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DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 25

[Docket No. TTB-2012-0006; T.D. TTB-109; Re: Notice No. 131]

RIN 1513-AB94

Small Brewers Bond Reduction

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Temporary rule; Treasury decision.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau (TTB) amends its regulation that sets forth the penal sum for a brewer's bond where the excise tax liability of the brewer is reasonably expected to be not more than \$50,000 in the current calendar year and the brewer was liable for not more than \$50,000 in such taxes in the preceding calendar year. For a period of three years, the penal sum of the required bond will be \$1,000 for such brewers who file excise tax returns and remit taxes quarterly. In a related proposed rule published elsewhere in this issue of the **Federal Register**, TTB is soliciting comments from all interested parties on this amended regulatory text, on whether TTB should permanently adopt this change, and on other proposed regulatory changes.

EFFECTIVE DATES: This temporary rule is effective from [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER] through December 7, 2015.

FOR FURTHER INFORMATION CONTACT: For questions concerning this document, contact Ramona Hupp, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005; telephone 202-453-1039, ext. 110; or by email at BeerRegs@ttb.gov.

For questions concerning tax payment procedures and quarterly filing procedures, contact the National Revenue Center, Alcohol and Tobacco Tax and Trade Bureau, 550 Main Street, Suite 8002, Cincinnati, OH 45202-5215; telephone toll free 1-877-882-3277; or by email at ttbquestions@ttb.treas.gov.

SUPPLEMENTARY INFORMATION:

Background

TTB Authority

Chapter 51 of the Internal Revenue Code of 1986 (IRC), pertains to the taxation of distilled spirits, wines, and beer (see title 26 of the United State Code (U.S.C.), chapter 51 (26 U.S.C. chapter 51)). With regard to beer, IRC section 5051 (26 U.S.C. 5051) imposes a Federal excise tax on all beer brewed or produced for consumption or sale within the United States or imported into the United States. The rate of the Federal excise tax on beer is \$18 for every barrel containing not more than 31 gallons, and a like rate for any other quantity or for fractional parts of a barrel, with an exception that the rate of tax is \$7 a barrel for the first 60,000 barrels of beer for a domestic brewer that does not produce more than 2 million barrels in a calendar year. Section 5054 (26 U.S.C. 5054) provides that, in general, the tax imposed on beer under section 5051 shall be determined

at the time the beer is removed for consumption or sale, and shall be paid by the brewer in accordance with section 5061 (26 U.S.C. 5061).

IRC section 5061 pertains to the time and method for filing tax returns and payment of the applicable excise taxes. Section 5061 states that Federal excise taxes on distilled spirits, wines, and beer shall be collected on the basis of a return, and that the Secretary of the Treasury (the Secretary) shall by regulation prescribe the period or event for which such return shall be filed.

Section 5061(d)(1) generally requires that the taxes owed on alcohol beverages, including beer, withdrawn under bond, be paid no later than the 14th day after the last day of the semimonthly period during which the withdrawal occurs. Under a special rule, September has three return periods (Section 5061(d)(5)), resulting in a total of 25 returns due each year. Section 5061(d)(4) provides an exception to the semimonthly rule for taxpayers who reasonably expect to be liable for not more than \$50,000 in taxes with respect to beer imposed by 26 U.S.C. 5051 and 7652 in a given calendar year and who had an excise tax liability of not more than \$50,000 the previous calendar year. Under this provision, such taxpayers may pay the excise taxes on alcohol beverages withdrawn under bond on a quarterly basis.

Throughout this preamble, TTB may refer to brewers who are eligible to file excise tax returns on a quarterly basis as “small brewers.” While there is no specific statutory or regulatory definition as to who is a “small brewer,” TTB believes that section 5061(d)(4) of the IRC, which provides an exception to the semimonthly rule for taxpayers whose annual alcohol excise tax liability is not

expected to be more than \$50,000, and who were liable for not more than \$50,000 in such taxes in the preceding calendar year, provides a reasonable standard for determining when a brewer may be considered “small”.

Section 5401(b) of the IRC (26 U.S.C. 5401(b)) provides that all brewers shall obtain a bond to insure the payment of any taxes owed. The amount of such bond shall be “in such reasonable penal sum” as prescribed by the Secretary in regulations “as necessary to protect and insure collection of the revenue.”

