

AUDITS AND ENFORCEMENT BY THE ALCOHOL AND TOBACCO TAX AND TRADE BUREAU

In 2002, the United States reorganized government departments to reflect the new mission of the Department of Homeland Security. Alcohol, Tobacco and Firearms (“ATF”), a long-standing bureau within the Department of the Treasury, was split into two pieces. Firearms and explosives enforcement, investigation and anti-terrorism work ended up in the Department of Homeland Security. The Alcohol and Tobacco Tax and Trade Bureau (“TTB”) who is responsible for permitting, excise taxes, and tobacco settlement enforcement remained with the Treasury.

TTB itself is located in Washington DC at 1310 G Street, N.W. The administrator, John Manfreda, worked at TTB since its separation from ATF in 2003. He became administrator on January 4, 2005. He was chief counsel to ATF 1999-2003. He has a law degree from Georgetown University School of Law, class of 1974. He is an easy going, polite but thorough executive. Secretary Munchin, like all of his predecessors, delegated the final agency decision making power of alcohol and tobacco permits, excise tax issues, and revocation proceedings to Administrator Manfreda. He will be the final decision maker in any administrative action related the federal permit, excise tax, audit or record keeping issues for your brewery or distillery (also for alcohol importers and tobacco product manufacturers and importers).

While you will go to Washington if you seek a final agency determination on an audit resulting in permit revocation or a permit denial, most investigative work and all preliminary enforcement will be handled from the TTB National Revenue Center in Cincinnati, Ohio. Thurla Skorla is the Director of the Center. She will issue the initial administrative decision. She will also be the initial decision maker on any audit penalties up to and including revocation.

I. Purpose of Audit and Enforcement

A. The primary purpose is in aid of collecting the Gallonage Tax.

- \$13.50 per proof gallon (pro rata if smaller) of distilled spirits manufactured in or imported into the United States. 26 U.S.C. 5001
- This applies to wines containing more than 24% alcohol as they are considered distilled spirits
- \$18.00 per barrel on beer brewed in the United States or imported into the United States. 26 U.S.C. § 5051
- Wine is provided for in 26 U.S.C. § 5041

B. In addition to the record keeping required for a producer or importer, note the definition of dealer in the statute. Most, if not all, distilleries and breweries will be dealers as defined in the statute—“any person who sells or offers for sale distilled spirits, wines, or beer.” 26 U.S.C. § 5121(c)(3) and 26 U.S.C. § 5122(c)(4). Thus each brewer and distiller must be aware of the dealer record keeping required by 26 U.S.C. §§ 5121-5124. NOTE: In addition to your permit to produce or import distilled spirits or beer, you must also be registered with the Secretary as a dealer. 26 U.S.C. § 5124 (unless you are only distilling or brewing products not for sale).

C. You will usually get notice that an auditor is visiting, it is normal practice. It is not required, however, and surprise audits happen on rare occasions.

D. Your auditor will look for:

- Evidence of required bonds
- Condition of the premises
- All required records
- Accurate calculation of tax amounts
- Accurate reporting of gallons manufactured or imported

- The auditor will search for in the public record and otherwise revisit requirements for issuance of the permit
 - A felony in the last five years
 - An alcohol related misdemeanor in the last three years 27 U.S.C. § 204(a)(2)
 - Evidence that by reason of his business experience, financial standing, or trade connections, not likely to commence operations within a reasonable period or to maintain such operations in conformity with Federal law 27 U.S.C. § 204(a)(2); 26 U.S.C. §§ 51712(d) and 5172(b) – 7172(h); 27 C.F.R. § 1.24
 - Under the catchall provision aggressive auditors will pull debt collection records, judgment records, background checks, bankruptcy records and, of course, any unpaid/unfiled taxes
 - Not just the company BUT every manager, operating agent, significant shareholder
 - An aggressive auditor will be looking for any evidence that the material submitted on your permit application was false or misleading as well

NOTE: The permitting disqualifications make your client the keeper of all the other investors. This is an uncomfortable situation, but you need to insist on a full background, credit, and criminal background check on every investor, officer, or high level manager. The sin of one could disqualify all. It is best to avoid anyone with one of the disqualifications, but you might survive if a minority investor not involved in operations.

