



ROBERT P. KOCH  
PRESIDENT AND CHIEF EXECUTIVE OFFICER

December 21, 2005

Mr. John Manfreda  
Administrator  
Alcohol and Tobacco Tax and Trade Bureau  
U.S. Treasury  
650 Massachusetts Avenue, NW  
Washington, DC 20226

Re: **Comments in Response to Notice No. 41**  
70 FR 22274 - April 29, 2005

Dear Mr. Manfreda:

Wine Institute is the trade association of California wineries. Our 862 California wineries and affiliated businesses are pleased to submit these comments to Notice No. 41, the ANPRM omnibus labeling initiative.

Wine Institute appreciates TTB's response to our request for rulemaking contained in our comments to the White Papers of 2004. We firmly believe that a public comment period is a reasonable means of accomplishing major and significant changes to labeling regulations. We have long been in support of TTB's previous disposition of ingredient labeling and have agreed with its decision not to move ahead with mandatory nutrition information as was requested in 1993.

Notice No. 41 responds to the various rulemaking petitions (CSPI / NCL "alcohol facts" petition), intervening legislation (i.e., the Allergen Labeling Act), previous requests by industry members for voluntary nutrition and alcohol information, and issues remaining on carbohydrate labeling (e.g., "low carbohydrate" claims). We realize that feedback from industry groups and consumers on any of these issues is important in shaping future regulations based on the issues raised in the ANPRM. We also realize that the ANPRM is the first public step in a series of administrative steps that need to be taken to accomplish the changes discussed in the notice.

The public response to this notice, in particular, is illuminating for the sheer volume of comments that TTB has received. The result of New Economy mechanisms, thousands of comments were generated from web site forms and show the successful results of digital grass roots efforts to engage the public with little effort required by these responders. We appreciate the task ahead for TTB in evaluating and being responsive to the comments received, and we hope that our comments can be added among those that TTB seriously considers.

We have joined with other organizations in filing joint comments on the allergen labeling portion of the ANPRM. We will use these comments to address some of the remaining subject areas. Like many other comments, these comments do not address all of the questions raised in the ANPRM. While we would like to respond to all questions that TTB has raised in its ANPRM, our organization has not reached consensus on many of the issues raised in the ANPRM. In many respects, the ANPRM and the events leading up to the ANPRM, have generated more procedural questions than answers for our members. We look forward, however, to participating in future rulemaking endeavors on the subjects raised and as proposed regulations are developed. We are confident that our organization will be able to find common ground when presented with more concrete regulatory proposals.

## **Summary of Wine Institute Positions**

Notice No. 41 is a comprehensive proposal raising questions in several areas, including: ingredient labeling; nutrition labeling; drinks comparison graphics; the definition of a standard drink; alcohol facts labeling; and allergen labeling. At this early rulemaking stage, our comments should not belie the significance we attach to the ANPRM. We clearly recognize what is at stake, and we realize the public policy issues and the public health implications of the commenters and petitioners, as well as TTB's statutory mission with respect to false and misleading labels and advertisements. We summarize our positions below:

- We continue our opposition to ingredient labeling.
- We are in favor of TTB making efforts to harmonize its labeling requirements with those of other major producing nations, and with other Federal agencies, especially the Food and Drug Administration.
  - TTB should consult with FDA for its nutrition labeling expertise and for the benefits as well as shortcomings of mandatory nutrition labeling;
  - TTB should realize that its mandate under the FAA Act is different from the Congressional objectives of the Nutrition Labeling and Education Act (NLEA) and seek policies that are consistent with the FAA Act.
- We have been and continue to be opposed to mandatory nutrition labeling but will await further rulemaking proceedings on the issue and revisit this issue with our membership. Should TTB consider mandatory nutrition labeling, we believe TTB should adopt, to the extent that it can, the requirements of the NLEA for nutrition panel label information so that the information expressed is consistent with other food products and so that wine, beer and distilled spirits can implement any future changes to make nutrition information more effective.
- We are opposed to the use of drinks comparison or "equivalency" graphics and were extremely pleased with TTB's second white paper that did not propose its use.
- For the same reasons that we oppose the graphics, we also are opposed to references to a "standard drink." There should be established a standard serving size should voluntary or mandatory nutrition labeling be considered.

We note, as well, that these comments do not reflect the unanimous sentiments of all of our members, some of whom have submitted their own more detailed comments in response to the Advance Notice.

## **Ingredient Labeling**

Wine Institute believes that the exhaustive record on ingredient labeling depicted in the ANPRM only serves to reinforce our longstanding position in opposition to such labeling requirements. With respect to wine, we believe that there is not a clear demand for such information, and that such labeling could be misleading. Wine Institute does not believe that such labeling delivers useful or meaningful information to a consumer.

