September 26, 2005

Via Hand Delivery

Frank Foote
Chief, Regulations and Rulings Division
Alcohol & Tobacco Tax & Trade Bureau
Attn: Notice 41
1310 G Street, N.W.
Washington, DC 20005

Re: TTB Notice Number 41: Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages

Dear Mr. Foote:

The Brewers Association is pleased to submit the following comments in response to TTB Notice No. 41, *Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages* ("Notice 41"), 70 Fed. Reg. 22,272 (Apr. 29, 2005).[1] The Brewers Association appreciates this opportunity to contribute the perspective of America's small breweries to this examination of TTB's labeling and advertising regulations.

The Brewers Association was established in January 2005 by the joining of The Brewers' Association of America and the Association of Brewers. The Brewers Association's predecessor organizations collectively had served the interests of small American brewers for a combined total of eighty-eight years. With the formation of the Brewers Association, small brewers now speak with a unified national voice on important government affairs issues like Notice 41.

[1] On June 23 TTB extended the deadline for submitting comments to September 26, 2005. *See* 70 Fed. Reg. 36,359 (June 23, 2005).

The Brewers Association represents the approximately 1,400 small brewers located in every American state and the District of Columbia, and thousands of homebrewers and beer[2] enthusiast consumers around the nation. All small breweries producing less than two million barrels of beer per year can become full brewery members of the Brewers Association, and larger brewers, beer wholesalers and suppliers to the beer industry may join as associate members. In addition, homebrewers and individuals may join the Brewers Association through its American Homebrewers Association division. Today, the Brewers Association has approximately 725 small brewing company members, 175 associate and allied trade members, and over 9,000 American Homebrewers Association members.

We divide these comments into three major sections, each containing specific subsections. Section A presents general comments applicable to virtually all the issues raised in Notice 41. It includes three subsections that address: (1) the general principle in favor of voluntary and against mandatory labeling and advertising rules; (2) the burden of persuasion that proponents of new mandatory rules must bear; and (3) the economic burdens and threat to brewer creativity posed by significant new mandatory labeling requirements. Section B includes comments on the five "major issues" outlined in Notice 41, subdivided into three subsections addressing: (1) the information panel proposals contained in the "alcohol facts," "serving facts" and "composite" issues outlined by TTB; (2) calorie and carbohydrate claims; and (3) allergen labeling. Section C addresses two specific issues: (1) a special rule for small producers; and (2) alternatives to new labeling requirements.

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[2] Except where specifically noted, these comments employ the term "beer" in its ordinary meaning, and intend the term to include products defined as "malt beverages" under the Federal Alcohol Administration Act. *See* 27 C.F.R. § 211(a)(7).

Before turning to specifics, we wish to outline how these comments address the 36 individual questions posed in Notice 41. The Notice poses numbered questions in five subsections identified as "A" through "E" in section V. *See* 70 Fed. Reg. at 22,278-82. These comments accordingly identify individual questions by the lettered subsection and question number assigned by Notice 41. Thus, "Question A.1." identifies first question posed in subsection A of section V. *See id.* at 22,279. A footnote at the beginning of each subsection of these comments identifies those Notice 41 questions addressed within that subsection.

A. GENERAL COMMENTS

1. Government Policy Should Favor Voluntary Labeling Rules Except Where Information is Misleading or a Lack of Information Could Threaten Public Health or Deceive Consumers[3]

Subject to specific exceptions discussed in more detail below, the Brewers Association supports the ability of brewers to voluntarily provide information to consumers via labels and advertising. This general rule is, of course, subject to the caveat that the information in question must be both truthful and non-misleading. We urge TTB to apply this general principle in examining the issues raised in Notice 41, and respectfully suggest that the principle in favor of voluntarily labeling and advertising is mandated by the First Amendment and comports with current policy under the Federal Alcohol Administration Act, 27 U.S.C. §§ 201-211 (the "FAA Act"). *See, e.g.*, 27 C.F.R. § 7.28(e).

Conversely, the Brewers Association generally opposes the imposition of new mandatory requirements on the labeling and advertising of malt beverages. This general rule, too, is subject to certain sensible exceptions. *First*, the FAA Act itself requires that alcohol beverage labels

[3] Responsive to Questions B.3., D.4. and E.

contain certain fundamental pieces of information to allow consumers to make meaningful choices, and these mandatory pieces of information have appeared on alcohol beverage labels since the Act's enactment in 1935. *See* 27 U.S.C. § 205(e)(2); 27 C.F.R. § 7.22. *Second*, where a particular statement or claim is made that, if not qualified or explained, could mislead consumers, then mandatory rules may be necessary to ensure that consumers receive adequate information to avoid confusion or deception. *See, e.g.*, *TTB T.D.-1, Health Claims and Other Health-Related Statements in the Labeling and Advertising of Alcohol Beverages,* 68 Fed. Reg. 10,076, 10,089-91, 10,101-102 (March 3, 2003) (*codified at* 27 C.F.R. §§ 4.64(i), 5.42(b)(8), 7.29(i)); *ATF Ruling* 80-3 (May 30, 1980) (holding that caloric and carbohydrate representations made without qualification in the labeling and advertising of malt beverages are considered to be misleading). *Third*, where the failure to disclose a particular piece of information about a beverage is likely to have significant adverse health consequences to consumers, mandatory labeling rules are appropriate. *See, e.g.*, T.D. ATF-150, *Ingredient Labeling of Wine, Distilled Spirits and Malt Beverages*, 48 Fed. Reg. 45,549, 45,554 (Oct. 6, 1983).