Remember the broad scope of who must have a basic permit: Anyone who distills spirits, produces wine, rectifies or blends distilled spirits or wine, bottles,

warehouses, sells, offers for sale, ships in interstate commerce or foreign commerce—distilled spirits or wine. 27 C.F.R. § 1.21

E. Tips for the Audit

- If you have notice, prepare your files and records, have them in one place neat and ready to go
- If you have strong in-house accounting/compliance staff, pick the best (CFO, accountant) to be with the auditor at all times. Timely explanations can save negative audit findings. Knowing exactly what the auditor looked at can help you shape a response to any findings.
- Keep a detailed record of what the auditor reviews and particularly what is copied
- Be prepared for the auditor to want access to electronically stored data. Have the right equipment and person available in the room. You do not want the auditor wandering around your operation more than is absolutely necessary (I am not suggesting you restrict, due to the operational requirements they can look around like an OSHA inspector does, but for the most part you want the auditor/agent in one room with one or two people)
- Be relentlessly polite.

NOTE: One key step to avoiding audit findings—get the best help you can. If you are an importer, use a customs broker like UPS or Advanced Bonded & Customs Services, Inc. If you need outside help get it. Your accountant or lawyer should be present if your in house personnel do not have the education or experience to handle the audit. Your accountants need to have experience in this area.

F. Breweries

- Breweries give notice rather than applying for permits 27 C.F.R. §25.61
- TTB reviews and can request additional information
- While not as rigorous as the permit process for distilled spirits, wine or tobacco, brewer still must be approved by TTB before operating
- Brewers who import or purchase beer from another must get a permit, similar process to that described for distilled spirits and wine
- Detailed record keeping requirements for all brewers 27 C.F.R. §§ 25.591-25,301
- All those records and, of course, the excise tax calculations, returns and payments are all subject to audit

II. Audit Findings, Permit Denial/Revocation—What Happens Next

A. Most audits result in findings. The most common:

- Underpayment
- Missing or inaccurate records
- Improper labeling

B. Usually the permit holder or brewer's attorney or accountant negotiates, payments are made, record keeping improved and follow up inspections—but what if that doesn't happen

C. TTB will assess and then collect taxes for payments. This can only be challenged by the taxpayer after payment through the administrative process and, if necessary, district court litigation to seek a refund. It is like every other tax—you have to pay what is assessed and then try to get it back.

D. If you cannot agree with TTB, they must initiate a proceeding under 27 C.F.R. Part 71 to deny, revoke or suspend your permit or notice.

- The auditor/investigator presents findings and evidence to a supervisor, usually the Deputy Assistant Administrator for Field Operations, TTB/NRC if the audit involves issues other than tax payment/assessment (currently Ronald Hancock)
- If the issues are strictly excise tax payment/assessment presents findings to the Director of the Tax Audit Division, TTC/NRC
- Both are in Cincinnati. The supervisor then recommends action to the Director of the TTB NRC—permit/notice revocation, suspension, fines, tax assessment, penalties. The Director, Thurla Skora, makes the first administrative finding
- If the distiller or brewer is not satisfied with the finding, then demand a hearing
- The hearing is held in the judicial district where the permit holder/notice holder resides. It is conducted by an Administrative Law Judge
 - Limited discovery is allowed
 - The rules of evidence are relaxed
 - Due to budget issues and light docket load, TTB no longer has its own ALJs instead they are borrowed from other agencies. My last one came from the Coast Guard
 - TIP: You must educate the ALJ as if you were educating a really well educated jury. Unlike an agency assigned ALJ, the loaner ALJ will not have background and experience about the TTB and what it does
 - The application of the audit and the penalty lead most permit holders to raise equal protection, due process concerns about

being singled out and treated differently from similarly situated permit holders. These are valid, important defenses to raise.

