

MODEL STATUTE BY MARIN INSTITUTE

**FOR REGULATING THE SALE OF CAFFEINATED ALCOHOL BEVERAGES AND
SIZE AND ALCOHOL CONTENT OF FLAVORED MALT BEVERAGES**

STATUTE No. _____

SECTION 1: PURPOSE

The purpose of this statute is to promote the health and safety of the public by limiting persons' access to: (1) premixed alcoholic beverages containing stimulants, such as caffeine; and (2) high-volume flavored malt beverages containing high alcohol content, sold either for on-sale or off-site consumption in the State of [name of State].

Commentary to Section 1:

Section 1 establishes the primary purpose of the statute, the promotion of the "health and safety of the public." Providing the purpose of the law may assist a court or agency with ascertaining the legislative intent when applying or interpreting the law. All findings as described below in Section 2 should support the above purpose.

SECTION 2: FINDINGS

The governing body of [name of state], after completing a legally noticed public hearing, finds the following:

- a) WHEREAS, the 21st Amendment of the United States Constitution grants States the authority to regulate the sale and distribution of alcoholic beverages within its borders.
- b) WHEREAS, alcohol is a leading cause of death and injury, from impaired driving to violence, sexual assault, and suicide, and contributes to family and community disruption, poor school performance, among other social problems.
- c) WHEREAS, sweetened alcoholic beverages appeal to underage drinkers.
- d) WHEREAS, sweeteners and flavorings mask the flavor of alcohol.
- e) WHEREAS, the U.S. Food and Drug Administration, on November 17, 2010, sent letters to four manufacturers warning them that caffeine is an unsafe additive in alcoholic beverages, noting the "evidence that the combinations of caffeine and alcohol in these products pose a public health concern."
- f) WHEREAS, the U.S. Federal Trade Commission also sent warning letters on November 17, 2010, to these companies. Citing incidents "suggesting that alcohol containing added caffeine presents unusual risks to health and safety," the FTC warned that marketing such beverages may constitute an unfair or deceptive practice in violation of the FTC Act.

- g) WHEREAS, combining alcohol with stimulants does not ameliorate the alcohol's negative effects on one's motor coordination and visual reaction times.
- h) WHEREAS, adding caffeine and other stimulants to alcohol is potentially harmful because such additives may impair one's ability to judge his or her own intoxication as well as the ability to judge intoxication in someone else. This may result in increased alcohol consumption and can lead drinkers to wrongly conclude that they are capable of engaging in risky and potentially dangerous activities, such as operating a motor vehicle or engaging in risky sex.
- i) WHEREAS, young people are particularly vulnerable to increased problems associated with the use of alcoholic beverages that contain stimulants as they are more likely to misjudge their own intoxication and more likely to take risks than adults and to suffer high rates of alcohol problems, including alcohol-related traffic accidents, violence, sexual assault and suicide.
- j) WHEREAS, the combination of stimulants and depressants may place undue strain on the heart and central nervous system and the overuse of caffeine can result in acute overdoses that can cause health problems including anxiety, heart palpitation, mania, depression, lapses of judgment, and in extreme cases death.
- k) WHEREAS, the marketing of alcoholic beverages containing caffeine and other stimulants associates the products with nonalcoholic energy drinks and other soft drinks through the use of containers with similar sizes, shapes, and graphics to nonalcoholic drinks. These similarities create the potential for confusion among adult and youth consumers, retailers, parents, law enforcement officers, and others regarding which products contain alcohol.
- l) WHEREAS, the marketing of alcoholic beverages containing caffeine and other stimulants appears to be directed primarily at young people through the use of nontraditional marketing campaigns, including interacting with consumers through social networking websites (e.g., MySpace and Facebook) and product giveaways (e.g., at spring break and extreme sporting events).
- m) WHEREAS, the marketing messages of alcoholic beverages containing caffeine and other stimulants imply that they have energizing effects and fail to disclose to consumers the adverse effects and consequences associated with their consumption.
- n) WHEREAS, manufacturers of caffeinated alcoholic beverages are reformulating these beverages without caffeine and other stimulants but keeping the oversized containers and high alcohol contents.
- o) WHEREAS, inexperienced drinkers are particularly sensitive to alcoholic beverages containing high alcohol contents and may be unaware of the alcohol content due to flavorings and sweeteners.

- p) WHEREAS, the U.S. Dietary Guidelines for Americans defines moderate drinking as “up to 1 drink a day for women and up to 2 drinks for men;” for beer, a drink is 12 ounces.
- q) WHEREAS, the National Institute on Alcohol Abuse and Alcoholism defines a standard drink as a beverage that contains about 0.6 fluid ounces of pure alcohol and considers a 12-ounce beer containing 5% alcohol as one standard drink.
- r) WHEREAS, a single container of 23.5 ounces of 12% alcohol (as is typical of some flavored malt beverages currently on the market) contains 2.82 fluid ounces of alcohol, or 4.7 times the amount of alcohol in a standard drink. In other words, consuming one can is the equivalent of consuming of 4.7 standard drinks.

Commentary to Section 2:

The Findings section establishes the basis upon which the bill is predicated. Each finding should provide evidence supporting the bill’s purpose and establishing the necessity of the legislation. The Findings section may be useful for a court or agency ascertaining the legislative intent when applying or interpreting the law. When the statute is codified in the state’s code the findings may be excluded.

NOW THEREFORE:

BE IT ORDAINED BY THE LEGISLATURE OF THE STATE of _____:

SECTION 3: DEFINITIONS

“Beer” means a beverage:

- (a) contains at least .5% alcohol by volume;
- (b) Is referred to as:
 - (1) Beer;
 - (2) Ale;
 - (3) Porter;
 - (4) Stout;
 - (5) Lager
- (c) “Beer” does not include flavored malt beverage or caffeinated malt beverage.

