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COMMISSION APPROVED

COMMENTS OF THE BUREAUS OF CONSUMER PROTECTION,
ECONOMICS, AND COMPETITION
OF THE FEDERAL TRADE COMMISSION

Submitted In Response To Bureau Of Alcohol, Tobacco And Firearms Notice Of Proposed Rulemaking, Use Of The Terms "Cereal Beverage," "Near Beer," "Alcohol-Free," And "Non-Alcoholic" In The Labeling And Advertising Of Malt Beverages, Notice No. 610, 51 Fed. Reg. 39,666 (October 30, 1986)

January 28, 1987

NOTE: These comments represent the views of the Bureaus of Consumer Protection, Economics, and Competition of the Federal Trade Commission and do not necessarily represent the views of the Commission or of any individual Commissioner. The Commission, however, has authorized the submission of these comments.

I. INTRODUCTION AND SUMMARY

By Notice of Proposed Rulemaking, No. 610, 51 Fed. Reg. 39,666 (October 30, 1986), the Bureau of Alcohol, Tobacco and Firearms ("BATF") requests comments on its proposal to promulgate regulations that reaffirm existing regulations and further codify its current policies restricting the use of the term "beer" in the labeling and advertising of "dealcoholized" malt beverages. For the reasons set forth below, the Bureaus of Consumer Protection, Economics, and Competition of the Federal Trade Commission ("FTC staff") oppose this proposal. In brief, BATF's current policy -- which it proposes to reaffirm -- precludes manufacturers of a product that is in fact beer with the alcohol removed from advertising and labeling the product as "beer." See Section II below. The only purpose of this restriction appears to be to protect consumers from purchasing this product in reliance on the mistaken belief that they are buying an alcoholic beverage. The market, however, provides strong incentives to sellers to ensure that no such deception or confusion occurs, without the need for government intervention. See Section III below. Rather than protecting drinkers of alcoholic beverages, BATF's restrictions are likely to harm consumers who are seeking healthier and safer substitutes by depriving them of valuable information concerning the alternative of non-alcoholic beer. For these reasons, the restrictions are likely to undermine, rather than promote, BATF's statutory objective of providing

consumers with adequate information as to the identity and quality of malt beverage products. See Section IV below.[1]

II. BACKGROUND

In response to increasing consumer demand for healthier and safer substitutes for alcoholic beverages, the advertising and

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[1] The Notice of Proposed Rulemaking also proposes to incorporate into BATF's regulations current BATF policy restricting the use of the terms "alcohol-free" and "non-alcoholic" in the labeling and advertising of malt beverages. BATF prohibits the use of the term "alcohol-free" in the labeling and advertising of malt beverages containing any alcohol. BATF, however, permits the use of the term "non-alcoholic" in the marketing of malt beverages when: (1) the malt beverage contains less than 0.5 percent alcohol; and (2) the statement "contains less than 0.5 percent alcohol by volume" is included in direct conjunction with that term. A.T.F. Rul. 85-11, A.T.F.Q.B. 1985-3. The FTC staff's views concerning the use of these terms and alcohol content disclosures in the marketing of dealcoholized beverages are set forth in Statement of C. Lee Peeler, Associate Director for Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission before the Subcommittee on Select Revenue Measures, Committee on Ways and Means, U.S. House of Representatives (May 19, 1986), which is incorporated herein by reference. This comment will not further address these aspects of BATF's proposal, except to note that the Food and Drug Administration ("FDA") recently issued proposed regulations permitting de minimis quantities of cholesterol to be present in foods labeled as "cholesterol free," 51 Fed. Reg. 42,584 (November 25, 1986), and has issued final regulations allowing de minimis amounts of salt in "salt free" foods, 21 C.F.R. 105.66. Absent evidence of consumer expectations to the contrary, BATF should pursue a similar approach in the labeling and advertising of malt beverages. Many foods, including soft drinks, condiments, bread, ice cream, pickles and sauerkraut contain amounts of alcohol similar to that remaining in dealcoholized malt beverages. The FDA staff has determined that there is no evidence that the low levels of alcohol contained in these products are unsafe to any consumers. Statement of Curtis E. Coker, Assistant to Director, Division of Regulatory Guidance, Center for Food, Safety and Applied Nutrition, Food and Drug Administration before the Subcommittee on Select Revenue Measures, Committee on Ways and Means, U.S. House of Representatives May 19, 1986. See also Schaefer, On The Effects of Consuming "Non-Alcoholic" Or "De-Alcoholized" Beverages And Health Risks (Prepared for the Federal Trade Commission, January, 1986).