By striking the forgoing balance against new government-mandated labeling and advertising rules, TTB will ensure that consumers receive the optimal amount of information. Experience has shown that alcohol beverage manufacturers respond to consumer demands for additional information about their products, otherwise they risk losing market share to those more responsive to consumer demands. TTB's current labeling standards operate efficiently and effectively for both consumers and industry members. The system encourages manufacturers to provide additional product information that consumers demand while allowing TTB to set limits as appropriate and to prevent the use of misleading information.

Applying these general principles to the possible labeling and/or advertising information discussed in Notice 41, the Brewers Association believes that virtually all of the information discussed should be permitted but not mandated. As discussed more fully below, the exceptions to the general rule applicable to the questions posed in Notice 41 are:

- Products labeled or advertised with claims about the products' calorie, carbohydrate or other nutritional content, as such claims justify additional disclosures to ensure that consumers receive objective information with which to evaluate the claims.
- Major allergens, at levels which are scientifically proven to be harmful to at risk individuals, as such allergens may pose a health risk to a significant number of consumers, justifying mandatory labeling requirements.
- Imposing mandatory or voluntary representation of a standard drink measurement. Standard drink policies (if one were to conceivably be adopted) cannot be applied equally to all alcoholic beverages both in their packaged form and as they are served and consumed. Beer, wine and liquor are very different kinds of alcoholic beverages. While some may consume liquor/distilled spirits straight out of the bottle, for the most part distilled spirits/liquor is mixed in varying proportions with other beverages resulting in drink delivery that is no longer "standard" as might be indicated on a package label.

  For the purposes of labeling, indication of alcohol by volume or proof alcohol is clear and factual statement of product strength, which the consumer already uses to make responsible choices. There is no need for an additional, mathematically derived and misleading indication of "standard drink" on product packaging.

  Furthermore, a policy of adopting a basis for a "standard drink" definition approaches a government defined health policy. This calls into question whether or not it

is the TTB's responsibility to create such indicators of healthy consumption of alcohol. An adoption and the subsequent implications of any "standard drink" policy for labeling purposes will only burden the consumer with confusion.

2. Proponents of New Labeling and Advertising Rules Have Failed to Justify the Need for Such Rules[4]

Notice 41 summarizes several ideas for new mandatory labeling requirements concerning a great deal of information, including ingredients, alcohol content, alcohol servings, and calorie, carbohydrate and other nutritional information. 70 Fed. Reg. at 22,275. Each proposal would radically change current and longstanding federal labeling and advertising policies. Yet to date proponents of these changes have failed to present compelling theoretical justifications or factual evidence that the reasons for rejecting similar proposals in the past are no longer valid, or that new circumstances justify dramatic changes in longstanding alcohol beverage labeling and advertising policy.

Where the government seeks to change longstanding policy and impose new regulations, it must bear the burden of justifying the proposed new regulations. *See, e.g.*, *JSG Trading Corp. v. United States Dep't of Agric.*, 176 F.3d 536, 544 (D.C. Cir. 1999); *British Steel v. United States*, 127 F.3d 1471, 1475 (Fed. Cir. 1997); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 402, 512 (1994). As explained in Notice 41, TTB's predecessor, the Bureau of Alcohol, Tobacco & Firearms ("ATF"), considered and rejected similar mandatory labeling proposals on several occasions during the last three decades. These prior rulemaking exercises addressed and explained why mandatory new labeling requirements almost identical to those in Notice 41 should not be imposed on the industry.

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[4] Responsive to Questions B.1., B.7., D.1., D.8. and E.

Ingredient Labeling: ATF conducted a comprehensive examination of the benefits and costs of mandatory ingredient labeling from 1975 through 1986. After exhaustive study, several rulemaking proceedings, and even litigation, the Agency determined that ingredient disclosures would not prove useful to consumers because basic ingredients and additives are transformed to such an extent during the production process that there is only a strained relationship between the initial ingredients and the content of the final product. *See* 70 Fed. Reg. at 22,277. Current proponents of ingredient labeling have not and can not identify any aspect of the fermentation or distillation process that has changed so significantly – or, indeed, at all – since 1986 that the fundamental transformation of ingredients and additives no longer occurs.

Nutrition Labeling: ATF also considered proposals for mandatory nutrition labeling of alcohol beverages in 1994-95. Again, after thorough study, ATF did not identify any convincing evidence that such labeling would provide consumers with substantially useful information. *Id.* at 22,278. Furthermore, ATF concluded that there was little consumer interest in mandatory nutrition labeling for alcohol beverages. *Id.* While Notice 41 proposes multiple labeling formats for nutrition information, it does not cite to any evidence that contradicts ATF's prior conclusion that mandatory nutrition labeling would be more costly than helpful. Absent substantial record evidence to the contrary, ATF's prior conclusion on the subject should stand.

Caloric and Carbohydrate Claims: After ATF issued its initial policy governing the voluntary use of calorie and carbohydrate labeling on malt beverages in 1976, it issued what would become the definitive statement on "light" and "lite" beer products in 1980 with the publication of *ATF Ruling* 80-3. Thereafter the Agency rejected proposals to craft different policies for "light" beer and similar products on three separate occasions. *See* 70 Fed. Reg. at 22,278. More recently, TTB refined its policy on the use of calorie and carbohydrate claims to

include distilled spirits and wine. *See TTB Ruling* 2004-1 (April 8, 2004). Nothing in the past twenty-five years has produced any evidence showing that the policy established in *ATF Ruling* 80-3 fails to provide consumers with the truthful and useful calorie and other nutritional information they need.

