Shumaker

MARCH 27, 2020 | PUBLICATION

Summary of U.S. Advertising Laws and Regulations for Malt Beverages and Energy Drinks

INDUSTRY SECTOR

Hospitality, Leisure, & Sports

RELATED ATTORNEYS

Christian H. Staples

MEDIA CONTACT

Wendy M. Byrne
wbyrne@shumaker.com

Click here to download: Summary of U.S. Advertising Laws and Regulations for Malt Beverages and Energy Drinks

I. WHAT IS, AND IS NOT, ADVERTISING?

At the outset it is important to understand what is, and is not, considered to be advertising or an advertisement under U.S. law. Generally speaking, as applied to any product, be it beer, energy drinks, or other beverages, an advertisement is any statement or representation concerning the product that is intended to promote its purchase and consumption by consumers.[i]

With respect to beer and malt beverages, specifically, the federal regulations promulgated by the Alcohol and Tobacco Tax and Trade Bureau ("TTB") under the direction of the Secretary of the Treasury as authorized by the Federal Alcohol Administration Act ("FAA Act"), state that an advertisement "includes any written or verbal statement, illustration, or depiction which is in, or calculated to induce sales in, interstate or foreign commerce, or is disseminated by mail, whether it appears in a newspaper, magazine, trade booklet, menu, wine card, leaflet, circular, mailer, book insert, catalog, promotional material, sales pamphlet, or in any written, printed, graphic, or other matter accompanying the container, representations made on cases, or in any billboard, sign, or other outdoor advertisement, public transit card, other periodical literature, publication, or in a radio or television broadcast, or in any other media."[ii] The definition of an advertisement in the context of malt beverages is therefore very broad, and includes advertising not only in traditional media such as television, radio, billboards, and other printed materials, but also online content accessible on the Internet, including popular social media websites such as Facebook, Instagram, and Twitter.

The same TTB regulations expressly exclude from the definition of an advertisement "[a]ny label affixed to any container of malt beverages; or any coverings, cartons, or cases of containers of malt beverages used for sale at retail," as well as "[a]ny editorial or other reading material (i.e., news release) in any periodical or publication or newspaper for the publication of which no money or valuable consideration is paid or promised, directly or indirectly, by any brewer, and which is not written by or at the direction of the brewer."[iii]

The labeling of malt beverages is governed by its own set of federal laws and regulations, which are distinct from the laws and regulations governing advertising, but which also overlap with advertising to some extent.

The mandatory labeling requirements for malt beverages are contained in the Beverage Alcohol Manual published by the TTB and are readily accessible through the TTB's website.[iv] Mandatory information that must be contained on the label of a malt beverage product includes the brand name, the class and type designation (i.e., malt beverage, beer, ale, lager, porter, etc.), the name and address of the producer, bottler or importer, the country of origin (if imported), net contents, alcohol content, the Surgeon General's health warning statement, and any required disclosures of additives.[v] There are also very specific type size and legibility requirements for the mandatory label information.[vi] Labels for malt beverages must be pre-approved through the TTB's Certificate of Label Approval ("COLA") online program prior to sale or distribution of the product in interstate commerce.

II. THE SPECIFIC LAWS, REGULATIONS, AND OTHER AUTHORITIES GOVERNING ALCOHOL ADVERTISING.

A. The U.S. Constitution, interpreted by the U.S. Supreme Court.

Given the constitutional history surrounding prohibition and repeal in the United States, the U.S. Constitution provides an important foundation to many of the current laws and regulations governing alcohol, and the policies behind them.

The Twenty-First Amendment to the U.S. Constitution, which repealed prohibition, gives each of the fifty states broad power to regulate alcohol within their borders.[vii] The three-tier system of alcohol distribution in the U.S., which requires separation of ownership and control between the producer, distributor, and retailer, is largely a product of the Twenty-First Amendment, although its origins can be traced back even earlier.[viii] The extent of the regulatory powers reserved to the states by the Twenty-First Amendment has been the subject of recent inquiry by the U.S. Supreme Court.