## **Nutrition Information Labeling -**

### ***TTB Should Consult with Other Agencies: Nutrition / Standard Drink / Alcohol Facts Labeling Information***

Notice No. 41 requests comments on whether nutrition information should be allowed on labels either as additional voluntary or express mandatory information. TTB has also requested whether it harmonize its alcohol beverage labeling regulatory requirements with those of other major producing nations, such as the Member States of the European Union, Australia, and Canada, and with regulatory schemes of other Federal agencies, such as the Food and Drug Administration (FDA).

Wine Institute is cognizant of and is thankful for the efforts that TTB has been devoting to issues raised by industry members with respect to product labeling. In the past several years, TTB has been responsive to industry labeling concerns. TTB has published procedural and policy documents on the use of statements of average analysis when used in conjunction with carbohydrate labeling and has issued several policy documents for compliance with the National Organic Program. Additionally, TTB has distributed other industry circulars and bulletins that seek to balance label statements within the structure of current regulations and statutes, primarily the Federal Alcohol Administration Act. We have witnessed the agency adapting to new products that have been developed in response to the recent public interest for low-carbohydrates products and are pleased with TTB's ability to respond and adapt its regulations to new product development, while at the same time maintaining its statutory directive to prevent deceptive and misleading labels.

As in 1993, there appears to be interest in nutrition information appearing on alcoholic beverage labels, either as voluntary or mandatory information. We again find ourselves debating nutrition information disclosure and, along with TTB, revisiting the statutory directives and the expectations of consumers. This country has had over a decade of exposure to nutrition

information labeling through the operation and requirements of the Nutrition Labeling and Education Act.

While we express no position with respect to voluntary nutrition labeling, we believe it would be constructive for TTB to assess the impact of the NLEA on food product labels and whether nutrition panel information has resulted in positive health for Americans. As it evaluates the public comments on nutrition labeling matters, it would be beneficial for TTB to determine whether nutrition panel information is increasingly used by consumers, whether there is a change in consumer conduct with the availability of such information, and whether there are other steps contemplated by the Food and Drug Administration to make its NLEA-mandated label regulations more effective.

Comments in the public record also indicate that many consumers want more nutrition information and that some individual industry members believe they have a Constitutional right to do so voluntarily. Our industry has long produced products that contain under 7% alcohol by volume and are subject to the requirements of NLEA. It is through products such as these that we have been aware of the ongoing issues regarding NLEA-mandated nutrition panel efficacy. We take this opportunity to provide some information to TTB on the Nutrition Labeling and Education Act public policy objectives, whether they have been achieved, whether such labeling suffers from any shortcomings, and whether such labeling translates and balances consumer expectation with consumer understanding.

### **TTB Should Consult with FDA on the Successes and Shortcomings of the NLEA**

TTB's current ANPRM requests comments on whether TTB should defer to the Food and Drug Administration on issues such as calorie claims, "low carbohydrate" and "effective carbohydrate" claims, and the allergen labeling issues. In collecting information to use in response to the ANPRM, we support the notion that TTB should also consult with FDA on the efficacy of the nutrition information being sought on labels. We believe TTB would benefit from such consultation and in being made aware of FDA research into the efficacy of nutrition information. As with the sulfite disclosure statement, where TTB consulted FDA's expertise, it would in this case prove helpful to coordinate TTB's efforts with the changing landscape of nutrition labeling for non-alcoholic beverage products. If one of the results of Notice No. 41 is an effort to mandate nutrition information, then alcoholic beverage nutrition information should be consistent with NLEA-mandated nutrition panel information so that consumers can rely on a consistent appearance and the uniform presentation of information.

The purpose of NLEA was not only to "clarify and strengthen" FDA's legal authority to require nutrition information in food labeling, but to also address FDA's review of health claims. House Report at 7, reprinted in 1990 U.S.C.C.A.N. at 3337. The legislative history of the NLEA evidences no Congressional intent to expand the scope of health claims beyond what FDA had envisioned in its 1990 proposal.<sup>1</sup>

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<sup>1</sup> On the contrary, the legislative history reflects concern that FDA had been too permissive and that health claims in the marketplace needed more control. See House Report at 9, reprinted in 1990 U.S.C.C.A.N. at 3338-39.

With respect to health claims, the legislative history characterizes the health claims that NLEA provides for as claims about preventing or helping to prevent disease. Where examples of health claims are given, they invariably refer to the role of a food substance in preventing or helping to prevent a chronic disease, not to any role in treating an existing disease.<sup>2</sup> We know that TTB's own regulations address health claims and health-related claims separately,<sup>3</sup> and the focus of TTB's provisions on health claims is appropriately based on FAA requirements.

