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[Proposed Rules]
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DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Parts 4 and 24

[Notice No. 881 Re: T.D. ATF--398, Notice No. 859 and Notice No. 869]
RIN 1512-AB71

Labeling of Hard Cider (97-2523)

AGENCY: Bureau of Alcohol, Tobacco and Firearms (ATF), Department of
the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Bureau of Alcohol, Tobacco and Firearms (ATF) is proposing
amendments to the labeling rules for hard cider. We are doing so in
response to comments on our temporary rule and notice of proposed
rulemaking on this subject. We are postponing the label compliance date
for that temporary rule by a Treasury decision published in the Rules
section of today's Federal Register.

DATES: Written comments must be received on or before November 26,
1999.

ADDRESSES: Address written comments to the Chief, Regulations Division,
Bureau of Alcohol, Tobacco, and Firearms, P.O. Box 50221, Washington,
DC 20091-0221. See the Public Participation section of this notice for
ways to send comments. See the Disclosure section of this notice for
the location of our Reading Room.

FOR FURTHER INFORMATION CONTACT: Marjorie D. Ruhf, Regulations
Division, 650 Massachusetts Avenue, NW, Washington, DC 20226; (202)
927-8202; or mdruh@atf.gov.

SUPPLEMENTARY INFORMATION:

Background

On August 21, 1998, ATF issued a temporary rule, T.D. ATF-398 (63
FR 44779), to implement various sections of the Taxpayer Relief Act of
1997, Public Law 105-34 ('`the Act``). On the same day, ATF issued a
notice of proposed rulemaking, Notice No. 859 (63 FR 44819), inviting
comments on this temporary rule for a 60 day period. In response to
requests from the industry, ATF reopened the comment period for an
additional 30 days on November 6, 1998, by Notice No. 869 (63 FR
59921).

ATF's Temporary Rule on Labeling of Hard Cider

Section 908 of the Act amended the Internal Revenue Code of 1986 (IRC) to create a new excise tax category for hard cider. The temporary rule, T.D. ATF-398, implemented this section, including establishing temporary rules for labeling hard cider. We changed both the IRC and the Federal Alcohol Administration (FAA) Act labeling rules. We explained the changes this way:

Since the term ``hard cider'' now has tax significance, no wine may be designated as ``hard cider'' unless it conforms to the definition of hard cider in Sec. 24.10 and is eligible for the tax category of hard cider. The reference to cider in the FAA [Act] labeling regulations at Sec. 4.21(e)(5) is amended to show that the term ``hard cider'' is reserved for use in wine eligible for the tax category of hard cider. A new Sec. 24.257(a)(3)(iv) has been added to the IRC wine labeling requirements for wine under 7 percent alcohol by volume to show that wine eligible for the tax category of hard cider will be marked ``hard cider'' rather than simply ``wine'' under that section.

We set a compliance date of February 17, 1999, for this change, to allow time for producers to change labels to conform with the temporary rule.

Basis of Our Temporary Rule

ATF (as a delegate of the Secretary of the Treasury) has general authority to issue labeling regulations under the IRC, 26 U.S.C 5368(b), which states,

Wine shall be removed in such containers * * * bearing such marks and labels, evidencing compliance with this chapter, as the Secretary may by regulations prescribe.

We also have authority under the FAA Act, 27 U.S.C. 205(e), to prescribe regulations that insure that alcohol beverages are labeled or marked to ``* * * provide the consumer with adequate information as to the identity and quality of the products. * * * ''

When the new wine tax category was created and named ``hard cider,'' we revised the IRC labeling provisions to allow hard cider to be labeled as such

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without further indication that it is taxed as a wine. Before that amendment, wines with less than 7 percent alcohol by volume had to be marked with the word ``wine'' and an appropriate modifier to identify the tax class. We also amended the FAA Act labeling regulations to provide that no product could be called ``hard cider'' if it was not eligible for the tax category of ``hard cider.'' Before the amendment, the FAA Act regulations had allowed the use of the term ``cider'' for apple wines in certain circumstances. The term ``hard cider'' was not addressed.

In short, we required the phrase ``hard cider'' on containers of wine eligible for the hard cider tax rate and prohibited its use elsewhere. We believed this would evidence compliance with tax law and provide the consumer with adequate information as to the identity of

the product.

