



DEPARTMENT OF THE TREASURY
ALCOHOL AND TOBACCO TAX AND TRADE BUREAU
WASHINGTON, D.C. 20005

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SENT VIA U.S. MAIL AND ELECTRONIC MAIL

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Dear Dr. Lurie, Ms. Weinstock, and Ms. Greenberg:

On December 16, 2003, Linda F. Golodner and George A. Hacker submitted a petition (the "2003 petition") on behalf of your organizations (among others) requesting that the Alcohol and Tobacco Tax and Trade Bureau (TTB) amend its regulations to require an "Alcohol Facts" panel on alcohol beverage labels, similar to the "Nutrition Facts" panel on labels of foods and "Supplement Facts" panel on labels of dietary supplements.

This petition requested that the "Alcohol Facts" panel include the following information in a standardized format:

- The alcohol content, expressed as a percentage of volume;
- The serving size for a standard drink that contains 0.50 ounce of ethyl alcohol;
- The amount of alcohol in ounces and number of calories per serving;
- The number of standard drinks (using 0.50 ounce of ethyl alcohol as a standard drink) per container;
- An ingredients declaration, listing each ingredient (including food and color additives, and flavors) by its common or usual name (to appear immediately below the Alcohol Facts panel), and;
- Current *U.S. Dietary Guidelines* definitions of moderate drinking for men and women.

The 2003 petition also stated it was important to declare allergens on alcohol beverage labels.

In April 2005, TTB published an Advance Notice of Proposed Rulemaking (ANPRM) “soliciting public comment on a wide range of alcohol beverage labeling and advertising issues to help the agency determine what regulatory changes in alcohol beverage labeling and advertising requirements, if any, TTB should propose in future rulemakings.”¹ The ANPRM sought comments on a variety of issues, including the proposals made in the 2003 petition. In July 2006, after considering the comments it received, TTB issued an interim rule allowing the voluntary use of allergen statements on alcohol beverage labels and setting forth rules for their use,² and issued a proposed rule setting forth “mandatory labeling standards for major food allergens used in the production of alcohol beverages.”³ In July 2007, TTB issued a proposed rule to amend the regulations to set forth new requirements and options for alcohol content labeling and for the presentation of certain calorie and nutrient information in a mandatory “Serving Facts” statement.⁴ TTB received numerous public comments on each of these proposed rules, which it reviewed and analyzed. Both rulemaking projects remained active for several years, but neither resulted in the issuance of a final rule, and both projects were withdrawn from the Unified Agenda of Regulatory and Deregulatory Actions (“Unified Agenda”) in 2017.⁵

TTB believes that it adequately responded to the 2003 petition by initiating the 2005 rulemaking described above. See *WWHT, Inc. v. FCC*, 656 F.2d 807, 813 (D.C. Cir. 1981) (explaining that when an agency receives a petition for rulemaking, it “may either grant the petition, *undertake public rule making proceedings* . . . or deny the petition.” (citation omitted) (emphasis added)). To the extent any further response is required, this letter constitutes TTB’s final decision on the 2003 petition.

For the reasons set forth below, TTB is hereby granting the 2003 petition to the extent that TTB will engage in a new rulemaking on the issues of nutrient content labeling, expanded alcohol content labeling, major food allergen labeling, and ingredient labeling. To the extent the petition requests additional or different action by TTB, we are denying it.

¹ Notice No. 41 (70 Fed. Reg. 22,274, 22,275, April 29, 2005); see also *id.* at 22,279-22,280 (discussing the 2003 petition).

² T.D. TTB-53 (71 Fed. Reg. 42,260, 42,263, July 26, 2006).

³ See Notice No. 62 (71 Fed. Reg. 42,329, July 26, 2006).

⁴ See Notice No. 73 (72 Fed. Reg. 41,860, July 31, 2007).

⁵ See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1513-AB07> (Serving Facts rulemaking) and <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1513-AB08> (allergen labeling rulemaking).

