of the United States Constitution and codified in federal and state statutes and regulations.

The three-tier system is based in part on the distinctions among categories of licensed beverages that were determined by Congress during the historical debate on the 21st Amendment. Additionally, of paramount importance during the establishment of the current system of distribution was the concept that each tier of licensed beverage distribution should remain independent.

This heavily regulated three-tier system is an integral part of a broader, complex system with policies and procedures that seek to establish and maintain an orderly marketplace, whereby wholesalers and regulators alike can assure economic accountability to each state and address the concerns of citizens in each state and each community served. To that end, virtually all of our members run family-owned businesses that have been based in the same locality for decades. No other sector of the licensed beverage industry or American industry in general has this local presence and accountability.

Historically, beer and other malt beverages have constituted a unique category in the licensed beverage industry. As an example of the unique character of beer, it bears mentioning that after the repeal of Prohibition, laws were enacted that made beer more accessible to the consumer in order to help achieve temperance goals and restore a stable marketplace in beverages with a lower alcohol content.

With a continued understanding of the unique characteristics of their products, members of NBWA continue to assume their obligations in fostering responsible business practices in the markets they serve. This is further evidenced by the fact that our members work with over 600,000 licensed malt beverage retailers in the U.S.

The current TTB rulemaking is important for a variety of reasons, among them is the fact that the proposed rule looks to balance traditional governmental concerns with new product development.

Flavored malt beverages (FMB) have been popular with consumers at various times over the last fifty years, and the most recent additions in this category have attracted a small, but significant, niche in the overall malt beverage market. The proposed rule strikes the balance sought by TTB and permits brewers and importers to supply our members with new and existing FMB brands while maintaining the integrity of the malt beverage category.

Federal laws defining "beer" and "malt beverage" are essential building blocks in the above-referenced systems of federal and state regulation. A beer, ale or other malt beverage must be the product of fermentation and a brewing process, an art form that dates back thousands of years. The federal definition of "malt beverage" has remained unchanged since 1935, and the definition of "beer" in the Internal Revenue Code dates back to the 1800s.¹

The FMB standard proposed by TTB, commonly referred to as the "0.5% by volume standard," is a straightforward clarification of these long-standing federal policies.

Congress clearly intended to encourage production of malt beverages as opposed to other beverages with higher alcohol content. Production of malt beverages with alcohol content between 0.5% and 3.2% was permitted in 1933 prior to the repeal of most

The term "malt beverage" means a beverage made by the alcoholic fermentation of an infusion or decoction, or combination of both, in potable brewing water, of 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 there from, and with or without the addition of carbon dioxide, and with or without other wholesome products suitable for human food consumption," 27 U.S.C. 211(a)(7).

[t]he term "beer" means beer, ale, porter, stout, and other similar fermented beverages (including sake or similar products) of any name or description containing one-half of 1 percent or more of alcohol by volume, brewed or produced from malt, wholly or in part, or from any substitute therefore. Internal Revenue Code, 26 U.S.C. 5052.

federal laws implementing the 18th Amendment.² This measure was enacted in part to provide an incentive to reestablish a legal, ethical and commercially viable malt beverage industry in the United States.

The standards for licensed beverages established by Congress have been widely adopted by state legislatures and regulatory agencies that play an important role in regulating commerce in licensed beverages under the 21st Amendment. While the primacy of state laws are the basis for all licensed beverage regulation, federal leadership in defining beverage categories is essential to an orderly and efficient U.S. market and permits states to focus their efforts on industry integrity, proper sales practices and other important alcohol policy issues.

TTB's use of an alcohol content level of 0.5% by volume is consistent with dozens of state statutes and regulations. Beer wholesalers have strong records of compliance and cooperation with state officials in attaining these important policy goals, and no public purpose is served in this case by opening up new areas for regulation by individual states.

Making their voices heard as well, organizations representing the alcohol beverage control agencies of many states have formally indicated their support for a uniform and consistent national standard on this issue. Several states have also commented on and communicated outright support for the specific standard proposed by TTB. There are other states that have undertaken or are contemplating unilateral legislative, regulatory or enforcement actions. Absent clear direction from TTB, some states may establish alternative approaches to regulation and distribution of FMBs by amending their existing licensing and regulatory systems. Changes in this area could inevitably lead to unnecessary conflict and disruption in an area where government policy is intended to maintain stability and fairness.

In addition to consistency with long-standing laws and proven public policies, the proposed TTB standard would not adversely affect the alcohol beverage marketplace.

Proponents of alternatives to the TTB proposal have suggested that malt beverage retailers and other industry members would be harmed by the 0.5% standard and that new product development would be hindered. These statements are unfounded.

Hundreds of FMB products have been produced over the years that meet the 0.5% standard. Recently, malt beverage suppliers have demonstrated that products can be formulated under the 0.5% standard with the same clarity, taste profile and other characteristics as existing brands in the marketplace that do not currently meet the proposed standard. Contrary to some claims, the proposed new standard would not harm beer wholesalers or retailers by eliminating or damaging successful brands that have been built through the cooperative efforts of brewers, wholesaler and retailers.

2 P.L. 73-3, March 22,1933.

To further ensure no harm is done to existing successful brands, the notice of proposed rulemaking indicated that TTB is sensitive to the need for a transition period to permit reformulation of any existing products that do not meet the proposed new standard.

NBWA encourages TTB to set an effective date for the final standard that accommodates all reasonable supplier requests articulated in comments submitted in response to Notice No.4. Any potential negative effects on existing brands or products in the stream of commerce should be addressed for suppliers wishing to comply with the formalized FMB standard.

In conclusion, NBWA strongly supports the proposed 0.5% by volume rule. It will help clarify and ensure the integrity of beer. It will also give state regulators and legislators, members of Congress, federal regulators and beer consumers a clearer understanding of what beer is and what beer is not.

NBWA appreciates the opportunity to participate in the TTB rulemaking, and it is our hope that our formal comments will be given careful consideration.

Sincerely,

David K. Rehr