

DEPARTMENT OF THE TREASURY
ALCOHOL AND TOBACCO TAX AND TRADE BUREAU

27 CFR PARTS 4, 5, AND 7

[Notice No. 41]

RIN 1513-AB07

INTRODUCTION

This response to TTB Notice 41 is a consensus analysis resulting from open meetings sponsored by the North American Chapter of the International Wine Law Association, AIDV (L'Association Internationale des Juristes pour le Droit de la Vigne et du Vin) and held on June 27, 2005 and July 11, 2005 in San Francisco and New York respectively. Invitations were sent to all U.S. Chapter members and to a number of non-AIDV member industry attorneys (see enclosed copy). Draft responses to the issues raised by Notice 41 were compiled and circulated to all attendees of both meetings for review and suggestions and revisions were encouraged. The report enclosed herewith is a consensus document that has been reviewed and approved by all attendees and it represents the views of both in-house and outside law firm beverage alcohol industry counsel.

AIDV counts amongst its members more than 300 lawyers specializing in wine-related matters worldwide. The North American chapter's members include the senior lawyers of the alcoholic beverage bar in the United States, and the General Counsels of the major wine companies.

PREAMBLE

~~Federal standards of identity and class and type information have been mandated by~~
Congress and understood by consumers for more than 70 years. American consumers understand American beer, wine and spirits labels.

In the view of the authors of this analysis, many of the proposals listed in Notice 41 will serve only to confuse, and possibly even mislead, consumers.

We have no objection to, and, in fact endorse, label disclosure of allergens present in levels that have been scientifically documented as problematic. We do, however, object to potentially misleading or unnecessary information that creates label "clutter" at a time when most national governments and international industry trade associations are working toward harmonized and simplified global labels on global products that will be more meaningful and understandable to global consumers.

Additionally, as Notice 41 suggests the possibility of mandatory requirements related to calories, carbohydrates and other nutritional measures, AIDV takes this opportunity to express concerns with TTB's current standards for evaluating those measures. In TTB Procedure 2004-1, the Agency adopted a set of procedures for testing calorie, fat, carbohydrate and other

nutritional measures without the benefit of notice-and-comment rulemaking. As a result, the wine industry was deprived of an opportunity to formally express its views on the appropriateness of the specific procedures adopted. Indeed, we understand that at least one method announced in Procedure 2004-1-AOAC 985.10 for measuring carbohydrates in standard wines can result in a significant overstatement of the actual carbohydrate measure of a wine. We accordingly urge TTB to initiate rulemaking to establish more appropriate standards and, in the interim, abandon the inflexible approach taken in Procedure 2004-1 in favor of a flexible test that recognizes as appropriate any methodology that produces the most accurate result for the product tested.

LABELING AND ADVERTISING OF WINES, DISTILLED SPIRITS AND MALT BEVERAGES; REQUEST FOR PUBLIC COMMENT

1. Should TTB seek to require mandatory nutrition labeling (that is, calories, fat, carbohydrates, and protein) for alcohol beverage products, or should nutrition information be permitted only on a voluntary basis?

Answer: TTB should not require mandatory nutrition labeling. Beverage alcohol products have never been promoted as nutritional and the mere presence of a nutrition panel on beverage alcohol containers would suggest that some such products could be nutritional. We also believe, however, that the first amendment would permit voluntary statements that are clearly factual and not misleading in content or presentation.

2. Should TTB seek to require mandatory ingredient labeling (that is, a list of all ingredients used to make the product, including processing aids) for alcohol beverage products, or should ingredient labeling be permitted only on a voluntary basis?

Answer: TTB should not require mandatory ingredient labeling because the ingredients used to make beverage alcohol products, including processing aids, do not survive fermentation or distillation. TTB's predecessor agency, ATF, rejected prior petitions to require mandatory ingredient labeling and no new facts have emerged that would now require a different conclusion. It is particularly noteworthy that the European Union has also considered, and rejected, mandatory ingredient labeling during the past year.

As was suggested with regard to nutritional labeling, any permitted voluntary statement should be clearly factual and not misleading in content or presentation.

3. What areas need further research and evaluation before TTB can reach decisions on whether and how changes can be made?

Answer: Further research is required concerning allergens derived from processing aids. More needs to be known about whether potentially allergenic processing aids remain in the finished product after distillation or fermentation and whether remaining trace amounts, if any, are sufficient to cause allergic reactions.

4. Are there modifications TTB can make to current requirements regarding alcohol beverage labels to help consumers better understand and benefit from the information on the label?

