

**Advertisement:** Fireball Whisky promotional material

**Advertiser:** Sazerac Company, Inc. (Non-DISCUS Member)

**Complainant:** Industry member

**Complaint Summary:**

The complainant considers the Fireball Whisky promotional material set forth below to violate Responsible Content Provision (RCP) Nos. A1 and A2.



Responsible Content Provision No. A1 provides that “[a]ll beverage alcohol advertising and marketing materials, regardless of placement, are intended for legal purchase age adults who choose to drink. The content of beverage alcohol advertising and marketing materials should primarily appeal to individuals 21 years of age or older.”

Responsible Content Provision No. A2 provides that “[m]arketing that primarily appeals to individuals under the age of 21 is inappropriate. Advertising and marketing materials are considered to ‘primarily appeal’ to persons below the legal purchase age if they have special attractiveness to such persons beyond the general attractiveness for persons of legal purchase age.”

The complainant states that “the totality of the overall packaging, including the depictions of normal ‘Halloween’ graphics like pumpkins, ‘dragon like’ fire-breathing animals and use of ‘trick or treat’ language are very similar to Halloween graphics typically seen on other Halloween consumable products, like large bags of candy, that have special attractiveness to persons below the legal purchase age.”

The complainant relays that “[w]hile we understand the ‘dragon’ is part of the Fireball brand, the overall net impression of the advertising -- which in this context is promoting the activity of ‘trick or treating’ – is an activity that involves children wearing costumes, the likes of which could be a dragon.” The complainant asserts that “[t]his packaging is particularly similar to large bags of candy that are found in the candy aisles of most grocery stores. See below images/links below for examples.”

- [Snickers Fun Size Halloween Chocolate Candy Bars](#)



- [Cadbury Halloweenies Halloween sweets](#)



- [Bag of M&S Choc Shock Beans Milk Chocolate Beans](#)



- [REESE'S, Milk Chocolate Peanut Butter Snack Size Pumpkins Candy](#)



- [Variety Halloween Candy Bag](#)



The complainant states that “[g]iven the similarity of the imagery to large bags of Halloween candy, if this product were found in a setting where persons below the legal purchase age were present, those minors would be very likely influenced to think that they could grab a small bottle and partake of its contents, just as they would if they found a large Halloween-decorated bag of Snickers bars. In fact, the Fireball display at issue here actually says ‘Fireball Candy Pack,’ which further exacerbates the violation, as a minor seeing this would see it as Halloween ‘candy’ that is safe to consume.”

The complainant also asserts that “[w]e don’t believe the use of ‘Adult Trick or Treat’ cures the violation because most adults do not engage in ‘trick or treating’ as an activity. Most trick or treating is done by minors and the use of trick or treat actually makes it more appealing to minors because that is an activity that is naturally appealing to minors. This does not help the situation any more than putting the word ‘Adult’ on a Nickelodeon-themed bottle of whiskey.”

#### **Code Review Board Decision:**

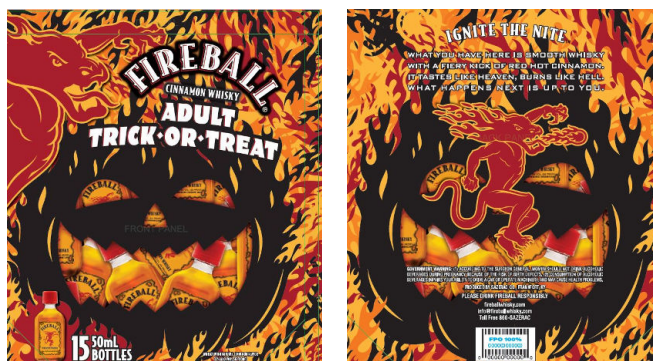
In response to the alleged violations of RCP Nos. A1 and A2, the advertiser stated that “Sazerac has carefully reviewed the complaint and is confident that the Fireball Halloween Packaging, when properly considered in its totality, appeals to adults of legal purchase age and does not bear any primary appeal or special attractiveness to persons below the legal purchase age.

Moreover, Complainant has provided no compelling argument or evidence in support of its allegations. For these reasons, explored in greater detail below, the Fireball Halloween Packaging does not violate the Code or any other legal requirements.”