To summarize, in order to justify the extensive changes suggested by Notice 41, TTB must possess compelling evidence and a sound rationale that radical changes are necessary and justified by sound public policy. To date, proponents of such rule changes have presented little more than conclusory claims of consumer benefit to justify their proposals. TTB should not base a fundamental restructuring of federal labeling requirements with a seven-decade record of success on such a negligible record.

3. The Proposed Labeling Requirements Would Significantly Burden Small Businesses[5]

Imposing almost any subset of the new mandatory labeling requirements proposed in Notice 41 would dramatically impact nearly every aspect of a small brewer's business, from its choice in ingredients to its ability to access markets. If TTB moves forward with mandatory labeling requirements, small brewers would face a potentially devastating economic double hit – the first from significantly higher production and administration costs and the second from severe restraints on their brewing creativity.

There are approximately 431 small packaging brewers in the United States. The Brewers Association represents nearly 200 of these as members. Their production capacity ranges from under 1,000 barrels to over 100,000 barrels. In order to estimate the potential economic impact of proposed labeling changes, earlier this year the Brewers Association surveyed small brewers,

[5] Responsive to Questions B.6., B.8., D.7. and D.9.

requesting estimates from each brewer on the costs for compliance, including new labeling equipment, label re-designs, lab testing and related services. In addition, the Brewers Association solicited responses to the following questions:

- Would [Notice 41's] potential requirements necessitate a significant change in your labeling equipment, supplies and/or labeling process?
- Would requiring specific ingredient labeling or specific calorie content information restrain your creativity?
- Would requiring specific ingredient labeling or specific calorie content information restrain you from developing and offering new beers (including seasonal beers that may vary in ingredients or strength year to year and thus would require different labels annually)?
- Would requiring a set ingredient label or specific calorie content cause you to withdraw from interstate sales?
- Would the additional costs attributable to labeling requirement changes cause you to cease bottling operations?

Based on the cumulative responses of 97 small packaging brewers (who represent a combined volume of 5,698,924 barrels of the approximately 7 million barrels produced by small brewers), *see* Attached Survey, pp 28-29, our survey revealed that mandatory ingredient and nutrition labeling requirements would significantly increase small brewers' costs of doing business and deter the creativity and innovation that has made craft brewing both popular and profitable as small businesses.

First, the proposed labeling rules would have a substantial financial impact on all small brewers, regardless of their size. Over 91.8% of the survey respondents reported that Notice 41's proposed labeling requirements would require a significant change in their labeling, labeling equipment, supplies and/or labeling processes. The aggregated average costs for respondents by size are:

- Under 1,000 bbl - **$35,530** per brewery
- 1,000 to 25,000 bbl - **$171,146** per brewery
- 25,001 to 100,000 bbl - **$825,684** per brewery
- Over 100,000 bbl - **$1,515,032** per brewery

These numbers are significant to small businesses like Brewers Association members. Extrapolating these average costs to all small (under 2 million barrels annual production) packaging brewers in the United States, the Brewers Association estimates that implementation and compliance with Notice 41's labeling proposals would cost an additional $107,584,824.

Many members of the Brewers Association could not easily absorb these added costs, and would be forced to make fundamental changes in their operations. To illustrate, our survey found that:

- Additional labeling costs would cause about 27% of survey respondents to cease bottling operations.
- Mandatory ingredient or calorie labeling would force approximately 29% of survey respondents to withdraw from interstate sales.

As a result, Notice 41 could significantly lower the number of small brewers competing in the marketplace, and would deprive consumers of a significant number of products from these small companies.

Just as importantly, mandatory labeling rules like those outlined in Notice 41 would curtail the very creativity that makes small breweries successful. The ability to pursue innovative recipes is a key tool in the efforts of small brewers to maintain their economic competitiveness and gain consumer interest and market share for their products. As observers throughout the world have noted, small brewers have made America one of the most exciting beer markets in the world today, with a diversity of styles and a breadth of experimentation not

found even in the traditional centers of Western brewing culture like Belgium, Britain and Germany.

The creativity and innovation of small brewers and the market demands for their products has given rise to a number of practices that new mandatory labeling rules would jeopardize. Small brewers often vary their beer recipes from batch-to-batch by adjusting the amount of ingredients used. This flexibility allows brewers to adjust the taste profile of the final product to improve their beers and maintain customer interest. Indeed, many brewers have established a tradition of modifying seasonal recipes in order to excite consumers by promising a new flavor for each annual release. While these variations do not have a labeling impact under current TTB regulations, they would likely lead to changes in calorie content and the like that would require new labeling under several of the proposals discussed in Notice 41.

Mandatory ingredient labeling, or specific calorie and nutritional disclosures, would substantially curtail brewer creativity because any change in a recipe would incur significant expenses, such as additional lab analyses to calculate new calorie, alcohol content and similar information, and new labels to disclose these changes to the public. According to the Brewers Association survey, about 65% of respondents state that specific ingredient or calorie labeling would restrain their creativity. Moreover, at least 76% of survey respondents state that mandatory ingredient or calorie content labeling would restrain their ability to develop and offer new beer products, including seasonal beers.

