



ADMINISTRATOR

DEPARTMENT OF THE TREASURY
ALCOHOL AND TOBACCO TAX AND TRADE BUREAU
WASHINGTON, D.C. 20220

SEP 20 2007

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National Association of Attorneys General
2030 M Street, 8th floor
Washington, DC 20036

Dear Attorneys General:

Thank you for your letter of August 20, 2007 in which you expressed concerns about the formulation and marketing of alcohol beverages that contain ingredients typically associated with non-alcohol energy drinks. The Alcohol and Tobacco Tax and Trade Bureau (TTB) shares your concerns and we welcome the opportunity to work with you on these issues.

In your letter, you requested an expansion of TTB's efforts to prevent misleading health-related statements from being made in connection with the marketing of these beverages. TTB shares your concerns about preventing consumer deception in the marketing of alcohol beverages that contain caffeine and other ingredients associated with non-alcohol energy drinks. In particular, it is our position that the use of advertising or labeling statements that imply that consumption of these beverages will have a stimulating or energizing effect, or will enable consumers to drink more of a product without feeling the effects of the alcohol, are misleading and in violation of the regulations. As set forth in more detail below, TTB will continue to monitor alcohol beverage advertisements in the marketplace, and to take appropriate enforcement action against false or misleading claims.

Your letter also urged TTB to request that any company that manufactures a malt beverage containing more than 6% alcohol by volume provide TTB with adequate information to verify that the composition of that beverage complies with the Federal regulations limiting the amount of alcohol that can be derived from sources other than fermentation at the brewery. As set forth in more detail below, our current regulations already require the submission of formulas for certain flavored malt beverages, including those that derive any alcohol from added flavors. TTB also monitors compliance with these requirements through onsite inspections of breweries. We will continue to monitor compliance with these requirements through review of formulas and inspection of breweries.

TTB

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TTB Programs to Prevent Misleading Health-Related Statements in the Promotion of Alcohol Beverages

The Federal Alcohol Administration Act (FAA Act) authorizes the Secretary of the Treasury to issue regulations regarding the labeling and advertising of alcohol beverages in order to prevent deception of the consumer, to provide the consumer with adequate information as to the identity and quality of the product, and to prohibit false or misleading statements. (27 U.S.C. § 205 (e) and (f)). The regulations at 27 CFR Parts 4, 5 and 7 set forth requirements with regard to the labeling and advertising of wines, distilled spirits, and malt beverages, respectively. The FAA Act generally requires industry members to submit labels to TTB for approval prior to use.

Rulemaking on Health Claims and Health-Related Statements

TTB shares your concerns about the health effects of alcohol beverage consumption. In 2003, TTB addressed through rulemaking the use of health claims and health-related statements in the labeling and advertising of wines, distilled spirits, and malt beverages. The regulations set forth strict conditions for the use of health-related statements, including specific health claims and general references to alleged health benefits or health effects, in the labeling or advertising of alcohol beverages. The term "health-related statement" includes statements and claims that imply that a physical or psychological sensation results from consuming the alcohol beverage. Labels and advertisements may not contain any health-related statement that is untrue in any particular or tends to create a misleading impression. The regulations provide that TTB will review such claims on a case-by-case basis and may require as part of the health-related statement a disclaimer or some other qualifying statement to dispel any misleading impression conveyed by the health-related statement. There are more detailed requirements for health-related statements that constitute specific health claims or health-related directional statements.

Label Review Process

TTB examines labels for all alcohol beverages that are subject to the FAA Act. In this fiscal year, ending September 30, we expect to have examined about 120,000 applications for label approval. We expect to have approved about 96,000 of those applications. The balance we will have rejected or the application will have been withdrawn. These latter actions are the result of some deficiency or non-compliance with regulations. Our evaluations of labels are directed to ensuring that the labels contain certain mandatory information, and that they do not mislead consumers.

TTB carefully reviews and approves labels for malt beverages containing caffeine and other ingredients only after assuring that they do not make misleading claims, including misleading health-related claims, in violation of our regulations. These

determinations require a case-by-case analysis of each label in accordance with 27 CFR § 7.29(a)(1) and (e)(2)(i). TTB takes the same approach for distilled spirits and wines in accordance with 27 CFR § 5.42(a)(1) and (b)(8)(ii) and 4.39(a)(i) and (h)(2)(i), respectively.

Advertisements

Although TTB offers a pre-clearance service to industry members for alcohol beverage advertisements, our regulations do not require mandatory pre-approval of advertisements before they appear in the marketplace. We actively review advertisements on the Internet, radio, television, in print, and on outdoor media, as our resources allow, or when potential violations are brought to our attention. Advertisements for alcohol beverages with caffeine and other ingredients associated with non-alcohol energy drinks are reviewed on a case-by-case basis in accordance with 27 CFR § 7.54(a)(1) and (e)(2)(i) for malt beverages, 5.65(a)(1) and (d)(2)(i) for distilled spirits, and 4.64(a)(1) and (i)(2)(i) for wine.