NLEA legislative history further indicates that the common purpose behind all three main parts of the NLEA - the nutrition labeling, nutrient content claims, and health claims provisions - was to promote long-term health maintenance and prevention of disease by providing truthful, scientifically valid information to consumers on the food label.<sup>4</sup> We note that these statutory objectives are not altogether consistent with the goals of the Federal Alcohol Administration Act on labeling, but both the NLEA and the FAA are concerned with providing truthful information to consumers

In 1988, Congress passed the Alcoholic Beverage Labeling Act. Final regulations to implement the Act were issued in 1990. The Act requires the current "Government Warning" that is present on every container of alcoholic beverages sold in this country.<sup>5</sup> States are preempted from requiring any other label statement relating to alcoholic beverages and health.<sup>6</sup> We make mention of the ABLA here, because it serves as a reminder that alcoholic beverages are at times singled out by Congress for labeling purposes. In the case of Notice No. 41, there is no act of Congress for "alcohol facts" labeling, but a rulemaking petition by the National Consumers League and the Center for Science in the Public Interest. These organizations have held press conferences on

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<sup>2</sup> See House Report at 8, reprinted in 1990 U.S.C.C.A.N. at 3337 ("fiber prevents cancer"); House Report at 20, reprinted in 1990 U.S.C.C.A.N. at 3350 ("fiber helps to prevent cancer"); 136 Cong. Rec. H5841 (statement of intent of changes since bill was reported out of committee) ("fiber prevents cancer"); 136 Cong. Rec. H5841 (statement of Rep. Waxman) ("bran prevents cancer"); 136 Cong. Rec. S16,609 (Statement of Sen. Mitchell) ("reduces the risk of cancer"); 136 Cong. Rec. H12,953 (statement of House floor managers) ("fiber in cereal prevents cancer"); 136 Cong. Rec. H12,954 (statement of Rep. Madigan) ("bran prevents cancer").

<sup>3</sup> 27 CFR §§ 4.39, 4.64

<sup>4</sup> See 136 Cong. Rec. H5843 (statement of Rep. Moakley) (legislation responds to Americans' increasing concern about their diets and reducing the risk of disease); 136 Cong. Rec. H5843 (statement of Rep. Madigan) (question under consideration is how to most effectively inform consumers about health risks related to diet); 136 Cong. Rec. S16,609 (statement of Sen. Metzenbaum) (many Americans use dietary supplements to help prevent chronic disease; rapid scientific advances link nutritional substances to maintenance of long-term health and prevention of long-term disease); 136 Cong. Rec. S16,610-11 (statement of Sen. Hatch) (vitamins and minerals are important in helping to prevent certain serious illnesses and health problems; because of rapid scientific advances linking the prevention of long-term disease to improved nutritional supplementation, important to allow dietary supplements to be marketed so that consumers are informed of the health or disease-prevention benefits they may confer); 136 Cong. Rec. H12,954 (statement of Rep. Moakley) (healthy eating can lower risk for certain illnesses, such as heart disease and cancer).

<sup>5</sup> 27 CFR Section 16.21 requires the following warning on alcoholic beverage labels:

**GOVERNMENT WARNING:** (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems.

<sup>6</sup> 27 CFR § 16.32

Notice No. 41 and actively engage the public and its constituency.<sup>7</sup> In the absence of any Congressional declaration on the public policy goals to be achieved, we urge TTB to move with caution on mandatory nutrition and alcohol facts labeling. While there may be 18,000 public comments, an extremely large percentage of them are computer-generated form comments. A national program calling for mandatory nutrition and/or alcohol facts labeling is a decision that requires expertise in areas that TTB may be unfamiliar with and where consultation with outside agencies would not only be wise, but warranted.

We realize that consumers have, since the advent of the NLEA nutrition panels, developed an expectation of finding nutrition information on food labels. The NLEA applies to most food products, regardless of whether a food product is held out as “nutritional,” regardless of whether it’s candy, soft drinks, or frozen pizza. How do consumers use nutrition information that they seek? How effective are currently existing nutrition labels? Do consumers understand the information that they are provided? What is the impact of advertising and health claims on consumer understanding? These are questions that the Food and Drug Administration is in a position to answer. In many respects, these are questions that the Food and Drug Administration is already addressing.

### **Since TTB’s Denial of 1993 Nutrition Information Rulemaking Petition, Consumer Use of Nutrition Information Has Not Increased**

In 1993, TTB published a previous ANPRM to consider whether nutrition labeling information should be required and ultimately rejected the rulemaking petition for two reasons: because they found no consumer interest in nutrition labeling of alcoholic beverages, and because nutrition labeling would not provide substantial, useful information to consumers. At that point, the Nutrition Labeling Education Act of 1990 had been in existence for three years. Wine Institute participated in that rulemaking and opposed mandatory nutrition label information.