marketing of certain "non-alcoholic" or "dealcoholized" beverages have significantly increased.[2] These products generally are produced from beer or wine by use of vapor pressure techniques that leave only trace amounts of alcohol of less than 0.5 percent by volume, while preserving some of the basic taste, color, smell and character of the original product.[3] The size of this rapidly growing industry is already substantial; up to 8 million cases of

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[2] Along with the BATF, the FTC has concurrent jurisdiction over the advertising and labeling of malt beverages under Sections 5 and 12 of the Federal Trade Commission Act (15 U.S.C. §§ 45 et seq.), which generally prohibit false, deceptive or unfair practices in or affecting commerce. In implementing its statutory mandate, the FTC has acquired substantial economic expertise in understanding the informational roles of advertising and labeling in the processes by which markets respond to consumers. This expertise extends to the examination of such issues as the effects on consumer welfare of specific government-imposed standards, disclosures, and other advertising restrictions. International Harvester Company, 104 F.T.C. 949 (1984). See also, Letter from Federal Trade Commission to Congressman Dingell (October 14, 1983) ("Deception Policy Statement"), and Letter from Federal Trade Commission to Senators Ford and Danforth (December 17, 1980) ("Unfairness Policy Statement"). FTC staff's research on advertising restrictions includes: W. Jacobs et al., Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984) (Federal Trade Commission); R. Bond et al., Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980) (Federal Trade Commission); R. Bond et al., Self Regulation in Optometry: The Impact on Price and Quality, L. and Hum. Behav. (1983),; Drug Product Selection (1979) (Federal Trade Commission); A. Masson and R. Steiner, Generic Substitution and Prescription Drug Prices: Economic Effects of State Drug Product Substitution Laws (1985) (Federal Trade Commission); M. Frankena et al., Alcohol Advertising, Consumption, and Abuse (1985) (Federal Trade Commission); and J. Calfee, Cigarette Advertising, Health Information and Regulation Before 1970 (1985) (Federal Trade Commission).

[3] See Schaefer, supra note 1.

non-alcoholic malt beverages currently are being consumed annually in the United States.[4]

Although non-alcoholic malt beverages have substantially similar characteristics and constituents -- except for the quantity of alcohol -- as the typical alcoholic beer, current BATF regulations[5] preclude manufacturers from labeling and advertising these products as "beer." Specifically, manufacturers are prohibited from using the class designations "beer," "lager beer," "lager," "ale," "porter," "stout," or any other class or type designation commonly associated with malt beverages containing 0.5 percent or more alcohol by volume, in the labeling and advertising of any product containing less than 0.5 percent alcohol by volume. The Notice of Proposed Rulemaking proposes to maintain this prohibition by codifying current BATF policy[6] to provide expressly that malt beverage products containing less than 0.5 percent alcohol by volume shall bear the class designation "malt beverage," "cereal beverage," or "near beer."

Section 5(e) and (f) of the Federal Alcohol Administration Act ("FAA Act"), 27 U.S.C. 205(e) and (f), provides, in general terms, that malt beverage labeling and advertising shall not contain any statement that is false, misleading, deceptive, or

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[4] It has been estimated that the non-alcoholic malt beverage industry will experience a 25 percent annual growth rate. "BATF Rules on 'Alcohol Free' Ad Claims," Advertising Age, January 27, 1986.

[5] 27 C.F.R. 7.24(d) and 7.54(d).

[6] Rev. Rul. 57-322, 1957-2 C.B. 930.

likely to mislead the consumer regarding the product.[7] In addition, Section 5(e) and (f) authorizes the Secretary of the Treasury to prescribe such regulations as will provide the consumer with adequate information as to the identity and quality of the malt beverage product, except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are prohibited unless required by state law.[8]

Since the FAA Act does not specifically address the labeling

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[7] The term "malt beverage" is defined in Section 17(a)(8) of the FAA Act, 27 U.S.C. 211(a)(7), and its implementing regulation, 27 C.F.R. 7.10, as follows:

> [A] beverage made by the alcoholic fermentation of an infusion or decoction, or combination of both, in potable brewing water, of malted barley with hops, or their parts, or their products, and with or without other malted cereals, and with or without the addition of unmalted or prepared cereals, other carbohydrates or products prepared therefrom, and with or without the addition of carbon dioxide, and with or without other wholesome products suitable for human food consumption.