The Brewers Association survey accordingly demonstrates that Notice 41 would negatively affect nearly every aspect of a small brewer's business. The resulting cost increases and restraints on creativity would directly impact the ability of many small brewers to offer quality, competitive products and ultimately restrict, diminish or eliminate consumer access to

their products. This adverse impact on small businesses is not matched by any compelling factual or theoretical case for new mandatory labeling requirements. At a time when small businesses face challenges on multiple fronts in order to stay in business, the Brewers Association urges TTB to reject efforts to impose expensive and unnecessary new mandatory labeling requirements on brewers.

B. COMMENTS ON MAJOR ISSUES UNDER CONSIDERATION

1. Introduction

Notice 41 advances five "major issues" for consideration, under the headings:

A. Calorie and Carbohydrate Claims;

B. Alcohol Facts Label and Ingredient Labeling;

C. Allergen Labeling;

D. Serving Facts Labeling; and

E. Composite Label Approach.

70 Fed. Reg. at 22,278-82. As the "alcohol facts," "serving facts" and "composite label" sections all propose substantial new and potentially mandatory labeling disclosures to be included in some type of "information panel," we address all three together. Specific comments on calorie and carbohydrate claims and allergen labeling follow.

As noted above, the Brewers Association supports the right of brewers and other alcohol beverage producers to provide ingredient, caloric and nutritional information on a voluntary basis so long as the information is presented in a truthful and non-misleading manner. As discussed in more detail below, the Brewers Association strongly opposes the mandatory use of information panels, whether for ingredient labeling, serving facts or nutritional disclosures. With regard to calorie and carbohydrate claims, the Brewers Association supports TTB's current

policies as outlined in *TTB Ruling* 2004-1 and *ATF Ruling* 80-3. Finally, the Brewers Association urges TTB to establish common-sense major allergen labeling requirements for alcohol beverages that maximize the effectiveness of disclosures by minimizing unnecessary labeling rules unconnected with any measurable threat to human health.

2. Information Panels[6]

Notice 41 includes three different proposals (the so-called "alcohol facts," "serving facts" and "composite" proposals) that could require the use of information panels on all alcohol beverage labels. *See* 70 Fed. Reg. at 22,279-82. Two of the proposals would require the listing of somewhat different sets of information while the third ("composite") approach would combine the first two proposals to create a single, all-encompassing information panel. Before turning to specific pieces of information below, the Brewers Association believes the alcohol facts, serving facts and composite panel proposals all suffer from fundamental flaws that counsel against their adoption as mandatory labeling rules.

First, beer and all alcohol beverages are consumed primarily for social purposes, not as a source of daily nutrition. As such, the labeling of alcohol beverages should not be required to include the same nutritional, ingredient and other information as the labels for food products. Indeed, both the alcohol facts and serving facts proposals appear to concede as much, as neither attempts to present the same information as the information required by the Nutrition Labeling and Education Act of 1990 administered by the Food & Drug Administration ("FDA"). *See* 21 U.S.C. §§ 341, *et seq*.

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[6] Responsive to Questions B.1., D.1. and E.

Second, requiring the disclosure of information that few consumers have demanded risks an actual reduction in the amount of information consumers derive from alcohol beverage labels. A cluttered label is an unread label, especially when it includes information that does not meet an existing demand by consumers. Instead, giving brewers the flexibility to provide information that consumers want and in any non-misleading format selected by the brewer will ensure that consumers receive the optimal amount of information, not useless label "clutter."

Third, one can hardly imagine a more intrusive approach to alcohol beverage labeling rules than the panel formats suggested in Notice 41. As TTB knows, a substantial amount of the information proposed for the alcohol facts or serving facts panels already (*e.g.*, alcohol content, ingredients, calories) has been the subject of voluntary labeling for many years. Yet the lack of any standardized "panel" format to present information about alcohol content, ingredients, calories and the like has not led to any demonstrable consumer confusion over the information. What the "panel" approach does accomplish, however, is to ensure that any mandatory labeling rules, if adopted, would require substantial changes to existing labeling and likely requires brewers to purchase new equipment in order to meet the new requirements. *See* page 9, *supra*. Any benefits of this approach cannot even begin to meet the substantial costs associated with it.

We now turn to some of the specific information proposed by the alcohol facts, serving facts and composite proposals discussed in Notice 41.

a. Ingredient Labeling[7]

The alcohol facts and composite approaches both include ingredients as possible mandatory information. Imposing mandatory ingredient labeling, however, would contradict the

[7] Responsive to Questions B.2, B.7. and E.

consistent position of TTB's predecessor and would give consumers little if any useful information.

The substantial transformation of ingredients that takes place during the fermentation process substantially undermines the usefulness of ingredient labeling for beer. Unlike most other food products, the ingredients that go into producing a beer – malted barley, other grains, hops, brewing yeast and water – do not emerge from the production process in a form that remotely resembles the original inputs. Recognition of this fundamental fact resulted in ATF's rejection of prior mandatory ingredient labeling proposals in 1975 and 1983. *See* T.D. ATF-150, *Ingredient Labeling of Wine, Distilled Spirits and Malt Beverages*, 48 Fed. Reg. 45,549, 45,550-51 (Oct. 6, 1983); *Ingredient Labeling of Malt Beverages, Distilled Spirits and Wine*, 40 Fed. Reg. 52,613, 52,613 (Nov. 11, 1975). Moreover, the D.C. Circuit in *Center for Science in the Public Interest v. Department of Treasury* rejected efforts to overturn ATF's conclusion that mandatory ingredient labeling would not provide useful information, finding that there was "more than enough evidence in the record to support the agency's conclusion that, in many cases, both basic ingredients and additives will be substantially transformed by distillation and fermentation." *See* 797 F.2d 995, 1000 (D.C. Cir. 1986). The court explained that the complete rulemaking record supported ATF's conclusion that mandatory ingredient labeling would be "little value to consumers generally or to people with allergies, and the label information might even [be] misleading since it would not accurately describe the contents of the finished product." *Id.* at 1001. As the basic processes of fermentation are the same today as in 1975, there is no reason to mandate ingredient labeling that would be of questionable accuracy and could prove more misleading than informative for consumers.

