

## What Happens if the Feds classify your Kombucha as Beer?

On March 8, 2018 the Federal Tax and Trade Bureau (the agency in charge of the alcohol, the “TTB”) reminded kombucha producers that TTB regulations on alcohol beverages apply to kombucha that contains 0.5% or more alcohol by volume (“ABV”) at any time during production, when bottled, or at any time after bottling. In the TTB’s eye, most Kombucha would be defined as beer, if the alcohol is derived from fermentation of sugar.

If the TTB begins enforcing compliance in this area, that would mean you, the producer, would be subject to new regulations and an additional agency’s jurisdiction. States could follow suit as well. The biggest changes:

1. Internal Revenue Code provisions that apply to alcohol beverages
2. Labeling
3. Marketing
4. Permits to operate as a beer brewer and licensing your premises for alcohol

This one-sheet briefly addresses the general effects of these changes.

### 1. Internal Revenue Code

When the TTB says that kombucha producers must comply with the Internal Revenue Code (“IRC”), it does not just mean pay a new tax. The larger headache is the other regulations in the IRC that govern record keeping and logistics of transporting and selling an alcoholic beverage.

For example, take bottling. If you currently send your bulk product out for bottling, you can forget about doing that with beer. A brewer may only remove bulk beer in bond for transfer to another brewery if the brewery transferring the bulk beer and the brewery receiving the bulk beer are under the same ownership.

And yes, there is tax involved too. The federal tax for a small producer is currently \$3.50 per barrel (31 gallons). If the states decide to tax kombucha as a beer too, then you will also face a state excise and sales tax.

#### Beer Excise Taxes 2018

Item Description	Current Rate	2020+ Rate	California
Under 2m barrels	\$3.50/ gal	\$7/gal	\$0.20
Over 2m barrels	\$16/gal	\$18/gal	\$0.20

(barrel = 31 gallons)

### 2. Labeling

Producers would have to label all product bottles and larger containers containing over 0.5% ABV with the government warning label:

**GOVERNMENT WARNING:** (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects.

(2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery and may cause health problems.

Bottles, cases and kegs should be marked with: the name or trade name of the brewer; net contents of the container; nature of the product (potentially “beer”); and place of production.

### 3. Formula Approvals

Beers that go through any number of “non-traditional” steps, such as pasteurization or the addition of flavors or non-beverage ingredients, must be approved by TTB prior to production. This means the brewer should submit a formula with the recipe (this can be done online). Typical approval time is about 18 days.

### 4. Permits to operate: Your premises and You

Kombucha that reaches 0.5% ABV at any time during the production process must be produced on a TTB-qualified premises, e.g. a brewery. Additionally, if your product reaches an alcohol content of 1.2% alcohol by volume during production, then you must qualify as a beer brewer, even if the finished product is a non-alcoholic beverage (containing less than 0.5% alcohol by volume). These are onerous obligations, requiring you to submit a lot of personal information about your finances and background, as well as post a bond.

### 5. Which agency is in charge?

The FDA is still your main regulator. Beer –regardless of ABV-- that is made without both malted barley and hops is not subject to the labeling requirements of the FAA Act and must instead comply with FDA labeling requirements. The only areas over which TTB has jurisdiction are the IRC and the government warning labeling.

### 6. What to do?

TTB will decide what producers to pursue based on consumer or competitor complaints or a marketplace survey of its own. That means if TTB picks up a sample of kombucha in the marketplace and determines that the sample has an alcohol content of 0.5% or more ABV, TTB will require the producer to either:

- Take corrective steps, such as adopting a manufacturing method to ensure that fermentation does not continue after bottling; or
- Qualify with TTB as a beer brewer.

To avoid potential liability for violations of the IRC and labeling laws a producer would have to commit to one of these steps. (It is not enough to require retailers to refrigerate the kombucha.)

The other thing you can do is call your congressperson! There is a bill in both houses of Congress called the Keeping our Manufacturers from Being Unfairly Taxed while Championing Health (KOMBUCHA) Act that aims to exempt kombucha produced between 0.5% - 1.25% ABV from alcohol regulation.

*This is not intended as legal advice. If you would like to discuss your own situation and how the TTB could impact your production, please contact Laura Altieri, at the Vine Legal Group, [www.VineLegalGroup.com](http://www.VineLegalGroup.com), [laura@vinelegalgroup.com](mailto:laura@vinelegalgroup.com)*