

Beverage Breakdown

October 2024 Edition

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Welcome to Nutter's *Beverage Breakdown*, a periodic legal update on developments related to the alcohol beverage industry, including industry news, federal and state updates, noteworthy litigation, and more. We look forward to sharing our insights with you as we cover everything that's brewing across the sector.

Industry News

The U.S. Drug Enforcement Administration (DEA) has delayed the **rescheduling process for cannabis**. The DEA will hold a hearing on the rescheduling proposal on December 2, 2024.

The SEC charged Keurig Dr Pepper with making inaccurate statements about the recyclability of K-Cups. KDP's annual reports filed with the SEC in 2019 claimed that the company had validated that the pods can be "effectively recycled" but failed to disclose that major recycling companies disagreed with that assessment and that some recycling companies refused to accept the pods. KDP agreed to pay a \$1.5 million civil penalty to settle the charge. Companies' claims about **sustainability or environmental impact** made in any context can pose regulatory exposure if the substantiation for those claims is insufficient.

NCSLA announced that it has contracted with Jaffe Management and appointed Jenna Ayala, Associate Manager at Jaffe, as Executive Director of the organization.

The Teamsters are striking against Bigfoot Beverages in Oregon. The **strike** began on September 19 and was expanded to

include all locations in early October. Teamsters leadership claim the distributor is engaging in unfair labor practices, including attempting to replace pension benefits with a 401(k) plan.

A retailer outside of Kansas City received a letter from a large alcohol beverage supplier regarding an ad that the retailer had displayed above one of their wines. The ad compared the alleged residual sugar levels of the large supplier's wine to the sugar in a lesser-known brand of wine (the ad was produced by the smaller winemaker). The large supplier identified potential false advertising issues with the advertisement, but both the smaller winemaker and the retailer stood by what they claim was a truthful ad. **Comparative advertising**, specifically in the alcohol beverage space, is nuanced. For example, Wine Institute's advertising code obligates members making comparative advertising claims to ensure the claims are "truthful and appropriately substantiated" and prohibits the disparagement of competitors' products via comparative advertising. This standard is a bit stricter than FTC's general policy on disparagement in comparative ads, which it finds may be permissible so long as it is truthful and not deceptive.

Federal/State Regulatory Updates

Federal Updates

Assignments of **Craft Beverage Modernization Act** (CBMA) tax benefits for products imported in calendar year 2024 must be submitted through myTTB no later than December 31, 2024. 2025 assignments of CBMA tax benefits may also now be assigned in myTTB.

TTB accepted a **\$2 million offer in compromise** from Frank-Lin Distillers Products, Ltd. for underpaying the excise tax on distilled spirits withdrawn from bond. The OIC indicated that the underpayment was “proximately caused by improperly configured and implemented NetSuite software supposedly designed to correctly track and prepare reports and FET filings to ensure compliance.” Industry members should ensure that they maintain some level of oversight over software or outsourced services utilized to provide compliance or reporting support because ultimately those obligations fall at the feet of the licensee, including when it comes to regulatory enforcement.

The reopened comment period for TTB’s proposed changes to the **authorized standards of fill** for wine and distilled spirits closed on October 9, 2024. Notice No. 210 proposed to add 10 authorized standards of fill to those already authorized for wine and, alternatively, to eliminate all but a minimum standard of fill for wine containers. The notice also proposed to eliminate all but a minimum and maximum standard of fill for distilled spirits containers.

TTB published a proposed rule, Notice No. 234, **Modernization of Permit Application Requirements for Wine Premises** where the agency proposed “deregulatory amendments” to “modernize and streamline the application requirements for wine premises.” These amendments would relax certain reporting requirements related to changes in the business of proprietors of wine premises. Comments to the proposed rule are due on or before December 2, 2024.

USDA is holding a meeting of the **National Organic Standards Board** (NOSB) October 22–24, 2024. NOSB assists USDA in the development of standards for substances to be used in organic production and advises the Secretary of Agriculture on any other aspects of the implementation of the Organic Foods Production Act.

The FTC finalized its Trade Regulation Rule on the use of **consumer reviews and testimonials** in September. The final rule becomes effective on October 21, 2024. The rule will prevent businesses, or those acting on their behalf, from using deceptive endorsement and review practices. It prohibits (1) fake or false consumer reviews, consumer testimonials, and celebrity testimonials (e.g., an AI-generated fake review); (2) buying positive or negative reviews (businesses cannot provide compensation or other incentives conditioned on the writing of a consumer review that expresses a particular sentiment, positive or negative); (3) insider reviews and consumer testimonials (e.g., reviews written by officers, managers, or company insiders that fail to disclose clearly and conspicuously their material connection to the business); (4) company-controlled review websites; (5) review suppression; and (6) misuse of fake social media indicators (e.g., the buying or selling of followers or using bots to generate views).