Specifically, in *Granholm v. Heald*, 544 U.S. 460 (2005), and even more recently in *Tennessee Wine and Spirits Retailers Assoc. v. Thomas*, 139 S.Ct. 2449 (Jun. 26, 2019), the U.S. Supreme Court concluded that the states' regulatory powers over alcohol afforded by the Twenty-First Amendment must be considered in the context of the entire constitutional scheme, and that states do not have unbridled discretion to regulate alcohol within their borders. For example, under *Granholm* and *Tennessee Wine and Spirits*, a state law that discriminates against advertisements of out-of-state producers in favor of advertisements of in-state producers would almost certainly be deemed unconstitutional under the "dormant" side of the Commerce Clause of the Fifth Amendment to the U.S. Constitution, and would not be validated or otherwise "saved" by the Twenty-First Amendment.[ix]

The First Amendment to the U.S. Constitution also provides substantial protection to advertisements and serves as a limit on governmental regulation of speech.[x] The First Amendment guarantees the freedom of speech.[xi] Under the commercial speech doctrine of the First Amendment that has developed at common law, the government has less authority to regulate truthful, non-misleading speech than it does to regulate false or misleading speech. Accordingly, many of the laws and regulations regarding advertising are intended to prevent false or misleading claims and to otherwise protect consumers.

For example, the commercial speech doctrine of the First Amendment has been applied by the U.S. Supreme Court to invalidate a state law that completely banned price advertising for alcoholic beverages.[xiii] The Court concluded that price advertising was constitutionally protected commercial speech and that there was insufficient evidence that the complete ban on such speech significantly advanced the state's asserted interest in reducing alcohol consumption.[xiv]

The commercial speech doctrine has also been applied by the U.S. Supreme Court to invalidate a federal law that prohibited statements regarding the percentage alcohol content of malt beverages.[xv] The Court held that

truthful, verifiable numerical statements about the alcohol content of malt beverages constituted commercial speech protected by the First Amendment.[xvi]

On the other hand, courts have generally declined to invalidate laws that regulate all forms of speech (i.e., content neutral restrictions), and instead merely restrict the time, place and/ or manner of speech. For example, the Fourth Circuit Court of Appeals held that a city ordinance prohibiting the placement of billboards advertising alcoholic beverages in areas where the billboards were more likely to be viewed by minors (i.e., near schools) did not violate the First Amendment's protections for commercial speech because the ordinance merely restricted the location where such advertisements could be placed.[xvii] Notably, the ordinance did not prohibit the placement of billboards in other areas where the billboard were less likely to be viewed by minors, and therefore was no more restrictive than necessary to promote the government's interest.[xviii]

While these historical and constitutional considerations are important, the specific laws and regulations governing advertising discussed below provide a better instruction on the "do's" and "don'ts" for advertisers.

B. The Federal Alcohol Administration Act.

The Federal Alcohol Administration Act (the "FAA Act") is the primary U.S. law governing alcoholic beverages. The FAA Act provides, in pertinent part, that it shall be unlawful for any brewer, importer, wholesaler, or bottler of malt beverages, directly or indirectly through an affiliate, to publish or disseminate any advertisement, unless such advertisement is in conformity with the proscribed regulations intended to do all of the following:

- to prevent consumer deception and false or misleading advertising;

- to provide consumers with adequate information regarding the identity and quality of the products advertised, the alcoholic content thereof, and the person responsible for the advertisement;

- to prohibit statements that are disparaging of a competitor's products, or are obscene or indecent; and

- to prevent statements inconsistent with any statement on the labeling of the products advertised.[xix]

The FAA Act also restricts and/or prohibits certain commercial arrangements known as exclusive outlets or tied houses, as well as commercial bribery.[xx] Many of these arrangements and practices are common in industries other than the alcoholic beverage industry.

For example, an alcoholic beverage industry member (i.e., a producer, importer, or distributor) cannot pay or otherwise credit a retailer for any advertising or product display.[xxi] This prohibition extends to cooperative advertising between an industry member and a retailer.[xxii] Additionally, the purchase by an industry member of advertising on signs, scoreboards, programs, scorecards, and the like at ballparks, racetracks or stadiums, from the retail concessionaire is prohibited under the FAA Act.[xxiii] Furthermore, an industry member cannot purchase advertising in a retailer's publication intended for distribution to the retailer's customers or to the general public.[xxiv] Industry members are also prohibited from renting display space at a retail establishment or reimbursing retailers for setting up product displays.[xxv]

In sum, an industry member cannot give anything of value to a retailer that might be construed as an unlawful inducement or attempt to restrict trade. These regulations highlight the need for advertisers of alcoholic beverages to understand and abide by the federal prohibitions on exclusive outlets, tied houses,

and commercial bribery, in addition to the express regulations governing advertising. These are complex topics with many nuances and exceptions, beyond the scope of this initial study.

