WINE INSTITUTE

ROBERT P. KOCH
PRESIDENT AND CHIEF EXECUTIVE OFFICER

August 30, 2005 Comment 79

Chief, Regulations and Procedures Division
Alcohol and Tobacco Tax and Trade Bureau
Attn: Notice No. 49
P.O. Box 14412
Washington, DC 20044-4412

Re: **<u>Vintage Date Proposal</u>**
Notice No. 49

Wine Institute is the public policy trade association of California wineries, and the petitioner in the above-described Notice of Proposed Rulemaking. Our 845 member wineries and affiliated businesses produce 85% of all wine made in the United States. We appreciate the opportunity to submit these comments in support of Notice No. 49.

We would like to first restate the basis of the rulemaking petition. From the comments that have already been received (as of August 29, 58 comments appear on TTB's web site), it appears that some commenters misunderstood several of the points raised in our petition.[1] Wine Institute's petition was the result of five years of discussion within our membership on the issue of vintage date requirements. This issue was discussed in the context of other label issues. With respect to vintage date percentages, we focused on whether the current regulation was reasonable or too restrictive, and whether the rule should be changed to permit flexibility in winemaking styles and to address the competitive imbalance and the different enforcement and compliance environment for domestic wine products when compared to imported products.

In our five-year discussion with California wineries on the vintage date issue, we noted in our petition that Wine Institute considered a number of other solutions to the varietal percentage inequities, including petitioning for multi-vintage labeling. As with ATF's rulemaking efforts with respect to multi-vintage labeling that were withdrawn with the publication of Notice No. 529 on May 18, 1984 (49 FR 21083), there was little in the way of a positive member response to this suggestion. Likewise, a suggestion that Wine Institute demand stricter enforcement by TTB of the 95% vintage labeling requirement for imported wines was not viewed as a viable solution. While these solutions were considered, Wine Institute's membership believed that the most effective solution was a regulatory one, as proposed.

[1] We refer to some of the public comments made available on TTB's web site. When we refer to a specific comment, we include the Comment Number.

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Wine Institute's petition to change the regulations was based on several reasons, which we summarize here:

Fair and Open Competition

Our rulemaking petition was supported by evidence that vintage date percentages vary from country to country. We asserted that when the top ten producers of wine are considered, at least 82% of the wine they produce, and probably more, is made under regulations that are less restrictive than those that apply in the United States. Likewise, at least 90% of the wines exported from the top ten exporting countries (excluding the U.S.) are made under less restrictive regulatory regimes.

We further pointed out that more and more U.S. consumers are purchasing wines produced under the 85% standards. We cited the Agricultural Import Commodity Aggregations report published by the United States Department of Agriculture's Foreign Agricultural Service, which indicated that Australia's wine imports into the U.S. showed a percent change of **+19.88%** from the calendar year 2003 to 2004. Australia's vintage date percentage is set at 85%. Likewise, Spain's percent gain for the same period, according to the FAS, is listed at **+14.36%**. Spain's vintage date percentage is 85%. While maintaining the status quo is the position for many growers who believe that a change in vintage percentage will have negative financial effects, doing nothing is not an option when foreign competitors with this unfair advantage are increasingly gaining more U.S. market share.

In the comments that have been submitted in response to Notice No. 49, there are no comments which have provided any reason why the U.S. is at 95%. Instead, comments seek to retain the current 95% requirement in the absence of any historical support for its existence. In our research, we know that the vintage date percentage in the United States was, at one time, absolute, requiring 100% of the grapes to be harvested in the labeled calendar year. We also know that the rule was changed during the omnibus labeling revisions in the late 1970's to allow 95% as an allowance for topping of barrels. In our rulemaking petition, we point out that even the current 95% level is inconsistent with the majority of other wine-producing countries, which enforce vintage date requirements that are not as strict.

The comment period has not generated comments from other countries, with the exception of Comment 41 from the Argentine government, which contains a statement that is tantamount to an admission that wine is being shipped from Argentina without any regard to U.S. vintage date percentages.[2]

[2] "Argentina is making use of the third option, namely, that the wine may be entitled to bear the vintage date when the invoice is accompanied by, or the American bottler possesses a certificate issued by a duly authorized official of the country of origin, certifying that the wine is of the vintage shown and that it would be entitled to be labeled with that year if it had been sold within the country of origin." Comment 41.

