



## Food & Beverage ADVISORY ■

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### Alcoholic Beverage Labeling: An Aperitif Toward Compliance and Away from Litigation

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Beverage companies have raced new products to market to meet consumer demand for new alcoholic beverage products, like hard seltzers, flavored distilled spirits, and ready-to-drink beverages, and with countless other products in development. Determining how these beverages are regulated and the role of the Alcohol and Tobacco Tax and Trade Bureau (TTB) and the U.S. Food and Drug Administration (FDA) is the first step in ensuring regulatory compliance.

The TTB is responsible for oversight over labeling and advertising of distilled spirits, certain wines, and malt beverages, which are defined terms under the Federal Alcohol Administration (FAA) Act and TTB's labeling regulations—covering many, but not all, alcoholic beverages. The few categories of alcoholic beverages that do not fall within the scope of the TTB's authority under the FAA Act are subject to FDA labeling requirements under the Federal Food, Drug, and Cosmetic Act. Kinds of alcoholic beverages subject to FDA labeling requirements include, for example, those that do not meet the definitions for "wine" (e.g., diluted wines and cider with less than 7% alcohol) or "malt beverage" (e.g., a hard seltzer that is not made with *both* malted barley and hops).

The jurisdictional divide over alcoholic beverage regulation is set out in a Memorandum of Understanding (MoU) between the TTB and FDA. For example, the TTB defers to the FDA on issues of ingredient safety, food contact material safety, and adulteration under the Federal Food, Drug, and Cosmetic Act. Additionally, the TTB will consult the FDA before it takes any action to recall a product. The MoU makes it clear that there are areas of the regulatory landscape that involve both the TTB and the FDA.

One significant difference between a TTB-regulated beverage and an FDA-regulated beverage is pre-market approval. Beverages that are subject to the labeling and advertising regulations of the TTB must obtain a Certification/Exemption of Label/Bottle Approval (COLA) before they can be brought to market. The COLA process requires that the marketers of alcoholic beverages submit their proposed label along with the necessary forms to the TTB for approval. Though the TTB requires pre-market label approval, the TTB's labeling requirements are generally less demanding than the FDA's. For example, the TTB does not require that labels include nutritional information—but the FDA does. Ensuring compliance with the applicable labeling requirements is particularly important because representations made on product labels can serve as a source of liability for beverage producers.

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## Litigation Landscape

As alcohol producers continue to diversify their portfolios, they venture into an uncertain and complicated litigation environment. Not only must producers comply with applicable TTB and FDA regulations, but they also must assess their exposure to consumer litigation. A label that is wholly compliant from a regulatory perspective may still expose producers to lawsuits challenging that the label is misleading to a reasonable consumer. Even an accurate beverage label cannot offer a silver-bullet defense if a plaintiff challenges other elements of the packaging or marketing—the “overall appearance”—as potentially misleading to consumers.

The past few years have seen a sharp increase in the number of food and beverage labeling suits, and an enterprising plaintiffs’ bar has started targeting alcoholic products and beverages. These lawsuits often challenge product labels, claiming they contain false or misleading representations about the product’s ingredients, qualities, or characteristics. For example, a consumer recently *beat* a motion to dismiss his putative class action challenging the defendant’s Rita product, spritzy alcoholic beverages that feature familiar cocktail monikers like “Margarita,” “Mojito,” and “Sangria.” *Browning v. Anheuser-Busch LLC*, No. 4:20-cv-00889 (W.D. Mo. May 13, 2021). The district court upheld the consumer’s allegations that these labels were deceptive and misleading because they falsely imply that the Rita beverages contained distilled spirits or wine (when in reality they are malt beverages).

Another putative class action challenges Flying Embers hard seltzers and kombucha products, alleging dual wrongs with the vitamin C, antioxidant, or botanical fortified alcoholic beverages. *Kuciver v. Fermented Sciences Inc.*, No. 1:21-cv-05668 (N.D. Ill. Oct. 24, 2021). The consumer alleges that the beverage labels—which promote ingredients like “Antioxidant Vitamin C,” “Live Probiotics,” or “Adaptogens” or state the beverages are “Brewed With Benefits”—both violate FDA regulations (which prohibit fortifying alcoholic beverages with nutrients) and falsely imply that the alcoholic beverages provide health benefits. A third putative class action alleges that the Truly hard seltzers misrepresent that they contain appreciable amounts of fruit to get their fruity flavor, when they instead contain undefined “natural flavors.” *Galvez v. The Boston Beer Company*, No. 3:21-cv-01508 (S.D. Cal. Aug. 25, 2021).

These suits are a sampling of types of labeling challenges that producers likely are to face. As producers continue to market and distinguish their products, we expect that the rate of lawsuits challenging alcoholic beverage labeling will rise.

## Best Practices

So what can alcohol producers do in a legal landscape that has more moving parts than a Long Island iced tea? For starters, producers should consider:

- Formalizing their label review and approval process so that marketing and legal teams work in conjunction with (rather than against) one another. Compliant, low litigation risk, and marketing-department-friendly labeling exists, and producers are more likely to check all boxes with an engaged, collaborative team.
- Taking extra care on flavoring, cocktail, origin, and nutrients claims to ensure they do not increase litigation exposure, particularly as new alcoholic beverages come under increased litigation scrutiny.
- Making greater use of disclaimers and qualifying language on the *consumer-facing packaging*. A disclosure on the bottom of the packaging will only impact the most fastidious of consumers, but a clear, unambiguous disclosure on the front packaging may discourage prospective litigants from filing suit and strengthen a producer’s motion to dismiss defenses even if a lawsuit is filed.

- Taking full advantage of available regulatory approvals, including COLAs issued by the TTB. Some state consumer protection laws include safe harbors for conduct deemed lawful. Although not conclusive, citing a COLA may discourage litigation and provide a producer another motion to dismiss defense in litigation.

Beverage producers are tasked with difficult decisions when they create their labels, and knowing the current regulatory and litigation landscape can help make that task a bit easier.

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