Public Comments on the Temporary Rule

We received 48 comments in response to the temporary rule and the notice of proposed rulemaking. Two comments addressed the issue of semi-generic wine designations (also covered in the temporary rule and notice), and all the rest concerned the hard cider rules. All the comments will be discussed in a future final rule. In this document, we will discuss only the comments concerning labeling of hard cider. Based on comments we received, we find the temporary rule as originally issued imposes an unintended and unnecessary burden.

Comments on Labeling of Ciders Not Eligible for the New Tax Rate

Producers who make ciders that are not eligible for the new tax rate, but who have been using the term ``hard cider'' to describe their product, wrote to ask us to change our temporary labeling regulations. Their products include apple wines containing 7 percent or more alcohol by volume, ciders that contain less than 7 percent alcohol by volume with other fruit flavors, and ciders that contain 50 percent or less apple juice. Under the temporary rule, each of these products is excluded from the definition of cider, and therefore is not entitled to use the name ``hard cider'' on labels. The producers and other interested persons submitted the following comments:

Senators Patrick J. Leahy and James M. Jeffords of Vermont, the principal authors of the provision that reduced the tax on ``hard cider,'' wrote to ATF to express concern at ATF's interpretation of the statute. They said:

Prohibiting producers from using this term if their cider contains more than seven percent alcohol runs counter to this common understanding of the term. Further the change is somewhat anomalous; ciders with more than seven percent are, by most people's thinking, even ``harder'' than those products that you will allow to be labeled as ``hard cider.'' The rule change will cause consumer confusion, and could well affect sales of the affected products. We urge that you not adopt this proposed rule.

Richard G. Burge of Wyder's Cider noted that they will be ``prohibited from calling [their] products `hard cider', which will be reserved for the handful of apple only fermented ciders that comply. However, Wyder's ciders have been accepted by the discriminating consumer and industry professional alike as a high quality cider alternative to the heavier English styles. Our number two ranking in the California cider market attests to this fact and to the fine quality of the product and its legitimacy as a hard cider. We fail to understand how it is that our hard ciders will not only be unable to enjoy the lower tax rate, but will also be completely shut out of the very product category that we helped to establish.* * * We believe the rules should promote the category, not choke it, and at the very least should allow non-conforming producers to sell their products as hard cider.''

Mr. Edward C. Metcalfe, founder and former owner of North River Winery in Vermont, wrote to give historical information on hard cider. He said, ``even in the earliest days of cider making, sugar, molasses or other sweetener was often added to raise the alcohol content to give the product more kick and to help it keep better under crude storage conditions. The `harder' a cider was, the higher the alcohol content. These traditional hard ciders have been made for many years, often with

an alcohol content as high as 12%-14%.' Mr. Metcalfe expressed concern that ``the new labeling requirements would make some current commercial products unsaleable.' He enclosed labels from the North River winery, which makes a cider that is 9% alcohol by volume under the brand name ``Metcalfe's Hard Cider,' a brand name that would be prohibited under the new rules.

The current owners of North River Winery, Annmary T. Block-Reed and Clyde A. Reed, also submitted comments on the history of the term ``hard cider'' and noted our regulations ``would be denying what has been commonly agreed to as the understanding of hard cider for generations, all over the world.' They further noted the regulations, as written, would impose a financial hardship, since they are a small winery and would need to replace several years' supply of labels.

Finally, several consumers wrote to express concern about ATF's rules for labeling hard cider. One consumer wrote that ``changing the definition of the words `hard cider' to only mean ciders which are under 7% alcohol would be misleading to consumers and would cause widespread confusion in the marketplace.' Another said ``I believe that the general public would not be served well in changing the words `hard cider' to mean something other than their traditional meaning.'

Comments on Labeling Cider Eligible for the New Tax Rate

Producers of wines eligible for the hard cider tax rate stated they prefer to use a phrase like ``apple cider'' or ``draft cider'' in their marketing:

Brian t of Black <greek-i>sesas Fagan Cider Co, L.L.C. asked a question in his comment: ``Our product label currently says `Goldfinch Cider'. Does it have to say `Goldfinch Hard Cider' as the main product name designation, or can we retain `Goldfinch Cider' and note ``hard cider'' elsewhere on the label?

Paul Thorpe of E&J Gallo Winery (``Gallo'') commented that the regulations should be amended to allow designation of products in the hard cider category ``by an equivalent phrase, such as `hard apple cider' or `hard draft cider.' ``Gallo further suggested that we state a minimum standard for location and legibility of this required information. Gallo suggested'' on the label in legible type and lettering no smaller than 2 millimeters in height.' They noted this requirement would be consistent with the general requirements for mandatory information under the FAA Act regulations for labeling of wine and beer.