The advertiser noted that “[t]he hallmarks of a ‘primary appeal’ and/or ‘special attractiveness’ to persons below the legal purchase age include depictions of children or portrayals of objects, images, or cartoon figures that primarily appeal to persons below the legal purchase age, including, by way of example, use of the name or image of Santa Claus, or parodies of famous children’s products or children’s media. Examples where DISCUS has found that advertising material primarily appealed to persons below the legal purchase age include: trademarks and trade dress that evoked common children’s cereals or products that noted a similarity in taste to such cereals; marketing materials that evoked well-known children’s media companies and children’s television shows; and trade dress and marketing materials that feature toys and/or appeared to be toys. None of these factors are involved here.”

The advertiser continued by relaying that “[i]n contrast, when the totality of the material – including graphics, text, and use of trademarks and trade dress widely known to be associated with a beverage alcohol product – primarily appeals to adults of legal purchase age and does not otherwise rely upon or parody children’s products or children’s media, such materials have no ‘special attractiveness’ to persons under the legal purchase age beyond the general attractiveness for persons of legal purchase age. For example, DISCUS has found that advertising material primarily appealed to persons of legal purchase age, and not children when: depictions of products that appeal to children, such as candy, feature alongside prominent statements concerning the alcoholic nature of the product; the product is associated with a well-known trademarks widely-known to be used primarily for beverage alcohol products and similarly features prominent statements concerning the alcoholic nature of the product; and the materials feature overtly nostalgic and evocative materials that call back to, reference, and/or suggest youthful concepts or experiences. Each of these factors is present here.”

Regarding the Fireball Whisky Halloween packaging, the advertiser stated that “[t]he Fireball Halloween Packaging easily satisfies the above-discussed guidelines and is in full compliance with the Code. For convenience, we have copied here the front and back of the Fireball Halloween Packaging in its entirety below:



As shown in the above images, the overriding theme of the Fireball Halloween Packaging is fire and flames, including images of Fireball's iconic dragon mascot and a black jack-o'-lantern design lit aflame, blazing with intense colors of red, orange, yellow. These images are not cartoonish Halloween graphics targeted towards children and persons below the legal purchase age but are instead intimidating and adult-oriented graphics merely evocative of common Halloween indicia. When common, universal holiday indicia are utilized in this manner, blending together a holiday theme with otherwise responsible advertising that primarily appeals to adults of legal purchase age, DISCUS has found no violation of the Code."

Regarding the jack-o-lantern design, the advertiser stated that "[p]umpkins and jack-o'-lanterns are common, widely understood symbols of Halloween festivities in the United States and are not exclusively associated with children and persons below the legal purchase age. In fact, the tradition of carving pumpkins and other root vegetables for Halloween in the United States derives from Gaelic culture in Ireland where the practice has existed for centuries and is not an activity primarily undertaken by children. In fact, this tradition was form of folkloric superstition to ward off evil spirits on the eve of All Saints' Day, occurring on November 1. As such, the mere inclusion of a jack-o'-lantern design on the Fireball Halloween Packaging does not somehow cause such packaging to suddenly have a 'special attractiveness' to persons below the legal purchase age. This is particularly the case here where the jack-o'-lantern on the Fireball Halloween Packaging is black, lit aflame, filled with clear depictions of liquor bottles, and in all respects appears quite ghoulish. This rendering is a far cry from the cartoonish and playful carved pumpkins designs depicted on the third-party candy packaging examples submitted by Complainant that are more attractive to children and persons below the legal purchase age."

Regarding the Fireball dragon, the advertiser relayed that "[s]imilarly, the inclusion of the iconic Fireball dragon does not contribute to any 'special attractiveness' to persons below the legal purchase age, particularly as such inclusion actually increases the primary appeal to adults of legal purchase age. The inclusion of trademarks and mascots widely known to be associated with beverage alcohol products may increase the primary appeal to adults of legal purchase age and decrease the appeal to persons below the legal purchase age. Indeed, DISCUS has found no special appeal to persons below the purchase age when advertising materials feature an eponymous mascot for beverage alcohol products that are not otherwise highly cartoonish or appealing to children. Here, the Fireball dragon and its fireball design are essential components of the branding for Fireball Whisky and serve as a tremendous source-identifier for Sazerac's beverage alcohol product. Sazerac possesses numerous federal trademark registrations and pending applications covering the Fireball Dragon and/or its fireball design in the United States evidencing the design's long-standing association with the Fireball Whisky brand. As a result, the inclusion of these elements strongly indicates a primary appeal to adults of legal purchase age and negate any 'special attractiveness' to children or persons below the legal purchase age. Moreover, suggesting that a company cannot use its long-standing trademarks in a holiday promotion – based solely on conjecture about the costumes a child could wear on Halloween – is unreasonable, creates a slippery slope concerning enforceability, and unduly restrict a company's ability to promote itself during competitive seasons."

