

TABLE 2.—VOLUME OF BEER BASE PRESENT IN FLAVORED MALT BEVERAGES

Volume of flavored malt beverage derived from fermented beer base (Percent)	Number of Flavored Malt Beverages
0–25	95
26–50	4
51–75	1
76–100	14

C. What Conclusions Have We Drawn From this Study?

It is clear from the study's findings that the great majority of the alcohol in most flavored malt beverages is not derived from fermentation of malt and grain. Instead, it is very clear that most of these products' alcohol is derived from distilled spirits contained in added alcohol flavorings. We found that over 75% of the alcohol in most of the flavored malt beverages studied is derived from alcohol flavoring materials, and that in some cases, this figure rose to more than 99%. In contrast, the alcohol derived from flavorings constitutes less than 25% of the overall alcohol in only 4 of the 114 products studied.

A second finding from this study is that most flavored malt beverages contain very little actual beer. Only 15 out of the 114 flavored malt beverages studied contain as much as 50% by volume fermented beer; the remainder of their volume consists of flavors, water, and other ingredients. Two of the flavored malt beverages studied contain only 1% fermented beer by volume.

IV. Establishing a Standard for Added Alcohol

A. ATF Ruling 96–1

As noted in Reader's Note "A" above, references to ATF refer to the agency as it existed in the Department of the Treasury before January 24, 2003. Please note that while the former ATF issued this ruling, it remains in effect and all references to ATF in the ruling should be considered references to TTB. See the Homeland Security Act of 2002, Public Law 107–296, section 1912 (November 24, 2002). This ruling may be accessed on the TTB Web site at: <http://www.ttb.gov/alcohol/info/revrule/revrule.htm>.

For many years, ATF and its predecessors have allowed brewers to use alcohol flavoring ingredients when producing malt beverages. In fact, ATF recognized this practice in 1996 by issuing Ruling 96–1 (ATF Quarterly Bulletin 1996–1, p. 49). For malt beverages in excess of 6% alcohol by

volume (alc/vol), the ruling establishes that a maximum of 1.5% alc/vol may be derived from alcohol flavoring materials. The ruling does not establish a limit on alcohol derived from flavoring materials for malt beverages under 6% alc/vol. Ruling 96–1 also states that ATF would initiate future rulemaking to consider the prohibition, restriction, or limitation on the use of flavor materials containing alcohol at any stage in the production of malt beverages, but that "pending completion of rulemaking, ATF will allow the continued production or importation of fermented beverages which contain alcohol not solely the result of fermentation at the brewery * * *."

B. Standard for Added Alcohol and Alcohol From Fermentation

Neither the IRC nor the FAA Act provides a clear statement as to how much, if any, of a beer's or a malt beverage's overall alcohol content may come from added flavors or other alcohol-containing materials or, conversely, how much of their alcohol content must result from fermentation at the brewery. While neither statute sanctions the direct addition of distilled spirits or other alcohol to beer or malt beverages, we and our predecessors have long allowed flavors, including flavors containing alcohol, to be added to these products. For example, flavors may be added to beer to provide a particular flavor character.

Many States have urged us to define flavored malt beverages and establish regulatory limits on the addition of alcohol to beer and malt beverages through the use of flavors. In the absence of such a Federal definition and regulation, several States have said that they will develop their own definitions for flavored malt beverages.

We believe that the definition of "beer" in the IRC, which refers to beer, ale, porter, stout, and "other similar fermented beverages," requires that a product must derive a substantial portion of its alcohol from fermentation at a brewery since the definition does not contemplate a product that derives most of its alcohol content from distilled spirits. As our study shows, very few products currently marketed as flavored malt beverages meet this standard.

We also believe that a similar standard should apply to the definition of "malt beverage" under the FAA Act, which defines a malt beverage as a product made from the fermentation of malted barley with hops. While the definition in the Act allows for the addition to malt beverages of "other wholesome food products" such as

flavors, we do not believe that Congress intended for such added materials to be a malt beverage's dominant ingredient or source of most of its alcohol content.

For these reasons, the Treasury Department and TTB propose to delineate how much of the alcohol content of a beer or malt beverage must be derived from fermentation at the brewery, and how much of the product's alcohol content may be derived from alcohol added through the use of flavors and other ingredients containing alcohol.

C. What Is the Significance of 0.5% Alcohol by Volume?

The Department of the Treasury and TTB consider one-half of one percent alcohol by volume (0.5% alc/vol) to be the dividing point between an alcohol beverage subject to internal revenue tax and a beverage containing alcohol that is not subject to tax as an alcohol beverage. This dividing point is recognized in IRC § 5052, which defines beer as containing one-half percent alcohol or more by volume. While the IRC does not establish an alcohol content threshold for wine or distilled spirits, TTB regulations at 27 CFR 24.10 use the same threshold, 0.5% alc/vol, as the distinction between a taxable wine and a beverage that is not subject to tax as wine on removal from a winery. In sum, the Treasury Department and its alcohol taxation agencies have historically used the 0.5% alcohol by volume threshold as a dividing line between alcohol products subject to one type of taxation or another.

The presence of alcohol in many beverage products is widespread, from juice, soft drinks, and soda, to cereal beverages made by brewers. For soft drinks and some other beverages, the small amount of alcohol present is usually derived from the use of flavoring materials containing distilled spirits. However, where the alcohol content in such a beverage product reaches 0.5% alc/vol, the product would be subject to the internal revenue excise tax for distilled spirits products. Such beverage products containing as much as 0.5% alc/vol clearly meet the statutory definition of distilled spirits.

In the absence of specific statutory language stating otherwise, we believe that IRC § 5052 supports a regulation 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 or other materials, as a distilled spirits product. Under our proposed rule, such products would be taxed and classified as distilled spirits.