Stephen Swift of Matthew Clark Brands, Ltd., makers of Blackthorn Fermented Cider, noted they have been describing their product as ``fermented cider'' on labels and in advertising for over 12 years. He said the term ``hard cider'' ``implies that the product is distilled (as in hard liquor).'

Roger Daniels of Green Mountain Cidery, makers of Woodchuck Draft Cider, advocated that ATF should take the following positions: ``(a) that there are no new regulatory standards or restrictions on the use of the labeling designation ``hard cider,' (b) that there are no new regulatory standards or restrictions with respect to container or packaging sizes for ``hard cider,' and (c)

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that the FAA Act regulations do not apply to ``hard cider.'

Discussion of Comments

When we drafted the hard cider labeling sections of the temporary

rule, we did not intend to cause a hardship for the industry or consumers. We intended to maintain the current system of identifying the tax class of wine by information on the label. The function of ATF's marking requirement is to insure proper identification of the wine for tax purposes, and to inform consumers of the identity of the product. From the comments, we see that the term ``hard cider'' has broader meaning in the industry and among consumers than the definition given in the regulations.

In light of these comments, we reviewed our need for tax identification on the labels of wines. Although much of our work takes place on wine premises where supplemental information is available to establish the tax rate of a given lot of wine, we believe there are times when we must be able to tell the tax rate from looking at the label alone. For example, we use this information in processing disaster loss claims, conducting market sampling, and verifying import and export documentation. Therefore, we will maintain the requirement that the label must contain sufficient information to establish the tax rate, but we request comments on ways to provide this information with the greatest flexibility for the industry.

We note there is some confusion in the industry on whether the wine labeling rules and standards of fill in 27 CFR part 4 apply to hard cider less than 7 percent alcohol by volume. They do not. The rules in part 4 implement the FAA Act, and apply only to wine which contains ``not less than 7 percent and not more than 24 percent of alcohol by volume.'' That is why hard cider under 7% alcohol by volume is exempt from ATF's label approval requirements and metric standards of fill. Instead, wine under 7 percent alcohol is subject to Food and Drug Administration labeling rules. However, ATF has some wine labeling jurisdiction under the IRC, which applies to all beverage wine containing 0.5 percent or more alcohol by volume. The IRC wine labeling rules are in 27 CFR part 24. These rules do apply to hard cider under 7 percent alcohol by volume.

New Proposed Rule

In this document, we are proposing alternative labeling rules and requesting public comments. In the Rules section of this issue of the Federal Register, we are publishing a Treasury decision postponing the compliance date for the hard cider labeling rules (originally February 17, 1999).

First, we propose to remove the amendment we made to Sec. 4.21(e)(5) of the Federal Alcohol Administration Act wine labeling regulations. Part 4 only applies to wines that contain 7%-24% alcohol by volume. As amended, that section prohibited the use of the term ``hard cider'' on any wine with 7% or more alcohol by volume. We intended to avoid confusion between these higher alcohol wines and wines in the new hard cider tax class by this prohibition. After reviewing the comments, we find this precaution unnecessary. We believe the required statement of the alcohol content will distinguish the product from other products properly identified as ``hard cider'' under the IRC. Since the hard cider tax rate is limited to wines under 7% alcohol by volume, it will be clear that a product with, say, a 9% alcohol content is not ``hard cider'' within the meaning of the IRC.

Second, we are proposing to amend the IRC marking requirements in part 24. When the new tax class of hard cider was established, we amended the labeling rules to substitute the phrase ``hard cider'' for the word ``wine'' to identify the tax class. On IRC wine labels, no single item of information gives the tax class. On conventional wines, the word ``wine'' and the alcohol content (modified by the word ``carbonated'' or ``sparkling'' if either applies) identify the tax

class.

For products under 7% alcohol by volume, we want to differentiate between ciders which are eligible for the hard cider tax rate and those which are taxable as still wine containing not more than 14% alcohol by volume. Some producers have marketed eligible products as ``draft cider,'' ``fermented cider'' or ``apple cider'' and do not wish to use the term ``hard cider'' on labels. Some producers have marketed mixed-fruit ciders or low-alcohol ciders that are otherwise excluded from the current definition of hard cider under the name ``hard cider'' and do not wish to rename their products.