Oregon Senator Jeff Merkley and New York Senator Kristen Gillibrand introduced the **USPS Equity Act** that would allow USPS to ship alcoholic beverages directly from licensed producers and retailers to 21+ consumers in accordance with state and local shipping regulations. Sen. Markley highlighted that USPS ships to rural destinations so the bill could provide access to alcoholic beverages to people in those areas, as well as increase the competition for shipping rates.

Oregon Senator Ron Wyden introduced the **Cannabinoid Safety and Regulation Act** that would put hemp-derived THC in line with alcohol beverages from a regulatory perspective. The Act provides that: “the Secretary of Agriculture, the Commissioner of Food and Drugs, the Attorney General, and the Director of the Alcohol and Tobacco Tax and Trade Bureau, acting jointly, shall publish a report that includes recommendations for a Federal regulatory framework for cannabinoid beverages that contain tetrahydrocannabinol...that— (1) is modeled on the Federal regulatory framework for alcohol; and (2) delineates responsibilities among the Department of Agriculture, the Food and Drug Administration, the Department of Justice, and the Alcohol and Tobacco Tax and Trade Bureau, for labeling, taxation, manufacturing, and adulteration standards of cannabinoid beverages that contain tetrahydrocannabinol.”



The House Committee on Oversight and Accountability subpoenaed documents from the U.S. Dept. of Health and Human Services secretary Xavier Becerra and U.S. Dept. of Agriculture secretary Tom Vilsack related to the 2025 iteration of the **Dietary Guidelines for Americans**. The subpoenas outline an allegedly improper delegation of authority over the development of alcohol consumption guidelines to the Interagency Coordinating Committee on the Prevention of Underage Drinking (ICCPUD). The National Academies of Sciences, Engineering, and Medicine (NASEM) already has jurisdiction over this issue. Congress set aside \$1.3 million for NASEM to study the relationship between alcohol consumption and health outcomes to help in the development of the 2025 Dietary Guidelines, and the subpoena indicates that HHS and USDA have failed to comply with the committee's requested documents and communications. ICCPUD does not publish information or provide access to meeting materials under Federal Advisory Committee Act requirements, meaning the studies they are undertaking may lack transparency and oversight. Following the subpoena, 113 members of Congress signed on to a letter authored by Representatives Mike Thompson and Dan Newhouse that, in part, questions ICCPUD's concept of conducting original research on adult alcohol consumption when the purpose of the committee is to prevent underage drinking. The letter ultimately requested that the ICCPUD discontinue its study.

State Updates

Ohio

Senate Bill 94 was signed by the Ohio Governor and allows free tastings at agency stores (samples used to cost at least \$0.50), lifts the restriction on grains of paradise in alcoholic liquor or beer, and removes the production cap for certain micro-distilleries that already hold an A-3a liquor permit as of the bill's effective date.

California

- Retailers must make electronic payments to beer, wine, and distilled spirits wholesalers for deliveries. Starting on January 1, 2026, retailer licensees must make payments to wholesaler licensees for beverage alcohol deliveries via electronic funds transfer within 30 days of delivery. Wholesalers will be responsible for selecting the third-party payment processor. However, the state law that requires delivery invoices to be paid within 42 days of the date of delivery to avoid a 1% interest charge for every 30 days the payment is late remains in place.

- A bill that would have decreased the California Redemption Value (CRV) deposit for wine and spirits packaged in boxes, bladders, pouches, or similar containers less than 24 fluid ounces from \$0.25 to \$0.10 was vetoed.
- On-premise beer and wine licensees may now sell **domestically produced soju and shochu** to their customers. Previous privileges were restricted to only imported Korean soju or Japanese shochu.
- The state has added a **Beer Caterer's Permit** which allows beer manufacturers to sell their products at events off their licensed premises like street fairs, private parties, and other civic events. Beer manufacturers with a Type 01 or a Type 23 license can apply for the Beer Caterer's Permit beginning January 1.
- **"Sell-by" dates** have been banned in the state, effective July 2026. California has cracked on allegedly misleading "sell by" or "best before" dates because the terms have no universal meaning under current law. The law is aimed at reducing food waste and climate-emissions. "Sell by" dates often act as a guide for stores to pull products from the shelf and not as an indicator of whether a product is still safe to consume. The new law will require the use of "Best if Used By" to signal peak quality or "Use By" for product safety. **Beer and other malt beverages are exempt** from compliance with these new requirements.