We realize that twelve years have passed since we last visited the issue, and in the interim consumers have had the benefit of being exposed to nutrition panels for food products since that time. This time, TTB is not responding to a rulemaking petition, but to a request by an individual industry member for voluntary serving fact and nutrition labeling. Based on the number of comments received, it appears that consumer interest in responding to the current ANPRM has increased (even though the only rulemaking petition that has been submitted was the one from the National Consumers League and the Center for Science in the Public Interest). Still, while we know that many consumers read nutrition panel information, has there been an increase in the amount of consumer use of nutrition information?

We know, from FDA studies, that the number of consumers who use nutrition panel information has remained relatively stable since 1994.<sup>8</sup> Since TTB’s earlier foray into nutrition labeling,

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<sup>7</sup> See [http://nclnet.org/news/2005/alcoholfacts\\_10122005.htm](http://nclnet.org/news/2005/alcoholfacts_10122005.htm).

<sup>8</sup> In one study, the percent of those surveyed who claim to use food labels “often” or “sometimes” when buying a food product for the first time has remained relatively stable over the years. This study showed that in 1994, 70%

there has been no measurable increase in the consumer use of nutrition label information, according to the FDA's Obesity Working Group. While consumer use of nutrition information has not increased, the many comments to TTB tend to show that many policy makers and organizations are seeking to close the information gap by requiring or voluntarily permitting an expression of nutritional information on alcoholic beverage labels.<sup>9</sup> In evaluating these comments, it may be helpful for TTB to be aware of the shortcomings of the current NLEA-mandated nutrition panel information.

## **Consumer Use of Nutrition Information Does Not Correlate to Consumer Behavior**

Despite fifteen years of providing macronutrient information to consumers, at least with respect to weight control, there appears to be a lack of correlation between consumer use of nutrition information and the national obesity rates. While consumer groups assert that better information about alcohol and calorie content makes sense given the national obesity epidemic, this argument ignores the fact that nutrition information on every other food product has not stemmed the out-of-control national obesity rates. Since the Center for Disease Control has been maintaining records, which began even before the start of the NLEA, the national obesity rates have soared. The runaway national problem of obesity has occurred in an environment where the nutritional composition of most foods is mandated.

The Center for Disease Control states:

During the past 20 years there has been a dramatic increase in obesity in the United States. In 1985 only a few states were participating in CDC's Behavioral Risk Factor Surveillance System (BRFSS) and providing obesity data. In 1991, four states had obesity prevalence rates of 15–19 percent and no states had rates at or above 20 percent. In 2004, 7 states had obesity prevalence rates of 15–19 percent; 33 states had rates of 20–24 percent; and 9 states had rates more than 25 percent (no data for one state). ("Overweight and Obesity: Obesity Trends: U.S. Obesity Trends 1985–2004" at <http://www.cdc.gov/nccdphp/dnpa/obesity/trend/maps/index.htm>.)

Using the Center for Disease Control data, when we compare and move outward from the baseline year of 1991, when provisions of the Nutrition Labeling and Education Act of 1990 first delivered to consumers nutrition information on food products, and plot out the national obesity trends over time since then, the CDC's data shows an astounding rise in obesity rates despite the information that has been conveyed to consumers:

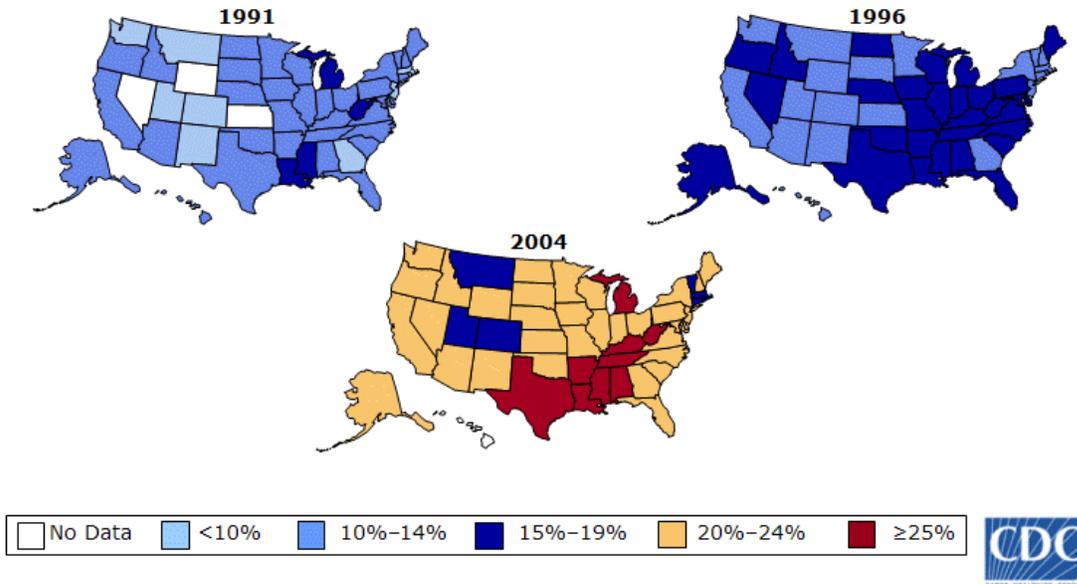
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responded positively to this question. In 2002, with nutrition labels well entrenched in the food chain, that percentage was reported at 69%. (Derby and Levy, 2000; Levy, 2004; Lin, 2004)