Moreover, TTB's existing regulatory regime greatly reduces the need for mandatory ingredient labeling for alcohol beverages. Unlike food products, alcohol beverage labels, including beer labels, must disclose to consumers the class and/or type of beverage to which the product belongs. *See* 27 C.F.R. §§ 7.22(a)(2), 7.24. And Congress, in enacting the FAA Act, established as a matter of law which basic ingredients must go into a beer. *See* 27 U.S.C. § 211(a)(7); *see also* 27 C.F.R. § 7.10. Thus, a consumer of beer knows that he/she is purchasing and consuming a product made of barley malt (or other grains as substitutes), hops and water that has been subject to fermentation.

The existing class/type requirement accordingly ensures that consumers generally know what ingredients (prior to fermentation) were used make their beer. In this respect, TTB surely must recognize that unlike the rapidly-evolving food industry, the vast majority of all beers and other alcohol beverages consumed today are made with the same ingredients and by the same processes that have been used for centuries.[8] The beers produced by today's creative and innovative brewers manipulate the process and formulation of these basic ingredients to produce the flavor and diversity of a small brewer's beer portfolio. Moreover, as federal law requires the class/type designation to indicate the product "as known to the trade," 27 C.F.R. § 7.24(a), the law already provides consumers with a known description corresponding to a product with particular ingredients and characteristics.

Existing law also provides consumers with ingredient information in those relatively infrequent occasions where a product contains unusual ingredients not generally found in conventional beer products. For such products, TTB requires "an adequate and truthful

[8] Certain exceptions like flavored malt beverages do exist in the marketplace, but they represent a very small percentage of the overall market.

statement of composition." *Id.* Current TTB policy requires such statements of composition whenever a product contains flavorings, spices or other ingredients not usually found in conventional beers. *See Flavored Malt Beverage and Related Regulatory Amendments*; 70 Fed. Reg. 192, 233 (Jan. 3, 2005); *cf. Industry Circular* 2002-2 (July 24, 2002). Thus, in any situation where a brewer offers a beer product that contains something more than traditional ingredients, TTB already requires the use of a statement of composition in order to accurately inform consumers of the product's unusual ingredients.

Given the substantial transformation of a beer's ingredients during fermentation, the consumer's general knowledge of what a beer contains, and existing rules for products containing unique ingredients, proponents of mandatory ingredient labeling must carry a heavy burden in demonstrating that today, for the first time, the benefits of ingredient labeling outweigh its costs. The Brewers Association respectfully submits that this burden has not been met.

b. Alcohol Content[9]

Although the Brewers Association supports the ability of brewers to voluntarily provide information about a product's alcohol content, we do not agree that any new circumstances require that the information become mandatory. To the contrary, converting the voluntary alcohol content rules prompted by the *Rubin v. Coors* litigation, *see* 27 C.F.R. § 7.71, into a mandate to impose new rules would stand congressional intent on its head and impose unnecessary costs on the industry.

As TTB knows, the FAA Act prohibits brewers from stating alcohol content on the labels and in the advertising of malt beverages. *See* 27 U.S.C. §§ 205(e)(2), 205(f)(2). In *Rubin v.*

[9] Responsive to Questions B.5.

Coors, the United States Supreme Court held that this ban violates the First Amendment rights of brewers seeking to voluntarily provide truthful alcohol content information to beer consumers. 514 U.S. 476 (1995). Congress, however, has never distanced itself from the position taken by the FAA Act. Thus, imposing mandatory alcohol content requirements on malt beverage labels and advertising would go directly against the intent of Congress as expressed in the text of the FAA Act itself. While TTB has, out of necessity, adjusted its alcohol content labeling rules to accommodate the demands of the First Amendment, it should not go further by imposing a rule that would require the very information that Congress saw fit to prohibit.

c. Serving Size[10]

The Brewers Association emphasizes beer's flavor and diversity, championing the value of quality over quantity. American small brewers promote the moderate and responsible consumption of beer and the appreciation of its many flavors. There are over 100 distinct styles of beer made by American brewers. Educating the consumer about the differences in beer flavor, aroma, color, alcohol content, body, other complex variables and historic brewing traditions, beer history and gastronomic qualities are core values of the Brewers Association and its 700+ brewery members and 9,000+beer consumer members.

The alcoholic content of the most popular beer styles generally range from 3 percent to 10 percent. The Brewers Association recognizes the importance of understanding the alcohol content of different types of alcoholic beverages, especially as they are served and consumed. Beer is distinctly unique from distilled spirits. Packaged beer and served beer are virtually

[10] Responsive to Questions D.2, D.3 and D.12.

identical in alcohol content. Packaged distilled spirits/liquor and served distilled spirits/liquor have entirely different alcohol contents, unless not blended with other beverages.

