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**ABC ADVISORY OPINION 2020-003**

January 28, 2021

- Question: “Can wine spritzers under 7% ABV be sold at retail stores where the sales of staple groceries exceed 10% or greater of gross sales receipts?”<sup>1</sup>
- Requested by: Charles George  
Executive Director  
Wine & Spirits Wholesalers of Kentucky
- Syllabus: Wine spritzers under 7% ABV are “weak ciders” as defined by KRS 241.010(70) and can therefore be sold at grocery stores.
- Statutes construed: KRS 241.010(38), (70), and (74); KRS 243.230 (5)
- Legal authority: KRS 241.010(38), (70), and (74); 21 USC Sec 321(2)(f); 26 USC Sec 5041(1); 27 USC Sec 211(6)

*Opinion of the Department of Alcoholic Beverage Control*

The Requester, Charles George, Executive Director of Wine and Spirits Wholesalers of Kentucky, (hereinafter “the Requester”) has asked that the Department of Alcoholic Beverage Control (hereinafter the “Department”) deem wine spritzers to be “wine” and regulate them as

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<sup>1</sup> This Advisory Opinion Request (“Request”) was submitted under the process outlined in 804 KAR 6:020. Though this request does not meet the criteria for consideration under 804 KAR 6:020 Section 2(1) as it “present[s] a general question of interpretation, pos[es] a hypothetical situation, [or] involve[s] the activities of third parties” the Department is permitted to issue an advisory opinion on its own initiative in accordance with Section 2(2). As the question posed concerns a matter that the Department previously resolved without promulgating public guidance, the Department now opts to issue this advisory opinion to publicize the Department’s interpretation of the matter in question, namely the legal classification of wine spritzers.

wines in accordance with statute. As asserted by the Requester, “A wine spritzer, as disclosed on numerous brand websites, is typically wine combined with sparkling water, and may include fruit juice and natural flavors.” Because these ingredients include wine, the Requester argues that wine spritzers are, in fact, wine, and should be regulated as wine pursuant to Kentucky statutes. Further, according to the Requester, “the TTB treats wine spritzers and all wine-based products as ‘wine,’ not a malt beverage.”

This matter is not merely a semantic exercise; how wine spritzers are classified determines whether they can be sold in grocery stores. KRS 243.230(5). The Requester also notes that there are significant tax implications—“from \$.50/gallon (wine) to \$.08/gallon (malt beverage), an 84% decrease”—that are determined by how these alcoholic beverages are classified.

The definitions at issue in this Request are KRS 241.010(38), (70), and (74)—namely “malt beverages,” “weak cider,” and “wine,” respectively. “Malt beverages” are defined by statute to include weak ciders. KRS 241.010(38). “Weak cider” is defined by statute as “any fermented fruit-based beverage containing more than one percent (1%) but less than seven percent (7%) alcohol by volume.” KRS 241.010(70). Finally, “wine” is defined by statute as the following:

the product of normal alcoholic fermentation of the juices of fruits with the usual processes of manufacture and normal additions, and includes champagne and sparkling and fortified wine of an alcoholic content not to exceed twenty-four percent (24%) by volume. It includes sake, cider, hard cider, and perry cider and also includes preparations or mixtures vended in retail containers if these preparations or mixtures contain not more than fifteen percent (15%) of alcohol by volume. It does not include weak cider.

KRS 241.010(74). So, both weak ciders and wines are defined under Kentucky statutes as being fermented, fruit-based, alcoholic beverages.

Notably, though the Requester is correct that the TTB taxes wine spritzers as wine, how a beverage is taxed does not define what the beverage is. The tax rate of all “wine” is set by 26 USC Sec. 5041, which defines as “wine” as “all wines (*including imitation, substandard, or*

*artificial wine, and compounds sold as wine*) having not in excess of 24 percent of alcohol by volume.” 26 USC Sec 5041(a) (emphasis added). So, anything labeled as a wine—even artificial wine—is taxed as wine. However, while the TTB *taxes* all “wines” as defined by 26 USC Sec 5041, it only *regulates the labeling* of “wines” as defined by the Federal Alcohol Administration Act (FAAA), which defines “wine” as alcoholic products containing no less than 7% alcohol by volume and no greater than 24% alcohol by volume.<sup>2</sup> 27 USC Sec. 211(6). The Food and Drug Administration (FDA) regulates the labeling of “wines” containing less than 7% of alcohol by volume as “food” pursuant to the Federal Food, Drug and Cosmetic Act, 21 USC Sec. 321(2)(f), and also under the Fair Packaging and Labeling Act and the FDA’s implementing regulations. *See* FDA Compliance Policy Guide (CPG) 7101.04 (Dealcoholized Wine and Malt Beverages-Labeling) and CPG 7101.05 (Labeling – Diluted Wines and Cider with Less Than 7% Alcohol).

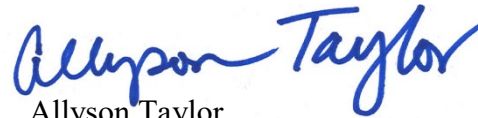
As the FAAA does not consider wine containing less than 7% alcohol by volume to be “wine,” wine spritzers are not required by the TTB to be labeled as “wine” so long as they contain less than 7% alcohol by volume (or more than 24% alcohol by volume), even if the TTB taxes them as wine. The KRS mirrors this distinction, defining “wine” as including fermented, fruit-based alcoholic beverages containing not more than 24% alcohol by volume, and excluding “weak ciders”—fermented, fruit-based, alcoholic beverages containing less than 7% alcohol by volume. *Compare* KRS 241.010(70) & (74). The KRS’s definition of “weak ciders” therefore encompasses wine spritzers, or “wine combined with sparkling water, [that] may include fruit juice and natural flavors,” that contain less than 7% alcohol by volume, even if wine spritzers may be federally taxed as wine.

The KRS’s definition of “malt beverages” includes weak ciders. KRS 241.010(38). So, as weak ciders, the prohibitions of KRS 243.230(5) do not apply to wine spritzers, which can be

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<sup>2</sup> Notably, this is not the only loophole in the TTB’s labeling jurisdiction. The TTB’s labeling jurisdiction vis-à-vis malt beverages is limited only to malt beverages as defined in relevant part by the FAAA as those beverages “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.” 27 USC 211(a)(7). Therefore, it does not include beers made with substitutes for barley or made without hops. *See* TTB Ruling 2008-3 (July 7, 2008).

sold by Kentucky businesses holding licenses to sell malt beverages, even those for whom a substantial part of their business involves the sale of staple groceries.



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Department of Alcoholic Beverage Control