<sup>9</sup> While there are efforts to close the information gap, there have been no suggestions on whether to close the jurisdictional one, i.e., whether the NLEA should be amended to include alcoholic beverages.

## Obesity Trends\* Among U.S. Adults BRFSS, 1991, 1996, 2004

(\*BMI  $\geq 30$ , or about 30 lbs overweight for 5'4" person)



Source: Behavioral Risk Factor Surveillance System, CDC.

The data shown in these maps were collected through [CDC's Behavioral Risk Factor Surveillance System \(BRFSS\)](#). The obesity problem has reached epidemic levels, all in the presence of mandatory nutrition information for the past fifteen years. The Food and Drug Administration has responded to the epidemic and has created an Obesity Working Group, whose findings are found at <http://www.cfsan.fda.gov/~dms/nutrcal.html>. At least with respect to weight control, mandatory nutrition labeling falls well short of preventing runaway obesity. In reviewing the efficacy of the food label and the nutrition information mandated by the NLEA, the Working Group made some significant findings. Of interest are the results of a consumer survey. The Working Group includes the following table which indicates the recent trends in food label use, along with the following statement:

Before recommending any changes in the NFP [i.e., 'Nutrition Facts Panel'] relevant to obesity, it is important to understand how consumers currently use the NFP and to assess whether the NFP has been effective in facilitating positive dietary change. Research shows that most consumers are familiar with the nutrition information on food labels (Marietta *et al.*, 1999; Neuhouser *et al.*, 1999; Kristal *et al.*, 2001; FDA, 2003), which they use primarily for evaluating the nutrition quality of specific food products, but the percentage of consumers who use NFP information productively for weight management purposes is low (Barone *et al.*, 1996; FMI, 1996; Ford *et al.*, 1996; Levy *et al.*, 1996; Mitra *et al.*, 1999; Roe *et al.*, 1999; Garretson and Burton, 2000; Levy *et al.*, 2000; IOM, 2003; FDA, 2003) (e.g., see Table 1 below).

| <b>Table 1. Recent Trends in Reported Food Label Use: 1994-2002 HDS Surveys</b> (Derby and Levy, 2000; Levy, 2004; Lin, 2004) |                                |                                |                                |
|---|--------------------------------|--------------------------------|--------------------------------|
|   | <b>1994</b>                    | <b>1995</b>                    | <b>2002</b>                    |
| <b>Sample size (N)</b>  | <b>(1,945)</b>                 | <b>(1,001)</b>                 | <b>(2,743)</b>                 |
|   | <b>% population (weighted)</b> | <b>% population (weighted)</b> | <b>% population (weighted)</b> |
| <b>(1) Percent who use food labels "often" or "sometimes" when buying a food product for the first time</b>                   |                                |                                |                                |
| How often do you read the food label?   | 70                             | 69                             | 69                             |
| <b>(2) Percent who use labels "often" for specific purposes<sup>1</sup></b>   |                                |                                |                                |
| To figure out how much to eat   | 34                             | 40                             | 35                             |
| To see if food is high or low in calories, salt, vitamins, fat, etc.  | 77                             | 83                             | 67                             |
| To help in meal planning  | 34                             | 36                             | 32                             |
| <b>(3) Percent who use specific label information "often"<sup>2</sup></b>   |                                |                                |                                |
| Do you use the serving size information, when available?  | 29                             | 26                             | Not Asked                      |
| <sup>1</sup> Based only on label users who "often" or "sometimes" use labels when they buy a food product for the first time. |                                |                                |                                |
| <sup>2</sup> Based on all respondents.  |                                |                                |                                |

From this and other areas of the report, we can conclude as follows:

- Consumers are familiar with nutrition information on food labels;
- Consumer use of NLEA-mandated information for weight control is low;<sup>10</sup>
- More research is necessary to establish whether the food label is as useful as it could be in assisting consumers by making weight management as easy as possible.<sup>11</sup>

<sup>10</sup> The Working Group further states:

“Despite reports of a positive correlation between label use and certain positive dietary characteristics, the trend toward obesity has accelerated over the past decade. It may be that consumers do not take advantage of the available information on the food label to control their weight, perhaps because they do not appreciate how the information could be used for weight management purposes or perhaps because they find it too hard to apply the available information to such purposes. In any case, it is clear that consumers would benefit if they were to pay more attention to and make better use of information, including calories, on food labels. Providing encouragement and making it as easy as possible for consumers to do so are worthy public health objectives.”