C. TTB Regulations.

The FAA Act directs the Secretary of the Treasury to proscribe regulations to carry out its provisions on advertising and certain prohibited industry acts and practices.[xxvi] The Alcohol and Tobacco Tax and Trade Bureau ("TTB") is a bureau operating under the Department of the Treasury that is charged with collecting excise taxes, enacting regulations, and ensuring compliance with those regulations.

While the FAA Act does not require alcohol beverage advertisements to be pre-approved prior to broadcast or publication, the TTB does offer industry members a voluntary advertising pre-clearance service. To submit an advertisement for the TTB's pre-clearance review, you can email it to market.compliance@ttb.gov. Although pre-approval of advertising is not required under federal law, the laws of some states may require advertisements to be pre-approved.

The TTB monitors the advertising of alcoholic beverages through a combination of pre-clearance reviews, referrals/ complaints, and internal selections for review.[xxvii] Penalties for violating the TTB's advertising provisions include fines, permit suspension and/or permit revocation.[xxviii] The TTB can also require advertisers to alter or withdraw non-compliant advertisements.[xxix]

The TTB regulations implementing the FAA Act can be generally divided into two categories: (1) mandatory statements that must be made in any advertisement, and (2) prohibited statements that cannot be made in any advertisement. Each is addressed in turn below.

1) Mandatory Statements.

There are two (2) mandatory statements that must appear on every advertisement of beer or other malt beverage product. The first mandatory statement is the name and address of the brewer, bottler, packer, wholesaler, or importer responsible for the publication or broadcast of the advertisement.xxx The street number and street name may be omitted from the address, so in practice only the city and state is required.xxxi If the advertiser is based outside the U.S. and has no U.S. presence, the name of the advertiser and the country where the advertiser is based should be included in the advertisement. In this situation, it is common for the importer or distributor to serve as the responsible advertiser.

The second mandatory statement is the statement of the class to which the product belongs, corresponding to the statement of class which is required to appear on the label of the product.[xxxii] Common classes of malt beverages include beer, ale, lager, pilsner, porter, stout, etc., but even "malt beverage" can be a sufficient class designation for purposes of the regulations, if appropriate.[xxxiii]

The second mandatory statement (i.e., the statement of class) is not required when an advertisement refers to a general product line of malt beverages or to all of the malt beverage products of one company, in which event only the first mandatory statement (i.e., the name and address of the responsible advertiser) is required.[xxxiv]

Both mandatory statements must appear "in lettering or type size sufficient to be conspicuous and readily legible."[xxxv] Additionally, both mandatory statements must be clearly a part of the advertisement and cannot be separated in any manner from the remainder of the advertisement.[xxxvi] For traditional print media and outdoor billboard advertising this generally poses no issues, but for broadcast advertisements, the mandatory statements are typically included at the very beginning or end of the advertisement.

2) Prohibited Statements.

In addition to the two mandatory statements discussed above, the TTB regulations contain a long list of prohibited statements.[xxxvii] For example, an advertisement of malt beverages must not contain any of the following:

• Any statement that is false or untrue, or that tends to create a misleading impression;

• Any statement that is disparaging of a competitor's product;

• Any statement that is obscene or indecent;

• Any statement that implies governmental supervision over production, bottling, or packaging, or any statement that the malt beverages are produced and sold under or in accordance with any City, State, or Federal authorization, law or regulation;

• Any statement inconsistent with labeling;

• Statements of alcohol content like "strong," "full strength," "high test," "high proof" or similar;

• Any health-related statement that is untrue, misleading, or unsubstantiated;

• Flags, seals, coats of arms, crests, or other insignia; and • Any subliminal or similarly deceptive advertising techniques.[xxxviii]

Notwithstanding the foregoing, an advertisement comparing a product with competitors' products (for example, through use of taste test results) is not prohibited so long as the advertisement is not disparaging of the competitors' products, deceptive, or likely to mislead the consumer.[xxxix] If taste test results are used in an advertisement, then the taste test procedure used must meet scientifically accepted procedures (examples of which are listed in the regulations) and a statement must appear in the advertisement providing the name and address of the testing administrator.[xl]

D. TTB Industry Circulars.

TTB Industry Circulars are issued by the TTB and apply existing statutory or regulatory requirements to a specific circumstance or set of facts, or restate such requirements, and may even announce new requirements or discuss corrective actions. TTB Industry Circulars should be followed whenever applicable.

