

CONSENT CALENDAR

12-13-05

Date:

To: Honorable Mayor and
Members of the City Council

From: Councilmember Dona Spring

Subject: Resolution Regarding the Sale of Alcopops

RECOMMENDATION: that the City Council pass the attached resolution which 1) supports the proper classification of “alcopops” as distilled spirits and 2) opposes any legislation to either reclassify alcopops to a lower classification; and 3) opposes legislation to reduce taxation on this type of alcoholic beverage by reclassification; and 3) requests that taxes from alcopops be used to fund alcohol prevention, treatment and enforcement programs to reduce teenage drinking; and 4) that the City Manager send a letter and this resolution to our state elected officials, the Department of Alcoholic Beverages and to the State Board of Equalization.

BACKGROUND: please see the attached e-mail from Joan Kiley of the Alcohol Policy Networks requesting passage of this resolution.

FINANCIAL IMPLICATIONS: NONE

CONTACT PERSON: Councilmember Dona Spring 981-7140

RESOLUTION N.S.

Marketing and Regulation of Flavored Alcoholic Beverages (Alcopops) and the Prevention of Youth Alcohol Problems

Whereas, this body strives to prevent underage drinking and end the negative consequences associated with underage drinking.

Whereas, flavored alcoholic beverages or “alcopops” are sweet soda pop-style alcohol concoctions, such as Smirnoff Ice, Mike’s Hard Lemonade and Skyy blue, and are popular with youth, particularly adolescent girls;

Whereas, the alcohol industry is pursuing a marketing campaign that makes these fruity, sweet drinks attractive to young people;

Whereas, a recent survey conducted by the American Medical Association found that teenage girls report drinking alcopops more than other alcoholic drinks, while adult women over 21 years of age report alcopops as their least-consumed alcoholic beverages;

Whereas, nearly one in six teenage girls who have consumed alcopops have been sexually active after drinking;

Whereas, one out of four girls who have consumed alcopops have driven after drinking or have been in a car where the driver was drinking alcohol;

Whereas, the producers of alcopops produce these beverages by taking a beer base, removing most of the taste, color, odor and brewed alcohol, and then injecting distilled alcohol, sugar, carbonation, among other ingredients;

Whereas, this production method should result in a classification of alcopops as distilled spirits under California law because California’s definition of distilled spirits encompasses “all dilution and mixtures thereof”;

Whereas, the producers apparently use this production method in order to falsely claim that alcopops should be regulated as beer even though, according to the California Attorney General and a tax annotation of the Board of Equalization, any alcoholic beverage containing distilled alcohol is distilled spirits under California law;

Whereas, the producers illegally market alcopops as a beer instead of distilled spirits contrary to California law to gain marketing advantages used to target underage drinkers, including much lower taxes, ready availability and access to network television for advertising;

Whereas, when informed by the California Attorney General that the beer classification of alcopops violated California law the alcopops producers and distributors sought relief from the California Legislature through AB 417, using a “gut and amend” legislative maneuver to limit public disclosure and review;

Whereas, despite the Governor’s veto of AB 417, the Department of Alcoholic Beverage Control and the Board of Equalization refuse to enforce current law and reclassify alcopops as distilled spirits, to the detriment of California’s young people;

Whereas, if the BOE and ABC properly classified alcopops, the drinks would be subject to the distilled spirits tax rate, providing California with an estimated 40 million dollars in additional revenue;

Whereas, if the BOE and ABC properly classified alcopops, the drinks would only be sold in outlets with general licenses (which include the sale of distilled spirits) and not in outlets with beer and wine licenses, which would drastically limit their availability to underage minors;

Whereas, this body anticipates legislation similar to AB 417 in the next legislative session;

BE IT THEREFORE RESOLVED THAT:

The City of Berkeley will oppose any proposed legislation in the California Legislature to reclassify alcopops as a means to decrease the taxation or availability of alcopops from the taxation and availability laws that are applicable to distilled spirits;

AND BE IT FURTHER RESOLVED THAT:

The City of Berkeley urges the Board of Equalization and the Department of Alcoholic Beverage Control to enforce California law and classify alcopops that contain distilled alcohol as distilled spirits;

AND BE IT FINALLY RESOLVED THAT:

The City of Berkeley will support any proposed legislation that dedicates a portion of the additional tax revenues that are collected as a result of enforcing California law and classifying alcopops as distilled spirits to for community-based underage drinking prevention, treatment and enforcement programs.