The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers chapter 51 of the IRC and its implementing regulations pursuant to section 1111(d) of the Homeland Security Act of 2002, codified at 6 U.S.C. 531(d). The Secretary has delegated various authorities through Treasury Department Order 120–01 (Revised), dated January 21, 2003, to the TTB Administrator to perform the functions and duties in administration and enforcement of these laws. The TTB regulations that implement the provisions of sections 5051, 5054, 5061, and 5401, of the IRC as they relate to beer, are set forth in part 25 of title 27 of the Code of Federal Regulations (CFR).

Penal Sum of the Brewer’s Bond

Penal sum amounts of the brewer’s bond are set forth in 27 CFR 25.93. For brewers filing tax returns and paying tax semimonthly, the penal sum of the bond must be equal to 10 percent of the maximum amount of tax that the brewer will become liable to pay during the calendar year. For brewers filing tax returns and paying tax quarterly, the penal sum of the bond must be equal to 29 percent

of the maximum amount of tax which the brewer will become liable to pay during the calendar year. Under § 25.93(c), the minimum bond amount is set at \$1,000 and the maximum bond amount is \$500,000.

TTB explained the rationale for the bond amount for quarterly taxpayers in a temporary rule, T.D. TTB-41, published in the **Federal Register** on February 2, 2006 (71 FR 5598), which implemented the quarterly tax payment procedures of section 5061(d)(4) of the IRC. TTB permanently added the temporary rule to the regulations in T.D. TTB-94, published on August 24, 2011 (76 FR 52862). In T.D. TTB-41, TTB stated that due to the longer deferral period between the accrual of the tax liability and the actual payment of tax, the 10 percent bond coverage provided for semimonthly filers would be inadequate for small brewers who were eligible and opted to pay taxes quarterly.

Brewer's Bond Amount and Its Effect on Quarterly Filing

In recent meetings, beer industry groups and individual brewers have informed TTB that, for small brewers, the increase of the penal sum amount to 29 percent of the brewer's expected maximum tax liability for the year has deterred such brewers from filing returns on a quarterly basis. A review of TTB's records provides data that support this conclusion. At the end of 2011, 2,026 brewers submitted tax returns to TTB, and 1,846 of those brewers paid less than \$50,000 in excise tax annually and were eligible to file returns quarterly. Further, the majority of those 1,846 brewers paid much less than \$50,000 in excise tax, given that 1,616 of those brewers (87.5 percent) paid annual taxes of \$7,000 or less.

TTB's records also show that of these 1,616 brewers, 841 (52 percent) filed semimonthly rather than quarterly tax returns.

The effect of § 25.93 is that a brewer who files returns quarterly instead of semimonthly may have to increase its bond coverage. For example, a small brewer with an annual Federal excise tax liability of \$40,000 per year who files returns semimonthly must obtain bond coverage of \$4,000 (10 percent of \$40,000). If the same small brewer opts to file its tax returns quarterly rather than semimonthly, the brewer must increase its bond coverage to 29 percent of its maximum annual tax liability, which would result in a bond amount of \$11,600.

The effect of § 25.93 also may mean that small brewers who want to file quarterly would be more than likely ineligible to obtain the minimum bond coverage under § 25.93(c). For example, a small brewer with an annual Federal excise tax liability of \$7,000 would have a semimonthly tax liability of less than \$300 and would need to obtain only the minimum bond coverage of \$1,000. If the same brewer opted to file returns quarterly rather than semimonthly, the quarterly tax liability would be \$1,750, making the brewer ineligible for the minimum bond. Instead, the brewer must increase its bond coverage to 29 percent of its maximum annual tax liability, which would be \$2,030.

In the case of brewers who are eligible to file quarterly returns, TTB has revisited the issue of whether requiring a penal sum of at least 29 percent of a small brewer's maximum annual tax liability is necessary to establish a "reasonable penal sum" that adequately protects and insures collection of the revenue. TTB's tax return statistics reveal that the total sum of Federal excise

tax collected from brewers who are liable for not more than \$50,000 in taxes annually represents a small amount of the total sum of excise tax collected on beer each year. Small brewers paid approximately \$11.5 million, or just over six percent, of the \$177.8 million in Federal excise tax on beer collected in 2011. Similar collections occurred in 2010, with small brewers paying approximately \$10.15 million, or 5.6 percent, of the \$180.6 million in excise tax collected that year.

The Proposed Regulatory Amendment

After discussions with beer industry members and a review of excise tax return data, TTB believes that given the relatively low risk to the revenue, a penal sum of \$1,000 for bonds obtained by small brewers is reasonably sufficient to protect and insure collection of the revenue. TTB also believes that amending the regulatory requirements regarding the penal sum of brewers bonds may result in an increase in quarterly filings and tax payments. In addition, TTB believes an increase in quarterly filings and tax payments will lessen costs and increase efficiencies for both TTB and industry members.