The advertiser also stated that “the Fireball dragon mascot itself does not, as Complainant argues, resemble the type of dragon that a child might dress as during Halloween, but rather is a more sophisticated dragon that would appeal to adults:”



The advertiser added that “[t]he Fireball dragon mascot is a fiery red, muscular, anthropomorphic dragon featuring sharp angular talons on its hands and feet, a head that is half composed of flames, fearsome teeth set in a strong jaw, and – of course – a fireball hurled out of its mouth. In these ways, the Fireball dragon mascot symbolizes the numerous adult-oriented aspects of the Fireball Whisky product: the strength of the alcohol content, the burning sensation associated with consumption of alcohol and cinnamon flavors, and the overall warmth one feels after drinking the product. This is all in stark contrast to the cartoonish, loveable, and fluffy dragon costumes worn by children, as shown in the examples below. Even a search for a ‘scary’ child’s dragon Halloween costume yields a result (on the righthand side below) that is much more playful and childlike in appearance than the muscular, fire-breathing Fireball dragon, which bears more resemblance to a demon than a dragon.”



Regarding the flame graphics, the advertiser stated that “[c]omplainant notably does not account for the significant flame graphics featured in the Fireball Halloween Packaging. Flames and fire graphics tend to primarily appeal to persons above the legal purchase age given that these images are frequently used in food and beverage labeling and advertising to signal spiciness of a product (e.g., hot sauce) and serve as a warning that the product should be consumed with caution. By including a veritable firestorm on the packaging, the Fireball Halloween Packaging design makes it clear that the product is not something fruity or sweet, the flavor profiles usually sought out by children seeking candy. The graphics primarily appeal to adults of legal purchase age and possess no special attractiveness to children and persons below the legal purchase age – in fact, the intensity of the flame graphics likely cause a special aversion by children and persons below the legal purchase age.”

The advertiser noted that “Complainant further fails to consider that there is a prominent depiction of a miniature Fireball Whisky bottle in the lower left hand corner of the front of the packaging and the jack-o’-lantern design appears to be filled with similar miniature bottles of

whisky. These standard 50 mL bottles are quite common in the beverage alcohol industry, and these or similar bottles are not used for children's beverages. These images indicate the product contains alcohol, specifically miniature bottles of the well-known Fireball Whisky product. Accordingly, the prominent inclusion of these images of the whisky bottles primarily appeals to adults of legal purchase age without any special attractiveness to persons under the legal purchase age. Complainant also fails to consider the numerous textual elements that also primarily appeal to adults of legal purchase age without any primary appeal or special attractiveness to children and persons under the legal purchase age."

The advertiser continued by stating that "[t]he largest and most prominent text on the front of the packaging states: **FIREBALL® CINNAMON WHISKY ADULT TRICK-OR-TREAT** clearly indicating the product is the prominent FIREBALL® alcohol brand, is whisky, contains alcohol, and is for 'adults.' These are all aspects DISCUS has previously considered probative when finding no violation of the Code. The lower left-hand corner of the packaging states '**Whisky with Natural Cinnamon Flavor 33% Alc/vol (66 Proof)**,' once again clearly indicating the product is whisky and contains alcohol. The back of the package prominently states '**What you have here is a smooth whisky with a fiery kick of red hot cinnamon. It tastes like heaven, burns like hell. What happens next is up to you.**' This language primarily appeals to adults of legal purchase age and not towards children or persons under the legal purchase age. The statement explicitly identifies the product as whisky, advises the reader that the product will have a 'fiery kick of red hot cinnamon' (which, as discussed above, is not a flavor profile sought out by children who want candy), and warns that the product 'burns like hell,' cautioning consumption in a highly informal and provocative manner, using language that is not generally suitable for children. The back of the package contains the standard government health warning statement required by federal law and the Alcohol & Tobacco Tax and Trade Bureau ('TTB'), as well as the encouragement to '**PLEASE DRINK FIREBALL RESPONSIBLY,**' which is language closely associated with the consumption of alcoholic beverages that adults of legal purchase age would recognize."