***BILL LOCKYER State of California
Attorney General DEPARTMENT OF JUSTICE***

1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Public: (916) 324-5477
Telephone: (916) 324-2512
Facsimile: (916) 322-2630
E-Mail: Steven.Gevercer@doj.ca.gov

August 22, 2005

The Honorable Greg Aghazarian
California State Assembly
State Capitol, Room 4167
Sacramento, CA 95814

RE: Opposition to your Measure, AB 417, as Amended on August 22, 2005

Dear Assembly Member Aghazarian:

The Office of the Attorney General respectfully opposes this measure's proposed amendment to section 23006 of the Business and Professions Code. The amendment, in our view, proposes a significant change in existing law and has major implications with respect to teenage alcohol abuse. The proposal merits a front-and-center policy debate rather than "gut and amend" treatment.

Current California law (the Alcoholic Beverage Control Act, Bus. & Prof. Code, section 23000 et seq.) recognizes three types of alcoholic beverages for tax purposes, namely, distilled spirits, beer, and wine. The first two definitions are relevant here. "Distilled spirits" are defined as "an alcoholic beverage obtained by the distillation of fermented agricultural products, and includes alcohol for beverage use, spirits of wine, whiskey, rum, brandy, and gin, including all dilutions and mixtures thereof." (Bus. & Prof. Code, section 23005.) "Beer" means "any alcoholic beverage obtained by the fermentation of any infusion or decoction of barley, malt, hops, or any other similar product, or any combination thereof in water, and includes ale, porter, brown, stout, lager beer, small beer, and strong beer but does not include sake, known as Japanese rice wine." (Bus. & Prof. Code, section 23006.)

In *People v. Tux Winery Co.* (1937) 21 Cal.App.2d 586, the court found that beverages which comprise combinations of water and various flavorings with fruit spirits or alcohol, in that

The Honorable Greg Aghazarian

August 23, 2005

Page 2

case containing "whiskey flavor," are "distilled spirits" and taxable as such rather than as "wines." The court cited the definition of distilled spirits under the ABC Act, which definition

remains the same today. The key language of the statute, according to the court, was "all dilutions and mixtures thereof." (*Id.* at p. 589.)

California's current definition of "beer" does not include any beverage that mixes beer with distilled spirits, while the definition of "distilled spirits" includes alcoholic beverages that contain any amount of distilled spirits or dilutions or mixtures thereof. The Final Rule promulgated by the Alcohol and Tobacco Tax and Trade Bureau (TTB) (70 Fed. Reg. 194, January 2005) provides that "flavored malt beverages" with no more than 49% of their alcohol content from flavors containing distilled spirits may be treated as "beer" for federal tax and classification purposes. However, it is critical to note, states are not required to follow federal law but may take a different view concerning the classification and taxation of these products (70 Fed. Reg. 230), and they must follow state laws on these issues, regardless of what standard TTB adopts (70 Fed. Reg. 220).

California law does not currently defer to federal law in the taxation or classification of alcoholic beverages. Accordingly, a product that includes beer and any amount or kind of distilled spirit or flavor from distilled spirits is a "distilled spirit" (or dilution or mixture thereof) and should be taxed and classified in California as a distilled spirit.

The policy implications with respect to the change in definition proposed by AB 417, however, are not only fiscal. Flavored malt beverages (FMBs) are sweet-tasting, alcoholic drinks that mimic familiar non-alcoholic beverages like cola, lemonade, iced tea, and fruit-flavored water. Many FMBs are "branded" in the name of a distiller (e.g., Smirnoff Ice, Bacardi Silver, Jack Daniel's Original Hard Cola) in the apparent hope that new drinkers will start with these sweet "branded" drinks and move to the distiller's brand of hard liquor when the drinkers mature.

Unfortunately, studies confirm that much of the advertising for these products is directed at underage persons, and that underage drinkers have developed a thirst for these sweet alcoholic drinks. A 2001 poll found that 51% of teens between the age of 17-18 and 35% between 14-16 have tried FMBs, compared to less than a quarter of adults. The 2004 "Monitoring the Future" Study found that nearly one-third of high school seniors report regularly drinking FMBs. In December 2004 the American Medical Association released Teenage Drinking Survey Results, which found that about 33% of American teenage girls have tried FMBs and 82% of them believe these beverages taste better than beer and other alcoholic drinks.

The Honorable Greg Aghazarian
August 23, 2005
Page 3

Accordingly, given our concerns about the significant change in existing law proposed by AB 417 at this late date, and the public policy direction it charts with respect to combating alcohol abuse, my office must respectfully oppose this measure.

Sincerely,

STEVEN M. GEVERCER
Deputy Attorney General/
Legislative Advocate

For BILL LOCKYER
Attorney General

cc: Senate Floor Analysis
Minority Floor Analysis



FLAVORED MALT BEVERAGES

Request

The Chief of staff for the 53rd Assembly District made the following request:

In light of the recent amendments to AB 417 (Aghazarian), I am curious what the revenue gain to the state would be if in fact malt beverages were taxed at the higher distilled spirits rate, rather than at the rate assigned to beer products.