1) TTB Industry Circular 2011-01 (Regarding Mandatory Statements in Advertisements).

TTB Industry Circular 2011-01[xli] essentially serves as a reminder to alcoholic beverage industry members that the mandatory statements under the FAA Act and TTB regulations must appear in all advertisements, and that it is the industry member, not the media outlet, that is ultimately responsible for the content of an advertisement.

This circular was issued in response to concerns regarding a common practice by media networks of filling empty broadcast air time by running incomplete advertisements that do not include the mandatory statements. This is especially common in broadcasts of sporting events and other live broadcasts, where an advertisement may be cut short in order to return the audience to the scheduled program or event. The TTB strongly recommends that industry members fully inform media outlets and advertising agencies of the requirement to include the mandatory statements in all advertisements. As a best practice to help ensure

that the mandatory statements are not omitted by broadcast media outlets, advertisers should avoid placing the mandatory statements at the very end of the advertisement, to minimize the risk of the mandatory statements being cut-off or omitted in circumstances where the full advertisement is not aired.

2) TTB Industry Circular 2011-02 (Regarding Certain Promotions by Media Personalities).

TTB Industry Circular 2011-02[xlii] addresses a common advertisement practice whereby an industry member compensates a media personality, such as a radio disk jockey or a TV show host, for promoting its alcoholic beverage products at various times during the broadcast. Unlike scripted or other pre-recorded advertisements, the media personality is typically provided with a set of general talking points about the product that the industry member wants to be highlighted during the broadcast. The media personality may not be aware of the mandatory statements that must accompany all alcohol advertising or may fail to include the mandatory statements in the promotion, or may make promotional statements that are specifically prohibited by the TTB regulations or other applicable law. This circular serves as a reminder that while these kinds of promotions are not prohibited, industry members are ultimately responsible for ensuring that all advertisements contain the mandatory statements and do not violate the applicable laws and regulations, regardless of the format of the advertisement or the means and method of transmission.

3) TTB Industry Circular 2013-01 (Regarding Advertising on Social Media).

TTB Industry Circular 2013-01[xliii] confirms the TTB's position that content posted to social media may be an advertisement under applicable law. This circular specifically mentions Facebook, Twitter, LinkedIn, and YouTube, in addition to blogs and mobile applications (a/k/a "Apps"), as being included within the social media umbrella, but is careful to point out that the foregoing is not an exclusive list of all social media websites and other digital media subject to the TTB regulations.

For traditional social networking services, like Facebook, the TTB considers alcoholic beverage industry member fan pages to be advertisements. Accordingly, the TTB recommends that the mandatory statements appear in a location where viewers would most logically expect to find information about the company or its brands of alcoholic beverage products. Typically this will be the "profile" or "about" section of the industry member's fan page.

For video sharing sites, like YouTube, the TTB requires that the mandatory statements appear in all videos and also on any associated "channel" created or maintained by or for the industry member. The best location for the mandatory statements is where the industry member's "profile" or "about" information is contained within the site, or wherever else viewers would most logically expect to find information about the company or its brands of alcoholic beverages.

For microblogs, like Twitter, with specific text character or word count limitations, the TTB has determined that it is impractical to require the mandatory statements to appear in every post or "tweet." However, similar to the other social networking services described above, the mandatory statements must appear in a conspicuous place on the industry member's home or profile page, and also within videos and other content posted to the microblog, including "linked" content, if the content constitutes an advertisement under applicable law.

E. TTB Rulings.

TTB Rulings are issued by the TTB to state its official position on the interpretation or application of a statute or regulation, and on occasion may clarify existing guidance. TTB Rulings should be followed whenever applicable.

1) ATF Ruling 95-2 (Regarding the Depiction of Athletes, Athletic Events, and Motor Vehicles, in Advertisements).