The advertiser relayed that "[i]mportantly, Complainant unduly discounts the inclusion of the key word 'ADULT' that precedes 'TRICK-OR-TREAT' on the Fireball Halloween Packaging, which explicitly indicates that the product is intended for consumption by adults, just as in the ADULT CHOCOLATE MILK matter noted above. The reference on packaging to 'Adult Trick-or-Treat' is evocative of Halloween celebrations for adults, and does not target children or primarily appeal to them; such holiday referencing, when considered in context, is not a violation of the Code. Complainant appears to mistakenly believe that Halloween is a holiday exclusively marketed towards and celebrated by children. This is not true. According to the National Retail Federation, 69% of consumers planned to celebrate the Halloween holiday this year, with 28% of consumers this year planning to throw or attend a party. In fact, there is an entire culture of 'adult trick-or-treating' events and ways to celebrate the holiday as an adult and the term 'adult trick or treat' primarily appeals to that. Complainant also ignores that adults oftentimes accompany children when they go trick-or-treating, such that this miniature Fireball Whisky product could be the type of 'treat' that adults might bring or receive while accompanying their children so they can enjoy the holiday alongside their children. The term 'adult' is a key element of the context that cannot be discounted."

The advertiser continued by stating that “[t]aken together, the totality of the text, graphics, and trade dress on the Fireball Halloween Packaging – including the prominent and intense flame and fire imagery, the non-cartoonish dragon, and the frightening and flame-engulfed jack-o’-lantern; as well as numerous indications the product is beverage alcohol intended for adults – convey an overwhelming impression that such packaging is primarily intended to appeal to adults of legal purchase age who celebrate the Halloween holiday, and not to children and persons under the legal purchase age. Complainant has likewise failed to establish that the Fireball Halloween Packaging is primarily appealing to children and persons under the legal purchase age through any ‘special attractiveness’ to these demographics. Complainant has merely expressed a generalized dissatisfaction that the Fireball product evokes Halloween themes through adult-oriented references to jack-o’-lanterns and trick-or-treating, which are universal indicia suggestive of Halloween and activities adults frequently engage in. Any incidental appeal to children or persons under the legal purchase age is only ‘the [same] general attractiveness for persons of legal purchase age,’ which does not violate the Code.”

Regarding the packaging and its relation to bags of Halloween candy, the advertiser noted that “[a]t the outset, we note that two of the five products provided by Complainant as examples of purportedly similar ‘large bags’ of Halloween candy do not appear to be products sold in the United States. Both products are images pulled from a British stock image website (Alamy) and appear to be sold exclusively outside the United States, if at all. The image of ‘Cadbury’s Halloweenies Halloween sweets’ features United Kingdom food regulatory labeling and the ‘Bag of M&S Choc Shock Beans Milk Chocolate Beans’ are from M&S a/k/a Marks & Spencer, a prominent UK grocery store chain. As these products are irrelevant to the U.S. market, they should be disregarded in any analysis. For the reasons set forth above in Section I, the Fireball Halloween Packaging and the third-party Halloween-themed candy packaging cited by Complainant are quite different in their appearance and primary appeal. The candy packaging features cartoonish, playful, and inviting imagery primarily appealing to children and persons under the legal purchase age. These materials stand in stark contrast to the fiery, intense, cautionary images and text warnings featured on the Fireball Halloween Packaging that primarily appeals to adults of legal purchase age. The only similarity they share are generalized themes of Halloween, yet the way each party expresses those themes are primarily appealing to different demographics, with the Fireball Halloween Packaging lacking any ‘special attractiveness’ to children and persons under the legal purchase age.”

Regarding trade channels for the product, the advertiser asserted that “[i]t is also critical to acknowledge the context in which these products are sold. The Fireball Halloween Packaging was sold in stores authorized to sell liquor and, if sold in a general-public grocery store, offered in the store’s designated liquor department – not near the store’s candy section and not commingled with bags of candy. The very nature of the purchasing process for each product therefore dictates that the Fireball Halloween Packaging primarily appeals to adults of legal purchase age, who, by virtue of their age, are the only persons capable of purchasing beverage alcohol. Indeed, the photograph submitted by Complainant shows the Fireball Halloween Packaging alongside numerous other beverage alcohol products. Any underage person seeing the Fireball Halloween Packaging would only encounter it in a post-sale context such that it cannot be *primarily* appealing to them. Sazerac also wishes to clarify that the retail sign



designating the product as 'Fireball Candy Pack' was created by the retailer and not approved by Sazerac. As such, this signage only exists within that store, where only an adult of legal purchase age would be capable of purchasing the product."