- TTB uses 26 U.S.C. § 6103 as a shield against such claims
 - That section forbids TTB (and the government in general) from disclosing taxpayer information. Without discovery of how similar permit holders have been investigated and treated, it is very hard to substantiate these defenses
 - TIP: Use their own publications against them. Like most government agencies, TTB publishes newsletters and press releases about its hard work and successes. I have used press releases about settlement of actions against permit holders as evidence of disparate treatment. TTB still objects and says they can't testify because of Section 6103—but at least some evidence is in. TTB also does a weekly newsletter (it used to do two, one for tobacco and one for alcohol, but combined them some years ago). It can be found going back three years on the website. The newsletter reports settlements as well. See <https://www.ttb.gov/newsletters/ttb-news.shtml>
- The hearing before the ALJ is a full blown trial. Opening statements and closing arguments. TTB bears the burden of proof and goes first
 - Typically the ALJ will also allow post-trial briefs and proposed findings of fact/conclusions of law
 - After considering all of this, the ALJ will make findings of fact and conclusions of law and recommend a decision to the TTB Officer—none other than the Director of the National Revenue

Center, Thurla Skora, who made the initial administrative decision

- The TTB Officer then accepts written arguments, reviews the file and evidence, and makes a second administrative determination after a contested case
- If the permit holder is not satisfied, the permit holder requests review from the Administrator as the Secretary's designee for final agency action
- The Administrator receives the entire record from the ALJ and the TTB Officer. The permit holder can request to make an oral presentation to the Administrator. You should ALWAYS request oral presentation
- The Administrator will issue a Final Agency Decision (FAD). It will state when it takes effect—typically 60 days after the permit holders time to request judicial review runs.

E. Judicial Review of Final Agency Action

The permit holder or applicant may file for judicial review of any FAD refusing, revoking, suspending or annulling a permit. The request must be filed within 60 days of the final order with the Circuit Court of Appeal where the permit holder/applicant resides or the United States Court of Appeals for the District of Columbia. 27 U.S.C. § 204(h).

Remember when counseling your clients, the civil and administrative processes discussed above are normal. The Secretary does have the power to enforce criminal violations that are set out in the statute. The TTB administrator as the Secretary's designee can instruct the U.S. Attorney for the District to issue warrants and prosecute criminal violations.

INTELLECTUAL PROPERTY CONSIDERATIONS AND ADVERTISING IN BREWERY AND DISTILLERY BUSINESSES

Intellectual property breaks down into four different categories. Patents protect useful inventions. A subtype of patent, design patents, protect unique decorative designs that have no functional purpose. Trademarks, service marks and trade dress protect a name, symbol or other method that identifies the person or business who is the source of the goods or services and associates it with them and their reputation for quality. Copyright protects the expression of an idea in writing, sculpture, painting, music, film, photographs or any other fixed medium or mixed media. Trade secret law protects valuable inventions, business processes or even business information like customer lists that is not generally known, publically available, available with some effort by searching public sources, or easily determined through non-proprietary methods. The owner of a trade secret must take comprehensive reasonable steps to protect it.

Federal law alone governs patents and copyrights. Both state and federal law provide protection for trademarks, service marks, trade dress and trade secrets.

This section will focus on intellectual property rights in the order of importance to your clients in the ordinary course. First, trademarks/service marks/trade dress, then trade secrets, then copyrights and finally patents.

I. Trademarks, Service Marks and Trade Dress.

Each of these identifies the source of goods or services in the mind of the relevant consuming group. The concept is to build a brand that your purchasers

recognize, associate with qualities they wish to buy, and protect that brand from use by others. Three forms of protection exist—federal statutory protection including registration of the mark, state statutory protection including registration of the mark, and common law protection.

An initial decision is whether the business entity name should reflect the branding goal. Many companies do—Ford Motor Co., Coca Cola, Inc., Apple, Inc.—all company names that reflect the registered trademark and branding of the business. Sometimes the client will adopt the entity name and form the entity early in the process before market research and branding decisions. A disconnect between the company name and the product mark is not fatal, but does lose the advantage of every contract, shareholder meeting, letterhead reinforcing the brand. In the event of a business name different from the word-based trademark, the client may want to consider reserving corporate names that reflect the mark as a precaution.

The federal trademark and unfair advertising law can be found in 15 U.S.C. §§ 1051 to -1129.

The South Carolina Trademark Act can be found at S.C. Code Ann. §§ 39-11-1105 to -1195.

- Common law rights exist in the areas where the mark use sells and advertises its goods and services. Even if someone receives a state or federal registration after use began, the mark holder will retain rights in those areas only—the registered owner has it everywhere else.
- State registration, like federal registration, requires actual use of the mark in commerce or an intent to use followed by actual use shortly after registration. It gives rights across the entire state, not just in the area where sold/advertised. Filing fee is low. State performs very simple examination, unless a registered or reserved corporate/entity name or a registered state trademark is very similar, you will be registered.