The Bureau of Alcohol, Tobacco and Firearms ("ATF") was the predecessor to the TTB. The name of this ruling merely reflects the fact that it was issued by the ATF prior to the creation of the TTB. It is nonetheless controlling authority.

ATF Ruling 95-2,[xliv] issued in 1995, addressed the depiction of athletes, athletic activities or events, and motor vehicles in the advertising of alcoholic beverages.xlv This ruling states that "the depiction of athletes on alcoholic beverages labels and advertising is often deceptive and misleading in that it implies that consuming alcohol is conducive to athletic skill or physical prowess, or that consuming alcohol does not hinder the athlete's performance."[xlvi]

Accordingly, this ruling holds that depictions or references to athletes, athletic activities or events, or motor vehicles in alcoholic beverage advertisements will not be automatically considered deceptive or misleading, but will be reviewed on a case-by-case basis to determine whether the advertisement is deceptive or misleading based upon the totality of the message conveyed by the advertisement.[xlvii]

The ruling offers the following examples of advertisements considered to be unacceptable under the FAA Act and the TTB regulations:

• Advertisements which state that consumption of alcoholic beverages will enhance athletic ability, health, or conditioning;

• Advertisements which depict any individual (famous athlete or otherwise) consuming or about to consume an alcoholic beverage prior to or during an athletic activity or event; and

• Any advertisement depicting consumption of an alcoholic beverage while the person consuming the beverage is seated in, about to enter, operating, or about to operate an automobile or other machinery.

The ruling also states that the use of disclaimers intended to negate deceptive or misleading inferences in the advertising of alcoholic beverages is unacceptable.

The ruling also offers the following examples of advertisements generally considered to be acceptable, so long as they do not contravene the unacceptable examples and principles discussed above:

• Depictions of or references to athletes, including famous athletes, whether in motion or not and whether in uniform or not;

• Depictions of or references to motor vehicles or other machinery or equipment, whether in motion or not, whether occupied by a driver or not;

• Team logos;

• Schedules of athletic events; and

• Depictions of, references to, or commemorations of specific events (e.g., an automobile race), specific cars or other equipment, such as hockey sticks, footballs, golf clubs, and the like.

It is important to note that while this ruling does not contain a blanket prohibition on advertisements that depict the consumption of alcohol (unless in connection with a motor vehicle), many broadcast media

networks adhere to voluntary codes and/or policies that prohibit the dissemination of advertisements depicting alcohol consumption in any context. Heineken® highlighted this "unwritten" policy in a recent TV advertisement featuring famous actor Neil Patrick Harris.[xlviii] As a best practice to ensure that advertisements are deemed acceptable by broadcast media outlets, advertisers should refrain from depicting the actual consumption of alcohol in advertisements.

2) TTB Rulings 2004-1, 2013-2, and 2014-2 (Regarding the Advertisement of Calorie, Carbohydrate, and Other Nutrient Contents, including Gluten Content).

TTB Ruling 2013-2, issued May 28, 2013, modified and amplified prior TTB Ruling 2004-1,[l] issued April 7, 2004, yet both are important for their impact on statements about nutrient content, including calorie and carbohydrate content, in the advertising of beer and other malt beverages.[li]

Under TTB Ruling 2004-1, statements of calorie or carbohydrate content in advertisements are considered misleading unless they include a statement of average analysis that lists the number of calories and the number of grams of carbohydrates, protein, and fat contained in the product based on a single serving. The TTB subsequently clarified that this policy did not apply to advertisements where the only statement of caloric or carbohydrate content is a brand name incorporating the term "light" or "lite" (i.e., Bud Light or Miller Lite). However, statements such as "low carb," "low calorie," or other similar claims are subject to the policy and require a statement of average analysis under this ruling.

TTB Ruling 2013-2 expanded upon the statement of average analysis requirement for calorie and carbohydrate claims, and authorizes, on an interim basis pending the completion of final rulemaking, the inclusion of a Serving Facts statement on advertisements on a voluntary basis. A Serving Facts statement is merely a statement of average analysis with the addition of a title, a serving size that reflects how the product is typically consumed, information about the number of servings per container, and optional information regarding the alcohol content on a percentage of alcohol by volume basis.

