

MEMORANDUM

TO: Dave Arland/Indiana Broadcasters Association Inc.

FROM: Scott Leisz and Dan Byron

DATE: August 16, 2024

RE: Advertising Laws and Regulations Handbook – Advertising of Alcoholic Products Update

Q: May broadcasters air advertisements for beer, wine or liquor?

A: Yes. The Federal Alcohol Administration Act, as administered by the Bureau of Alcohol, Tobacco and Firearms (“ATF”), provides advertising guidelines for these products. This law and the ATF regulations allow of the advertisement of beer, wine, and liquor and provide for certain content requirements and restrictions. There are no FCC or FTC rules governing the advertisement of alcohol products on radio and television stations, except for the general prohibitions against deceptive, false, or misleading advertising.

As for the State of Indiana, Indiana Code § 7.1-2-3-16(a) provides that the Indiana Alcohol and Tobacco Commission (“the Commission”) shall have the power to both regulate and prohibit advertising intended to advertise an alcoholic beverage or the place where alcoholic beverages are sold. The same statute also provides, however, that the Commission shall not exercise the prohibition power contained in subsection (a) as to any advertisement broadcast over duly licensed radio and television stations. IND. CODE § 7.1-2-3-16(c). The statute further provides that all advertisements relating to alcoholic beverages, whether published in the newspaper or broadcast over the radio or television, shall conform to the rules and regulations of the Commission. IND. CODE § 7.1-2-3-16(d).

That said, there are very few rules or regulations that have been promulgated by the Commission relating to the advertising of alcoholic beverages. Indiana Administrative Code section 905 I.A.C. 1-38-4, provides that “[p]rimary sources of supply, wholesalers, or salesman of alcoholic beverages, or the agents or representatives thereof, may advertise in such media as provided by law alcoholic beverages by brand name.” 905 I.A.C. 1-38-4(a). Furthermore, “[r]etailers and dealers of alcoholic beverages, or the agents or representatives thereof, may advertise in such

media as provided by law alcoholic beverages by price and brand name and the place where they may be obtained.” 905 I.A.C. 1-38-4(b). All advertising must conform to the brand name or logo on the label upon the actual container of the alcoholic beverages so advertised. 905 I.A.C. 1-38-4(d). However, no such advertising shall contain offers of financial rewards as inducements to purchase alcoholic beverages. 905 I.A.C. 1-38-4(c).

Q: May broadcasters air advertisements for happy hours?

A. Generally, yes. Although Indiana Code § 7.1-5-10-20 previously prohibited many types of traditional “happy hours”, Indiana Code § 7.1-5-10-20.5, effective July 1, 2024, now allows happy hours under certain conditions:

It is lawful for a permit holder to sell alcoholic beverages during a portion of the day at a price that is reduced from the usual, customary, or established price that the permit holder charges during the remainder of the day, subject to the following:

- (1) A price reduction;
 - A. may not exceed:
 - (i) four (4) hours in one (1) day; and
 - (ii) fifteen (15) hours in one (1) week; and
 - B. may be during consecutive or nonconsecutive hours that are divided by the permit holder in any manner.
- (2) A price reduction may not be made from 9 p.m. prevailing local time until 3 a.m. prevailing local time, the following day.

Notably, IND. CODE § 7.1-5-10-20 still makes it unlawful to:

- (1) Furnish two (2) or more servings of an alcoholic beverage upon the placing of an order for one (1) serving to one (1) person for that person’s personal consumption.

[and]

- (2) Charge a single price for the required purchase of two (2) or more servings of an alcoholic beverage.

Newly effective Indiana Code § 7.1-5-10-20.5, now allows permit holders to sell alcoholic beverages at reduced prices for an entire day. IND. CODE § 7.1-5-10-20.5(c).

Conversely, permit holder can also increase the price of alcoholic beverages during a portion of the day, provided this price increase occurs when the permit holder offers paid live entertainment and is not incidental to their usual services. IND. CODE § 7.1-5-10-20.5(d).