To address these concerns, we propose several changes to 27 CFR 24.257. First, we propose to adopt the minimum and maximum type size requirements of 27 CFR 4.38. Several commenters asked about the minimum size for required information under the IRC, because the part 24 regulations are silent on this point. We propose to use the FAA Act type size requirements because they are already in use by the wine industry for higher alcohol products. We do not specify placement of information required in Sec. 24.257, and we do not propose to add any placement requirement as part of this rulemaking. Products with 7 percent or more alcohol by volume will still be subject to the FAA Act rules covering placement.

We propose to remove the requirement that the word ``wine'' or the words ``carbonated wine'' must be ``part of the brand name or in a phrase in direct conjunction with the brand name.'' Information on the kind of wine may be anywhere on the label. We also propose to add some alternative labeling terms to reflect the industry practice of calling products ``cider'' instead of wine on these labels. In our proposed regulation, we do not require or restrict the use of words such as ``draft'', ``fermented'' or ``hard'' to identify products in the tax class of hard cider. We propose, where the words on the label leave doubt as to the tax class, cider makers must include a reference to the tax class by section of the law. For example, the temporary rule has a requirement that hard cider must contain more than 50 percent apple juice. If a cider contains less than 50 percent apple juice, it is taxed as a still wine under 14 percent alcohol by volume, but it may still be called cider. In order to make it clear that this cider is taxed at \$1.07 instead of \$0.226, we propose to require that the label show ``tax class 5041(b)(1) IRC'' or an equivalent phrase. This wording is adapted from 27 CFR 25.242, on marking nontaxable cereal beverages. We request industry and consumer suggestions for the best way to show this information on the container. We also request suggestions for other ways to differentiate between ciders eligible for the hard cider tax rate and those which belong in other tax categories without restricting the use of the name ``hard cider.''

Paperwork Reduction Act

The regulatory sections we propose to amend by this notice contain collections of information which were previously approved by the Office of Management and Budget (OMB). Although we propose amending these sections, the changes are not substantive or material.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) relating to a final regulatory flexibility analysis do not apply to this proposed rule because the agency was not required to publish a general notice of proposed rulemaking under 5 U.S.C. 553 or any other law. Pursuant to 26 U.S.C. 7805(f), ATF will send a copy of this proposed rule to the Chief Counsel

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for Advocacy of the Small Business Administration for comment on its impact on small business.

Executive Order 12866

It has been determined that this proposed rule is not a significant regulatory action as defined by Executive Order 12866. Therefore, a regulatory assessment is not required.

Public Participation

ATF requests comments on the proposed regulations from all interested persons. We specifically request comments on the clarity of the proposed rule and how it may be made easier to understand.

Please include the following in all comments:

ATTN: Notice No. 8

Your name,
Your company affiliation, if it is pertinent to your comment,
Your reason for interest in the project (are you a consumer, grower, producer?),
Your signature on paper comments sent by mail or facsimile transmission (FAX).

Address written comments to the Chief, Regulations Division, Bureau of Alcohol, Tobacco and Firearms, P.O. Box 50221, Washington, DC 20091-0221.

Fax comments to (202) 927-8525. Be sure fax comments are legible, on 8 1/2" x 11" paper, and they are 3 pages or less.

E-mail comments to nprm@atf.gov. E-mail comments must contain no attachments, special characters or encryption.

ATF will treat all comments as original written comments. We do not acknowledge receipt of comments. We will carefully consider all comments received on or before the closing date. We will also consider comments received after that date if it is practical to do so, but we cannot guarantee consideration of comments received after the comment period closes.

During the comment period, you may request an opportunity to present oral testimony at a public hearing. However, the Director reserves the right, in light of all circumstances, to determine if a public hearing is necessary.

Disclosure

Comments, including the name of the commenter, will be disclosed to the public. Do not include any material in your comment if you consider it to be confidential or inappropriate for disclosure to the public.

You may view and copy written comments on this project during normal business hours in the ATF Public Reading Room, Room 6480, 650 Massachusetts Avenue, NW, Washington, DC.

Drafting Information: Marjorie D. Ruhf, Regulations Division, Bureau of Alcohol, Tobacco and Firearms drafted this document.

List of Subjects

27 CFR Part 4

Advertising, Consumer protection, Customs duties and inspection, Imports, Labeling, Packaging and containers, Wine.