Relatedly, TTB Ruling 2014-2[liii] held that the term "gluten-free" may be used in the advertising of any malt beverages where the product manufacturer would be entitled to make a gluten-free claim under the standards set forth in the applicable regulations promulgated by the Food and Drug Administration.[liii] This ruling emphasized that industry members are responsible for verifying the accuracy of any gluten content claim and that the TTB may request the submission of samples to the Beverage Alcohol Laboratory for testing to confirm the validity of such claims.

F. Federal Trade Commission.

The Federal Trade Commission ("FTC") is an independent agency of the U.S. government. The principal mission of the FTC is the promotion of consumer protection and the enforcement of civil antitrust law through the elimination and prevention of anti-competitive business practices.

The FTC regulates advertising across all industries, including, but not limited to, the alcoholic beverage and energy drink industries. Accordingly, the FTC maintains concurrent jurisdiction with the TTB over alcoholic beverage advertising. This means that even if the TTB does not initiate an investigation or find a violation of its regulations, the FTC can independently investigate and prosecute an advertiser for an unlawful advertisement.[liv]

The FTC derives its power and authority from the Federal Trade Commission Act (the "FTC Act"), which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[lv] The FTC Act states that an act or practice is "unfair" if it "causes or is likely to cause substantial injury to

consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[lvi]

The FTC Act also prohibits the dissemination of false advertisements.lvii The FTC Act defines a "false advertisement" as "an advertisement, other than labeling, which is misleading in a material respect."[lviii] While the FTC Act does not explicitly define what constitutes an advertisement, courts have concluded that "representations concerning the qualities of a product and promoting its purchase and use" are advertisements under the FTC Act.[lix]

If, upon investigation, the FTC has reason to believe that a law or regulation is being or has been violated, the FTC may initiate an enforcement action using either an administrative or judicial process, which may include cease and desist orders, injunctive and other equitable relief, and civil penalties.[lx]

G. Voluntary Advertising Codes in the Alcoholic Beverage Industry.

In addition to the federal laws and regulations which must be followed under penalty for non-compliance, the alcoholic beverage industry also adheres to certain voluntary and non-binding advertising codes. Both the *Brewers Association*® and *The Beer Institute* have promulgated voluntary codes and guidelines pertaining to the advertising of beer and other malt beverages.[lxi] Though non-binding, most, if not all, industry members elect to comply with these voluntary guidelines in an effort to help ensure that their advertisements are socially responsible and respectful. While this does not always occur (i.e., consider the recent Bud Light ads highlighting Miller Light's use of corn syrup in the brewing process, which resulted in litigation), compliance with these voluntary codes is a recommended best practice.

Notably, these voluntary codes propose that advertising placements for beer in traditional media outlets (i.e., magazines, newspapers, TV, and radio) may only be made where at least 71.6% of the audience is expected to be adults of legal drinking age (i.e., 21 years old).[lxii] For digital media, the voluntary codes propose that the user/audience confirm that he or she is of legal drinking age, typically through disclosure of a complete birth date or other form of user registration, prior to accessing the advertising content.[lxiii]

III. ENERGY DRINK ADVERTISING.

The foregoing sections have focused on the advertising of alcoholic beverages. This section is devoted exclusively to the advertising laws and other issues of significance affecting energy drinks.

Energy drink advertisements are not subject to the FAA Act or the TTB Regulations discussed above (unless the energy drinks contain alcohol). However, the FTC regulates advertising across all industries, and is not limited solely to alcoholic beverages. Therefore, the FTC Act, discussed in Section II(F) above, is equally relevant to the advertising of energy drinks as it is to the advertising of beer and other alcoholic beverages. However, energy drink advertising is only generally regulated under the FTC Act (i.e., energy drink advertising must not be false, misleading, unfair, or deceptive).

The greatest area of regulation for energy drinks relates to labeling. Specifically, energy drinks may be classified either as a traditional food/beverage, or as a liquid dietary supplement, both of which have unique definitions and labeling requirements under federal law. Energy drinks classified as a food/beverage must comply with the Nutrition Labeling and Education Act and be labelled with a Nutrition Facts panel.[lxiv] On the other hand, energy drinks classified as a liquid dietary supplement must comply with the Dietary Supplement Health and Education Act and be labelled with a Supplement Facts panel.[lxv] While there is no black-letter law dictating which classification energy drinks must fall into, the Food and Drug Administration ("FDA") issued Guidance for Industry: Distinguishing Liquid Dietary Supplements from Beverages (January