Nutrition labeling is a candle that burns at two ends: one end burns the desire and expectation of consumers to be informed about the composition of the products they consume, the other end is lit by the health claims and catch phrases that have confused and misled consumers into purchasing product that they may not need. Advertising hooks - "Talk to your doctor," "antioxidant," and the countless other food pitches that saturate a consumer's world - all trigger visceral responses that may influence a consumer into making decisions. TTB should consider all factors and learn from the ongoing research that FDA is currently conducting.

## FDA Admits a Need for Additional Studies and Education Efforts

Wine Institute urges TTB to move carefully before it takes any position where labeling regulations are not considered in the larger context of advertising and free speech, and whether proposed labeling changes will result in the end with misleading or deceptive consumer information. Already, we witness TTB's caution in responding to new product roll outs and the marketing and advertising that accompany them in its notice on "energy drink" products and in the statements that accompany the approved "resveratrol" label.<sup>12</sup>

While the approval of wine labels touting the resveratrol levels may appear benign, truthful, and nonmisleading, the newspaper accounts,<sup>13</sup> representations,<sup>14</sup> and even the state legislative efforts

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<sup>11</sup> In the Report from the Division of Market Studies Office of Scientific Analysis and Support, FDA CFSAN, Office of Scientific Analysis and Support, Center for Food Safety and Applied Nutrition, FDA, in support of the Obesity Working Group, FDA, dated December 28, 2003, it is stated:

**"The role of food labeling.** Since passage of the Nutrition Labeling and Education Act 10 years ago, consumers have had nutrition labeling on most packaged foods (small product lines were excluded as were foods packaged on premises in supermarkets and delis). As discussed later, it is clear that consumers both like and use the nutrition information on the back of food packages and the health and nutrient content claims on the front of packages. However, it is not clear how successful consumers have been at using labels to eat healthy diets. Research is necessary to establish whether the food label is as useful as it could be in assisting consumers by making weight management as easy as possible."

<sup>12</sup> Resveratrol can be classed as a polyphenol, a tannin, a fungicide, a phytoalexin and it can be placed into other categories as well. Chemically, there is a cis, and a trans form of naturally occurring resveratrol. Any given analysis might include either or both. Yet the two naturally occurring forms differ in their ability to increase the levels of HDL cholesterol in a human body. In addition, there are also resveratrol glycosides in grapes and wine that may or may not be reported. Therefore, a reported analysis may not accurately portray what the consumer would perceive. Perhaps worse, the physiological effect of a given amount resveratrol will not be the same in all individuals – because of the natural variations from body to body in their abilities to react to outside chemical influences.

<sup>13</sup> Headline from the Oregon Mail Tribune of May 9, 2005: "State Pinots Rank High on Health Scale". The article states: "Winery president Jim Bernau says he's been careful not to make any health claims on the labels, but mentions that a study by a Cornell University professor suggests that resveratrol may reduce one's chance of developing heart disease or cancer."



tend to distort the truthfulness of the message. Simplifying chemical nomenclature and analysis is not often attempted on a wine label, and often cannot be done without misleading the reader. In the case of the resveratrol label, we are presented with information that consumers may easily misinterpret.

At times, the advertisements and brand names and product claims may tend to confuse consumers, making them fixate on one of the macronutrients instead of the entire nutrition panel information set. We recognize that nutrition information can be important and relevant for many health concerns in addition to weight control, and that many Americans are dealing with other health concerns that impact their food choices, such as heart or kidney disease. If additional information is to be made

mandatory on all wine labels, we would hope that such labeling information would address legitimate concerns recognized through a well-designed plan of information delivery as well as education, or the industry will suffer the same demise as the NLEA, where we are left struggling to make information more effective.

Wine labels should not be altered to reflect only information for people interested in losing weight, or solely for people concerned about alcohol intake, or for people concerned about heart disease. There are many Americans who maintain a healthy weight that enjoy our products, and we would hope that any of the labeling initiatives discussed in the ANPRM seek to optimize the effectiveness of information, whether on the label or on industry-member sponsored web sites. Although we recognize that specific nutrition information may be appropriate in some instances, we believe that mandating wine, beer and distilled spirits producers to provide nutrition labeling statements should be supported by much more than artificial digital grass roots efforts.