U.S. Wines at a Technological Disadvantage

We pointed out in our rulemaking petition that U.S. wineries were also at a technological disadvantage when compared to most imported wines. We asserted that the differences in vintage date percentages results in a direct impact on the quality and cost of U.S. wine and influences the purchase of U.S. wine at all price points. American winemakers are at a considerable disadvantage compared to their colleagues in most of the world's major wine producing countries in being able to use only 5% of wine from another vintage in the blend. The outcome is that U.S. wineries are placed at a competitive disadvantage in the global market because it is more costly and challenging to make wines of consistent quality at a given price point as compared to other countries with a less descriptive vintage date percentage requirement.

Some commenters opposed to the proposed rule change indicated that U.S. wineries should simply choose not to label their products with a vintage date,[3] yet the survey evidence submitted in Comment 44 states that consumers value such information and think it is important, perhaps not intending to, but actually supporting Wine Institute's assertion that a level playing field for all wines, regardless of where produced, should be TTB's goal if it wants to provide consistent information to consumers. If, as stated in the survey, consumers believe that vintage date information is important, we believe that consumers would want that information to be based on consistent standards and presented in a consistent manner on wine labels. To do what some suggest, i.e., nothing, would only result in an ever-widening technological and economic divide between U.S. and imported wines.

U.S. Winemakers at an Economic Disadvantage

We noted in our petition that the imbalance in the vintage date percentage directly affects not only the consumer's perception of price and value, but further economically impedes the efficiency of those California wineries that maintain separate tanks for older vintages. We stated that the current vintage date regulation results in increased production costs, that global competition need not invest in as much cooperage as these California wineries since they do not require as many additional tanks for older vintage inventory. This less efficient tank utilization could compel some California wineries to make greater capital investments in new storage. With a change in the regulation as proposed, better tank efficiency would lead to lower production costs for these wineries, which will support more competitive pricing. A sampling of major California Central Valley wineries indicates that tank utilization under an 85% vintage date rule would be improved by 6%.[4]

[3] Comment 2, for example, from Matthew Reid, indicates categorically that "pretending that non-vintage wines are from a single vintage is wrong."

[4] There are also economic inefficiencies for California wineries that export to countries that have a less-then-95% vintage date standard. Comment 35, submitted by Turrentine Wine Brokerage, notes: "Due to the more restrictive 95% requirement in the U.S., wineries would still need to make separate blends for export, thus requiring more tanks and more labor to maintain those separate blends, all of which adds extra cost in a very competitive world market."

Baseline Vintage Date Should Be Consistent with Other Countries

Wine Institute's petition seeks baseline vintage date requirements that are consistent with other countries. We believe that the proposed change would allow California wineries to compete more fairly on price and value. We see a recurring theme in some comments that the proposed regulation is a "lowering" of standards. We do not see this the same way. We see the current 95% standard for wines labeled with a state or county appellation of origin to be a trade barrier to open and fair competition. Without a change in this requirement, the current U.S. regulation will continue to work to perpetuate a competitive inequity and economic disadvantage for U.S. wineries. Wine Institute wants a fair vintage date rule, one that will not impair our ability to compete in our own country with imported products sold here.

A Compromise Position

Finally, we state in our petition that the rulemaking petition represents a compromise among our members. We mentioned in our petition that our approach is a compromise[5] reached after an earlier proposal calling for a change in vintage date percentage to 85% for all wines resulted in deadlock. We noted, however, that current regulations already draw percentage distinctions between state and county appellations of origin and American Viticultural Area appellations of origin. We referred to 27 CFR Section 4.25a, which entitles a U.S. wine to an appellation of origin of a state or county if, among other things, at least **75 percent** of the wine is derived from fruit or agricultural products grown in the appellation area indicated (27 CFR Section 4.25a (b)(1)(i)), and in contrast entitles a U.S. wine to an American Viticultural Area appellation of origin only if not less than **85 percent** of the wine is derived from grapes grown within the boundaries of the viticultural area (27 CFR Section 4.25a (e)(3)(iii)).

Some comments have referred to the difficulty in enforcing differing vintage date standards for wines labeled with a state or county appellation (proposed at 85%) as opposed to wines labeled with a viticultural area appellation of origin (proposed to remain at 95%). We point out that the percentage requirements for appellations of origin has maintained these separate percentages for many years. Current regulations already have built-in percentage distinctions for appellations of

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[5] Comment 46, calling for its members to comment on the proposal and urging its members to use this compromise as a basis to oppose the proposed rulemaking, misunderstands the economic issues involved and instead is a desperate effort to increase comments in opposition to the proposed rule, regardless of accuracy. The resulting comments, such as Comments 47, 57, and 58, express opinion without fact, and we urge TTB to treat these comments with the same degree of thought that was put into them.

