



**COLORADO**

**Department of Revenue**

Enforcement Division - Liquor & Tobacco

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## **BULLETIN 18-08**

REFERENCE: Senate Bill 16-197 – Questions Regarding Transition to Full Strength Beer

DATE: September 10, 2018

### **Colorado Liquor Enforcement Division**

In response to multiple industry inquiries regarding the transition to “full strength” beer that goes into effect January 1, 2019 under Senate Bill 16-197 (“SB 197”), the Liquor Enforcement Division (“LED”) is issuing this Bulletin regarding three issues:

1. Whether fermented malt beverages (“FMB”) manufacturers may make full strength beer and sell it to FMB wholesalers, so that the FMB wholesalers can pre-stage it in their warehouses and delivery vehicles prior to the January 1, 2019, date on which retailers licensed to sell FMB can begin to sell full strength beer under SB 197.
2. Whether the Beer and/or Liquor Codes prohibit the delivery of full strength beer to the licensed premises of retailers licensed to sell FMB in advance of the January 1, 2019, the effective date of the relevant provisions of SB 197, to facilitate the beginning of sales of full strength beer on January 1, 2019.
3. Whether FMB and malt liquors may be commingled at wholesaler warehouses and during transport by wholesalers before or after SB 197 takes effect.

#### **1. Accommodations concerning full strength beer for FMB manufacturers and wholesalers prior to January 1, 2019.**

SB 197 made a number of changes to Article 46 of Title 12 (the “Beer Code”) and Article 47 of Title 12 (the “Liquor Code”). One such change was to make the definitions of FMB and malt liquors virtually the same beginning January 1, 2019. *See* §§ 12-46-103(1) and 12-47-103(19), C.R.S. (effective January 1, 2019). SB 197’s change to the definition of FMB allows FMB licensees to manufacture, distribute and sell so-called “full strength” beer beginning January 1, 2019.

Prior to January 1, 2019, however, these privileges are not in place. *See, e.g.*, § 12-46-103(1), C.R.S. (effective until January 1, 2019). An FMB manufacturer is only permitted to make FMB (not malt liquor). Because under the statutes in effect for the duration of 2018 FMB is defined as beer containing not more than 3.2% alcohol by weight, an FMB manufacturer’s license privileges do not include the privilege manufacturing full strength beer during 2018. Until January 1, 2019, only a

licensed malt liquor manufacturer has within its license privileges the manufacturing of full strength beer.

On the other hand, retailers licensed to sell FMB are permitted to begin selling full strength beer beginning on January 1, 2019. Doing so would be impossible if FMB manufacturers have not yet made full strength beer, and if that full strength beer has not yet been sold to FMB wholesalers, who would on or after January 1, 2019 be authorized to sell it to retailers licensed to sell FMB. For the purpose of appropriately effectuating SB 197 and facilitating a smooth transition to the sale of full strength beer products to consumers beginning on January 1, 2019, by retailers licensed to sell FMB, as allowed under SB 197, some temporary accommodation is appropriate for FMB manufacturers and wholesalers. Accordingly, the Division will not consider the following activities to be an enforcement priority:

- (a) The manufacturing of full strength beer by licensed FMB manufacturers beginning on or after November 1, 2018, so long as such full strength beer is not intended for sale to consumers by FMB retailers prior to January 1, 2019 and so long as such full strength beer is not received by retailers licensed to sell FMB prior to January 1, 2019;
- (b) The sale of such full strength beer by licensed FMB manufacturers to licensed FMB wholesalers, between November 1, 2018 and January 1, 2019, so long as such full strength beer is not intended for sale to consumers by FMB retailers prior to January 1, 2019 and so long as such full strength beer is not received by retailers licensed to sell FMB prior to January 1, 2019; and
- (c) The pre-staging of such full strength beer in licensed FMB wholesalers' warehouses and delivery vehicles prior to January 1, 2019, for delivery to retailers licensed to sell FMB on or after January 1, 2019, so long as such full strength beer is not intended for sale to consumers by FMB retailers prior to January 1, 2019 and so long as such full strength beer is not received by retailers licensed to sell FMB prior to January 1, 2019.

