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Non-Alcoholic Beer Regulation 101

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As part of the general move to better-for-you beverages, non-alcoholic (NA) options have been and will likely continue to be on the rise. However, how NA is treated, or not treated, as "beer" has significant impact on its potential route to market. The below summarizes the overall treatment of NA beer under US federal law, as well as examples of restrictions on direct-to-consumer (DTC) shipments imposed by certain states.

FEDERAL TREATMENT OF NA BEER

- **Tax Treatment:** The Alcohol and Tobacco Tax and Trade Bureau's (TTB) regulations define "beer" as a fermented beverage containing 0.5% or more alcohol by volume (ABV) and brewed or produced from malt, wholly or in part, or from any substitute for malt. (*See*: 27 C.F.R. § 25.11.) The regulations refer to a malt beverage containing less than 0.5% ABV as a "cereal beverage." (*See:* 25.11.) Because NA beer contains less than 0.5% ABV, TTB will not treat it as a "beer" under the Internal Revenue Code (IRC), and accordingly it will not be subject to federal alcohol excise taxes in the United States.

- **Formula Requirements:** Once a process is developed for an NA malt beverage and prior to production, a formula must be submitted and approved by TTB. If an NA malt beverage is "alcohol-free," TTB policy is to require submission of laboratory testing results.

- **Labeling:** The Federal Alcohol Administration Act (FAA Act) regulates malt beverages, regardless of their alcohol content, if they meet the Act's requirements of containing some malted barley, some hops (or hop parts or products) and having been subject to fermentation. An anomaly exists because the FAA Act's definition of "malt beverage" does not include any minimum or maximum threshold of alcohol content. Because nonalcoholic and alcohol-free beers are produced like conventional beer and then de-alcoholized, they fall under TTB's labeling and advertising jurisdiction. Several regulations specifically address such products. (*See*: 27 CFR § 7.71.)

- **FDA Requirements:** The Food and Drug Administration (FDA) requires NA beverages that are not malt beverages under the FAA Act (beverage without malt and hops or an

unfermented beverage) to be labeled in accordance with the Food, Drug, and Cosmetic Act (FD&C Act), Fair Packaging and Labeling Act (FPLA) 15 U.S.C. §§ 1451-1461, and the Nutrition Education and Labeling Act 21 U.S.C. §§ 343-350. (Click here for more information.) These statutes and the FDA regulations require a full ingredient list and nutritional facts label. If an NA beverage without malt or hops or an unfermented beverage is being considered, a full explanation of the FDA requirements will be needed to develop a compliant production, labeling and marketing plan. The FDA has industry guidance on labeling and formulation of "dealcoholized beer." (*See:* FDA CPG Sec. 510.400, updated Nov. 2005.)

- **Production Process Issue:** If the production process for an NA beverage includes removal of alcohol from beer through reverse osmosis or other processes that separate alcohol from the other components of a beverage, the process may be considered distilling operations, which will require a federal basic permit for a distilled spirits plant. (*See*: *ATF Ruling 85-6*.)

STATE REGULATION OF DIRECT-TO-CONSUMER SHIPMENT OF NA BEER

NA beer presents opportunities for brands looking to distribute their products directly to consumers in most states without the stringent regulations that apply to distributing beer.

State regulation of direct-to-consumer NA beer varies. A vast majority of states have statutory definitions of "beer" similar to the IRC's definition, which include a minimum threshold of 0.5% ABV. Some states, such as Arizona, Georgia, Idaho and Tennessee, have broad definitions of "beer" or "malt beverage" that are not tied to a specific alcohol content (similar to the FAA Act). Meanwhile, other states like Pennsylvania and Kansas have specific legislation which directly regulates NA malt beverages.

The most permissive state regulations in the majority of states allow both in- and out-of-state suppliers to make unlimited shipments of NA beer for consumers' personal use. However, as noted above, a minority of states which have broad definitions of "beer" or "malt beverage" potentially restrict the ability to sell NA beer directly to consumers. For example:

- Georgia defines "malt beverage" as any alcoholic beverage obtained by the fermentation of any infusion or decoction of barley, malt, hops or any other similar product, or any combination of such products in water, containing not more than 14% alcohol by volume and including ale, porter, brown, stout, lager beer, small beer and strong beer. (*See*: Ga. Code Ann. § 3-5-24; Ga. Comp. R. & Regs R. 560-2-8-.01.) "Alcoholic beverage" means and includes all alcohol, distilled spirits, beer, malt beverage, wine or fortified wine. (*See*: Ga. Code Ann. § 3-1-2.) Thus, to the extent the product will undergo at least some minimal amount of "infusing" and will include some malt, it will qualify as a "beer" for purposes of Georgia's regulatory regime. As a "beer," direct shipment is prohibited. (*See*: Ga. Code Ann. §§ 3-6-31; 3-6-32; Ga. Comp. R. & Regs. 560-2-9-.02.)

- In Texas, NA beer falls outside of the definitions of "beer" and "alcoholic beverage"; however, exclusive territory and beer franchise law apply to distributors who sell a "nonalcoholic beverage, produced or sold by a brewer of malt beverages and that bears the name, emblem, logo, or brand of a brewer of malt beverages is the same as a sale of malt beverages." (*See*: Tex. Alco. Bev. Law § 102.071(e).)

- Illinois generally defines "non-alcoholic merchandise" as a commodity containing less than

0.5% ABV. (*See*: 235 Ill. Comp. Stat. 5/1-3.41.) But Illinois' Beer Industry Fair Dealing Act expressly applies to malt beverage products containing less than 0.5% ABV that are marketed as an alternative to beer. (*See*: 815 Ill. Comp. Stat. 720/1.1(1).) In other words, in Illinois, an NA beer is not considered alcohol, but would be subject to the beer franchise law.

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