Background, Methodology, and Assumptions

Article XX, section 22 of the California Constitution bestows primary jurisdiction to interpret the Alcoholic Beverage Control Act, which contains the definitions for the terms “distilled spirits,” “beer,” and “wine,” on the Department of Alcoholic Beverage Control. The Board does not currently possess the expertise or resources to independently analyze any particular alcoholic beverage to determine its composition. So the Board is not currently able to independently classify alcoholic beverages on its own and cannot determine whether a flavored malt beverage’s composition would require it to be classified as beer or distilled spirits.

The legislature has expressly directed the Board to coordinate its efforts to tax beer and wine with those of the Internal Revenue Service, and the Internal Revenue Service currently classifies flavored malt beverages as beer, just like the Department of Alcoholic Beverage Control.

According to beverage industry reports from calendar year 2001 to calendar 2003, flavored malt beverages account for 2.5% to 2.7% of the US beer market. In fiscal year 2003-04, reported taxable gallons of beer to the Board amounted to 670,944,000 gallons. From this, we estimate that 17,445,000 gallons were for flavored malt beverages (2.6% x 670,944,000).

The current tax rate on beer is \$0.20 per gallon, while the current tax rate on distilled spirits under 100 proof is \$3.30 per gallon. This would be an increase in the tax rate of \$3.10 per gallon. A rate increase this large will cause a decline in consumption. The price elasticity of alcohol is usually very small, in the range of -0.1 to -0.2. Also, the price elasticity is different for off-sale (purchased for consumption off the premises) and on-sale (purchased for consumption on the premises) consumption of alcoholic beverages. The rate increases will increase the off-sale price by about 23.5% and the on-sale price by about 12.5%. Applying the price elasticities to these price increases gives a decline in consumption of 4.7% for off-sale sales and 1.3% for on-sale sales. Overall, the decline in consumption due to the price increase would amount to 3.8% or a decline of 670,000 gallons.

If flavored malt beverages were considered to be distilled spirits rather than beer products, it would limit the number of places that could sell this product. This would impact consumption especially in the off-sale market. We have not found much data on the percentages of these products sold at convenience stores or other retail outlets that have only a license to sell beer and wine. However, what information we have found leads us to believe that the portion is large. If we assume that half of these products are purchased in retail stores having only beer and wine licenses, and if we assume that two-thirds of those purchasers will not take the trouble to go to a store that sells all types of liquor, then there would be a decline in consumption of 4,357,000 gallons.

The above two factors would mean that there would be a decline in consumption from 17,445,000 to 12,418,000 gallons. The current excise tax revenue from flavored malt beverages amounts to \$3,489,000. The excise tax revenue from the estimated consumption of flavored malt beverages if they were considered to be distilled spirits would be \$40,979,000. This would be a revenue gain of \$37,490,000.

If flavored malt beverages were considered to be distilled spirits rather than beer products, the manufacturers of those products might decide to reformulate their products. Or they might continue to produce the current products in a smaller quantity and develop new products that would meet the definition of beer products. There is no way for us to predict the industry's response.

Revenue Summary

The revenue gain from considering flavored malt beverages to be distilled spirits rather than beer products would include an increase in excise tax revenues as well as an increase in state and local sales tax revenues. The revenue gain would be as follows:

Excise Tax Revenue Increase	\$ 37.5 million
State Sales & Use Tax (at 5.25%)	\$ 2.0 million
Total State	\$ 39.5 million
Local Sales & Use Tax (at 2.00%)	\$ 0.8 million
District Tax (at 0.67%)	\$ 0.3 million
TOTAL	\$ 40.5 million

David E. Hayes
August 26, 2005

cc: Mr. David Gau
Mr. Dennis Maciel
Ms. Margaret Shedd

-----Original Message-----

From: Joan Kiley [mailto:jlkiley@pacbell.net]

Sent: Tuesday, November 08, 2005 1:38 PM

To: JohnsCathy Kodama; Coleman, Barbara Ann; Glenda Rubin; Tracy Hazelton; Lori Lott; Beth Van Dyke

Subject: Resolution to City of Berkeley

The Alcohol Policy Network would like the City Council to adopt the attached resolution ASAP. We would like the SIG workgroup and BAPAC and the city's AOD task force to do this with us collaboratively. Perhaps there are other groups as well.

The subject matter is "alcopops." We talked briefly about state legislation recently having to do with giving the alcohol industry free rein to continue marketing these products illegally and deceptively. The Governor was persuaded to veto the bill. Now we must let the legislature know that what's been happening is unacceptable. One of the ways is to build support and awareness in the next couple of months before the legislature meets again. Our time is short.