2014), which contains informative, though non-binding, guidance on this topic.[lxvi]

Regardless of the classification, all claims, statements, and graphics contained on energy drink labels are subject to the Federal Food, Drug and Cosmetic Act, which provides that a product is misbranded if the labeling is false or misleading.[lxvii]

Additionally, any health claims associated with energy drinks must be closely scrutinized to ensure compliance with applicable law. Health claims related to the cure or treatment of any medical condition are reserved for drugs and cannot be made in connection with the labeling or advertising of energy drinks.[lxviii]

Similar to the voluntary advertising codes observed in the alcoholic beverage industry, the energy drink industry also appears to adhere to a voluntary, non-binding labeling and advertising code. The *American Beverage Association* ("ABA") is a trade association representing the broad spectrum of companies that manufacture and distribute non-alcoholic beverages, including energy drinks. The ABA claims that its member companies, representing approximately 95% of the energy drink category in the U.S. (including The Coca-Cola Co., Dr. Pepper Snapple Group, PepsiCo, Red Bull, Monster, and others), have agreed to adhere to certain commitments regarding the labeling and advertising of energy drinks.[lxix] The *ABA Guidance for the Responsible Labeling and Marketing of Energy Drinks* (April 30, 2014) provides, in pertinent part, as follows:

• That energy drinks be labeled as conventional food/beverage, and not as dietary supplements;

• That energy drink labels contain a quantitative caffeine declaration, separate from the ingredient statement and the Nutrition Facts Panel;

• That energy drink labels contain an advisory statement against consumption by children, pregnant or nursing women, and those sensitive to caffeine;

• That energy drink manufacturers will not market to children under 12 years of age ("Children"); will not sell or market their products in K–12 schools; will not provide product samples or coupons to Children; will not feature Children on their advertising or websites; and will not purchase advertising for broadcast or distribution where the target audience is predominantly composed of Children; and

• That energy drink manufacturers will not promote excessive or unduly rapid consumption of their product, and will not promote mixing their products with alcohol.

As a recommended best practice, energy drink industry members and advertisers should adhere to the ABA's guidance on these issues.

IV. CONCLUSION.

In conclusion, the laws and regulations governing advertising of alcoholic beverages (and to a lesser extent, energy drinks) are complex and are not easily reducible to a single study or summary. Hopefully, the foregoing has provided a comprehensive overview of the various federal laws and regulations of importance, keeping in mind that certain products (particularly alcoholic beverages) are often regulated not only at the federal level, but also at the state and local level. Advertisers of alcoholic beverages and energy drinks are therefore encouraged to determine and continuously self-monitor their compliance with the laws of every state in which their advertisements may be broadcast, distributed, or otherwise accessible, in addition to ensuring compliance with federal law.

[i] See Black's Law Dictionary, 8th Ed. ("advertisement").

[ii] 27 C.F. R. § 7.51.

[iii] 27 C.F. R. § 7.51(a), (b).

[iv] https://www.ttb.gov/beer/beverage-alcohol-manual

[v] See id.

[vi] See id.

[vii] See U. S. Const., amend. XXI, §2 ("The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

[viii] Christian Staples, Comment, In Vino Veritas: Does the Twenty-First Amendment Really Protect a State's Right to Regulate Alcohol? 31 Campbell Law Review 123-155 (2008).

[ix] See U.S. Const., Article I, § 8, clause 3 ("The Congress shall have power … [t]o regulate commerce … among the several states … ."); see also *Granholm v. Heald,* 544 U.S. 460 (2005); *Tennessee Wine and Spirits Retailers Assoc. v. Thomas*, 139 S.Ct. 2449 (Jun. 26, 2019).

[x] See U.S. Const. amend. I ("Congress shall make no law … abridging the freedom of speech.").

[xi] Id.

[xii] See id. and cases cited *infra.* The U.S. Supreme Court has developed a four-step test to determine whether commercial speech is protected under the First Amendment. *Central Hudson Gas and Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). First, the speech at issue must concern lawful activity and not be misleading. Second, the asserted governmental interest behind the law or regulation must be substantial. If both of these criteria are met, the Court must then determine whether the law or regulation directly advances the asserted governmental interest and, if so, it must then determine whether the prohibition on speech is any more restrictive than necessary to promote that interest. Under this test, laws and regulations that restrict commercial speech must be closely connected to a legitimate government interest, such as reducing the consumption of alcohol by minors, and must be narrowly drawn to restrict no more speech than necessary to promote that interest.