“Caffeinated alcoholic beverage” means a beverage:

- (a) containing at least .5% alcohol by volume;
- (b) to which is added, or infused with, caffeine and/or other stimulants including, but not limited to, guarana, ginseng and taurine; and
- (c) sold in a pre-mixed container

“Container” means any of the following containing an alcoholic beverage:

- (a) A bottle;
- (b) A can; or
- (c) Other receptacle.

“Flavored malt beverage” means a beverage:

- (a) containing at least .5% alcohol by volume;
- (b) that (as described 27 C.F.R. § 25.55) is treated by processing, filtration, or another method of manufacture that is not generally recognized as a traditional process traditional process in the production of a fermented beverage designated as “beer,” “ale,” “porter,” “stout,” “lager,” or “malt liquor.” For purposes of this subsection:
 - (i) Removal of any volume of water from beer, filtration of beer to substantially change the color, flavor, or character, separation of beer into different components, reverse osmosis, concentration of beer, and ion exchange treatments are examples of non-traditional processes for which you must file a formula.
 - (ii) Pasteurization, filtration prior to bottling, filtration in lieu of pasteurization, centrifuging for clarity, lagering, carbonation, and blending are examples of traditional processes for which you do not need to file a formula.
- (c) to which is added a flavor or other ingredient containing alcohol, except for a hop extract.

“Individually packaged” means a single container.

Commentary to Section 3:

Section 3 establishes the scope of the Model Law by providing a definition of the products subject to its terms. The Model Law will prohibit the sale of supersized “malt beverages.” By including definitions for “beer” and “flavored malt beverages” it is possible to create an exception for craft beer products that may be sold in oversized containers and include higher alcohol contents but are not as problematic as the cheap malt beverage products. The alcopops (referred to as “Flavored Malt Beverages” in Federal regulations) definition is drawn from a law in Utah regarding alcopop taxation, labeling and availability (Utah Code: Title 32A, Chapter 1, Part 8, Malted Beverages Act). This insures that the ban will cover these products regardless of any exceptions focused on beer products.

**SECTION 4: SALE OF CAFFIENATED ALCOHOLIC BEVERAGES AND
OVERSIZED FLAVORED MALT BEVERAGES WITH HIGH ALCOHOL CONTENT**

- (1) No caffeinated alcoholic beverage may be imported, produced, manufactured, distributed or sold at any alcohol outlet in the state.
- (2) No flavored malt beverage:
 - (a) with an alcohol content exceeding 6% alcohol by volume; or
 - (b) in a container exceeding 12 fluid ounces;may be sold or offered for sale.

Commentary to Section 4:

Section 4 describes the prohibited acts.

SECTION 5: ADMINISTRATION AND ENFORCEMENT

The [name of the state agency charged with administering the state's alcohol laws] shall be charged with administering and enforcing the provisions of this statute.

Commentary to Section 5:

Section 5 specifically delegates the administrative and enforcement responsibility of this statute to the state agency that currently oversees the state's alcohol laws. As the state already has such an agency charged with these duties, it is not necessary to create a new body to handle these tasks. If these tasks are handled at the local level, then the state may wish to add language allowing for such a delegation of duties.

SECTION 6: VIOLATIONS, PENALTIES, CIVIL ACTIONS

Any person or business entity that violates any provisions of this statute shall be guilty of an infraction and, upon a finding of such a violation by the [name of the agency charged with administering the state's alcohol laws] shall be subject to administrative assessment of civil penalties.

Commentary to Section 6:

Section 6 delegates the assessment of penalties to the state agency charged with administering the state's alcohol laws. The state can choose to provide specific penalties or reference penalties already established for other violations of the state's alcohol laws.

SECTION 7: APPEALS

Any person upon whom a penalty is imposed pursuant to Section 6 shall have the right to appeal the imposition of such penalty pursuant to the procedures established by [citation to section of state law or administrative code concerning appeals process for violations under the state's alcohol laws].

Commentary to Section 7:

Due process requires some administrative appeal procedure for both impositions of fines and/or penalties. As with Sections 5 and 6, most States have existing mechanisms that address appeals procedures which should be referenced.

SECTION 8: STRICTER LOCAL REGULATION PERMITTED

This statute does not prohibit local cities and counties from enacting any regulation of the sale of alcoholic beverages:

- (1) based on the container size, packaging numbers, or alcohol content that are more restrictive than those contained in the provisions of this statute; or
 - (2) containing stimulants or mixed with energy drinks
- that is more restrictive than those contained in the provision of this statute. No city or county may permit the sale of beverages prohibited in Section 4.

Commentary to Section 8:

Section 8 explicitly recognizes the authority of local governments to enact stricter regulations than those contained in the Model Statute. Since the statute restricts the sale of supersized malt beverages and caffeinated malt beverages, the Section's practical effect is to allow localities to enact ordinance further restricting container sizes, alcohol content or prohibiting the mixing of alcohol with energy drinks. The Section also ensures clarity of the state's purpose by explicitly preempting local ordinances from weakening the bans.

In some states, localities are explicitly preempted by State law from enacting laws that would regulate any type of alcoholic beverage that may be sold by alcohol retailers. In these cases, this provision can either be omitted, maintaining the general grant of exclusive state authority, or a phrase may be advisable that states explicitly that the provision is a specific exception to the general state powers statute.

SECTION 9: EFFECTIVE DATE

The effective date of this statute shall be 3 months from the date of its enactment.