Answer: Yes. Keep them as simple and as harmonized with other country requirements as possible. AIDV endorses the OIV (Organisation Internationale De La Vigne Et Du Vin) and NWWG efforts to secure easily understood harmonized wine labels with minimum mandatory requirements as presented in the OIV resolution on this subject passed at its June 17, 2005 General Assembly.

5. Should TTB 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)? If so, how would that be best done?

Answer: Yes, in principal, but with recognition of the fact that US beverage alcohol products have more issues in common with beverage alcohol from other countries than they do with food products in the US or elsewhere. Accordingly the concept of harmonizing US beverage alcohol labeling requirements with those of other major producing nations is supported, but not to the extent of unique cultural or country specific items.

Harmonization with FDA and other federal agency regulatory requirements is supported only to the extent that those regulatory requirements are consistent with TTB's regulatory framework including, but not limited to, its standards of identity and prior rulings history as well as an understanding of the transforming effects of distillation and fermentation and a recognition of the different uses for, and purposes of, the products regulated by other federal agencies.

6. Are consumers likely to derive benefits from more specific information on alcohol beverage labels, and, if so, are those benefits sufficient to warrant the economic costs associated with such revisions?

Answer: We question whether consumers would benefit from additional information, other than scientifically documented allergens in quantities sufficient to be allergenic, other than the minimum mandatory information recommended by both NWGG and OIV. Cluttered labels are unread labels. We have serious doubts whether the cost of additional label information requirements, other than allergens in problematic quantities, would warrant the economic costs of providing such information. If it is not truly necessary and required for legitimate health reasons, it will impose additional unnecessary cost burdens on industry and is likely to be misleading to consumers. If some manufacturers choose to provide more information on a voluntary basis, consumers will decide through their purchase choices whether such information is beneficial. Let the marketplace decide.

7. What should be the agency's priorities in deciding which changes to make on alcohol beverage labels, that is, which changes are most important and which are least important?

Answer: In order of importance we believe TTB's priorities should be:

- disclosure of true allergens but only to the extent they are present in quantities sufficient to produce allergenic reactions.
- harmonizing and minimizing mandatory requirements with those of other countries so that necessary information will be relevant, universal and readily recognized and understood by consumers,
- We believe ingredient labeling serving facts, and carbohydrate and caloric content would be counterproductive and misleading except only when a product describes itself as “light” or “low in calories or carbs”, in which case full disclosure should be required (e.g. for spirits, that spirits in general contain few, if any, carbs).

8. Should any new labeling requirements apply equally to advertisements?

Answer: No. Current mandatory requirements for advertising have proven adequate for decades. With the exception of documented allergens, why should beverage alcohol advertising have to meet new mandatory disclosure requirements not imposed on food product advertising (e.g. ingredient labeling) or not currently required on beverage alcohol advertising (e.g. contains sulfites).

CALORIE AND CARBOHYDRATE CLAIMS

1. Should TTB promulgate regulations that define “low carbohydrate” for alcohol beverage products as containing no more than 7 grams of carbohydrates per standard serving size, as specified in Ruling 2004-1? Why, or why not?

Answer: The consensus of participants is that low carb products are displaying signs of being a passing fad and we do not believe that the industry should be burdened for years to come with rules created to deal with a soon-to-be-forgotten fad. We believe it is appropriate for TTB to establish a definition for “low carbs”, but we also feel strongly that any label references to carbohydrates should be purely voluntary and should require a comparison to that supplier’s other products. Furthermore, the number of grams per serving are less meaningful for wines and spirits because they are generally much lower in carbohydrate content than beer. We also have problems with designating the number of carbohydrates per serving size because we have objections to the use of “standard” serving sizes as will be explained below.

2. Should TTB continue to prohibit use of the terms “effective carbohydrates” and “net carbohydrates” on labels and in advertisements? Why or why not?

Answer: Yes, because they are misleading and confusing terms not understood by consumers of beverage alcohol products. They are associated by consumers with food product nutritional claims.

3. Should TTB wait for the conclusion of FDA’s regulatory decision-making process for the use of the term “low carbohydrate” for food and beverage products FDA regulates before issuing regulations on a low carbohydrate standard for alcohol beverage products?

Answer: Yes, although we reiterate that, to avoid misleading consumers, any subsequent standard should be for voluntary, rather than mandatory use. Also, see our answer to #1 above.

4. How should TTB define the terms "low calorie" and "reduced calorie" for alcohol beverage products? Should we propose standards for these claims consistent with FDA's standards? Should we develop our own alternate set of standards and, if so what should they be?

Answer: TTB should propose caloric standards consistent with FDA standards, (calories are calories) but usage by industry should be voluntary and only with comparisons to that supplier's other products.