[xiii] *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

[xiv] Id.

[xv] *Rubin v. Coors Brewing Company*, 514 U.S. 476 (1995).

[xvi] Id. *xvii Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325 (4th Cir. 1996)

[xviii] See id.

[xix] 27 U.S.C. § 205(f).

[xx] 27 U.S.C. § 205(a), (b) and (c).

[xxi] 27 C.F.R. § 6.51.

[xxii] 27 C.F.R. § 6.52.

[xxiii] 27 C.F.R. § 6.53.

[xxiv] 27 C.F.R. § 6.54.

[xxv] 27 C.F.R. §§ 6.55, 6.56.

[xxvi] Id.

[xxvii] https://www.ttb.gov/what-we-do/program-areas/advertising

[xxviii] 27 U.S.C. §§ 204(e), 207.

[xxix] 27 U.S.C. §§ 205(f), 207.

[xxx] 27 C.F.R. § 7.52(a).

[xxxi] 27 C.F.R. § 7.52(a).

[xxxii] 27 C.F.R. § 7.52(b).

[xxxiii] See 27 C.F.R. § 7.24.

[xxxiv] 27 C.F.R. § 7.52(c)(1).

[xxxv] 27 C.F.R. § 7.53(a).

[xxxvi] 27 C.F.R. § 7.53(c).

[xxxvii] 27 C.F.R. § 7.54.

[xxxviii] 27 C.F.R. § 7.54.

[xxxix] 27 C.F.R. § 7.55(b).

[xl] 27 C.F.R. § 7.55(b).

[xli] https://www.ttb.gov/images/industry_circulars/archives/2011/11-01.html

[xlii] https://www.ttb.gov/images/industry_circulars/archives/2011/11-02.html

[xliii] https://www.ttb.gov/images/industry_circulars/archives/2013/13-01.html

[xliv] https://www.ttb.gov/images/pdfs/rulings/95-2.htm

[xlv] See https://www.ttb.gov/images/pdfs/rulings/95-2.htm

[xlvi] Id.

[xlvii] Id.

[xlviii] See https://www.adweek.com/brand-marketing/ad-dayneil-patrick-harris-doesnt-get-why-he-cant-drink-heinekenlight-tv-158989/

[xlix] https://www.ttb.gov/images/pdfs/rulings/2013-2.pdf l https://www.ttb.gov/images/pdfs/rulings/2004-1.pdf

[li] See https://www.ttb.gov/images/pdfs/rulings/2013-2.pdf and https://www.ttb.gov/images/pdfs/rulings/2004-1.pdf

[lii] https://www.ttb.gov/images/pdfs/rulings/2014-2.pdf

[liii] 21 C.F.R. § 101.91.

[liv] See generally 15 U.S.C. §§ 45, 46, 49.

[lv] 15 U.S.C. § 45(a). lvi 15 U.S.C. § 45(n).

[lvii] 15 U.S.C. §§ 52-55. lviii 15 U.S.C. § 55(a)(1).

[lix] *F.T.C. v. Nat'l Comm'n on Egg Nutrition*, 517 F.2d 485, 488 (7th Cir. 1975).

[lx] 15 U.S.C. §§ 45(b), 53(b).

[lxi] See https://www.brewersassociation.org/brewers-association-advertising-marketing-code/ and https://www.beerinstitute.org/responsibility/advertising-marketing-code/

lxii Id.

lxiii Id.

[lxiv] 21 C.F.R. § 101.9; 21 U.S.C. § 343(q).

[lxv] 21 C.F.R. § 101.36 ; 21 U.S.C. § 343(s).

[lxvi] https://www.fda.gov/regulatory-information/ search-fda-guidance-documents/guidance-industry-distinguishing-liquid-dietary-supplements-beverages

[lxvii] 21 U.S.C. § 343(a)(1).

[lxviii] See *Whitaker v. Thompson,* 353 F.3d 947, 949 (D.C. Cir. 2004) (noting that the consequences of classification as a "drug claim" or a "health claim" are substantial).

[lxix] https://www.ameribev.org/files/resources/2014-energydrinks-guidance-approved-by-bod-43020c.pdf