Neither the FAA Act nor BATF's regulations contains any reference to a minimum level of alcohol content before a product is considered a "malt beverage." The Notice of Proposed Rulemaking notes that the legislative history of the FAA Act clearly shows that Congress intentionally omitted any minimum alcohol content from the definition in order to bring all malt beverages within the purview of the statute, regardless of alcohol content. H.R. Rep. No. 1542, 74th Cong., 1st Sess. 16 (1935).

[8] BATF has interpreted this statutory prohibition as precluding statements of <u>actual</u> alcohol content and statements used to represent that the malt beverage is <u>high</u> in alcohol. Thus, BATF has held that the FAA Act does not preclude statements, such as "contains less than 0.5 percent alcohol by volume," indicating that the alcohol content of the malt beverage is <u>below the range</u> of alcohol content found in regular malt beverages. A.T.F. Rul. 85-11, A.T.F.Q.B. 1985-3.

and advertising of a product as "beer," the Notice of Proposed Rulemaking's structure of differing class designations for malt beverages that are above and below 0.5 percent alcohol content presumably is intended to implement the general provisions of Section 5(e) and (f).

III. THE PROPOSED RESTRICTIONS ON THE USE OF THE TERM "BEER" ARE UNNECESSARY TO SAFEGUARD THE CONSUMER FROM DECEPTION OR CONFUSION

The Notice of Proposed Rulemaking gives only one primary justification for the current restrictions -- which it proposes to reaffirm -- on the use of the term "beer." It states that the restrictions are necessary so that consumers will be better informed as to the identity of products containing little or no alcohol. The Notice of Proposed Rulemaking asserts that these restrictions reflect historic trade and consumer recognition that the reference to a product as a "beer" means that the product contains not less than 0.5% alcohol by volume.[9]

It is not clear, however, that this is a sufficient basis for invoking Section 5(e) and (f). The Notice of Proposed Rulemaking cites no evidence to show that restraints are actually necessary in order to safeguard the consumer from deception or confusion as to the "non-alcoholic" nature of the product.

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[9] 51 Fed. Reg. 39,666.

Historic trade usage[10] and general consumer recognition of "beer" as an alcoholic beverage notwithstanding, it is unlikely that consumers will mistake the dealcoholized nature of "non-alcoholic beer." The manufacturers of dealcoholized "beer" have strong incentives to ensure, through advertising and labeling, that consumers are aware that their product retains only trace amounts of alcohol. The target market for this product is consumers who desire less alcohol. If manufacturers do not take effective steps to inform consumers of the non-alcoholic nature of these products, the marketing of these products will not succeed.

It appears that non-alcoholic malt beverages generally command a premium price over their alcoholic counterparts, apparently reflecting higher costs of production. Given these higher costs, manufacturers of non-alcoholic malt beverages will take measures to ensure that their products are not confused with less costly, and lower priced, alcoholic beers. This situation contrasts markedly from the possible profit incentives of a manufacturer of a lower cost product -- for example, gold-plated

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[10] The National Prohibition (Volstead) Act defined "beer" as containing 0.5 percent alcohol or more in order to exempt malt beverages containing less than 0.5 percent alcohol from the prohibitions of the Eighteenth Amendment. Subsequent to repeal of this Amendment, the Internal Revenue Code has retained this definition for tax purposes. As the Notice of Proposed Rulemaking recognizes, these statutory definitions of "beer" merely reflect the understandable legislative determination that malt beverages containing less than 0.5 percent alcohol not be regarded as "alcoholic" beverages for prohibitory or taxing purposes. It is both notable and understandable that the legislature chose not to incorporate such a definition of "beer" into the statutory scheme of the FAA Act governing labeling and advertising -- an act serving entirely different statutory purposes.

jewelry -- in having it confused with a higher cost product -- solid gold.