27 CFR Part 24

Administrative practice and procedure, Authority delegations, Claims, Electronic fund transfers, Excise taxes, Exports, Food additives, Fruit juices, Labeling, Liquors, Packaging and containers, Reporting and recordkeeping requirements, Research, Scientific equipment, Spices and flavoring, Surety bonds, Taxpaid wine bottling house, Transportation, Vinegar, Warehouses, Wine.

Authority and Issuance

Accordingly, we propose to amend chapter I of title 27, Code of Federal Regulations as follows:

PART 4--LABELING AND ADVERTISING OF WINE

Par. 1. The authority citation for 27 CFR part 4 continues to read as follows:

Authority: 27 U.S.C. 205, unless otherwise noted.

Par. 2. Section 4.21 is amended by revising the third sentence of paragraph (e)(5) to read as follows:

Sec. 4.21 The standards of identity.

* * * * *

(e) Class 5; fruit wine

* * * * *

(5) * * * Fruit wines which are derived wholly (except for sugar, water, or added alcohol) from apples or pears may be designated ``cider'' and ``perry,'' respectively, and shall be so designated if lacking in vinous taste, aroma, and characteristics. * * *

* * * * *

PART 24--WINE

Par. 3. The authority citation for 27 CFR part 24 continues to read as follows:

Authority: 5 U.S.C. 552(a); 26 U.S.C. 5001, 5008, 5041, 5042, 5044, 5061, 5062, 5081, 5111-5113, 5121, 5122, 5142, 5143, 5173, 5206, 5214, 5215, 5351, 5353, 5354, 5356, 5357, 5361, 5362, 5364-5373, 5381-5388, 5391, 5392, 5511, 5551, 5552, 5661, 5662, 5684, 6065, 6091, 6109, 6301, 6302, 6311, 6651, 6676, 7011, 7302, 7342, 7502, 7503, 7606, 7805, 7851; 31 U.S.C. 9301, 9303, 9304, 9306.

Par. 4. Section 24.257 is amended by revising paragraph (a) to read as follows:

Sec. 24.257 Labeling wine containers.

(a) The proprietor must label each bottle or other container of beverage wine prior to removal for consumption or sale. The minimum

type size for information required by this section is: 2 millimeters for containers of more than 187 milliliters and 1 millimeter for containers of 187 milliliters or less. The maximum type size for alcohol content statements is 3 millimeters unless the container is larger than 5 liters. The label must be securely affixed and show:

- (1) The name and address of the wine premises where bottled or packed;
- (2) The brand name, if different from above;
- (3) The alcohol content as percent by volume or the alcohol content stated in accordance with 27 CFR part 4. For wine with less than 7 percent alcohol by volume stated on the label there is allowed an alcohol content tolerance of plus or minus .75 percent by volume; and
- (4) The kind of wine, shown as follows:
 - (i) If the wine contains 7 percent or more alcohol by volume and must have label approval under 27 CFR part 4, the kind of wine is the class, type, or other designation provided in that part.
 - (ii) If the wine has an exemption from label approval or contains less than 7 percent alcohol by volume, an adequate statement of composition may be used instead of the class and type in 27 CFR part 4. The statement of composition must include enough information to identify the tax class when viewed with the alcohol content. First, the wine should be identified by the word ``wine,'' ``mead,'' ``sake,'' ``cider'' or ``perry,'' as applicable. If the wine contains more than 0.392 grams of carbon dioxide per 100 milliliters, the word ``sparkling'' or ``carbonated,'' as applicable, must be included in the statement of composition. If the statement of composition leaves doubt as to the tax class of the wine, the wine must be marked ``tax class 5041(b)(1) IRC'' or an equivalent phrase. For example, a still wine marked ``wine'' showing an alcohol content of 16 percent alcohol by volume would be considered as adequately marked to identify its tax class as 5041(b)(2). A wine marked ``hard cider'' showing an alcohol content of 9 percent by volume would be considered as adequately marked to identify its tax class as 5041(b)(1). However, a wine with an alcohol content under 7 percent marked

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``hard cider'' and the alcohol content would not be adequately marked to identify its tax class, so the tax class must be shown.

- (5) The net content of the container unless the net content is permanently marked on the container as provided in 27 CFR part 4.

* * * * *

Dated: June 16, 1999.

John W. Magaw,
Director.

Dated: August 13, 1999.

John P. Simpson,
Deputy Assistant Secretary,
(Regulatory, Tariff and Trade Enforcement).
[FR Doc. 99-24834 Filed 9-24-99; 8:45 am]
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