I. Statutory Authority

TTB has authority to regulate the labeling of distilled spirits, wine, and malt beverages (“alcohol beverages”) under the labeling provisions of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. § 205(e), and also has labeling authority over containers of beer, wine and distilled spirits pursuant to Chapter 51 of the Internal Revenue Code of 1986 (IRC). TTB administers these IRC and FAA Act provisions pursuant to section 1111(d) of the Homeland Security Act of 2002, codified at 6 U.S.C. § 531(d). In addition, the Secretary of the Treasury (the Secretary) has delegated certain administrative and enforcement authorities to TTB through Treasury Order 120-01.⁶

Section 105(e) of the FAA Act, 27 U.S.C. § 205(e), sets forth standards for the regulation of the labeling of wine (containing at least 7 percent alcohol by volume), distilled spirits, and malt beverages that will be sold or otherwise introduced in interstate or foreign commerce. This section gives the Secretary the authority to issue labeling regulations to prevent deception of the consumer, to provide the consumer with “adequate information” as to the identity, quality, and alcohol content of the product, and to prohibit false or misleading statements. The statute does not specifically require or address ingredient, allergen, or nutrient labeling.⁷

The statutory requirements with respect to disclosure of alcohol content on labels differ among the three alcohol beverage categories. The FAA Act provides the Secretary with the authority to issue regulations that require alcohol content statements on labels of distilled spirits products. 27 U.S.C. § 205(e)(2). The FAA Act also provides the Secretary with the authority to require alcohol content statements for wines with an alcohol content of over 14 percent alcohol by volume, leaving such statements optional for wines with an alcohol content at or below 14 percent. Finally, the FAA Act contains language that specifically prohibits placement of alcohol content statements on malt beverage labels, unless required by State law, but in 1995 that ban was invalidated on First Amendment grounds by the U.S. Supreme Court in *Rubin v. Coors Brewing Company*, 514 U.S. 476 (1995).

⁶ See <https://home.treasury.gov/about/general-information/orders-and-directives/treasury-order-120-01>.

⁷ In prior litigation involving our predecessor agency’s decision to rescind mandatory ingredient labeling regulations before they took effect, the D.C. Circuit noted that it had previously recognized that the agency’s obligation under the FAA Act to “ensure that disclosure is adequate squarely implicates discretionary judgment on the part of the Secretary.” See *Center for Science in the Public Interest v. Department of the Treasury*, 797 F.2d 995, 999 n. 2 (D.C. Cir. 1986), citing to *Wawzskiewicz v. Department of the Treasury*, 670 F.2d 296, 300 (D.C.Cir.1981) (footnote omitted). The court held that there was no “plain meaning of the phrase ‘adequate information’ which indicates Congress’ intent as to whether the FAA Act either requires or prohibits ingredient disclosure regulations”, finding that while the legislative history indicated that ATF “may mandate ingredient disclosure, it hardly demonstrates clear congressional intent as to the scope of disclosure which [ATF] may require. [ATF’s] conclusion that the Act vests it with a zone of discretion within which it can choose to require or not require ingredient disclosure, as necessary to provide consumers with adequate information, is thus consistent with that congressional intent which can be discerned.”

Accordingly, under current TTB regulations that implement the FAA Act, numerical alcohol content statements are required on all distilled spirits labels.⁸ In the case of wine containing at least 7 percent and not more than 14 percent alcohol by volume, the alcohol content may be stated, but need not be stated if the type designation “table” wine (or “light” wine) appears on the brand label. However, wines containing more than 14 percent alcohol by volume must include a numerical alcohol content statement on the label.⁹ Finally, alcohol content statements are required for malt beverages only if they contain alcohol derived from added nonbeverage flavors or other added nonbeverage ingredients (other than hops extract) containing alcohol.¹⁰

Chapter 51 of the IRC (26 U.S.C. §§ 5001 *et seq.*) imposes taxes on distilled spirits, wines, and beer, and provides the Secretary authority to regulate the marking and labeling of containers of these alcohol beverages, to protect the revenue associated with those taxes. The tax rates differ depending on the classification of the product, and the marking and labeling requirements provide for the proper determination of tax liability based on the identity of the product. Section 7805(a) of the IRC, 26 U.S.C. § 7805(a), provides the Secretary with the authority to prescribe all needful rules and regulations for the enforcement of the IRC.