Whether mandatory or voluntary, establishing a "standard drink" policy that presents a "standard" graphic indicating that a glass of wine = glass of beer = equal to a "serving" of distilled spirits/liquor will invariably confuse and misinform the consumer and exacerbate any potential for irresponsible consumption of alcoholic beverages.

For beer, a voluntary simple statement of percent alcohol by volume has served to accurately assess beer strength for centuries (most, if not all, government regulations concerning beer's alcohol content are stated in terms of percent alcohol by volume or percent alcohol by weight). Providing for the continuation of voluntary presentation of percent alcohol by volume will be consistent with current government policies and continue to clearly inform beer drinkers in a format that they are accustomed to.

3. Calorie and Carbohydrate Claims[11]

In addition to the substantial changes proposed in the "information panel" proposals addressed above, Notice 41 also asks whether TTB should establish additional requirements for the display of calorie and carbohydrate information. The Brewers Association believes that existing policies that mandate such labeling for products making "light" and similar claims, while leaving brewers free to include or not include such information on other beer labels, strikes the appropriate balance and should remain TTB policy.

[11] Responsive to Questions A.1., A.2., A.3., A.4., A.5. and D.6.

TTB's current policy requiring a "statement of average analysis" on the labels of beer products labeled or advertised as "light" or "lite" was first announced twenty-five years ago in *ATF Ruling* 80-3. More recently, TTB extended this policy to products making carbohydrate and similar claims, and applied it to all alcohol beverages, not only beer. *See TTB Ruling* 2004-1. The rationale for requiring limited calorie, carbohydrate and other nutritional disclosures in the case of such products remains compelling today. Specifically, where a manufacturer or importer chooses to market a product based on the supposed "lighter" or lower-carbohydrate qualities of the beverage, then consumers ought to receive objective, clear information about the actual calories, carbohydrates and other measures for that beverage. In the absence of such disclosures, unqualified statements about a product's calorie or other nutritional measures would create a high risk for consumer deception. The Brewers Association accordingly supports existing TTB policy as articulated most recently in *TTB Ruling* 2004-1.

The rationale for a statement of average analysis disappears, however, where a product does not make any claims about its nutritional content. As noted above, consumers purchase and drink alcohol beverages for social reasons, not as sources of vital nutrients. Thus, the case for mandatory nutritional labeling on all alcohol beverages is vastly different than the case for mandatory disclosures on food products. In the case of consumers on restricted diets or seeking to loose weight, many "light" products on the market can cater to those consumers and, if demand exists, producers will voluntarily provide this information in response to competitive market forces. A "one-size-fits-all" government mandate simply is not required.

3. Allergen Labeling[12]

[12] Responsive to Questions C.2., C.3., C.4., C.5., C.8., and C.10.

The Brewers Association believes that mandatory rules regarding the disclosure of major allergens are necessary because certain types of allergens, or at least when present above scientifically determined harmful levels, can pose a significant threat to consumer health. Although the Food Allergen Labeling and Consumer Protection Act of 2004 (the "FALCP Act") does not apply directly to alcohol beverages subject to the FAA Act, *see, e.g.*, *Brown-Forman v. Mathews*, 435 F. Supp. 5 (W.D. Ky. 1976), Congress has instructed TTB to promulgate allergen labeling rules appropriate for alcohol beverages. *See* H.R. Rep. No. 608, 108th Cong., 2d Sess., at 3 (2004).

In formulating new rules in this area, the Brewers Association urges TTB to pursue a common-sense approach. For example, in cases where the product's brand name, fanciful name, or class/type designation clearly describes the presence of a major allergen, such as a product labeled as "wheat beer," a repetitive allergen disclosure is not necessary. Furthermore, TTB should apply the following principles when it formulates any allergen labeling requirement based on health-effects:

- Allergen labeling requirements must establish clear and scientifically determined harmful thresholds based on sound scientific principles and reliable data.
- Mandatory labeling should not be required if a specific compound or harmful component, ingredient or additive that qualifies as a major allergen is not present in the final product.
- Mandatory allergen labeling requirements should not apply if the production process removes or causes the elimination of the allergenic properties from the final product.

Finally, TTB has extensive experience in the implementation of labeling requirements for allergens like sulfites and FD&C Yellow No. 5. *See, e.g.*, 27 C.F.R. §§ 4.32(c), (e); 5.32(b)(5), (7); 7.22(b)(4), (6). Thus, TTB is fully capable of establishing new allergen labeling rules under its own authority. In cases where a determination requires the use of complex scientific

applications, such as an allergen threshold level, TTB should consult with FDA for any necessary assistance.

C. SPECIFIC ISSUES

1. Any New Labeling Requirements Should Accommodate the Needs of Small Producers by Exempting them from New Mandatory Rules[13]

As explained above, with the exception of major allergen labeling, the Brewers Association does not believe that new mandatory labeling regulations are necessary at this time. Should TTB nevertheless conclude that proponents of new labeling rules have met their burden of demonstrating the need for new mandatory requirements, the substantial economic burdens that each proposed labeling requirement would place on small brewers demonstrates that TTB should, at a minimum, provide small brewers and other small producers of alcohol beverages with an exemption from any new mandatory labeling rules, with the limited exception of major allergens. Such a policy would accurately reflect the overarching Congressional policy in favor of small businesses, a policy that often results in the exemption of small businesses from certain requirements of federal law.