As noted in your letter, in 2005, TTB issued "TTB Announcements" on the advertising of malt beverages, wines and distilled spirits containing ingredients associated with non-alcohol energy drinks. TTB expressed concern about advertisements and marketing promotions that implied that the physical effects of ingesting the extra ingredients in these beverages would allow consumers to drink more of the product without experiencing the negative effects of consuming similar quantities of traditional alcohol beverages. We noted that the Alcoholic Beverage Labeling Act requires a health warning statement on containers of alcohol beverages, warning consumers that, among other things, alcohol consumption impairs one's ability to drive a car or operate machinery. See 27 U.S.C. § 215. The Announcement on malt beverages set forth TTB's position as follows:

It is TTB's policy that the use of advertising statements that imply that consumption of certain alcohol beverages will have a stimulating or energizing effect, or will enable consumers to drink more of a product without feeling the effects of the alcohol, are misleading health-related statements that are in violation of the regulations appearing at 27 CFR 7.54(a)(1) and 7.54(e)(2). Pursuant to our Alcohol Beverage Advertising Program, TTB will take appropriate enforcement action when we determine that there have been violations of the advertising provisions of the FAA Act or its implementing regulations.

Since 2004, we have coordinated an ongoing program of reviewing advertisements for alcohol beverages with caffeine and other ingredients associated with non-alcohol energy drinks. These reviews have disclosed 14 websites containing advertisements that violated TTB regulations. As a result of our action, industry members corrected the non-compliant advertisements or withdrew them from the marketplace. We have raised concerns with statements such as "energy beer,"

“go longer,” “totally charged,” and “keeps the party going all night,” and these statements were removed from the websites.

As you know, TTB recently suspended a wholesaler’s basic permit as a result of advertising violations related to misleading energy claims. A TTB investigation revealed that McKenzie River Corporation (McKenzie) had published print advertisements implying that its alcohol beverage product had a stimulating or an energizing effect on the consumer. Based on the findings of the investigation, McKenzie stipulated that it had willfully violated the advertising provisions of the FAA Act. The company began serving a 7-day suspension of its basic permit on July 16, 2007. McKenzie also submitted a \$200,000 offer in compromise. TTB’s actions in this case reflect how seriously we take this issue.

Referrals

Referrals provide an excellent means for TTB to stay on top of ever-changing alcohol advertisements. Your letter expressed concerns about advertising statements made on the websites for Sparks and Sparks Plus, Bud Extra, and Liquid Charge and Liquid Core. We would note that as of September 11, 2007, the Bud Extra website does not contain the statements to which you objected. We are continuing to review the promotional statements made on the web sites for Sparks and Sparks Plus and Liquid Charge and Liquid Core. We will take appropriate action if we determine that any promotional materials for these products contain misleading health-related statements. We monitor these and similar websites frequently and invite you to continue to make referrals of any statements that you find to be misleading.

Formulation of Flavored Malt Beverages

Flavored Malt Beverage Regulations

On January 3, 2005, we issued Treasury Decision TTB-21, a final rule that clarified the status of flavored malt beverages under the provisions of the Internal Revenue Code of 1986 and the FAA Act. The regulations govern the production, composition, taxation, labeling, and advertising of flavored malt beverages.

The regulations permit the addition of flavors and other non-beverage materials containing alcohol to beers and malt beverages but limit the alcohol contribution from such flavors and other non-beverage materials to not more than 49% of the alcohol content of the product, in accordance with 27 CFR §§ 7.11 (a)(1) and 25.15(b). These regulations also provide that if a malt beverage or beer contains more than 6% alcohol by volume, not more than 1.5% of the volume of the finished product may consist of alcohol derived from flavors and other non-beverage ingredients that contain alcohol. The regulations also require brewers of this type of malt beverage to submit for TTB’s approval a detailed formula prior to making the product, in accordance with 27 CFR § 25.55(a).

Formulation Review

The formulas for flavored malt beverages that are submitted to TTB for pre-approval allow us to verify that the use of flavors is done in accordance with these regulations. During our field investigations, we review producers' batch records to verify that only approved formulas are being used in production. TTB will continue to monitor compliance with these regulatory requirements through review of formulas and review of producer records during field investigations.


State Laws

Finally, as you know, States also share responsibility for the regulation of alcohol beverages. Under the Twenty-First Amendment, States have broad authority to regulate the transportation, sale and distribution of alcohol beverages within their boundaries. States also have the authority to regulate the labeling and advertising of alcohol beverages, and may enforce regulations that are more restrictive than the applicable Federal regulations.

TTB appreciates the important role that the States play in the regulation of alcohol beverages. The partnership between regulators at the Federal and State levels ensures the most efficient use of our resources in this area. We continue to look for opportunities to work together.

Thank you again for bringing your concern for these important issues to our attention. TTB shares your views on the importance of preventing consumer deception in the advertising of alcohol beverages. You can be assured that we are currently studying ways to potentially expand our efforts as to the utilization of our limited resources to effectively and efficiently regulate such advertising within the parameters of TTB's jurisdiction. TTB will continue to carefully monitor advertisements and formulas for compliance with our regulations and we will take aggressive enforcement action when we find violations.

Sincerely yours,



John J. Manfreda