New Hampshire

New Hampshire joins a handful of other states in banning the sale of certain products with intentionally added PFAS effective January 1, 2027. The restrictions do not include unintentional contamination which may occur during manufacturing or shipping. The legislation covers food packaging and containers, among other products.

New Jersey

New Jersey-based law firm Lowenstein Sandler published a piece highlighting anecdotal evidence of an uptick in enforcement from the New Jersey Department of Environmental Protection under the state's seldom-used Toxic Packaging Reduction Act (TPRA). The firm noted that this enforcement resurgence coincides with Senate Bill 3135 which seeks to expand TPRA to prohibit, among other things, the use of PFAS in packaging. If the bill passed, New Jersey would join a growing list of states that bans use of PFAS in packaging, packaging components, or any product contained in a package that is sold or offered for sale.



Noteworthy Litigation

Jean-Paul Weg LLC et al. v. Director of the New Jersey Division of Alcoholic Beverage Control et al.: arguments were heard in this case before the Third Circuit on September 17. Recall, this case began when a New York City **wine retailer sued New Jersey over its ban on direct-to-consumer shipments** of wine from out-of-state retailers (but permitting the same for out-of-state wineries and in-state retailers). The retailer argued that the ban was a violation of the Commerce Clause, which forbids states from discriminating against interstate commerce. The lower court found that New Jersey's ban was a "legitimate, non-protectionist" way for promoting public health and safety.

Dale v. WSCO Petroleum Corp. and Kay et al v. Plaid Pantry, et al: several proposed class actions have been filed in Oregon related to certain **retailers' universal ID swiping policies for age-restricted products like tobacco and alcohol**. An ID "swipe" occurs when a driver license or identification card is passed through an ID reading device. Oregon law provides that a private entity may not swipe an individual's driver license or identification card, except to verify the individual's age when providing an age-restricted good or service to any person about whom there is reasonable doubt of the person's having reached 21 years of age. Reasonable doubt exists when the person appears to be under the age of 26. The suits allege that the universal ID swipe policies of retailers violate these laws because individuals are having their ID swiped despite there being no reasonable doubt as to whether they are over 21. The plaintiffs say the case is about privacy and protecting their personal information. As privacy and data protection issues become increasingly more salient, retailers should not only understand compliance and public safety obligations when it comes to selling alcohol or other age-restricted products, but the privacy implications as well when implementing national policies like this.

Elizabeth Castillo v. Prime Hydration LLC: a class action lawsuit filed against Prime Hydration was heavily trimmed last month. The suit alleged that Prime was misleading consumers by **marketing its Grape Sports Drink as "healthy" when it contained significant levels of eight types of PFAS** in amounts three times the EPA's recommended lifetime health advisory for drinking water according to Castillo's testing. In tossing a host of the plaintiff's claims (but with leave to amend), the judge found that many of the statements pointed to in Castillo's complaint were not sufficient to mislead, nor did Castillo plead "any actual allegations showing Prime... had exclusive knowledge—or any knowledge—about the presence of PFAS in the product."

Hassan v. Albertsons Companies, Inc.: a proposed class action has accused Albertsons Companies of employing **fake “strikethrough” reference prices for wine**, allegedly deceiving consumers into thinking they are getting a bargain. The lawsuit states that “nearly every wine product” in stores is perpetually on sale, meaning members are not actually receiving the discount they thought they were. The plaintiffs say this “false reference pricing” resulted in consumers being induced to make purchases they otherwise would not have made for products of lesser quality and value than they were led to believe.

Environmental Working Group v. Tyson Foods Inc.: EWG has accused Tyson foods of falsely claiming that it will be **net-zero by 2050** and of misrepresenting its industrial beef products as “climate-smart” in a lawsuit filed in the Superior Court of the District of Columbia. EWG says “there is no credible evidence that Tyson intends to significantly innovate, alter, or diversify its current activities to achieve its ‘net zero’ goal or produce truly ‘climate-smart’ beef, even if such a radical shift in Tyson’s business model were possible.”

CB Brand Strategies LLC et al. v. Oz Trading Group Inc.: in one of the more brazen examples of alleged infringement, CB Brand Strategies LLC (Constellation) has sued Ox Trading Group alleging that the company is selling and advertising beer products that **overtly imitate their beers like Corona, Pacifico, and others**. Oz Trading is believed to be owned and operated by former Hidalgo, Texas City Councilmember Oziel Trevino. The suit alleges that Oz Trading hired an alleged “alcoholic beverage consultant” called “Rezzonator” to help submit the purportedly infringing labels to the TTB for approval. Constellation demanded the COLAs be surrendered, which they eventually were in July. According to the complaint, Oz Trading has continued to import, sell, market, advertise, promote, and distribute the products in question including in interstate commerce, with products allegedly appearing in Texas, California, and other states.