Congress has long recognized that regulatory compliance places greater burdens on small businesses than on their larger counterparts and, on this basis, has approved numerous federal laws that grant exemptions for, or accommodate the needs of, small businesses. *See, e.g.*, 35 U.S.C. § 41(h)(1) (providing small business, independent inventors and non-profit organizations a 50% reduction in patent fees); 47 U.S.C. § 257 (requiring the Federal Communications Commission to identify and remove barriers to entry for small businesses into the telecommunications or information service industries); 47 C.F.R. § 1.2110 (providing authority

[13] Responsive to Questions B.4. and D.5.

for the provision of bidding credits to small businesses participating in radio license auctions conducted by the Federal Communications Commission); 13 C.F.R. Part 13 (addressing preferences established for small businesses bidding for federal government contracts); The Consolidated Appropriations Act, Fiscal Year 2004-05, Pub. L. No. 108-447, 118 Stat. 3118, (prohibiting the use of OSHA funds to conduct certain inspections of small businesses). Congress also passed the Regulatory Flexibility Act, *see* 5 U.S.C. §§ 601(3)-(4), 603(a), to ensure that federal agencies would consider how new regulatory requirements would impact different participants in the marketplace and, in particular, what accommodations for small businesses are necessary to preserve competition and to prevent monopolization by larger entities. *See, e.g.*, S. Rep. No. 96-878 at 3, 4, 9 (1980). All such laws recognize that even regulations that apply equally to all members of a particular industry can create barriers to entry for smaller businesses that cannot spread their costs of compliance across a sufficiently large base.

In the area of nutrition labeling specifically, Congress provided small businesses with nutrition exemptions for foods and dietary supplements. *See* 21 U.S.C. § 343(q)(5)(D), (E). Exemptions set forth in 21 C.F.R. §§ 101.9(j)(1) and 101.36(h)(1) apply to retailers who have no more than $500,000 in direct sales to consumers or no more than $50,000 in sales of food or dietary supplements to consumers. In addition, a business that employs fewer than an average of 100 full-time equivalent employees and that sells fewer than 100,000 units of a low-volume product in the U.S. during a 12-month period is eligible for the low-volume product labeling exemptions found in 21 C.F.R. §§ 101.9(j)(18) and 101.36(h)(2). Should TTB consider mandatory labeling requirements similar to those required for food, it should likewise structure its requirements to incorporate exemptions that address the needs of small brewers and other

small alcohol beverage manufacturers. Without such exemptions, the increased cost of new testing requirements, label designs and the like would inevitably lead to fewer new small brewer products, and could drive some small brewers from packaging altogether.

The statutes administered by TTB provide further compelling evidence that Congress wishes the Agency to interpret the law in a manner that does not unduly harm small businesses. Small brewers already benefit from a lower rate of excise tax that Congress enacted in 1976, *see* Pub. L. No. 94-529, *codified at* 26 U.S.C. § 5051(a)(2), and left unchanged when it increased the excise tax on beer in 1990, *see* Pub. L. No. 101-508. More recently, the current Congress enacted legislation that will require less-frequent tax payments by small excise taxpayers. *See* Pub. L. No. 109-59, *to be codified at* 26 U.S.C. § 5061(d)(4). Similarly, the legislative history behind the FAA Act demonstrates that Congress sought to assist small producers in their effort to enter the alcohol beverage industry and to compete within the marketplace. *See, e.g.*, Office of the General Counsel, 75th Cong., Legislative History of the FAA Act, Pub. L. No. 410, at 19 (1935) (regarding hearings before the House Ways and Means Committee on H.R. 8539); *id.* at 52 (quote of Mr. Cullen explaining that Congress must prevent activities that take advantage of the weakness of others in the industry).

In addition, regulations already applied to the brewing industry demonstrate the necessity of making reasonable accommodations to the needs of small business during the rulemaking process. Mandatory electronic funds payment requirements, for example, apply only to the largest excise taxpayers. *See, e.g.*, 27 C.F.R. § 24.272 (rule for wineries); 27 C.F.R. § 25.165 (rule for brewers). Similarly, the recordkeeping rules under the Bioterrorism Preparedness and Response Act of 2002 establish significantly less rigorous compliance deadlines for small and very small businesses. *See* 21 C.F.R. § 1.368.

In keeping with these well-established precedents for accommodating small business, should TTB pursue rulemaking to establish new mandatory labeling rules as suggested in Notice 41, the Brewers Association urges TTB to exempt small brewers from such requirements. Congress already has provided clear guidance on which brewers qualify as "small" under federal law by establishing a two million barrel per year eligibility requirement on the reduced rate of tax established in 26 U.S.C. § 5051(a)(2). It would be inappropriate for TTB to create a second, alternative definition of a "small brewer" when Congress already has spoken on the subject. Thus, should TTB proceed with further rulemaking, proposed rules should exempt brewers producing less than two million barrels per year from new mandatory labeling rules in order to accommodate the economic needs of small brewers, reduce barriers to entry into the marketplace of innovative new products and preserve consumers' access to a wide variety of products.

As chronicled in the Brewers Association survey, *see* pp 28-29, *supra*, many of the mandatory labeling and advertising requirements cited in Notice 41 would curtail the ability of small brewers to produce certain products, would increase their overall cost of doing business and would erect a high barrier to entry into the business of selling packaged beer. Moreover, for some small brewers, the burden of complying with mandatory labeling rules could force them to withdraw their products from interstate commerce. These harsh economic effects of the proposed mandatory labeling requirements justify a small brewer exemption.