- Federal registration requires actual use of the mark in commerce or an intent to use followed by actual use shortly after registration. It gives rights across the United States, not just in the area where sold/advertised. Application and renewal fees relatively high. The USPTO conducts an extensive examination of registered marks, advertising, publications, and the internet. USPTO considers beer, wine, distilled spirits and all alcoholic beverages to be in the natural zone of use.

A. Selecting the Mark.

Most clients focus on word marks. They are the best known and often easiest to recognize. Logos are equally important and common. More esoteric marks are color marks, sound marks, and since 1990, scent marks (only ten have been registered at the United States Patent and Trademark Office—USPTO). The strength of a trademark is a vital consideration in selecting the product name. Clients often want the most generic name because it makes it easy for consumers—what they don't understand is that very recognition makes it impossible to use as a source identifier.

The classification of strength:

- **Generic:** A generic term can NEVER be a trademark. It is so descriptive of the good or service it provides no distinction and it would adversely impacts competition. Thus, SHOE can never be a trademark for shoes and CLEANING can never be a service mark for a cleaning service. RUM cannot be a trademark for rum. And BEER cannot be your trademark for your new brew.
- **Descriptive:** A word or phrase that describes a feature, ingredient or attribute of the product or service or its nature. Usually too weak to be a mark. COLD AND FROTHY for beer is an example of a descriptive mark for beer that would not be given protection. Naked statements of

quality also are descriptive and not protectable like BEST AND STRONGEST VODKA. An exception exists for a descriptive mark so long in use that gained secondary meaning, recognition in the consuming public. An example is SHARP for televisions. Just coming out for registration, it would be rejected as a sharp picture is simply an attribute of a good quality television. Once it is used for a long time, supported by heavy advertising and recognized by consumers it can be a mark. Descriptive marks without secondary meaning, surname marks and geographic marks that are rejected for the Principal Register can sometime be registered on the Supplemental Register—this provides some benefits in the federal system. The real purpose is to provide notice of use while the mark holder strives through advertising and significant use to gain enough consumer recognition to provide secondary meaning so the owner can file a new, successful registration on the principal register. This is **not** the kind of mark a startup distiller or brewer should adopt.

TIP: The next three categories is where your client wants to be in selecting a word mark.

- Suggestive: A suggestive mark uses a work, term or phrase that suggests the actual product, service, or one of its attributes, but does not describe it. AIRBUS for airplanes is a good example of a suggestive mark. Maybe LIFTING SPIRIT for liquor or MAULING MASH for bourbon. How about LIQUID LOQUACIOUS for beer—I am really having a hard time with coming up with suggestive marks in this category but hopefully you get the idea. These marks are protected but do not have as extensive protection as the strongest two categories. Clients like suggestive marks, despite their narrower protection (need

to be using something nearly identical on nearly identical products for infringement) because it is more easily recognized by the consuming public than the two strongest categories.

- **Arbitrary:** Using a word or words with known meanings, but applying them to goods or services unrelated to those meanings. Examples are CAMEL for cigarettes or APPLE for computers. TALISMAN for a line of liquor would make a good example. In the recent hard seltzer market WHITE CLAW and TRULY are good examples of arbitrary marks. Arbitrary marks are very strong and use of a similar mark in a related area may be enough to support an infringement claim.
- **Fanciful:** A fanciful or coined mark is one that the owner created to brand the good or service. EXXON for gasoline and KODAK for film and cameras are good examples. COORS for beer and FINLANDIA¹ for vodka make good examples.

B. Mark Clearance.

Many clients want to run with a brand because they haven't heard of it, think its original and they are ready to go. **You must advise your client to engage you for a thorough trademark search.** One of the most devastating outcomes for a new business is to have initial success only to discover: (1) worst case—the mark used on the product infringes an existing one registered or in use in their area; (2) bad case—the area of expansion and sale allowed limited by an existing mark in use or registered in other states. While a search of federally registered and state registered marks is a great start, remember trademark rights come from common law use as well. Rights by use are limited to the area of advertising and sale by the senior

¹ Sibelius tone poem Finlandia did exist prior to the founding of the distiller but that does not seem to make it a word with a commonly known meaning thus placing the vodka mark in the arbitrary category.

user, but they do exist. A periodical search, newspaper search, internet name search, and corporate/entity name search all add greater value.

