

Part III - Administrative, Procedural, and Miscellaneous

Calculation of Volume of Alcohol for Fuel Credits; Denaturants

Notice 2009-06

SECTION 1. PURPOSE

This Notice provides a temporary safe harbor and a transitional rule to implement recent statutory changes relating to the volume of denaturants that will be treated as alcohol for purposes of certain credits and payments related to the fuel use of alcohol and alcohol fuel mixtures (§§ 34, 40(a), 6426(a), and 6427(e) of the Internal Revenue Code). These changes were made by section 15332 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110-234) (the Food Act). This notice affects alcohol producers, persons that use alcohol as a fuel in a trade or business, persons that sell alcohol at retail for delivery into vehicles, and producers of alcohol fuel mixtures that sell or use the mixture as a fuel in their trade or business.

SECTION 2. BACKGROUND

(a) Overview. Sections 34, 40(a), 6426(a), and 6427(e) provide tax incentives for alcohol and alcohol fuel mixtures that are sold for use or used as a fuel in certain

specified transactions. For these purposes, § 2(b) of Notice 2005-4, 2005-1 CB 289, provides that alcohol has the meaning given to the term in § 48.4081-6(b)(1) of the Manufacturers and Retailers Excise Tax Regulations except that, for purposes of the credit allowed by § 40, alcohol also includes alcohol with a proof of at least 150.

(b) Calculation of the volume of alcohol--(1) Before January 1, 2009. Before January 1, 2009, § 40(d)(4) provides that for purposes of determining the number of gallons of alcohol with respect to which a credit is allowable, the volume of alcohol shall include the volume of any denaturant (including gasoline) which is added under any formulas approved by the Secretary to the extent that such denaturants do not exceed 5 percent of the volume of such alcohol (including denaturants). A similar rule applies to alcohol fuel mixtures. See § 48.4081-6(b)(1) and Notice 2005-4.

(2) After December 31, 2008. Effective for fuel sold or used after December 31, 2008, the Food Act amended § 40(d)(4) to provide that denaturants included in the volume of alcohol may not exceed 2 percent of the volume of such alcohol (including denaturants). The Food Act also added section 6426(b)(5) to apply the same 2-percent limit to claims related to alcohol fuel mixtures under § 34, 6426, or 6427.

(c) Proof. Except as provided in section 2(a) of this notice, alcohol with a proof of less than 190 does not qualify for a credit or payment. The determination of proof is made without regard to added denaturants. See § 40(d)(1)(B) and 6426(b)(4)(A)(ii). Under the 5-percent limit, the amount of pure alcohol contained in each gallon qualifying as 190-proof alcohol may be as little as 90.25 percent of its total volume. Under the 2-percent limit, the amount of pure alcohol contained in each gallon qualifying as 190-

proof alcohol is increased to 93.1 percent of its total volume.

(d) TTB Requirements. Regulations promulgated by the Alcohol and Tobacco Tax and Trade Bureau of the Department of Treasury (TTB) in 27 CFR § 19.1005 provide that alcohol eligible for withdrawal as fuel alcohol must contain 2 gallons of denaturant for each 100 gallons of distilled spirits. To satisfy the TTB rule, denaturants included in the volume of fuel alcohol must exceed 1.96 percent of the volume of the fuel alcohol.

(e) Public comments--(1) Commentators have expressed concern about the ability to meet TTB's 1.96-percent minimum requirement while not exceeding the Food Act's maximum 2-percent denaturant allowance. The commentators indicate that existing denaturing equipment does not allow for denaturing within this 0.04-percent range on a consistent basis. They also indicate that there is no test procedure to accurately measure the amount of denaturant in alcohol after it has been denatured. As a result, ethanol producers and blenders will have no reliable means of determining when denaturants exceed the 2-percent limit. Concerns have also been expressed about alcohol containing 5 percent denaturant that is in transit or stored by alcohol fuel blenders on January 1, 2009.

(2) Because of concerns regarding the accurate measurement of denaturants in alcohol, this notice adopts a temporary safe harbor to allow time to study the problem and determine if there are effective means to test the volume of denaturant in alcohol. Under this safe harbor, the Service will not challenge a claim with respect to denaturants included in alcohol unless the denaturants clearly exceed the Food Act

limit. For this purpose, the Service will treat denaturants as not clearly exceeding the Food Act limit unless there is clear evidence establishing that denaturants exceed 2.5 percent of volume (including denaturants). The safe harbor is available only if no more than 2 percent of the alcohol's volume is disregarded under the rule providing that proof is determined without regard to added denaturants. This will ensure that the amount of pure alcohol provided for fuel use is increased in the amount required by the reduced denaturant limit. This notice also adopts a transition rule for January 2009 to provide relief for alcohol already produced and shipped.

SECTION 3. TEMPORARY SAFE HARBOR AND TRANSITIONAL RULE

(a) Safe harbor. If a credit or payment is allowable with respect to alcohol on account of an event (such as a mixture producer's sale of an alcohol fuel mixture for use as a fuel) occurring after December 31, 2008, and before the date specified in further guidance on this issue, the following rules apply:

(1) The Service will not challenge a claim to a credit or payment with respect to the approved denaturants included in the volume of such alcohol if--

(i) In determining the proof of the alcohol, not more than 2 percent of its volume is disregarded as an added denaturant; and

(ii) There is no clear evidence establishing that added denaturants are more than 2.5 percent of the volume of such alcohol (including added denaturants).

(2) Approved denaturants are any denaturants (including gasoline and nonalcohol fuel denaturants) that reduce the purity of the alcohol and do not exceed the amount of denaturants that may be added to such alcohol under a formula approved by

the Secretary.

(b) Nonproducer rule for January 2009. The volume of alcohol for which a credit or payment is allowable may be determined under the rules in effect before January 1, 2009, if--

(1) The credit or payment is allowable to a person other than the producer of the alcohol; and

(2) The credit or payment is allowable on account of an event (such as a mixture producer's sale of an alcohol fuel mixture for use as a fuel) occurring before February 1, 2009.

SECTION 4. EFFECTIVE DATE

This notice is effective on and after January 1, 2009.

SECTION 5. DRAFTING INFORMATION

The principal author of this notice is Taylor Cortright of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice contact Taylor Cortright on (202) 622-3130 (not a toll-free call).