5. Should TTB establish regulations for the use of the terms "light" and "lite" on alcohol beverage labels? If so, should we propose standards for these claims consistent with FDA's standards? How would these standards apply to products for which the term "light" is part of the standard of identity (such as "light whisky" or "light wine")?

Answer: TTB already has standards for the use of the terms "light" or "lite" on beverage alcohol. They need not be consistent with FDA standards because beverage alcohol is unique and the term "light" seems to mean different things for different beverage alcohol products; e.g. color for whiskey, alcohol content for wine and calories for beer. Accordingly, the use of the term "light" for beverage alcohol should be strictly voluntary and with a clear description of its meaning. For the same reason (i.e. different meanings), we believe TTB should avoid linking the terms "light" and "low calorie" or "low carbs". Each term should stand on its own and be regulated as such. To combine references to them will be misleading and confusing to consumers.

PETITION FOR "ALCOHOL FACTS" LABEL AND INGREDIENT LABELING

1. Should alcohol beverage containers bear an Alcohol Facts label similar to the one presented in the CSPI petition? Why or why not?

Answer: No for the following reasons:

- As noted in 1.a) above, ingredient labeling is misleading in that the ingredients do not remain after distillation or fermentation. As noted in the Preamble, ATF rejected ingredient labeling on three separate occasions and the European Union has recently rejected it for similar reasons. Ingredient labeling is simply not appropriate for beverage alcohol.
- A mandatory alcohol facts label should be strictly voluntary for those who wish to use them and only with clear definitions of the terms used in such labels. There should also be a comparison with the supplier's products that do not contain an "Alcohol Facts" label.
- TTB and not CSPI should be determining label requirements and standards. ATF has done so for decades and TTB, as ATF's successor, should follow ATF precedents on this subject.

2. Should such a label include an ingredient list as suggested in the CSPI petition?

Answer: No for the reasons given above.

3. Should the label be voluntary or mandatory?

Answer: Strictly voluntary and, if used, it should comply with specific definitions promulgated by TTB.

4. If mandatory, should there be any exemptions from the alcohol facts and ingredient labels, such as for small businesses or for small containers?

Answer: Yes for small labels but not for small businesses. If information is deemed important and relevant for consumers, it should be available for all consumers (with the sole exception of small containers where there are practical limitations). For large containers a reference to a website for such information should be adequate; particularly for wines which change with each vintage.

5. Should current alcohol content statement labeling requirements be expanded to cover wines with an alcohol content of 14 percent alcohol by volume or less and malt beverages?

Answer: No. There is no reason to fix something that is not broken. It should be left to a winery's or brewery's discretion whether or not to disclose alcohol content. The range is small enough as to not be meaningful in terms of mandatory information. It would be preferable, however, to disclose the alcohol content, rather than to be burdened with a serving facts box.

6. What would be the costs associated with mandatory alcohol facts and ingredient labeling to the industry and, ultimately, the consumer?

Answer: Unknown. We leave that for industry economists to answer. Our simple answer would be "too much" using perceived value as the benchmark; especially considering the burden of lab testing that would be required for each new vintage or blend for wine and for any formula modifications for other beverage alcohol products.

7. How might consumers benefit from such a label?

Answer: In our opinion they would not because of all the reasons listed above. We believe it would be misleading and confusing.

8. As a consumer, how much extra would you be willing to pay for alcohol facts and ingredient labeling information?

Answer: Consumers are very price sensitive. If the additional information is not considered by consumers to be meaningful, or if it is misleading, under their price/value analyses they will object to additional costs of providing such information and possibly trade

down to cheaper brands. This consumer “rejection” and “defection” could be particularly harmful to small batch producers who already incur higher costs per bottle.

9. Are there alternatives to mandatory alcohol facts and ingredient labeling for alcohol beverages? For example, if a label lists a Web site or telephone number where a consumer could obtain such information about the product, would this be sufficient?

Answer: We prefer a website which is available 24/7 without requiring additional personnel, or a telephone referral option for small producers without websites. Either alternative is clearly preferable to mandatory labeling.

ALLERGEN LABELING

1. Should TTB require allergen labeling on alcohol beverage containers to be part of or adjacent to a larger list of all ingredients found in the product, similar to the requirements of the Food Allergen Labeling and Consumer Protection Act of 2004? Why or why not?

Answer: No. As noted above, ingredient labeling is misleading for beverage alcohol because the ingredients do not survive distillation or fermentation. Only allergens present in amounts shown to cause allergic reactions should be listed. For example, sulfites, although an allergen, are not required to be listed if below the level deemed problematic; i.e. 10 ppm.

