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From: Daniel J. Popeo, David Price, WASHINGTON LEGAL FOUNDATION

COMMENTS
of
WASHINGTON LEGAL FOUNDATION
to the
ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, U.S. DEPARTMENT OF THE TREASURY
Concerning
PROPOSED RULEMAKING ON FLAVORED MALT BEVERAGES

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October 21, 2003

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William Foster, Chief Regulations and Procedures Division Alcohol and Tobacco Tax and Trade Bureau P.O. Box 50221 Washington, D.C. 20091-0221
Attn: Notice No. 4
Re: Flavored Malt Beverages and Related Proposals (2001R-136P)

Dear Mr. Foster:

The Washington Legal Foundation (WLF) would like to submit these comments to the Alcohol and Tobacco Tax and Trade Bureau (TTB) regarding the proposed rule on Flavored Malt Beverages and Related Proposals, 68 Fed. Reg. 14,292 (March 24, 2003) (hereinafter Proposed Rule). WLF believes that the requirements of the Proposed Rule would violate commercial free speech rights protected by the First Amendment. WLF is a nonprofit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation and participates in administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to promoting legal policies that are consistent with a free-market economy and to defending the rights of individuals and businesses to go about their affairs without excessive intervention from government regulators. WLF has been especially active in opposing government regulatory actions that infringe commercial speech rights. For example, WLF successfully challenged the constitutionality of Food and Drug Administration (FDA) restrictions that unconstitutionally impeded the flow of information

regarding off-label uses of FDA-approved products. See Washington Legal Found. v. Friedman,

13 F. Supp.2d 51 (D.D.C. 1998), appeal dismissed, 202 F.3d 331 (D. C. Cir. 2000). TTB has proposed significant new restrictions regarding how flavored malt beverages, or FMBs, must be labeled. TTB proposes to compel brewers to make certain statements on FMB labels that it does not require for other malt beverages. TTB further proposes to ban certain statements from all malt beverage labels and advertising altogether. For the reasons detailed below, the Proposed Rule is constitutionally infirm and would require substantial revision to comport with First Amendment principles.

Background

Flavored malt beverages, or FMBs, are fermented from malt and other fermentable materials. The brewer then adds water, flavors, coloring (in some instances), and carbon dioxide. The result is a drink that has a base of beer, but that looks and tastes different from beer. FMB brands include Mikes Hard Lemonade, Seagrams Coolers, Smirnoff Ice, Bacardi Silver, Bartles & Jaymes Coolers, Jack Daniels Hard Cola, and others. The alcohol content of an FMB is similar to that of most traditional malt beverages 4% to 6% by volume. FMBs are marketed like conventional beers, in bottles and cans. They are

priced competitively with conventional beers and taxed as beers. They are, in short, alternatives for consumers seeking a different taste experience than conventional beer. The Proposed Rule would create two sets of regulatory provisions concerning the information in FMB labels and advertising, one that requires certain statements on FMB labels

and one that prohibits certain statements in malt beverage labeling and advertising. The Proposed Rule would require that any malt beverage that contains any alcohol derived from added ingredients (i.e., FMBs) must state the alcohol content of the beverage on the brand (i.e., front) label. 68 Fed. Reg. at 14,296-97, 14301; proposed 27 C.F.R. 7.22. TTB does not currently require that any malt beverages bear a statement of alcohol content. FMBs would, therefore, join wine and distilled spirits, which must bear a brand label statement of alcohol content. 27 C.F.R. 4.32(a)(3)(wine); 27 C.F.R. 5.32(a)(3) (distilled spirits).1

TTB explains that prevention of consumer confusion justifies this mandatory disclosure: Due to the unique character of these new types of flavored malt beverages many consumers have limited experience with them. At the same time, due to their label appearance and the use of the brand names of well-known distilled spirits, we believe that consumers are likely to be confused as to their actual alcohol content. We believe that consumers are likely to assume that some flavored malt beverages are high in alcohol content like the distilled spirits whose brand names they bear. Likewise, while other brands of flavored malt beverages are not labeled with distilled spirits brand names, their labeling or packaging, which often resembles that of nonalcoholic new age beverages such as juices, sodas, bottled water, and energy drinks, is likely to confuse consumers as to their identity as alcohol products.
68 Fed. Reg. at 14,296-97. Thus, TTB posits that compelling disclosure of alcohol content will prevent consumers from thinking an FMB is either a distilled spirit or a non-alcoholic juice beverage. In addition to the mandated disclosures, the Proposed Rule also would ban brewers from making certain claims on all malt beverage labels and advertising. TTB proposes to prohibit any