Whatever is considered for future regulatory proposals, prototypes of labels should be rigorously tested with consumers to ensure that the desired effect is met with the targeted consumers, but without creating confusion for other consumers. This testing should address the label as a whole

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<sup>14</sup> In a handout distributed by the winery owner at a wine conference, it states: "The results of our wines made from our Estate Vineyard are so high we are thinking of calling the vines our "heart vines." Wine Institute's Technical Committee notes that there are many factors that determine wine resveratrol levels. Any label statement about the content of resveratrol in a given wine is almost certain to vary from vintage to vintage and, probably, from blend to blend. This is because resveratrol is produced in grape leaves and stored in grapevines as a reaction to fungal infections in the vine. The amount in vines depends upon grape variety, the degree of vine stress caused by fungal attack, vineyard pesticide use, geography and the specific vineyard. Winemaking also plays a part: resveratrol occurs in grape skins and in grape juice and wines, especially red wines in which the fermentation took place in contact with grape skins. The degree of skin contact and whether a wine has been filtered or fined can affect the residual amount of resveratrol in a wine. These factors could produce dramatic changes in resveratrol levels in wine, the meaning of which might not be clear to consumers.

in order to insure this result. If a part of the label is overemphasized or is overshadowed by another part of the label, the entire label may become ineffective. Mandatory label changes should only be implemented if research proves its effectiveness with consumers.

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As TTB gets set to embark on complex rulemaking to determine whether nutrition information is a matter of right, expectation, or voluntarily provided useful information that will improve public health, it would do well to learn from the experience of the Food and Drug Administration whether the lofty goals of the NLEA can be more successfully achieved by other or additional means. The FDA has conducted focus groups on subjects such as consumer attitudes towards nutrition; macronutrient information; large package sizes; serving versus package; calorie-related variations; serving size variations; calorie cues; among other things.

We realize that the Federal Trade Commission has submitted comments for select portions of Notice No. 41. We point out that the Federal Trade Commission mandate is protecting the consumer against fraud and deceptive advertising; their expertise, even by their own admission, is not in the protection of the health of the food consumer. We point out that the mission of the FTC and FDA are extremely different, and while the FTC comments may be of value, we believe that TTB should not place too much emphasis on FTC's comments as it does not evaluate all claims made by food producers. This is the role and mandate of the FDA.

What we derive from the studies of the Obesity Working Group is that over ten years of nutrition information has provided us with a paradox: that consumers like and use the nutrition information, but not very successfully, at least with respect to weight control. We suggest, in response to TTB's question regarding what areas need further research and evaluation before TTB can reach decisions on whether and how changes should be made, that it should carefully consult with the Food and Drug Administration about the effect of nutrition information and whether such information on alcohol beverages will have the desired effect on the general population, i.e., the transmission of useful nutritional information that will not be misunderstood, rendered ineffective by advertising and marketing, or have the consequence of constituting a health claim. This would apply not simply to nutrition information, but to other labeling issues, such as "serving facts" information and "alcohol facts" information. We encourage TTB to balance the consumer's right to know with sensible information that a consumer will be able to use.

"Although not finished, some preliminary observations can be made from our research so far. First, although consumers clearly use food labels, including health claims and the nutrition facts panel, the information may not yet be structured in a way to optimize understanding and use." (<http://www.cfsan.fda.gov/~dms/owg-appg.html>).

## ***FAA Act Directive May be Inconsistent with Mandatory Nutrition Labeling***

The Federal Alcohol Administration Act's mandate is very different from the Congressional objectives of the Nutrition Labeling Information Act.<sup>15</sup> Unlike other food producers, we operate under regulations issued by TTB that call for pre-market label approval and the strict control and review of health-related claims. In keeping with FAA mandates, Wine Institute urges TTB to seek to reconcile the FAA directives with the more sweeping coverage of the NLEA.

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<sup>15</sup> In 27 U.S.C. § 205(e) Congress authorized the Secretary of the Treasury to prescribe such labeling regulations:

- (1) as will prohibit deception of the consumer with respect to such products or the quantity thereof and as will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guarantees, and scientific or irrelevant matters as the Secretary of the Treasury finds to be likely to mislead the consumer;
- (2) as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (except that statements of, or statements likely to be considered as statements of alcoholic content of malt beverages are prohibited unless required by State law and except that, in the case of wines, statements of alcoholic content should be required only for wines containing more than 14 per centum of alcohol by volume), the net contents of the package, and the manufacturer or bottler or importer of the product;
- (3) as will require an accurate statement, in the case of distilled spirits (other than cordials, liqueurs, and specialties) produced by blending or rectification, if neutral spirits have been used in the production thereof, informing the consumer of the percentage of neutral spirits so used and of the name of the commodity from which such neutral spirits have been distilled, or in case of neutral spirits or of gin produced by a process of continuous distillation, the name of the commodity from which distilled;
- (4) as will prohibit statements on the label that are disparaging of a competitor's products or are false, misleading, obscene, or indecent; and
- (5) as will prevent deception of the consumer by use of a trade or brand name that is the name of any living individual of public prominence, or existing private or public organization, or is a name that is in simulation or is an abbreviation thereof, and as will prevent the use of a graphic, pictorial, or emblematic representation of any such individual or organization, if the use of such name or representation is likely falsely to lead the consumer to believe that the product has been indorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of, such individual or organization . . . .