2. Alternatives to Proposed Labeling Requirements[14]

Should TTB decide that the benefits of certain mandatory labeling disclosures outweigh the disadvantages, the Brewers Association urges TTB to provide alternatives for compliance.

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[14] Responsive to Questions B.9. and D.10.

For instance, as part of its 1980 ingredient disclosure rulemaking, ATF concluded that a producer could fulfill the proposed labeling requirement by making ingredient information available upon request. *See Labeling and Advertising of Wine, Distilled Spirits and Malt Beverages*, 45 Fed. Reg. 40,538, 40,540-41 (June 13, 1980). Today, wide accessibility to the internet and other forms of electronic media have greatly increased the ways that consumers can access the product information they seek. As discussed above, small brewers have fewer resources with which to purchase expensive labeling equipment and to redesign product labels in order to comply with many of Notice 41's mandatory labeling proposals. Having the option to provide mandatory information to consumers via electronic means would relieve some of the economic and administrative burdens of regulatory compliance for small brewers.

* * *

In sum, the Brewers Association urges TTB to pursue the following with regard to the proposals set forth in Notice 41:

- Permit the voluntary use of truthful and non-misleading ingredient and nutrition information on alcohol beverage labels.
- Reject the imposition of new mandatory labeling and advertising requirements.
- Maintain current policies governing the labeling requirements for products making calorie and carbohydrate claims.
- Establish common sense rules for mandatory major allergen disclosures.
- Reject mandatory or voluntary representation of standardize drink labeling or policy
- Exempt small brewer from any new mandatory labeling rules other than those related to major allergens and products making caloric or carbohydrate claims.
- Provide alternate compliance options for any necessary mandatory labeling requirements deemed necessary.

The Brewers Association appreciates this opportunity to provide comments on Notice 41 and looks forward to working with TTB to develop reasonable and effective labeling standards for malt beverage products.

Sincerely,

Charlie Papazian
President, The Brewers Association

Attachment: Brewers Association Member Survey pp. 28-29

cc: Brewers Association Board

Brewers Association Member Survey (conducted May 19 – August 19, 2005)

Re: *Notice Number 41* - *Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages*

As part of its response to TTB's request for public comment on Notice 41, the Brewers Association developed an online survey designed to assess the potential economic impact these proposed rules would have on small brewers. Members were given a brief overview of the types of label information additions under consideration and were provided a link to the April 29, 2005 Federal Register entry detailing the proposals.

Summary of Results:

- Would these potential requirements necessitate a significant change in your labeling equipment, supplies and/or labeling process? (e.g. adding a back label or moving to a 180 degree or wrap around label)

  91.8% Yes

- Would requiring specific ingredient labeling or specific calorie content information restrain your creativity?

  64.6% Yes

- Would requiring specific ingredient labeling or specific calorie content information restrain you from developing and offering new beers (including seasonal beers that may vary in ingredients or strength year to year and thus would require different labels annually)?

  76% Yes

- Would requiring a set ingredient label or specific calorie content cause you to withdraw from interstate sales?

  28.9% Yes

- Would the additional costs attributable to labeling requirement changes cause you to cease bottling operations?

  26.8% Yes

Averaged Cost Data
(Estimated additional costs incurred if new labeling requirements are approved):

Under 1,000 bbl (13 total respondents):
New Labeler (complete) - $13,425 (4 respondents)
Additional Back Labeler - $3,100 (2 respondents)
Installation - $2,000 (3 respondents)
Production Disruption - $4,375 (4 respondents)
Incremental cost of new labels - $2,700 (3 respondents)
Cost of redesign of new labels - $1,550 (7 respondents)
Cost of lab testing for analysis - $1,350 (6 respondents)
Costs of consultants, lawyers, etc. - $1,030 (5 respondents)
Other costs - $6,000 (2 respondents)

1,000 – 25,000 bbl (52 total respondents):
New Labeler (complete) - $67,891 (23 respondents)
Additional Back Labeler - $25,176 (17 respondents)
Installation - $5,921 (28 respondents)
Production Disruption - $32,897 (17 respondents)
Incremental cost of new labels - $14,183 (25 respondents)
Cost of redesign of new labels - $11,377 (35 respondents)
Cost of lab testing for analysis - $3,864 (30 respondents)
Costs of consultants, lawyers, etc. - $3,266 (18 respondents)
Other costs - $6,571 (7 respondents)

25,001 - 100,000 bbl (21 total respondents):
New Labeler (complete) - $238,149 (9 respondents)
Additional Back Labeler - $80,666 (9 respondents)
Installation - $55,230 (13 respondents)
Production Disruption - $121,100 (10 respondents)
Incremental cost of new labels - $27,772 (11 respondents)
Cost of redesign of new labels - $22,117 (17 respondents)
Cost of lab testing for analysis - $14,150 (16 respondents)
Costs of consultants, lawyers, etc. - $9,700 (15 respondents)
Other costs - $256,800 (5 respondents)

Over 100,000 bbl (7 total respondents):
New Labeler (complete) - $369,000 (5 respondents)
Additional Back Labeler - $558,000 (5 respondents)
Installation - $36,000 (5 respondents)
Production Disruption - $158,333 (3 respondents)
Incremental cost of new labels - $216,250 (4 respondents)
Cost of redesign of new labels - $35,071 (7 respondents)
Cost of lab testing for analysis - $22,358 (6 respondents)
Costs of consultants, lawyers, etc. - $10,020 (5 respondents)
Other costs - $110,000 (2 respondents)