Lastly, in the unlikely event that the evidence indicates that manufacturers are failing to inform consumers of the dealcoholized nature of their "beer," BATF could ensure that no deception or confusion arose by merely requiring dealcoholized malt beverages that use the term "beer" to disclose on the label that they contain less than 0.5 percent alcohol.[11]

Experience in other markets suggests that this approach is a sound one. BATF's restrictions on the term "beer" are inconsistent with the experience and policies of both the FDA and the FTC concerning the marketing of dealcoholized wine products.[12] Neither the FDA nor the FTC has prohibited the marketing of these dealcoholized products as "wine." Consumer advertising and labeling in that market prominently alert the consumer to both the dealcoholized nature of the wine products and to the fact that the products retain a trace amount of alcohol.[13]

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[11] Indeed, when the term "non-alcoholic" is used in the marketing of these products, BATF currently requires such an alcohol content disclosure. See supra notes 1 and 8.

[12] The FTC has jurisdiction over the advertising of all dealcoholized beverages, and has concurrent jurisdiction with FDA over the labeling of dealcoholized wine. Under an FDA-FTC liaison agreement, as in the case of other foods, over-the-counter drugs and cosmetics, the FDA exercises primary jurisdiction over labeling while the FTC regulates advertising.

[13] See Peeler, supra note 1.

IV. THE PROPOSED RESTRICTIONS ON USE OF THE TERM "BEER" ARE LIKELY TO HARM CONSUMERS BY REDUCING THE FLOW OF VALUABLE PRODUCT INFORMATION

BATF's restrictions on the use of the term "beer" are more likely to undermine than to promote the informational objectives of Section 5(e) and (f). Rather than benefiting consumers, BATF's restrictions on the use of the term "beer" appear likely to injure consumers by depriving them of useful product information.

Advertising and labeling provide information about product characteristics that reduces consumer search costs and enables consumers to choose the particular products or brands that best satisfy their preferences. Unnecessary government regulation can impose obstacles to this communication process that increase firms' costs of effectively advertising. As a result, firms will provide less information and consumer search costs will rise.

Subjective qualities, such as taste, are frequently among the most difficult product attributes to communicate to consumers. Yet, for consumers, such subjective qualities may be among the most material factors in the purchase decision. Here the non-alcoholic product may have many of the visual, smell, and taste characteristics of alcoholic beer, so BATF's prohibition on calling this product "beer" may deprive sellers of the most effective means of providing consumers with valuable information about the product's qualities. Indeed, the restriction may even mislead consumers into believing that there are other significant differences between the products, even if, in fact, there are not. Moreover, BATF's restrictions on the use of terms such as

"ale," "porter," and "stout" may inhibit product development and innovation by manufacturers of dealcoholized malt beverage products. Terms such as these may provide information to consumers concerning distinct malt beverage qualities that can not be easily conveyed by the use of any other terms or descriptions. Thus, BATF's restrictions on the use of these terms may hinder effective marketing of new dealcoholized beverages of these types.

Moreover, the marketing terms permitted by BATF -- particularly "cereal beverage" and "near beer" -- may possess unappealing connotations to consumers. Certainly, BATF should not impose these terms on the manufacturers of non-alcoholic malt beverages without having reliable evidence indicating whether and how the meanings of these terms differ from the meaning of "beer" to consumers. Generally, firms are in a better position than government to make the choices concerning the relative effectiveness of different means of conveying information.[14] In this manner, BATF's restrictions may hinder -- perhaps severely

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[14] Significantly, the dealcoholized malt beverage industry has strongly opposed BATF's restrictions on the use of the term "beer." See, e.g., Cardinal Brewery Fribourg, S.A., Petition For Labeling And Advertising The Alcoholic Content Of Moussy, A Malt Beverage, And Its Class Designation As Beer (February 26, 1986). An Advertising Age article, discussing BATF's restrictions, quotes an industry spokesman as stating:

> The cost of changing the labels and advertising is insignificant. What's significant is that we're losing potential sales because I can't say beer. A consumer doesn't want a light-malt beverage, he wants a beer.

Advertising Age, supra note 4.

-- the marketing of dealcoholized malt beverages. This would be an unfortunate result, given the national commitment to reducing the personal and economic losses caused by the abuse of alcoholic beverages.

V. CONCLUSION

For the above reasons, the FTC staff urges BATF to remove the current restrictions on the use of the term "beer" set forth in its Notice of Proposed Rulemaking. The restrictions appear unnecessary to protect consumers from deception or confusion, and are likely to harm consumers by reducing the flow of valuable product information concerning dealcoholized malt beverages.