The advertiser continued by noting that "[t]o the extent Complainant's issue with the Fireball Halloween Packaging derives from the use of a 'large bag' containing small bottles – as compared to a bottle, box, basket, or other method of transporting many small bottles – because this is a method by which Halloween candy is often sold, such concern is misplaced. This concern rests upon the mistaken assumption that children will be confused by the packaging and believe the product inside the Fireball Halloween Packaging is candy. Setting aside all of the visual and textual indications discussed above that make clear that the product inside the Fireball Halloween Packaging is not candy, once it is opened, it is clear the product is not candy. As noted above, 50 mL bottles are a common size for alcohol beverages and not a bottle size that is frequently used for children's drinks or candy. The bottles themselves are also challenging for children to open given their protective ring cap that requires significantly more grip strength to snap open compared to unwrapping a piece of candy. The bottles also have their own individual, TTB approved labeling further identifying them as alcohol beverages. To accept Complainant's position that such packaging violates the Code would be to also take issue with 12 ounce cans or tetra packs containing ready-to-drink alcohol beverages simply because soda and juices are also frequently sold in 12 ounce cans and tetra packs and children frequently drink soda and juice. That is simply irrational and would be a concerning interpretation of the Code."

The advertiser also relayed that "[a]ccordingly, the Fireball Halloween Packaging appeared in tightly controlled and highly regulated trade channels, namely stores authorized to sell liquor (or comparable sections of grocery stores), separate and apart from 'large bags' of candy, such that the Fireball Halloween Packaging is highly unlikely to be confused for candy. In this way, the Fireball Halloween Packaging further primarily appeals to adults of legal purchase age and lacks primary appeal or special attractiveness to persons below the legal purchase age."

The advertiser further stated that "Sazerac takes seriously its obligations to responsibly market alcohol products. Indeed, as reflected in Sazerac's Code of Conduct, 'Our products are intended for adults of legal drinking age, who choose to drink. We discourage underage drinking, driving under the influence, and excessive drinking; and our marketing and advertising communications will be guided accordingly.' Based on any reasonable review of the Fireball Halloween Packaging, no violation of the Code has occurred. For the reasons set forth above, the Fireball Halloween Packaging primarily appeals to adults of legal purchase age – including by means of flame and fire imagery, indications that the product is whisky and intended for 'adults,' and other factors – and does not primarily appeal to children and persons under the legal purchase age through any 'special attractiveness' to this demographic. The promotion is well in-line with other Halloween-themed branding in the beverage alcohol industry, including among other DISCUS members, and we would be quite concerned by a Code Review Board decision that deems a significant amount of advertising materials to be at fault merely because they are associated with a key annual holiday that is enjoyed by both children and adults. This is

particularly true where there is no evidence of consumer confusion or deception. Indeed, Sazerac is unaware of any consumer complaints regarding this issue or any confusion occurring as a result of the Fireball Halloween Packaging.”

The advertiser concludes by relaying that “[f]inally, Sazerac represents to the Code Review Board that the Fireball Halloween Packaging was a limited production, Halloween-edition product. As Halloween has now passed and retailers are focused on Christmas holiday promotions, the Fireball Halloween Packaging is no longer being actively advertised or promoted in view of the change in holiday seasons. Sazerac expects any products bearing the Fireball Halloween Packaging have been largely sold-through and will keep the topics raised by this proceeding in mind should Sazerac revisit this packaging next Halloween season. If Sazerac offers this product again, Sazerac will also ensure that its distributors and retailers are instructed to never refer to the Fireball Halloween Packaging as ‘candy’ in price labeling or other point-of-sale materials.”

After careful consideration of the complaint and the advertiser’s response, the Code Review Board found that the Fireball Whisky promotional material referenced above violated Responsible Content Provision Nos. A1 and A2 of the DISCUS Code of Responsible Practices for Beverage Alcohol Advertising and Marketing.

The Code Review Board found that, when viewed together, the packaging resembling a Halloween candy bag traditionally used for “trick or treating,” the use and large font size for the term “trick or treat,” and the large depiction of a jack-o-lantern create promotional material that is primarily appealing to those below the legal purchase age. The Board concluded that the inclusion of the word “Adult” before “trick or treat” did not negate or mitigate the fact that the overall totality of the packaging still primarily appealed to children.

In arriving at its decision, the Board considered all the elements together and determined that, while Halloween is indeed a holiday that adults enjoy and celebrate as well, the tradition of “trick or treating” with bags of candy is primarily centered around children and this promotional material invoked and shared similar attributes to Halloween “trick or treat” marketing generally targeted to children.

The Board noted that, while the use of traditional Halloween holiday imagery or terminology is not in and of itself a violation, caution should be exercised when using such material to ensure they do not primarily appeal to individuals below the legal purchase age.

**Action by Advertiser:** Given that this promotion was seasonal, the product and in-store promotional material has been depleted in retail locations. Thus, no action was taken.

**Status:** Closed.