Dwinell, LLC et al v. McCullough et al: last year winegrowers in Washington and Colorado sued California alleging that the state’s laws **discriminate against out-of-state wineries** by (i) allowing in-state wineries to sell directly to local retailers but not affording the same

privilege to out-of-state wineries, (ii) requiring out-of-state wineries use separate importer-wholesalers, and (iii) requiring an applicant show California residency in order to issue a winegrower license (holding a winegrower license would afford the licensee the privilege of self-distribution). Last month, a judge denied California’s most recent motion to dismiss (California’s initial motion to dismiss was granted when the judge ruled that the plaintiffs had failed to adequately allege injury in fact but granted them leave to amend the complaint). “Because Plaintiffs have alleged sufficient facts to state a claim under the Commerce Clause and Defendants have not shown that a stay is warranted, the Court denies Defendants’ motion.”

Buckel Family Wine, LLC v. Iowa Department of Revenue et al: Originally filed by Pheasant Court Winery, Buckel Family Winery replaced Pheasant as the lead plaintiff in this case challenging Iowa law that prohibits **out-of-state producers from obtaining a Class A permit that would allow them to self-distribute**. Buckel argues that this discriminatory treatment of in-state and out-of-state wineries is a violation of the dormant Commerce Clause. Buckel partially succeeded on a motion for summary judgement in the case, “Defendants make various arguments relating to Iowa’s legitimate nonprotectionist interests. None succeed.” The Order did address an issue raised by the State, that a finding in Buckel’s favor could create “out-of-state wholesalers.” The Order made clear that the decision only allows wine manufacturers to sell their own products to retailers, not other producers’ products.

Diageo North America Inc. v. W.J. Deutsch & Sons Ltd: Diageo sued Deutsch in 2017 accusing the company of **copying the Bulleit’s “clear canteen-shaped glass bottle with rounded shoulders” and other distinctive features of the bottle to allegedly trade on Bulleit’s reputation**. In 2022 a jury found that Deutsch’s bottles diluted the distinctiveness of Bulleit’s bottles. Before the Second Circuit, Deutsch argued that Bulleit did not have the “household-name level of recognition” needed to justify the jury’s findings but the appeals court sided with Diageo again and upheld the lower court’s finding that Diageo provided enough evidence that Deutsch’s whiskey bottle diluted Diageo’s Bulleit trademark right.



Transactions

- Glazer's Beer & Beverage is purchasing Capital Beverage (Oklahoma City).
- PE firm Butterfly Equity is acquiring Duckhorn in a \$1.95 billion deal.
- Campari bought a 14.6% stake in Capevin Holdings Proprietary Ltd., the South African owner of a whisky producer, for £69.6 million (\$92 million).

Nutter Spotlight – Cannabis Considerations

As the influence of cannabis continues to grow across markets, it is reshaping business models and consumer experiences, infiltrating various industries. In the beverage sector, cannabis-infused drinks continue to gain popularity, transforming markets and creating new business opportunities. Nutter's corporate client, **Canna Provisions**, represented by prominent litigators from Boies Shiller Flexner LLP, is the lead plaintiff in litigation against the U.S. government challenging the constitutionality of the Controlled Substances Act as applied to intrastate commercial cannabis activity. This litigation sparked some cannabis operators to review their tax filing position relating to the application of IRC Section 280E, which results in a significant tax burden for cannabis businesses. Nutter has represented clients with IRC Section 280E analysis and has issued a legal opinion to clients, which has been relied upon in amending tax returns and claiming material refunds owed by the IRS.

For cannabis-related inquiries, please reach out to [Tom Rosedale](#), Chair of Nutter's Corporate and Transactions Department.

About Nutter

Nutter is a Boston-based law firm that provides legal counsel to industry-leading companies, early stage entrepreneurs, institutions, foundations, and families, across the country and around the world. The firm's business and finance, intellectual property, litigation, real estate and land use, labor and employment, tax, and trusts and estates practice are national in scope. The firm was co-founded in 1879 by former U.S. Supreme Court Justice Louis D. Brandeis, before his appointment to the Court. For more information, please visit www.nutter.com and follow the firm on [LinkedIn](#).

This advisory was prepared by Nichole Shustack and Isabelle Cunningham, Alcohol Beverage attorneys, in Nutter's Alcohol practice group. If you would like additional information, please contact any member of our team or your Nutter attorney at 617.439.2000.

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