This can be a very frustrating stage of the project for a client. The client may search multiple potential marks only to have each one struck down for one reason or another. If, however, the client creates a successful brand—losing it in trademark litigation represents a much greater cost and frustration.

TIPS: One of the biggest mistakes made by attorneys in this area is not clearly describing the scope of each type of search that can be ordered and its benefit. You must tell the client what the benefit is of an internet search on top of a periodical search. Why it is important to look for entity names, not just advertising. You make an error if the client walks away thinking a federal registration search alone really eliminates the risk.

A second area of attorney error comes from searching too narrow a field. Either in selecting relevant classifications of goods and services (not really a problem here) or in not anticipating areas of natural expansion. If your client plans on making rum and only rum, of course a white variety, a dark variety, a high proof variety and flavored varieties, but still only rum, it is an error to restrict your search to rum brands. Other distilled spirits, especially cordials that could be rum based, and expanding lines might suggest other conflicts. In the current market of merging full line corporate purveyors of alcoholic beverages on the one end and micro-brewers/distiller on the other, it makes sense to search beer, wine and premade cocktails/hard seltzer/hard cider and other alternative alcoholic beverages.

One of the greatest strengths of trademarks is unlike patents and copyrights, they have no time limit. As long as your client actively uses the mark **and** takes reasonable steps to find infringement and enforce its trademark rights, you have a protectable trademark.

C. Trade Dress and Design Patents.

Design patents overlap strongly with copyright protections. They protect ornamental, non-functional, aesthetics of an industrial good. Copyrights can be obtained for similar things like garment patterns, ornamental designs of furniture etc. A design patent gives the inventor rights for 15 years from the date the USPTO issues the patent. 35 U.S.C. § 173. The aesthetic design of the bottle, etchings on the bottle, artwork on the label are all capable of design patent or copyright protection. Copyright rights last 70 years from the author's death. If the work is made for hire for an entity or someone else, or the author is anonymous or pseudonymous, then protection lasts 95 years from publication or 120 years from creation, whichever is shorter.

Most clients really desire trade dress protection, however. The real point of that unusual, unique bottle design or label art is to draw the attention of consumers and identify the source of the beverage. Like trademarks, trade dress protection lasts for as long as the owner is using it to identify source and takes reasonable efforts to protect against infringement. Like a design patent or copyright, the feature cannot be functional or necessary to the product. It must be decorative. Unlike them, it must be consistently used over time and recognizable as emanating from a single source. You cannot change the artwork with each year's batch.

Packaging trade dress must be either inherently distinctive or have acquired secondary meaning. Trade dress is inherently distinctive if it is suggestive, arbitrary or fanciful. If it is descriptive, it must obtain secondary meaning.

A mark is inherently distinctive when its intrinsic nature serves to identify a particular source. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992). In analyzing the trade dress an examiner or court will consider:

- a "common" basic shape or design;
- unique or unusual in a particular field;

- a mere refinement of a commonly adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods; or
- capable of creating a commercial impression distinct from the accompanying words.

Seabrook Foods, Inc. v. Bar-Well Foods, Ltd., 568 F.2d 1342, 1344 (C.C.P.A. 1977); *See also In re Chippendales USA, Inc.*, 622 F.3d 1346, 1351 (Fed. Cir. 2010) (stating that an abbreviated tuxedo costume consisting of wrist cuffs and a bowtie collar without a shirt "constitute[d] ‘trade dress’ because it was part of the ‘packaging’" for exotic dancing services).

A product design can never be inherently distinctive and must acquire secondary meaning. This would appear to have little relevance to alcoholic beverages as trade dress would always be packaging (although the addition of gold flakes in Goldschlager might be product design, non-functional and capable of designating the source of the goods).

D. Copyrights for Alcoholic Beverages.

A client cannot copyright a mere ingredients list with amounts. If truly new and unique, this might be patentable, but there have been few to no alcoholic beverage patents—process or machine—in recent years. If you add illustration and literary text describing the alcoholic beverage, a copyright is possible. **But, all that is protected is the expression**, anyone can take the ingredients, amounts and description of technique (heating, mixing etc.) and make the beverage without violating the copyright.

E. Trade Secret Protection,

The South Carolina Trade Secrets Act: S.C. Code Ann. §§ 39-8-10 to -130.