Similarly, Comment 48 from a retailer in the San Francisco Bay Area that has a large portion of its inventory in imported products that come from countries with a vintage date percentage that is less than 95%, parrots much of the comments in the popular form letter opposition, including the claim that consumers are confused about wine labels in general, but the commenter's web site is devoid of ANY educational labeling information.

origin, requiring 85% of grapes used to produce a wine to be derived from within the boundaries of a labeled American Viticultural Area, but requiring only 75% to be derived from within the boundaries of a county or state appellation of origin.

Many of the comments received by TTB have criticized the reasons set forth for in the rulemaking petition to support a rule change. We take this opportunity to respond to some of the issues raised in these comments.

Enforcement Issues – Why More Strenuous Enforcement, Alternative Solutions, Are Not a Viable Alternative

We raised the issue of adequate enforcement in our petition, and in response we have seen a few comments that suggested more strenuous enforcement of U.S. standards for imported products entering into the country in lieu of the proposed rule change. Wine Institute, as well, considered whether urging TTB to enforce its laws against imported products would suffice to correct the competitive and technical inequities. After reading the comments received, we are still not persuaded that such an approach would effectively level the playing field. With dwindling enforcement budgets and the evidentiary difficulties mentioned in our petition, we are still convinced that a higher TTB enforcement profile is not a feasible solution. It is not realistic to think that we can enforce our current vintage date percentage requirement against imported products. There are no scientific tests to determine vintage percentage from wine samples, record keeping in other countries may not be as rigorous as requirements in the U.S., and current certification standards are not the regulatory equivalent of the record-keeping requirements imposed on U.S. wineries. As with other wine labeling rules, there is simply a different enforcement environment that U.S. wineries operate within, with record-keeping requirements and TTB audits and inspections that are not part of an importer's operating procedure. Nothing illustrates this difference in enforcement environments more than the statement from the Argentine government (Comment 41) about how wines from that country comply with U.S. labeling laws:

> "Argentina is making use of the third option, namely, that the wine may be entitled to bear the vintage date when the invoice is accompanied by, or the American bottler possesses a certificate issued by a duly authorized official of the country of origin, certifying that the wine is of the vintage shown and that it would be entitled to be labeled with that year if it had been sold within the country of origin."

One commenter suggested pressure on importers to enforce current regulations,[6] but there is no suggestion as to what kind of pressure and what kind of record-keeping is adequate. We believe

[6] Comment 1: "Or placing greater responsibility, including potential punitive actions, including adverse "permit action", on the U.S. importer to ensure (guarantee) that the foreign supplier is in compliance with the U.S. regulations. The importer obtains a COLA, and should be held totally responsible to ensure compliance with the approved COLA, which would include the statement of vintage dates, at the required regulatory percent."

that such solutions, although well-intentioned, equate to nothing more than a long term diminishment of competitive ground for the US wine producer, will be time-consuming to manage, may not be capable of being accomplished effectively, and may still result in enforcement gaps that render the solution ineffective.

Likewise, the same commenter suggested that the U.S. government seek reciprocal agreements in lieu of a rule change.[7] The U.S. has been in constant negotiations with other countries to seek parity in labeling and production standards. These negotiations, which at times seem interminable, have been continuing for years without great success. Wine Institute as well urges TTB to continue such negotiations, but we see these solutions as long term possibilities, and not immediate nor practical enough for our membership.

We finally mention the noticeable absence of comments from wineries in countries such as Australia and Spain. This lack of public comment participation from those that should be subject to a higher vintage date percentage for their wines sold in the United States could be interpreted as a disregard or nonchalance about the current 95% regulatory requirement, a silent affirmation of the enforcement issues that we raise in our petition.

The Proposed Rule Will Not Result In Consumer Deception

Some comments allege that a change in the vintage date percentage as proposed would result in either consumer deception, a loss of consumer trust in U.S. wine products, or both.