2. If the product name appearing on the label of an alcohol beverage container indicates that an allergen is present in the product, is it helpful to the consumer to have the allergen labeled again in a standardized allergen statement elsewhere on the container? To illustrate: If a product is called “Wheat Beer,” should it also have a label elsewhere on the container that reads: “Allergens: wheat”? Why or why not?

Answer: Once should be sufficient. Why add label “clutter” through redundant listings?

3. TTB’s current regulations allow certain allergens such as milk, albumen (egg), isinglass (a protein from fish bladders), and soy flour to be used as fining, processing, and filtering agents in the production of alcohol beverages. While fining, processing, and filtering agents are not primary ingredients in an alcohol beverage product low levels of an agent may remain in the final product after production. When an allergen is used as a fining, processing, or filtering agent to produce an alcohol beverage should TTB require that the product be labeled “Processed with [a specific allergen]” or “May contain [a specific allergen]”? Why or why not?

Answer: There should be no listing of allergens until it is determined with scientific certainty that 1) remnants of allergenic processing aids remain in the product after distillation or fermentation, and 2) that the remaining trace amounts are sufficient to cause allergic reactions (e.g. sulfites below 10 ppm are not required to be listed). If there is uncertainty regarding the latter point, then “may contain” would be more accurate than “processed with” which leaves the impression that the processing agent is in the finished product.

4. Should allergenic fining, processing, and filtering agents be labeled in the exact same fashion as all other allergen ingredients? Why or why not?

Answer: Yes, but only if they are present in the final product in problematic levels as defined medically; e.g. sulfites.

5. Testing methods for detecting allergens in food and beverage products typically can only detect an allergen if it is present at or above a certain minimum value. In light of that fact, would it be helpful to consumers for TTB to require an allergenic fining, processing, or filtering agent to be labeled regardless of whether a detection test shows that the allergen is or is not present in the final product? Why or why not?

Answer: If processing, fining or filtering aids can no longer be detected following fermentation or distillation one would have to assume that they no longer remain in the product. If even trace amounts cannot be detected by sophisticated laboratory equipment, it should be safe to conclude that no allergens of problematic levels are present (e.g. sulfites below 10 ppm). To require label disclosure of something that cannot be found in a finished beverage alcohol product is clearly misleading.

6. What is the lowest amount of an offending food allergen (or minimum threshold level) in an alcohol beverage product necessary to provide a mild, yet perceptible adverse allergic reaction in consumers with the most sensitive food allergies?

Answer: This answer must come from the scientific or medical community.

7. Is it possible to define a minimum threshold level for each major food allergen? If so, what are the minimum threshold levels for each major food allergen?

Answer: Same response as #6.

8. If FDA and/or the scientific community establish conclusively a minimum threshold level for a particular allergen, should TTB exempt from any allergen labeling requirements products containing the allergen proteins, but at a level below the established minimum threshold level? Why or why not?

Answer: Yes. It would be misleading to imply the presence of an allergen when there are trace amounts only which are below conclusively established minimum threshold levels. Once again, why should they be treated differently from sulfites which need not be disclosed if below the established minimum threshold level?

9. What would be the costs associated with mandatory allergen labeling to the industry and, ultimately, the consumer?

Answer: Industry economists need to respond to this question.

10. How might consumers benefit from allergen labeling?

Answer: In the same way they benefit from a "contains sulfites" statement. If they have a problem with a particular allergen that is present in levels sufficient to cause an allergic reaction, they should be informed so that they can avoid the product.

REQUESTS FOR VOLUNTARY "SERVING FACTS" LABELING

1. Should alcohol beverage containers bear a Serving Facts label similar to the one presented in this section? Why or why not?

Answer: No. There are a number of variables which bring into question the validity of a "standard drink" definition. Mere ounces can be very misleading when no allowance is made for alcohol content. Certainly a glass of fortified wine is not comparable to an equal number of ounces of table wine. Nor is a low proof distilled spirit comparable to high proof spirits or a compound cocktail made with several spirits products or liqueurs. Further variables include absence or presence of food consumption, a consumers body weight and cultural backgrounds. Serving facts labeling can be very misleading. At best it should be permitted on a voluntary basis, and only if all terms and elements are specifically defined to include all of the most common variables.

2. Should such a label include a definition of a "standard drink" and if so, how should a "standard drink" be defined?

Answer: Unless the term "standard drink" takes alcohol content, body weight and all the other variables listed in #1 above into account, we believe the term "standard" is misleading and could lead to potentially serious liability issues.