1 TTB notes that there are good reasons to require labels of all malt beverages to bear an alcohol content statement. 68 Fed. Reg. at 14297. TTB, however, restricts this rulemaking only to mandatory alcohol content labeling on flavored malt beverages. We may examine the question of mandatory alcohol content labeling for all malt

statement, design, device, or representation in labeling or advertising, including, potentially, an FMBs own brand name which tends to create the impression that a malt beverage: (A) Contains distilled spirits; or (B) Is similar to a distilled spirit; or (C) Has intoxicating qualities. 68 Fed. Reg. at 14,298; proposed 27 C.F.R. 7.29(a)(7)(i); 7.54(a)(8)(i). The Proposed Rule would prohibit statements such as: Tastes like rum The flavor of brandy Serve like a liqueur 68 Fed. Reg. at 14,298. The Proposed Rule would even appear to prohibit statements such as Made by Old Sourmash Whisky Company, City, State, because of the identification of the distilled spirit in the companys name. See 68 Fed. Reg. at 14,298. The Proposed Rule is ambiguous regarding what brand names TTB will permit for FMBs. Under one reading of the Proposed Rule, an FMB brand name may incorporate neither the name of a distilled spirits product, nor a brand name associated with a distilled spirit product. As an example, the Proposed Rule would certainly prohibit Bacardi Rum Silver and might also prohibit the term Bacardi altogether on FMB labels and in FMB advertising altogether because that brand name is so closely associated with rum products. See 68 Fed. Reg. at 14,298; proposed 27 C.F.R. 7.29(a)(7)(ii); 7.54(a)(8)(ii).

beverages in a future notice of proposed rulemaking. 68 Fed. Reg. at 14297.

The bans described above would violate the First Amendment to the United States Constitution if TTB were to implement them as proposed.

The First Amendment Protects The Information that TTB Proposes To Restrict

Over twenty-five years ago, the U.S. Supreme Court held that the First Amendment protects even speech that does no more than propose a commercial transaction. Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976). [T]he free flow of commercial information is indispensable to the proper allocation of resources in a free enterprise system because it informs the numerous private decisions that drive the system. Rubin v. Coors Brewing Co., 514 U.S. 476, 481 (1995) (citations omitted). The Supreme Court has specifically held that information on beer labels is commercial speech protected by the First Amendment. Rubin, 514 U.S. at 481. In that case, the Supreme Court held as unconstitutional regulations of TTBs predecessor, the Bureau of Alcohol, Tobacco, and Firearms (ATF) that prohibited the disclosure of a beers alcohol content in labeling. Following Rubin, the constitutionality of TTBs Proposed Rule will be evaluated in accordance with the commercial speech doctrine set forth in Central Hudson Gas & Elec. Corp. v. Public Serv. Commn of N.Y., 447 U.S. 557, 562 (1980). Rubin, 514 U.S. at 482. Under the Central Hudson framework, courts consider the following factors in determining whether a government restriction on commercial speech survives First Amendment scrutiny:

(1) For commercial speech to come within the First Amendment, it must concern lawful activity and not be misleading. (2) Next, the reviewing court asks whether the asserted governmental interest is substantial. (3) If both inquiries yield positive answers, the reviewing court must determine whether the regulation directly advances the governmental interest asserted. (4) Last, the reviewing court must determine whether the regulation is more extensive than is necessary to serve that interest.

See Rubin, 415 U.S. at 482, citing Central Hudson, 447 U.S. at 566. The Proposed Rule does not implicate the first prong of this Central Hudson analysis. The labeling and advertising of FMBs concern lawful activity. It should also be presumed for purposes of discussion that the statements the Proposed Rule would require or prohibit are literally truthful, e.g., statements such as Tequila flavored should be presumed to be an accurate, truthful statement about the FMB, unless they are shown to be deceptive in a specific case.