As we indicated earlier, labeling regulations are not comprised of absolute standards. TTB has permitted single varietal designations, for example, when 75% of the grapes used to produce a wine is derived from grapes of the specified variety. These are not absolute standards, but they are indeed reasonable regulations based on consumer and industry concerns. There is a long legal history regarding TTB's ability to pass reasonable regulations. We point here to the **Wawszkiewicz v. Department of Treasury** decisions and related cases (Nos. 80-1086, 80-1137, 80-1244, United States Court of Appeals, District Of Columbia Circuit, 216 U.S. App. D.C. 138; 670 F.2d 296; 1981 U.S. App. LEXIS 15004, and cases related to this action). Wawszkiewicz clearly establishes TTB's regulatory authority in this area and its authority in determining what constitutes consumer confusion. The case and its results stand clearly for the proposition that regulations such as the 75% appellation of origin requirement (as opposed to a 100% requirement) are proper. Likewise, we believe that an 85% vintage date requirement is equally proper.[8]

[7] Comment 1: "Perhaps some attention should be given to proposals that are intended to enhance compliance by foreign producers, such as the development of some reciprocal agreements between various regulatory agencies in the various countries."

[8] 31 comments (Comment Nos. 5-18, 20-34, 39, 52) are based on a single form letter. All of these letters urge TTB to follow its mission statement, "Our objectives are to protect the (tax) revenue, protect the consumer and promote voluntary compliance," and to use this statement as a basis for rejecting the proposed rule. Consumers are not

Even disregarding the holding in Wawszkiewicz, however, Wine Institute asserts that the change in the rule will not cause any further erosion of consumer understanding, consumer deception or confusion. Allegations of consumer confusion completely ignore the simple truth that consumers are likely already being exposed to wines that are made with an 85% vintage date baseline. The solutions offered by these commenters range from requiring higher standards of the world[9] to not using a vintage date on a label. These "solutions" only **increase** the deception rather than directly address it by perpetuating the uneven playing field. Some commenters miss the point entirely (Comment 43 – "If it says 2003, then 100% of the grapes should be from that year").

Even in our own discussions, there were some members who would speak of label claims in terms of absolute truth, but current label regulations are reasonably developed and not absolute. Instead, label regulations represent reasonable rules that will provide consumers with adequate product information. Appellation percentages are not at 100%, but at 75% or 85%. Single varietal designations are not at 100%, but are generally at 75%.

The comments in the public record do not reflect consumer opposition to the proposal. Comments received by TTB are from industry members or affiliated companies, and those that appear to be from consumers are not.[10] Wine Institute believes that consumers would want fairness, that they would want all wines, regardless of whether they're imported or made in the United States, to be held to the same standards of quality and labeling. We are proposing vintage dating parity, not consumer deception.

Consumer Perception Of U.S. Wines Will Not Suffer: The Proposal is Not A Lowering of Standards

Some commenters state that the proposed regulation would result in a loss of consumer trust. Some comments predict that consumers would perceive the proposal, if made final, to be a drop in quality, and purchase other products instead, or alternatively, that consumers aren't sophisticated enough to understand the subtleties of the varying vintage date standards. As indicated in our petition, the proposed regulation does not require wineries to produce vintage wine at 85%. The proposed rule does not prevent wineries from producing vintage wine at 95% or 100% and marketing them as such.. The proposed regulation merely sets baseline standards that are consistent with the majority of wine produced in the world. We point out that there is no ongoing consumer revolution in Australia or Spain over their 85% vintage date requirement.

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protected by unequal standards, and TTB's efforts in developing labeling regulations should not be swayed by emotion. These comments ignore the facts and instead speak of economic interests in the guise of consumer concern. Consumers have not submitted these comments; these comments were submitted by growers.

[9] Comment 36: "We should continue using our energy and resources to not just maintain the standards, but to raise them when possible to protect the integrity of our wines, so that in the coming decades we can be recognized as the finest wine growing appellations in the world."

[10] With respect to Comment 2, for example, which on its face shows no affiliation with industry, we direct TTB to the following URL: http://www.seaveyvineyard.com/asst.html .

One commenter suggests that instead of creating more consistent baseline vintage date standards, that we should move toward higher standards for all U.S. wines and thereby increase product integrity in the eyes of consumers (Comment No. 36). Again, we assert that the proposal is intended to provide competitive and economic parity to U.S. wine producers.

The Proposed Rule Will Not Result In Economic Loss for Growers

Some comments assert that wineries should accept the inherent beauty of varying vintages.[11] Rather than seek a level of quality and consistency that is equal to products being imported into this country and against which U.S. wineries compete, it is suggested that U.S. wineries accept the marvelous disparities of nature. More sinister, however, is the suggestion that one commenter makes: the commenter “strongly suspect(s) that it (the rulemaking) is driven primarily by some wineries desiring to lower their costs by purchasing a greater proportion of lower priced grapes in years of abundant supplies – not for the reasons stated in the notice.”