Please read the resolution and give me your thoughts.
Thanks for your time.

Joan

Teenage girls targeted for sweet-flavored alcoholic beverages

Polls show more teen girls see "alcopop" ads than women age 31-44

For immediate release

December 16, 2004

CHICAGO — The American Medical Association (AMA) released the results of two nationwide polls today that reveal the extent of underage consumption and marketing exposure to "alcopops" or so-called "girlie drinks." The AMA expressed concern that hard-liquor brands are using these sweet-flavored malt beverages as "gateway" beverages to attract less-experienced drinkers.

"We're alarmed and concerned with these findings," said J. Edward Hill, president-elect of the AMA. "The percentage of girls who drink is on the rise faster than boys, and the average age of their first drink is now 13. These troubling trends make the aggressive marketing of so-called alcopops even more dangerous."

The AMA said the poll results underscore the need for physicians to counsel young patients and parents of adolescent children on alcohol use, health risks and advocate for policies that protect underage youth from the marketing tactics of the alcohol industry. The polls were funded as part of the AMA's partnership with The Robert Wood Johnson Foundation.

To assist physicians in their educational efforts, the AMA unveiled an informational poster for use in physicians' offices. The Girlie Drinks poster is the first in a series of educational materials that are being developed for physicians' offices that will help start a dialogue on this important health issue. The poster is available online at <http://www.alcoholpolicy.md.com>.

"We urge physicians who care for young people to use these posters to help inform their patients," Dr. Hill said. "Alcopops are marketed as fun, sexy and cool as if they are less risky to drink, but their health and safety consequences

are anything but sexy or cool. The difference in female physiology means that teen girls feel greater impairment from alcohol and encounter alcohol-related problems faster, including brain damage, cancer, cardiac complications and other medical disorders."

Key findings of the two polls released Thursday include:

- * Approximately one-third of teen girls report having tried alcopops, and one out of six have done so in the past six months.

- * More teen girls have had alcopops in the past six months than teen boys (31 percent versus 19 percent).

- * Teen girls report drinking alcopops more than other alcoholic drinks, whereas adult women age 21 or older rank it as their least-consumed alcoholic beverage.

- * For teens who have had alcoholic drinks in the past six months, girls drank more in all categories (beer, wine, alcopops and hard-liquor drinks) than boys.

- * Nearly one in six teen girls who have drunk alcopops in the past six months have been sexually active after drinking.

- * One out of four teen girls who have tried alcopops have driven after drinking or ridden in a car with a driver who had been drinking.

- * One out of five teen girls who have tried alcopops have thrown up, or passed out, from drinking.

- * Half (51 percent) of teen girls have seen alcopops ads.

- * Nearly half of all girls aged 16-18 report seeing alcopops ads on TV, compared to only 34 percent of women 21 or older.

* Teen girls report seeing or hearing more alcopops ads on TV, radio, billboards, the Internet and in magazines more than women 21 or older.

"While the alcohol industry claims to only target legal-age drinkers, their ads reach millions of impressionable young girls," Dr. Hill said. "Previous studies and these new polls show that teenagers see such ads more so than their legal-age counterparts. Parents should be outraged that these products clearly target and reach underage girls.

A study released earlier this year by the Center for Alcohol Marketing and Youth revealed that girls ages 12-20 saw 95 percent more magazine ads for alcopops than women over 21. Women 21-34, the age group identified as the target audience for alcohol ads, were actually less exposed per capita to magazine advertising for alcopops and beer than girls aged 12-20.

The AMA polls reveal similar patterns, indicating that underage children see more alcopops ads. In addition, the polls provide insights into the resulting harms from alcopops consumption. The teen survey found that one in six girls who report trying alcopops were sexually active after drinking, and 25 percent drove a car after drinking or rode with a driver who had been.

The AMA said alcohol consumption contributes to numerous health problems that effect teenage girls as they develop, well into their later years. These include breast cancer, osteoporosis, menstrual disorders, brain function and heart disease. According to the National Institute of Alcohol Abuse and Alcoholism, women drinking at the same rate as men, continue to be at higher risk for certain serious medical consequences of alcohol use including liver, brain and heart damage.

The Journal of Human Resources reported in 2001 that teen girls who binge drink are 63 percent more likely to get pregnant in their teen years. And compared with non-drinkers, girls who drink suffer from higher rates of depression, suicidal thoughts and complications with puberty and menstruation.

###

Editor's Note: The AMA Office of Alcohol and Other Drug Abuse directs two national programs, supported by The Robert Wood Johnson Foundation: Reducing Underage Drinking Through Coalitions and A Matter of Degree: The National Effort to Reduce High-Risk Drinking Among College Students.

For more information, please contact:

AMA Media Relations

(312) 464-4430 or (312) 464-5970