The Proposed Rule Would Unconstitutionally Ban Speech

TTBs Proposed Rule would ban outright numerous statements that brewers might wish to make about their products taste, aroma, production process, flavoring, or composition. The Proposed Rule would extend to trade and brand names and fanciful descriptions in both advertising and labeling. Virtually any reference to distilled spirits in a malt beverages labeling and advertising, such as With an aroma like a rich dark rum, or A flavored malt beverage

from the ABC Whiskey Company, would be banned. Indeed, TTBs blanket ban would outlaw use of distilled spirits taste and aroma metaphors in describing a beer. Similarly, it would prohibit brewers from truthfully informing consumers that a particular beer was aged in bourbon barrels or contains malts or other ingredients also used in producing distilled spirits. These restrictions would cut off the flow of information to willing recipients, namely, consumers who are considering whether to buy an FMB. Indeed, it strikes at the very information in which consumers would likely be most interested at the point of purchase: What

is the product? What does it taste like? Who stands behind it? TTB justifies its outright ban on these types of statements because the association drawn between well-known distilled spirits brand names and terms on labels of flavored malt beverages causes confusion for consumers, the media, and State regulatory and taxing organizations. See

Industry Circular No. 2002-4, Department of the Treasury (April 8, 2002). TTB incorporated this Industry Circular into the Proposed Rule, stating the labeling prohibitions would serve to prohibit the misleading impression that flavored malt beverages are distilled spirits or contain distilled spirits. 68 Fed. Reg. at 14,297-98. Referring to distilled spirits in malt beverage advertising or on labels is, in TTBs view, potentially misleading and therefore justifies a total ban upon such references.

The constitutionality of this ban must be judged under the Central Hudson framework. First, TTB must demonstrate that prevention of consumer misapprehension of the source of alcohol in a malt beverage is a substantial government interest. Preventing consumers from being deceived is a substantial government interest. See Pearson v. Shalala, 164 F.3d 650, 656 (D.C.

Cir.1999). While it is possible that prevention of deception in FMB labeling and advertising would satisfy the substantial interest prong of the Central Hudson analysis, TTB has offered no evidence of actual consumer misapprehension at all. Indeed, the information that is available suggests quite the opposite -- that consumers do not care about the origins of the alcohol source in an FMB. For instance, ATF concluded that consumers do not care about the source of alcohol in an FMB in closing its cocktail cooler rulemaking in 1997. Next, TTB must show that the prohibitions of the Proposed Rule advance the governments interest in a direct and material way. Rubin, 514 U.S. at 487, quoting Edenfield v. Fane, 507 U.S. 761, 767 (1993); see also 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 505 (1996). The burden TTB bears is not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. Rubin, 514 U.S. at 487, quoting Edenfield, 507 U.S. at 770-71. A court may well conclude that completely banning potentially deceptive speech would directly advance the governments interest in preventing deception. But rote invocation of the words potentially misleading will not supplant the burden of proof TTB bears. Pearson, 164 F.3d at 659, quoting Ibanez v. Fla. Dept of Bus. & Professional Reg., 512 U.S. 136, 146 (1994). TTB has made no such showing whatsoever, either that the deception it cites is real or that the proposed ban will alleviate that deception. See Rubin, 514 U.S. at 487. It further ignores the fact that these products already are prominently identified with a statement of composition that includes a clear indication that the products are malt beverages, and indicate that they

contain added flavors. TTB cites to nothing more than the possibility that consumers are, or might be, misled by distilled spirit references (i.e., flavor or brand) on malt beverage labels and advertising. TTB must do more. TTB must satisfy its burden of showing how banning distilled spirit references on FMB labeling and in FMB advertising will directly and materially advance the governments interest. Finally, TTB must demonstrate that its ban is no more extensive than is necessary to cure potential consumer confusion about malt beverage composition. See Rubin, 514 U.S. at 490-91; Central Hudson, 447 U.S. at 566. TTB cannot meet this burden. The First Amendment embodies a strong preference for disclosure over suppression. Pearson, 164 F.3d at 658. Indeed, the general thrust of federal alcohol policy appears to favor greater disclosure of information, rather than less. Rubin, 514 U.S. at 484. [I]f the government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so. Thompson v. Western States Med. Ctr., 122 S. Ct. 1497, 1506 (2002). Significantly, in Rubin, the Supreme Court rejected the Federal Alcohol Administration Acts ban on alcohol content statements on beer labels. The Court held that the Acts ban and ATFs implementing regulations were not sufficiently tailored to meet the governments goals because there were alternatives to the prohibition. 514 U.S. at 490. Those alternatives included limiting alcohol content in beers altogether and prohibiting marketing that emphasized high alcohol strength. Id. at 490-91. [T]he availability of these options, all of which could advance the Governments asserted interest in a manner less intrusive to [the brewers] First Amendment rights, indicates that [the ban] is more extensive than necessary. 514 U.S. at 491. See also 44

