

COMMENTS DUE ON FEDERAL PROPOSAL TARGETING MALT BEVERAGES

by

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A proposal is currently pending at the Alcohol and Tobacco Tax and Trade Bureau (ATTTB) that would, if implemented, infringe the First Amendment rights of alcohol brewers to advertise and label flavored malt beverages, or "FMBs." FMBs are marketed under brand names such as Tequila, Mike's Hard Lemonade, and Smirnoff Ice. They are very popular alternatives to beer, and are relatively low in alcohol, six percent or less by volume. Brewers make FMBs from a malt beer base to which flavors (usually in a non-potable ethyl alcohol base) colors, water, sugar, and carbon dioxide are added. FMBs are marketed, priced, and consumed like beer. This proposed ATTTB regulation, 68 Fed. Reg. 14292 (Mar. 24, 2003), would severely limit what a producer could say about an FMB on product labels and in advertising.

The FMB proposed rule would ban brewers from making certain claims on FMB labels and in FMB advertising. ATTTB proposes to prohibit any statement, design, device, or representation in labeling or advertising, including an FMB's brand name, which tends to create the impression that a malt beverage: 1) contains distilled spirits; 2) is similar to a distilled spirit; or 3) has intoxicating qualities. 68 Fed. Reg. at 14298; 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"; and "Serve like a liqueur." 68 Fed. Reg. at 14298. The proposed rule would even prohibit statements such as "Made by Old Sourmash Whisky Company, City, State," because of the identification of the distilled spirit in the company's name. *Id.*

ATTTB explains that its outright ban on these types of statements is necessary "to prohibit the misleading impression that flavored malt beverages are distilled spirits or contain distilled spirits." 68 Fed. Reg. at 14297-98. However, ATTTB has made no such showing whatsoever either that current FMB labeling and advertising are actually deceiving consumers, or that the proposed ban will alleviate this unproven deception.

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 front label. 68 Fed. Reg. at 14296-97, 14301; proposed 27 C.F.R. § 7.22(a)(5). ATTTB is singling out FMBs for this compelled speech. Currently, ATTTB does not require other malt beverages, such as beer, to bear a statement of alcohol content.

ATTTB's proposed bans violate the First Amendment. The Supreme Court has specifically held that information on beer labels is commercial speech protected by the First Amendment. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995). Applying the test for judging the constitutionality of restrictions upon commercial speech announced in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) and *Rubin*, 514 U.S. at 482, ATTTB must demonstrate that its ban is no more extensive than is necessary to cure potential consumer confusion about FMB composition. *See Rubin*, 514 U.S. at 490-

91; *Central Hudson*, 447 U.S. at 566. ATTTB has not met this burden.

There are alternatives to ATTTB's proposed bans that restrict far less speech. Most important, disclaimers and additional qualifying language, such as "contains no whiskey," can alleviate the (unproven) concerns that consumers believe some FMBs are, or contain, distilled spirits. In choosing suppression over disclosure to cure misleadingness, ATTTB has ignored the prominent naming of these products as a "Flavored Malt Beverage" and disregarded alternatives that are far less injurious to protected commercial speech, in violation of the Constitution. See *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 122 S. Ct. 1497, 1506 (2002); *Pearson v. Shalala*, 164 F.3d 650, 658 (D.C. Cir.1999).

Affected businesses and other interested parties can take action to counter this threat to commercial speech rights. Comments on ATTTB's proposed rule are due by June 23, 2003. Comments should be submitted to: 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, Flavored Malt Beverages and Related Proposals (2001R-136P).

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