To encourage a greater number of eligible small brewers to file excise tax returns and pay taxes quarterly rather than semimonthly, this temporary rule amends 27 CFR 25.93(a) to add a three-year exception to the current penal sum of the brewer's bond. During this three-year period, for brewers who are eligible to and choose to file their tax returns quarterly, the penal sum of the brewer's bond will be a flat \$1,000. The temporary rule's three-year period will allow TTB to determine if the adjustment to the bond amount results in increased quarterly

tax filing and payment by eligible brewers, and also will allow TTB to confirm the presumption that a \$1,000 penal sum of the bond is sufficient to protect and insure collection of the revenue. This temporary rule does not prohibit brewers who are eligible to file quarterly from filing semimonthly or maintaining their current bond amounts.

Public Participation

To submit comments on these regulations, please refer to Notice No. 131, the notice of proposed rulemaking on this subject published in the Proposed Rules section of this issue of the **Federal Register**.

Regulatory Flexibility Act

Because this regulation does not impose a collection of information on small entities, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) do not apply. Pursuant to section 7805(f) of the Internal Revenue Code, TTB will submit this temporary rule to the Chief Counsel for Advocacy of the Small Business Administration for comment on the impact of the temporary regulations.

Executive Order 12866

It has been determined that this temporary rule is not a significant regulatory action as defined in E.O. 12866. Therefore, a regulatory assessment is not necessary.

Paperwork Reduction Act

There is no new collection of information imposed by this Treasury decision. There is no change in the reporting or recordkeeping burden resulting from a reduced penal sum for certain small taxpayers.

Inapplicability of Prior Notice and Comment and Delayed Effective Date Procedures

TTB is issuing this temporary final rule without prior notice and comment pursuant to authority under section 4(a) of the Administrative Procedure Act (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” We believe prior notice and comment is unnecessary because we expect the affected public will benefit immediately from a reduced bond amount and be encouraged to lessen their reporting burdens. TTB does not believe there will be any objection to this rule since it is optional and reduces regulatory burdens.

Pursuant to the provisions of 5 U.S.C. 553(d)(1) and (d)(3), TTB is issuing this regulatory amendment without a delayed effective date. As provided for in section 553(d)(1), this amendment lowers the bond requirement for small brewers, thereby relieving a restriction which may have prevented such brewers from choosing to pay their taxes quarterly. TTB also has determined that good cause exists to provide industry members with immediate relief from the penal sum requirements under the existing regulations, in accordance with section 553(d)(3).

Drafting Information

Gerald M. Isenberg and Ramona Hupp of the Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, drafted this document.

List of Subjects in 27 CFR Part 25

Beer, Excise taxes, Reporting and recordkeeping requirements, Surety bonds.

Amendments to the Regulations

Accordingly, for the reasons set forth in the preamble, TTB amends 27 CFR, chapter I, part 25 as set forth below.

PART 25—BEER

1. The authority citation for part 25 continues to read as follows:

Authority: 19 U.S.C. 81c; 26 U.S.C. 5002, 5051–5054, 5056, 5061, 5121, 5122–5124, 5222, 5401–5403, 5411–5417, 5551, 5552, 5555, 5556, 5671, 5673, 5684, 6011, 6061, 6065, 6091, 6109, 6151, 6301, 6302, 6311, 6313, 6402, 6651, 6656, 6676, 6806, 7342, 7606, 7805; 31 U.S.C. 9301, 9303–9308.

2. Amend § 25.93 by:

- a. Amending paragraph (a)(2) by removing the word “For” in the first sentence after the heading and replacing it with the words “Except as provided in paragraph (a)(3) of this section, for”; and

- b. Adding a new paragraph (a)(3) to read as follows:

§ 25.93 Penal sum of bond.

(a) * * *

(3) Exception. For a period of three years beginning [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER] for brewers filing tax returns and remitting taxes quarterly under § 25.164(c)(2), the penal sum of the brewer's bond is \$1,000 on beer:

(i) Removed for transfer to the brewery from other breweries owned by the same brewer;

(ii) Removed without payment of tax for export or for use as supplies on vessels and aircraft;

(iii) Removed without payment of tax for use in research, development, or testing; and

(iv) Removed for consumption or sale.

* * * * *

Signed: September 18, 2012.

John J. Manfreda,

Administrator.

Approved: September 28, 2012.

Timothy E. Skud,

Deputy Assistant Secretary
(Tax, Trade, and Tariff Policy).