Additionally, the statute permits hotels to offer alcoholic beverages at no extra charge to registered guests and their visitors in areas where alcohol is not sold, from 7 A.M. to 3 A.M. IND. CODE § 7.1-5-10-20.5(d).

Because the above activities are now lawful, advertising of them by broadcasters is likewise now permissible. However, broadcasters should ensure that advertising of happy hour specials conform to the above limitations to avoid the revocation of privileges described in IND. CODE § 7.1-5-10-20.5.

Q. Are there any industry guidelines regulating the content of alcohol advertising?

A. Yes. In addition to federal law and ATF regulations, the advertisement of alcohol products is self-regulated by the alcohol industry through three voluntary codes: the Beer Institute Code, the Wine Institute Code and the Distilled Spirits Council of the United States (“DISCUS”) Code. In 1996, Seagram announced it would begin advertising its hard liquor products on television, which, at that time, was contrary to the DISCUS code. The DISCUS code now allows for such advertising. It has adopted voluntary regulations similar to the Wine Institute and Beer Institute codes on the placement of advertisements in broadcasting so that they target an audience that is 21 years and older and include only responsible age-appropriate content. Specifically, each of the codes permits placement of alcohol advertisements in programs where adults over 21 years of age constitute at least 73.8% of the audience, and each provides regulations against targeting underage drinkers and youth. Due to these codes, alcohol advertisers, including beer companies, are hesitant to place advertisements on many contemporary music radio stations, as it is challenging to ensure that the audience meets the required age limits.

Q: Are there any other restrictions or requirements for the content of advertisements for beer, wine or liquor including information relating to alcohol content?

A: Yes. As set forth in the Indiana statutes discussed above, retailers and dealers of alcoholic beverages may lawfully run advertisements for alcoholic beverages, including the prices and brands of the beverages and the locations where they may be purchased. *See* 905 I.A.C. 1-38-4. However, it is unlawful for advertising to contain offers of financial awards as inducements to purchase alcoholic beverages. 905 I.A.C. 1-38-4 (d).

The federal regulations provide for specific and different requirements for each of these products including disclosure of their alcohol content in advertising. Compliance with the requirements and prohibitions in advertisements for beer, wine and liquor is primarily the responsibility of the producer of the advertisement. Television and radio broadcasters are not responsible for ensuring compliance with ATF regulations; however, as with false or misleading advertisements, the broadcaster is always subject to complaints to the FCC and must comply with Indiana law.

Q: Are there any industry regulations governing the advertising of the alcoholic content of these products?

A: Yes. The DISCUS codes require that such advertising be truthful, factual and not used to “promote the potency” of the product. In addition, the Wine Institute Code prohibits any reference to the alcohol content in advertisements for wine or wine coolers, unless such disclosure is required by law.

Practical Considerations

In the absence of specific guidance from the ATC regarding happy hour advertising, broadcasters should proceed with caution when promoting such events. Additionally, broadcasters should review their program contracts as certain program providers, particularly including high school sports leagues, have restrictions in their agreements granting broadcast rights that limit some or all alcohol advertising. Given that the ATC has not directly addressed this issue, it is important to adhere to general principles governing alcohol advertising and promotional practices.

Firstly, broadcasters should ensure that all advertising is truthful, not misleading, and in compliance with existing alcohol promotion regulations. This includes avoiding any representations that could be construed as encouraging excessive or irresponsible drinking.

An example of a lawful promotion complying with existing regulations includes an advertisement for “\$2 off shots from 4-7PM on Mondays”. This type of promotion promotes a price reduction occurring for less than four hours in a day and does not exceed 15 hours in a week, outside of the prohibited happy hours (9PM-3AM). Broadcasters should take particular caution when considering “two-for-one” specials or similar promotions. Under Indiana Code § 7.1-5-10-20, it is still unlawful to furnish two or more servings of an alcoholic beverage upon the placing of an order for one serving, for one person’s personal consumption, and to charge a single price for the required purchase of two or more servings. Violating this statute could result in legal repercussions, even if the promotion is intended to attract customers during an otherwise lawful happy hour.