**2. Delivering or pre-staging FMB at the licensed premises of a retailer licensed to sell FMB prior to January 1, 2019 is prohibited.**

Subsections 12-47-901(8)(a) and (b), C.R.S., provide as follows (emphasis added):

(8)(a) It is unlawful for any manufacturer or wholesaler licensed pursuant to article 46 of this title to sell, deliver, or cause to be delivered **to any person licensed pursuant to section 12-47-407 or 12-47-408** any beverage containing alcohol in excess of three and two-tenths percent by weight or four percent by volume, or for any fermented malt beverage retailer licensed pursuant to article 46 of this title to sell, possess, or permit the consumption on the premises of any of the beverages containing alcohol in excess of three and two-tenths percent by weight or four percent by volume, or for any fermented malt beverage retail licensee licensed pursuant to article 46 of this title to hold or operate under any license for the sale of any beverages containing alcohol in excess of three and

two-tenths percent by weight or four percent by volume for the same premises. Any violation of this subsection (8) by any fermented malt beverage licensee licensed pursuant to article 46 of this title **immediately invalidates the license** granted under article 46 of this title.

(b) This subsection (8) is repealed, effective January 1, 2019.

These statutory provisions expressly prohibit FMB wholesalers from engaging in pre-staging of full strength beer **at retailer licensed premises** prior to January 1, 2019, because neither FMB manufacturers nor wholesalers can lawfully “sell, deliver, or cause to be delivered” any full strength beer to a retailer, and a retailer cannot lawfully “possess” such full strength beer before that date. And a violation of these provisions immediately and by operation of law invalidates the license. As such, an accommodation regarding this requirement is not appropriate.

**3. Segregation of FMB and malt liquors continues to be required by the Beer and Liquor Codes after SB 197.**

Some have argued that after the SB 197 changes go into effect on January 1, 2019, the segregation between FMB and malt liquors will no longer be required by law. For the reasons that follow, the Division disagrees, and believes that even after these changes go into effect, FMB and malt liquors must continue to follow separate channels. Although the definitions of FMB and malt liquors will become essentially identical beginning on January 1, 2019, the General Assembly made clear in the legislative declaration for SB 197 that even after January 1, 2019, FMB remains subject to a “separate and distinct regulatory framework.” § 12-46-102(2), C.R.S. (effective January 1, 2019). Section 12-46-102, C.R.S., provides:

(1) The general assembly hereby declares that it is in the public interest that fermented malt beverages shall be manufactured, imported, and sold only by persons licensed as provided in this article and article 47 of this title. The general assembly further declares that it is lawful to manufacture and sell fermented malt beverages subject to this article and applicable provisions of articles 47 and 48 of this title.

(2) The general assembly further recognizes that fermented malt beverages and malt liquors are separate and distinct from, and have a unique regulatory history in relation to, vinous and spirituous liquors, and as such require the retention of a separate and distinct regulatory framework under this article. To aid administrative efficiency, however, article 47 of this title applies to the regulation of fermented malt beverages, except when otherwise expressly provided for in this article.

The General Assembly could have eliminated the separate and distinct regulatory structures, license privileges, and channels for manufacturing, distributing and selling FMB and malt liquors, but chose not to do so. In fact, the idea of making the statutory changes that would be required to

eliminate the separate and distinct regulatory structures in SB 197 for FMB and malt liquors was considered by the SB 197 Statutory Working Group, and addressed in its December 29, 2017 Report to the General Assembly. *See* the discussion of Recommendation 5, beginning on p. 55 of the Report. Although the vast majority of the Working Group members voted in favor of recommending statutory changes that would be required to eliminate the separate licensing schemes for FMB and malt liquor manufacturers, wholesalers and importers, the General Assembly did not make such changes during the 2018 legislative session.

Furthermore, a fundamental premise under the Beer and Liquor Codes is that “[e]ach license issued under this article 47 and article 46 of this title 12 is separate and distinct” and it is “unlawful for any person to exercise any of the privileges granted under any license other than that which the person holds....” § 12-47-301(3)(a), C.R.S. Pursuant to this provision, an FMB licensee may not exercise the privileges of a licensee authorized to manufacture, distribute or sell malt liquors, and vice versa.

