Hard cider has shown phenomenal growth in the past several years. With rising consumer demand, more and more craft brewers are entering this rapidly expanding market. Although hard cider is typically distributed and marketed like a beer product, the federal government and most states actually tax and regulate cider as a type of wine. Brewers contemplating the production of cider accordingly must carefully consider the legal issues surrounding cider production and distribution that distinguish cider from beer. This article outlines some of the most important (though certainly not all) of these issues.

1. Classification of Hard Cider
The most fundamental aspect of cider distribution is its classification. Unfortunately, classifying cider for tax and other purposes is not simple. On the federal side, the tax (but not necessarily labeling) classification of cider depends on the product’s alcohol content, carbonation, and fruit content.

The Internal Revenue Code (IRC) defines “hard cider” as a subset of wine containing less than 7 percent alcohol by volume (ABV). Federal law requires that to be taxed as a hard cider, a product must be made primarily from apples (or apple concentrate and water) and must contain no other fruit product or other fruit flavorings. Alcohol & Tobacco Tax & Trade Bureau (TTB) regulations clarify that the “primarily from apples” requirement mandates that more than 50 percent of the volume of the finished product must come from apple juice (or the equivalent amount of apple juice concentrate reconstituted to its original brix). Federal law also provides that hard cider cannot contain carbonation exceeding 0.392 grams per 100 milliliters and still qualify for the hard cider tax rate.

For low-point ciders that fail to meet the hard cider tax classification, federal law taxes such products as part of the much broader category of “wine” but, despite not permitting the enjoyment of the cider tax rate, allows the labeling and marketing of such products as “cider.” Legislation entitled the “CIDER Act” is currently before the U.S. House of Representatives. It would expand the “hard cider” tax class by adding pear juice and pear juice concentrate as fruits authorized for use, raise
the carbonation limit, and raise the alcohol content limit to 8.5 percent ABV.

For ciders below 7 percent ABV, the Food & Drug Administration (FDA) has primary labeling jurisdiction under the Federal Food, Drug and Cosmetic Act (FD&C Act). The Federal Trade Commission has primary federal agency marketing oversight for such products.

With respect to hard ciders at 7 percent ABV or above, the still or sparkling wine excise tax rates apply, depending on the level of carbonation in the product. For such products, TTB has primary labeling, marketing, and advertising jurisdiction under the Federal Alcohol Administration Act (FAA Act).

At the state level, 42 states and the District of Columbia treat cider as a wine or special type of wine, and eight states (Alaska, Georgia, Iowa, Maryland, New Hampshire, Pennsylvania, Rhode Island, and Tennessee) treat cider as beer or a special type of beer.

2. Licensing
Brewers interested in producing hard cider must consider federal and state licensing requirements. At the federal level, production of any domestic cider (regardless of alcohol content) requires registration with TTB as a bonded winery or bonded wine cellar. If production will take place at a brewery, the bonded wine premises must alternate operations with the brewery, adding a layer of paperwork complexity. Any facility producing and/or warehousing cider must also register as a “food handler” with the FDA.

Because the FAA Act’s definition of “wine” excludes fermented fruit products containing less than 7 percent ABV, brewers do not need a winery “basic permit” to produce, wholesale, or import ciders below 7 percent ABV. Ciders containing 7 percent ABV or more qualify as “wine” under the FAA Act, and brewers producing such products accordingly need to obtain a federal winery basic permit. Similarly, importing or wholesaling cider at 7 percent ABV or above requires a wholesaler’s basic permit to wholesale such products, or an importer’s basic permit to import such products.

Every state also requires some type of license to produce and sell cider. Because most states classify cider as a type of wine, those states will require a winery license to produce hard cider. Many states also require out-of-state cider producers to hold some type of out-of-state wine shipping license in order to sell cider to in-state wholesalers. Brewers also should keep in mind that most states require wholesalers selling cider to hold a license authorizing the purchase and resale of wine. For the several states that treat cider as a type of beer, however, brewers should find that their existing wholesalers’ beer license in such states authorizes the distribution of cider.

3. Labeling
Labeling presents another complex picture due to jurisdictional quirks in the laws governing alcohol beverages. For ciders below 7 percent ABV, primary federal labeling jurisdiction rests with the FDA. Unlike TTB, the FDA requires no preapproval of labels prior to introducing a product in commerce. The FDA’s labeling requirements for cider appear in the sidebar on page 28.

But TTB is not entirely uninvolved in the labeling of hard cider below 7 percent ABV. TTB’s tax labeling regulations apply to all domestic ciders, and the government warning statement requirement applies to all alcohol beverages as well. No federal “standards of fill”—regulations authorizing only a limited number of approved container sizes—apply to low-point ciders (although some states may impose standards of fill).