“(5) "Trade secret" means:

(a) Information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(b) A trade secret may consist of a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy. The collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.”

The very new Federal Defend Trade Secrets Act: 18 U.S.C. §§ 1831-1839.

“(3) the term “trade secret” means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or

intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if--

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.”

The key to maintaining trade secrets is twofold. First, the client needs to research and make sure the subject matter is not commonly known in the industry, easily available, published, patented or copyrighted elsewhere. If this is not done, the client may waste a tremendous amount of resources on securing the “secret” only to find it not protectable the first time litigated.

Second, the client must take “reasonable measures” to protect the information. In the rapidly changing world of electronically stored information, this includes cybersecurity. Both paper and electronic copies must be clearly marked as confidential, trade secrets. They must be held in physically locked locations or password protected, isolated files. Access should be given only to those needing the information to do their jobs. Only necessary copies to perform work should be made and, when no longer needed, destroyed. Employees and contractors must sign agreements recognizing trade secrets, agreeing to abide by protection, and providing for non-disclosure/confidentiality. These policies must be included in a regularly updated, board approved policy and procedure manual. The company must conduct regular training.

Some surprisingly easy steps exponentially increase electronic system protection.

- Stay up to date! Upgrade versions and patch systems regularly.
- Create strong passwords; change them frequently. A free and initially informative password assessor can be found at:

<https://howsecureismypassword.net>

- Use letters, numbers, capitalized letters, and special symbols
Battered1776!Fish tests as taking trillions of years for a password breaking program to penetrate.



- Performing internal and external penetration testing.
- Regularly conducting vulnerability scans.
- Performing cybersecurity assessments.
- Conducting social engineering testing.
- Two factor authentication.

- Training employees.
- Encrypting all data and devices.

UPDATE YOUR ANTI-VIRUS PROGRAM DAILY OR REAL TIME.

F. Confidentiality and Non-Disclosure Agreements.

Necessary for protecting trade secrets. Also necessary for others negotiating to buy your business or be bought. Customer lists are not of much value in this market. Everyone who is wholesaling works with licensed bars, restaurants, dealers and warehouses. Retail is a very broad, non-specific market.

TIP: Draft these to protect truly confidential information. Trade secrets for certain. Beyond that processes, practices and procedures not known commonly outside the organization that give a competitive advantage. When agreements are overbroad, courts look for reasons to find them invalid. Be sure that the signer acknowledges the organization's ownership of the trade secrets, confidential and proprietary information the agreement protects. For employees, either this agreement or another should have them acknowledge the organization's ownership of all IP developed or in place and agree to assign any rights the law may give them.

G. Non-Compete Agreements.

Rarely effective for line employees. Those who engineer and design processes. If your client is buying the business of another, an effective non-compete is key. Non-compete agreements are disfavored in South Carolina. They are very closely scrutinized when signed by employees who are not inventors, co-owners, key persons or the like. South Carolina has no "blue pencil rule." If one provision of the non-compete is found illegal or unconscionable, the entire agreement fails. It is very important to impose reasonable geographic and duration limits.

While not truly a non-compete agreement, in this era of hops *terroir*, herbal infusions, and experimental ingredients, exclusive supplier agreements and confidentiality agreements with suppliers of key ingredients may be appropriate.

H. Advertising.

Alcoholic beverage advertising is heavily regulated at the federal and state level. Tobacco is the only industry with more regulation in the view of most practitioners. 27 C.F.R. §§ 5.61 to 5.66 applies to distilled spirits. The advertisement must:

- State the name and address of the permit holder who responsible for publication or broadcast;
- Contain a conspicuous statement of the class and type of spirit;
- State the alcohol content;
- State the percentage of neutral spirits and the commodity from which distilled;
- Exceptions for line advertising and certain consumer specialty product.
- No health related claims.

Further you can't make a false statement, disparage a competitor's product, use obscene or indecent material, no test results the TTB finds misleading (even if technically accurate)

There is a required GOVERNMENT WARNING health statement for labels. 27 C.F.R. §§ 16.20 to 16.22. This applies to all alcoholic beverages.

The advertising requirements for malt beverages, including beer, are found at 27 C.F.R. §§ 7.50 to 7.55. You must

- State name and address of the brewer, bottler, packer, wholesaler, or importer responsible for its publication or broadcast.
- The class of the malt beverage.
- No health related claims.