In addition Congress in the final paragraph of 27 U.S.C. § 205(e) enacted a program requiring the Secretary of the Treasury to approve all labels which were to be affixed to bottles filled with distilled spirits and wines, if such beverages pass through interstate or foreign commerce.

## ***Wine Institute is Opposed to the Use of the Graphic Icons and “Standard Drink” Language Suggested in the “Serving Facts” Portion of the ANPRM***

Wine Institute responded in the summer of 2004, to TTB’s two “White Papers” on serving facts by opposing the use of the “equivalency” or “drinks comparison” graphic icons such as the ones suggested. These graphics, which represent a shot glass, wine glass, and beer mug labeled with a “.6 oz alc” statement and connected by an “equals” sign, represented a major departure from the label standards of the time.

We objected to the use of the graphics on labels as well as the “standard drink” language for various reasons. We attach a copy of our response to TTB’s white paper to these comments and requested that TTB instead proceed by rulemaking. While some of the issues that were raised by Wine Institute in its response to the “white paper” are no longer relevant, much of our argument against the use of such graphics remain the same. It is an expression of “equalization,” a political message that should not be allowed on labels or in advertisements, the image representing the “A drink is a drink is a drink” statement and imagery that is used commonly by distilled spirits trade associations in their attempt to achieve parity with wine and beer in various regulated areas, such as taxes, access to markets, advertising, and other forms of regulatory control.

The equivalency graphic is an oversimplification of the concept of alcohol exposure. In context, the U.S. Dietary Guidelines’ use of serving sizes to define moderation along with their recommendations offers useful information to consumers. It takes two pages for the Dietary Guidelines to explain its recommendation in clear and concise fashion. It is a message that cannot be reduced to a single ambiguous and misleading graphic. The use of the graphic out of the context of qualifying language or balance provides only a partial picture and might be as likely to mislead the consumer as those that are actually false.

Without context, the graphic is subject to various interpretations and can be misleading. In TTB’s initial “white paper,” the Bureau prescribed use of the graphics as one that stands alone in connection with other dietary information. We indicated then that such a use lacked adequate qualification and context. We were extremely pleased when TTB issued its second white paper where the graphic was not mentioned.

The equivalency graphic is misleading and inaccurate because it does not take into account the many factors that affect the rate of intoxication and the metabolism of alcohol, such as gender differences, body composition differences, use of medication, mood changes, and personal metabolism rate, states the Alcohol Education Page of Radford University at Radford, VA. It also does not take into account the presence of food to decrease the rate of alcohol absorption.<sup>16</sup>

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<sup>16</sup> See [www.runet.edu/~kcastleb/bac.html](http://www.runet.edu/~kcastleb/bac.html)

Wine Institute opposes the singular and exclusive use of the equivalency graphic. We oppose the use of the graphic because its use is subject to differing interpretations. It has little application to the actual consumption patterns and trends of consumers and provides little in the way of useful information. Most hard liquor is not consumed in a shot glass. Much of the wine served is not presented in carefully measured 5 oz. glasses. And since wine is bottled using metric standards of fill, how is a consumer to transcend the obvious conversion confusion when a standard drink is being defined?

We urged TTB not to act in haste on this matter and requested instead that the bureau pause to consider the social, political, and legal ramifications that publication of the white paper would bring to bear upon the bureau. We urged TTB to incorporate the equivalency graphic and serving size statement as part of TTB's response to the petition of CSPI and NCL, if there is to be one, and if not, to conduct a rulemaking solely on the issue of serving size and the equivalency graphics. Our views have not changed on this. Contrary to comments made by DISCUS on this Notice, the term "standard drink" has never appeared in any edition of the Dietary Guidelines.

We believe strongly that the equivalency graphics and standard drink statements are untruthful, inaccurate, nonspecific, and misleading, and will result in consumer confusion in violation of current labeling regulations.

Thank you for allowing us to submit these comments. We would glad to respond to any questions these comments may raise.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Koch', with a large, sweeping flourish at the end.

Robert P. Koch  
President & Chief Executive Officer