



August 6, 2019

VIA ELECTRONIC SUBMISSION

Amy Greenberg
Director, Regulations and Rulings Division
Alcohol and Tobacco Tax and Trade Bureau
1310 G Street NW
Box 12
Washington, D.C. 20005

RE: Modernization of Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages, Proposed Rule, 83 Federal Register 60562 (Nov. 26, 2018)

Dear Director Greenberg:

On November 26, 2018, the Alcohol and Tobacco Tax and Trade Bureau (TTB) published a proposed rule titled *Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages*.¹ Although the original comment period was set to close in March 2019, the TTB extended the comment period until the end of June 2019.² This letter constitutes the Office of Advocacy's (Advocacy) public comments on the proposed rule. Advocacy is concerned that the agency's certification that the rule will not have a significant economic impact on a substantial number of small entities lacks a factual basis. Advocacy suggests the agency revise the rule to reduce the impacts of the definition of "oak barrel" and to establish a new class and type for mead or publish a supplemental initial regulatory flexibility analysis (IFRA) to propose alternatives to the rule.

I. Background

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so Advocacy's views do not necessarily reflect the SBA's or the

¹ 83 Fed. Reg. 60,562 (Nov. 26, 2018)

² 84 Fed. Reg. 9,990 (Mar. 19, 2019).



Administration's views. The Regulatory Flexibility Act (RFA),³ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁴ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to Advocacy's comments.⁵ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to Advocacy's submitted comments on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁶

The TTB's proposed rule makes several changes to labeling rules for wine, distilled spirits, and malt beverages stemming from statutory changes, case law, and the finalization of interim regulations. The proposed rule also removes the advertising rules for wine, distilled spirits, and malt beverages from each separate section and consolidates them into a new section. Additionally, the proposed rule offers definitions of terms used throughout the proposed rule and reorders each part of the rule into a more logical order of topics.

II. Advocacy is Concerned That the Rule Is Improperly Certified Under Section 605 of the Regulatory Flexibility Act

Under section 605 of the Regulatory Flexibility Act, an agency may avoid the requirements of an initial and final regulatory flexibility analysis, including a discussion of significant, burden-reducing alternatives, if the agency can certify that the rule will not have a significant economic impact on a substantial number of small entities. Any such certification must be accompanied by a statement of the factual basis for the certification.

Overall, Advocacy commends the TTB on its logical reorganization of the labeling and advertising rules and streamlining some of its processes. In discussions with small businesses in the alcohol industry, two issues with the proposed rule were brought to Advocacy's attention: the definition of "oak barrel" and creating a separate class and type for mead. Advocacy is concerned that these two issues will impose significant impacts on small businesses.

a. The Definition of "Oak Barrel"

The TTB proposes to define an "oak barrel" as a "cylindrical oak drum of approximately 50 gallons used to age bulk spirits."⁷ As the TTB states in its Regulatory Flexibility Act analysis, "the vast majority of producers, bottlers, and importers of alcohol beverages are small entities."⁸ Many of these small entities that age bulk spirits use oak barrels of varying sizes, including barrels of 25 and 30 gallons. Advocacy spoke with one small distillery that has approximately

³ 5 U.S.C. § 601 et. seq.

⁴ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et. seq.).

⁵ Small Business Jobs Act of 2010 (Pub. L. 111-240) § 1601.

⁶ *Id.*

⁷ 83 Fed. Reg. at 60,645.

⁸ *Id.* at 60,610.

5,000 proof gallons of whiskey that is either aging in small cooperage or in holding tanks after aging in small cooperage. According to the distiller, that would be approximately 1.5 million retail dollars of whiskey that could not be sold as “whiskey” because it has not been aged in a 50-gallon barrel. While the distiller could sell the product as something other than whiskey, that would require a new label and additional costs and perhaps less revenue. While the proposed rule allows for a 3-year compliance period for implementation of all the regulation’s provisions,⁹ industry stakeholders have expressed that that timeframe may not give them enough time to sell all spirits aged in barrels smaller than 50 gallons.

While the question of what to do with spirits that have already been aged in small cooperage is one issue, another is the need for small distillers to purchase all new barrels for the aging process and the need for increased space to store the larger barrels. The average cost of a 50-gallon barrel is between \$500-600, depending on factors including, but not limited to, the type of oak used to make the barrel, the cooper manufacturing the barrel, and whether the barrel is air dried or kiln dried. For the smallest of distilleries, at a minimum, a few hundred new barrels would be required.

Additionally, some small distillers use square instead of round oak barrels. Their physical spaces are small, and square oak barrels are easier to rack and take up less space. Those small distillers would find it difficult to store enough 50-gallon oak barrels to make production profitable.

The proposed definition of “oak barrel” would also affect the coopers who manufacture smaller barrels. Indeed, some coopers manufacture only oak barrels smaller than 50 gallons. Those coopers would suddenly find their products in vastly less demand if the proposed definition of “oak barrel” is included in the final rule.

b. Allowing Use of the Word “Mead” in Labeling and Advertising

Mead, or honey wines, while having been in existence for thousands of years have recently enjoyed a resurgence in popularity. According to the American Mead Makers Association, there are approximately 500 meaderies in the United States, which is about ten times as many as five years ago. While there has been some progress with labeling and advertising of meads over the past several years, under the current rules, a meadery still cannot simply label and advertise its product as “mead.” Indeed, if any flavor or color is added, the product can no longer be labeled simply “mead”; the label and any advertising for such a product would require the additional flavor be added to the description of the product, e.g. “mead with vanilla.”¹⁰ This restriction makes it difficult for meaderies to market their products to the public. Although meaderies make up only a small fraction of the alcohol industry, they account for a disproportionate number of rejected labels because of the use of the word “mead.”

III. Recommendations and Conclusion

Advocacy recommends that the TTB withdraw the proposed definition of “oak barrel” because it is overly burdensome on small businesses. If the TTB determines that the definition should be

⁹ *Id.* at 60,612.

¹⁰ *See* 26 U.S.C. 5387(b) and 27 CFR 24.200.

kept in the final rule, Advocacy recommends that the agency publish a supplement IRFA more accurately describing the definition's effect on small businesses that age bulk spirits and considering less burdensome alternatives.

Advocacy also recommends that the TTB follow the mead industry's suggestions and create a new class and type designation for mead as it has done for rice wine.¹¹ This would allow those in the industry to properly label and advertise their meads as "meads" and would limit the time and resources the TTB extends denying labels for what the industry and the public know and understand to be mead.

If you have any questions or require additional information, please do not hesitate to contact me or Assistant Chief Counsel Charles G. Jeane at (202) 205-7168 or by email at charles.jeane@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Acting Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Charles G. Jeane
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: Paul Ray, Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

¹¹ See 83 Fed. Reg. at 60,637.