Liquormart, 517 U.S. at 507-08 (there were alternative means of promoting temperance other than a ban on alcohol price advertising). In choosing suppression over disclosure to cure potential misunderstanding, TTB has disregarded a far less restrictive means. See Pearson, 164 F.3d at 658. The proposed bans are unconstitutional unless TTB can demonstrate with empirical evidence that disclaimers would bewilder consumers and fail to correct for deceptiveness. Whitaker v. Thompson, 248 F. Supp. 2d 1, 13 (D.D.C. 2002), quoting Pearson, 164 F.3d at 659-660. TTB has offered no evidence at all that the banned

statements are misleading or could not be qualified so as to prevent consumers from taking away a misleading impression. A malt beverage label or advertisement with the statement, With an aroma like a rich dark rum, may well not lead consumers to conclude that the beverage contains rum if a clear and prominent disclaimer accompanies the statement. Indeed, it strains credulity for the TTB to assert that a reasonable consumer would interpret a taste descriptor or other use of a distilled spirit term (e.g., aged in used bourbon barrels) as indicating the product contains or is a distilled spirit. The First Amendment requires that TTB prove that disclosures clarifying the content and source of FMBs will not cure any potential for deception in the banned statements. But, TTB has not developed any evidence (such as copy tests or other consumer research) that the obvious alternative to a total ban on speech -- disclaimers -- will not adequately clarify references to distilled spirits. Even where a product affects health -- and the formulation issues in the Proposed Rule clearly do not -- TTB must still meet its burden of justifying a restriction on speech and conclusory assertions such as those TTB presents here will fall far short. Pearson, 164 F.3d at

659. TTB simply has not met its burden.

TTB Would Prohibit What Another Agency Would Require

The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. 44 Liquormart, 517 U.S. at 503. The Supreme Court is very skeptical of government attempts to deprive consumers of accurate information about their chosen products. Id. As the Supreme Court has repeatedly stated, freedom of speech means that the speaker and the audience, not the government, assess the value of the information presented. Id. at 503-04, quoting Virginia State Bd. of Pharmacy, 425 U.S. at 762. TTBs proposed prohibitions are especially troubling and constitutionally infirm because they will deprive consumers of truthful, accurate statements about the content and flavor of FMBs. TTBs proposed bans reflect paternalism at its worst. The agency first assumes (but does not attempt to prove) that consumers are deceived. Then, on this very thin basis, TTB proposes to ban truthful information. Yet such a ban cannot be justified constitutionally by TTBs apparent assumption that consumers are too stupid to understand the meaning of clarifying information on a malt beverage label or advertisement. The solution to consumer confusion regarding FMB products, if such confusion exists at all, is more speech [e.g., alcohol content labeling], not less. More speech to cure potentially erroneous understandings of a foods content is precisely

the solution adopted by the FDA. Under FDA regulations, the prominent front label of a food product (which FDA refers to as the principal display panel) must bear the common or usual name of the food. That common or usual name must accurately identify or describe, in as simple and direct terms as possible, the basic nature of the food or its characterizing properties or ingredients. 21 C.F.R. 102.5(a) (emphasis supplied). Indeed, if, as TTB asserts, use of distilled spirits terms on malt beverage labels and advertisements misleads consumers into believing the products contain or are distilled spirits, under FDA food identity and flavoring regulations, the front label would have to bear a plain statement of what the beverage actually contains. See 21 C.F.R. 102.5(c). In FDA regulations, any consumer misapprehension such as supposedly exists for FMBs is cured through the constitutionally favored solution of more disclosure, rather than an outright ban. In so severely limiting how brewers can truthfully and accurately describe the flavor of their malt beverages, TTB is prohibiting what an agency with far more expertise in food labeling, the FDA, would require. Similarly, FDA flavor regulations require the identification of characterizing flavors in the food when the food contains added flavors. 21 C.F.R. 101.22. Were FDA regulations applicable here, all FMBs containing added flavors would have to identify the characterizing flavors on the product labeling. The Supreme Court has described a similar labeling and advertising regulatory scheme for beer as irrational. Rubin, 514 U.S. at 488. The Proposed Rule is irrational for much the same reasons as the scheme struck down in Rubin. On the basis of nothing more than pure

speculation about consumer confusion, TTB proposes banning truthful information outright. There are numerous alternatives available to TTB that do not rely upon keeping truthful information from consumers and infringing on constitutional rights. The Constitution requires that TTB look to those alternatives first and devise a rational, narrowly tailored scheme for the regulation of FMB labeling and advertising.

CONCLUSION

The Washington Legal Foundation respectfully requests that TTB withdraw its proposed rule with respect to labeling and advertising.

Respectfully submitted,

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