Interpreting SB 197 to allow commingling, or the virtual rather than physical separation, of FMB and malt liquors would render the different treatment of FMB and malt liquors in the Beer and Liquor Codes going forward meaningless. Such a construction would both violate the canon of statutory construction that an interpretation that would render part of the statute meaningless should not be adopted. It would also be contrary to the express legislative declaration that “retention of a separate and distinct regulatory framework” for FMB under the Beer Code is required. § 12-46-102(2), C.R.S. In other words, while both licensed FMB manufacturers and malt liquor manufacturers will be authorized to make full strength beer beginning on January 1, 2019, the General Assembly decided to keep in place the separate channels for the manufacture, distribution and sale of each going forward.

Beginning January 1, 2019, while an FMB manufacturer is authorized to make full strength beer, the products it manufactures are still considered FMB, not malt liquors. An FMB manufacturer cannot sell FMB to a malt liquors wholesaler licensee; rather, it must only sell FMB to an FMB wholesaler licensee. § 12-47-104, C.R.S. Similarly, an FMB wholesaler’s licensed privileges only permit it to sell FMB to a retail licensee that is authorized to purchase and sell FMB. *Id.* In other words, both before and after January 1, 2019, a person licensed as an FMB manufacturer cannot sell FMB to a malt liquor wholesaler, and a malt liquor manufacturer cannot sell malt liquors to an FMB wholesaler, because doing so is not within their respective license privileges. Rather, SB 197 maintains the separate and distinct licensed privileges that pertain to each type of license that previously existed, and carries forward the requirement to keep them separate, and in their respective channels of distribution. For example, the licensed privileges of a person holding a malt liquor wholesale license under section 12-47-406(b), C.R.S., permit only the storage, distribution and sale of malt liquors, not FMB.

Similarly, an FMB wholesaler’s licensed privileges do not permit storing, distributing or selling malt liquors, under section 12-46-104(b), C.R.S. To avoid exercising the privileges of a license a person does not hold, persons holding both an FMB wholesale license and a malt liquor wholesale license are required to keep FMB and malt liquors in separate physical locations while in storage and during transport. Furthermore, pursuant to section 12-47-301(3)(a), C.R.S., “[a] **separate**

**license must be issued for** each specific business or business entity and **each geographic location...**” (emphasis added). In addition, under section 12-47-103 (24), “[p]remises’ means a distinct and definite location, which may include a building, a part of a building, a room, or any other definite contiguous area.” Under these provisions, each licensee must have its own separate and distinct licensed premises, which means that its licensed premises may not overlap with that of another licensee. Therefore, even if a person holds both an FMB wholesaler license and a malt liquor wholesaler license, that person is required to maintain physical, not merely virtual, separation of malt liquors and FMB at that wholesaler’s warehouse.

The different treatment of FMB and malt liquors also remains in place for retailers licensed for off-premises consumption under the Liquor Code (i.e., retail liquor stores and liquor-licensed drug stores), and for retailers licensed for either on or off-premises consumption under the Beer Code. For example, a grocery or convenience store holding an FMB license pursuant to section 12-46-104(1)(c), C.R.S., is only permitted to sell FMB, and SB 197 does not change the law on January 1, 2019, to allow it to sell malt liquors. In contrast, both before and after January 1, 2019, a person holding a liquor-licensed drugstore license pursuant to section 12-47-408, C.R.S., is authorized only to sell “malt, vinous, and spirituous liquors,” but is not permitted to sell FMB. *See* § 12-47-408(1)(a)(I), C.R.S. Similarly, both before and after January 1, 2018, the licensed privileges of a person holding a retail liquor store license under section 12-47-407, C.R.S., permits the sale of “only malt, vinous, and spirituous liquors,” and does not include FMB. *See* § 12-47-407(1)(a)(I), C.R.S.<sup>1</sup>

The Division stands ready to work with the liquor industry to draft legislation in advance of the start of legislative session to address outstanding issues from SB 197.

If you have any questions about this bulletin, please contact the LED at 303-205-2306.

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<sup>1</sup> Furthermore, pursuant to section 12-47-901(5)(e), C.R.S., it is unlawful, with a limited exception not applicable here, for any person licensed to sell at retail “to have in possession or upon the licensed premises any alcohol beverage, the sale of which is not permitted by said license.” *See also* Regulation 47-914, 1 CCR 203-2 (“No licensee shall possess, maintain, or permit the possession, on the licensed premises, of any alcohol beverage which it is not licensed to sell or possess for sale”).