In another comment, without providing any substantiation to support the claim, the commenter states that “This proposed reduction (i.e., the proposed regulation) will cost the state’s growers over $100 million in deferred purchases and payments for grapes, including the high risks and costs of producing bulk wine for the open market.”[12]

We have heard similar arguments during our discussions as well. We realize that there is always a fear whenever there is a change in wine production or labeling rules. Still, we believe that the predictions in some comments that the proposed change will result in the downfall of the grower-winery economy[13] is incorrect.

Wine Institute suggests that a more reasoned and well-articulated position can be found in Comment No. 19 by Allied Grape Growers’ Nat DiBuduo, and we further mention that Allied Grape Growers represents 600 growers and 250,000 tons of grapes statewide:

> As a grower group, we are aware of the "fear" expressed by some growers that a winery's enhanced ability to blend vintages would cause a decrease in the demand for grapes. This "fear" is based on the notion that grape buyers could blend in additional wine in a "short" vintage to prevent grape demand and pricing from "peaking". However, if this were the case, then the opposite would also hold true. Specifically, in a larger crop year, the downward market pressure would not be so severe because the grape buyers would know they can "blend out" a portion of that vintage's supply into neighboring vintages? To believe in first notion, but not

[11] Comment 3: “Authentic vintage character is part of what gives wine bottles true individuality.” We would argue, however, that individuality can still be maintained at an 85% vintage date level.

[12] Comment 45. In contrast to the unsubstantiated claim that $100 million in deferred payments would result from the proposed rule, we direct TTB to Comment No. 35, which is from a broker who conducts a $100 million PER YEAR business in wine grapes and is in support of the proposal.

[13] “The California wine industry’s $45 billion contribution to the state’s economy will quickly decline if grape growers are unable to successfully grow and sell premium California winegrapes.” Comment No. 45

> the opposite notion, implies that basic economics do not apply in the winegrape market.
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> Overall, we believe that the net effect on the grape market of the vintage date change from 95% to 85% will be that the severity of price "peaks" and "valleys", based on annual crop size, will be moderated. This should be a good thing for growers and vintners alike by providing a stabilizing effect in the marketplace. Further, if the vintage date change allows wineries to be more competitive in the global marketplace, it will translate into increased sales and therefore increased demand for grapes from grape growers like us.

Many other commenters in support of the rulemaking petition share the same view. In its most simplistic sense, wineries and grape growers really do need each other. With all of the safeguards available to growers, we do not share in the view that vintner-grower relationships will suffer with the passage of the proposed regulation. When competition becomes fair, more domestic wine will be sold, and wineries will be looking to growers to supply them with more grapes.

Finally, the North Coast Grape Growers' suggestion in Comment No. 4 that "any relaxation in vintage dating standards be limited to those wines specifically relegated for export" is hardly a solution, since U. S. vintage date standards have no application to exports. The competitive disadvantage occurs in the United States. The correction needs to occur here in the United States.

The Proposed Rule Would Benefit U.S. Wineries Of All Sizes

Some comments suggest that the proposed rule would only benefit larger wineries. Some comments infer that only larger wineries are behind the rulemaking petition and that smaller wineries do not support the proposal. This is not reflected in the comments received. While some smaller businesses have been criticized for having a narrow perspective of the world and at times taken a more parochial approach to worldwide competition, we point out that in terms of number, most of Wine Institute's membership would fall within the "small business" category. These members recognize the globalization that is occurring in the wine marketplace and support our rulemaking proposal. The proposal has no regulatory flexibility impact and applies equally, regardless of the size of the winery. Neither does the proposed rule have any fiscal impact that triggers a need to tailor the regulation for smaller businesses. The proposal benefits all U.S. wineries, regardless of size, because it provides the same benefits and same competitive parity for all U.S. wineries, regardless of size.

We direct TTB to Comment 51, which is a letter from a small winery that supports the proposed vintage date change. We believe it is appropriate to end our comments with a quote from this commenter, as we strongly believe it reflects the understanding that our members have achieved after discussing the issue for five years:

> "We have successfully launched a brand and are gaining recognition in the marketplace for our value priced California Appellation ($10) wines. We have taken the position of offering the consumer a high quality product at a fair price.

> We work hard and we work smart. We do not seek a tax relief or the imposition of trade barriers on foreign wines. We are prepared to meet the foreign competition head on in the U.S. and in export markets and we are prepared to compete on both price and quality. All we ask for from our government is to maintain a level playing field between us and our foreign competition."

Wine Institute appreciates the opportunity to submit these comments and would be available to respond to any questions these comments raise.

Very truly yours,

Robert P. Koch

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