3. Should such a label include graphic icons similar to, but not necessarily limited to, the one presented in this section? Why or why not?

Answer: Not on a mandatory basis for all of the reasons listed in #1 above. Even voluntary usage is potentially misleading and questionable given the number and scope of variables.

4. Should the label be voluntary or mandatory?

Answer: Absolutely not mandatory. To be accurate there would have to be so many disclaimers and definitions as to render it impractical. Given the number of variables, voluntary statements should be restricted only to the amount of actual alcohol content in a single serving drink not mixed with other alcoholic beverages or ingredients.

5. If mandatory, should there be any exemptions from the serving facts label, such as for small businesses or for small containers?

Answer: Small containers would, of necessity, have to be exempt. There is no logical basis for excluding small businesses if the information is deemed so essential that it is mandatory. Furthermore, there is no extra burden here for small producers, as there would be with comprehensive nutritional information analyses, because the amount of alcohol content is required for other purposes.

6. If not mandatory for all alcohol beverage products, should the Serving Facts label be required at least on alcohol beverages that make certain calorie carbohydrate claims?

Answer: There is a better argument for requiring Serving Facts when calorie or carbohydrate claims are made and TTB's current policy requires additional information in those cases. When a supplier makes such claims, as noted above, we believe it is important that TTB require calories and carbohydrates to be kept in separate categories and be addressed separately on a label to minimize consumer confusion. We also believe it is important to require comparisons to the producer's products for which no calorie or carbohydrate claims are made. It is misleading to suggest, for example, that this distilled spirit is low in carbohydrates, when distilled spirits in general are low in carbohydrates. The implication of the "low carb" label is that competitive products are not "low carb".

7. What would be the costs associated with mandatory serving facts labeling to the industry and, ultimately, the consumer?

Answer: Industry economists will have to answer this question but we do not believe that costs are the issue as explained in detail above.

8. How might consumers benefit from such a label?

Answer: We do not believe they would. We believe "Serving Facts" are inherently misleading because of the many variables described above. Only alcohol content is meaningful.

9. As a consumer, how much extra would you be willing to pay for serving facts labeling information?

Answer: See answer to question #8 above.

10. Are there alternatives to mandatory serving facts labeling for alcohol beverages? For example, if a label lists a Web site or telephone number where a consumer could obtain such information about the product, would this be sufficient?

Answer: Listing an address, telephone number or, better yet a website, is a good alternative source for product information and it should be producer's choice of method. Websites are available 24/7 and can supply large quantities of product information. To the extent websites or telephone referrals can be utilized, labels are likely to be less "cluttered" and, therefore, better understood by consumers.

11. Should TTB allow a further breakdown of nutrients (for example, trans fat, sugars, fiber)?

Answer: No. These are not perceived issues for beverage alcohol and could cause widespread consumer confusion and misunderstanding. Unlike food items, people don't buy and drink beverage alcohol for nutritional purposes. Voluntary use, if permitted, should be restricted to product by product factually correct statements not deemed to be misleading by TTB and with appropriate counter-balancing statements as to potential negative effects of alcohol if the voluntary statements imply health benefits.

12. Does the use of "standard drink" and "serving size" on the same label create confusion? Does any confusion arise if a label specifies ounces of alcohol in conjunction with serving size and percent alcohol?

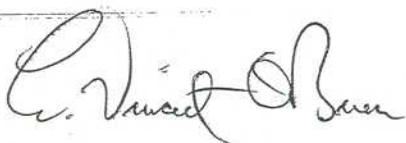
Answer: "Standard drink" and "serving size" have very different meanings and should not be confused. One refers (or should refer) to alcohol content and the other relates to the size of the drink. Combining them makes sense only if the variables discussed in questions 1 and 2 above are taken into account. Our belief is that the combination of the importance of the variables and the disclaimers that would be required for accuracy are too complex to deal with on a label. A website is a better place to deal with these issues. We also believe that any reference to a "standard drink" must disclose the amount of alcohol in addition to the number of ounces. The number of ounces without reference to alcohol content is seriously misleading.

COMPOSITE LABEL APPROACH

TTB is interested in receiving comments on whether a composite label, which combines the essential information on the examples discussed, would be appropriate to provide the consumer with information they want and need to see on alcohol beverage product labels. TTB is also seeking comments on whether such a composite label should be mandatory or voluntary.

Answer: A combined composite label would be overwhelming and confusing to even the most knowledgeable consumers. For all the reasons discussed above, we think a composite label will create such consumer confusion and label clutter that important label information will be overlooked, ignored and misunderstood.

Respectfully submitted,



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