For higher-strength ciders (i.e., ciders at or above 7 percent ABV), TTB has primary jurisdiction with respect to labeling. TTB’s labeling requirements for wine-strength cider appear in the sidebar. As with beer (“malt beverages” in FAA Act parlance), TTB
requires label pre-approval (i.e., Certificates of Label Approval or COLAs) for such products. For ciders at or above 7 percent, federal standards of fill apply, precluding popular beer packages like the 22-ounce bottle.

Few states impose substantive labeling rules on cider beyond those of FDA and TTB. But a few exceptions exist. Most notably, a number of states impose bottle and can deposit marking requirements on cider. Most states also require some type of label registration for hard cider products.

4. Distribution

Because beer is distributed virtually everywhere through a private, usually three-tier, distribution system (i.e., through licensed in-state wholesalers and retailers), brewers typically have little, if any, experience with “control” jurisdictions. Control jurisdictions are those where a state-owned monopoly controls the distribution (and, sometimes, retail sale) of alcohol beverages.

In some states, cider is distributed through the control system. Specifically, Utah and Wyoming are control states for all ciders, regardless of alcohol content. Mississippi, New Hampshire, and Pennsylvania also mandate the distribution of higher-strength ciders through a control system.

5. Franchise Laws

Although franchise law protection is nearly universal in the beer industry, application of franchise laws to hard cider presents a different picture. Numerous states with beer franchise laws do not have franchise laws applicable to wine (and, thus, cider). But since low-point cider is sold through the beer distribution network in most states, wholesalers’ mindset is that they have (or should have) franchise law-type protections.

For low-point ciders (generally, ciders containing below 7 percent ABV, except in certain states—Arkansas, Georgia, Iowa, Mississippi, Montana, Pennsylvania and Tennessee—which draw the line a bit lower, from 5.5 to 6.9 percent ABV), an alcohol-specific franchise law would apply in 26 states. Oklahoma has a unique “reverse franchise” law that prohibits a supplier from refusing to sell to a wholesaler desiring to purchase the supplier’s product. West Virginia also has a unique provision that prohibits exclusive agreements between suppliers and wholesalers. As discussed previously, Utah and Wyoming are control states for low-point cider, so no franchise law would apply in these states. For a simplified overview of the states where a franchise law would apply to low-point cider, see the map.

For ciders containing at least 7 percent ABV, the application of franchise laws largely tracks the application of franchise laws to wine. For such products, a franchise law would apply in 20 states: Alabama, Arkansas, Connecticut, Delaware, Georgia, Idaho, Maine, Massachusetts, Michigan, Missouri, Montana, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Tennessee, Vermont, Virginia, and Wisconsin. Both Minnesota and
Oklahoma have “reverse franchise” provisions governing wine that prohibit a supplier from refusing to sell to a wholesaler desiring to purchase the supplier's product. Again, West Virginia prohibits exclusive agreements between suppliers and wholesalers. Mississippi, New Hampshire, Pennsylvania, Utah, and Wyoming are all control states for higher-strength wine.

6. Trade Practice, Tied-House & Marketing Issues

Lastly, brewers contemplating hard cider production and sales should identify possibly different trade practice, tied-house, and marketing-related issues relating to cider distribution. For ciders containing 7 percent ABV or more, the federal trade practice and tied-house rules apply. Although these rules do not apply to low-point ciders, state rules concerning trade practices and tied-house issues usually apply to all ciders, regardless of alcohol content. State rules addressing trade practices and tied-house issues for cider products tend to be similar to those rules governing beer, but may not be exactly the same. For example, allowable sample sizes for cider products may differ from those allowed for beer.

With respect to marketing, an issue facing cider producers is which voluntary industry code a brewer should follow in marketing cider products. Brewers typically follow the Brewers Association Marketing & Advertising Code (BA Code) and/or the Beer Institute Advertising and Marketing Code (BI Code), while the wine industry generally follows the Wine Institute Code of Advertising Standards (WI Code). While most states treat cider as a type of wine product, low-point cider is typically sold through the beer distribution network in most states. Accordingly, the question of which advertising code applies to cider products is not entirely clear. While each of these codes will resolve most questions in the same manner, brewers should carefully consider how to proceed if a particular cider marketing practice complies with the BA Code or BI Code, but not the WI Code.

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Passing the Senate, New Mexico S.B. 263 would authorize counties to impose a local liquor excise tax.

Passing and signed by the House, New Mexico H.M. 67 requests a study on the feasibility of implementing regulations allowing the delivery of beer, wine, and hard alcohol, along with the concurrent delivery of prepared foods or groceries, to homes, hotels, and licensed bed and breakfasts.

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