II. Procedural History

2003 Petition

On December 16, 2003, the Center for Science in the Public Interest (CSPI), the Consumer Federation of America (CFA), the National Consumers League (NCL), and others submitted a petition that requested that TTB amend its regulations to require that labels of alcohol beverages include the following information in a standardized format:

- The alcohol content, expressed as a percentage of volume;
- The serving size for a standard drink that contains 0.50 ounce of ethyl alcohol;
- The amount of alcohol in ounces and number of calories per serving;
- The number of standard drinks (using 0.50 ounce of ethyl alcohol as a standard drink) per container;
- An ingredients declaration, listing each ingredient (including food and color additives, and flavors) by its common or usual name, and;
- Current *U.S. Dietary Guidelines* definitions of moderate drinking for men and women.

The petition requested that this information should be provided in the form of an “Alcohol Facts” panel on the labels of alcohol beverages, similar to the “Nutrition Facts” on labels of foods and “Supplement Facts” on labels of dietary supplements. The petition provided the following example of a standardized “Alcohol Facts” panel:

⁸ See 27 CFR 5.63(a)(3) and 5.65.

⁹ See 27 CFR 4.32(b)(3) and 4.36.

¹⁰ See 27 CFR 7.63(a)(3) and 7.65.

Alcohol Facts	
 Contains 5 Servings	Calories per Serving: 98 Alcohol by Volume: 13% Alcohol per serving: 0.5 oz
	Serving Size: 5 fl oz
U.S. Dietary Guidelines advice on moderate drinking: no more than two drinks per day for men, one drink per day for women.	

Ingredients: Grapes, yeast, sulfiting agents, and sorbates.

The petition requested that the regulations be amended to require an ingredient statement immediately below, but segregated from, the “Alcohol Facts” box. The petition also stated that allergens, in particular the “eight common food allergens” identified by the U.S. Food and Drug Administration, should be disclosed on the label.

TTB Rulemaking in Response to 2003 Petition

TTB’s review of the 2003 petition led to rulemaking, which began with the publication of an ANPRM in 2005 seeking public comment on TTB’s labeling policies, including the suggestions made in the 2003 petition,¹¹ and led to issuance of an interim rule¹² and a proposed rule in 2006 regarding major food allergen labeling,¹³ and another proposed rule in 2007 related to alcohol content and nutrient labeling in the form of a “Serving Facts” statement.¹⁴ You are referred to the rulemaking documents for information about their contents.

TTB did not issue a final rule on either mandatory allergen labeling or nutrient content labeling, but did issue a ruling that set forth standards for voluntary Serving Facts labeling in 2013.¹⁵ However, the only regulatory change that was adopted as a result of this rulemaking was an amendment to the regulations setting forth the rules for the voluntary labeling of major food allergens on alcohol beverage containers. TTB also published guidance on the voluntary use of “Alcohol Facts” statements (with alcohol content but no nutrient or calorie information) on labels.¹⁶ In 2017, TTB withdrew from the Unified Agenda both outstanding rulemaking projects.¹⁷

2021 Letter

¹¹ See Notice No. 41 (70 Fed. Reg. 22,274, April 29, 2005).

¹² See T.D. TTB-53 (71 Fed. Reg. 42,260, July 26, 2006).

¹³ See Notice No. 62 (71 Fed. Reg. 42,329, July 26, 2006).

¹⁴ See Notice No. 73 (72 Fed. Reg. 41,860, July 31, 2007).

¹⁵ See TTB Ruling 2013-2, Voluntary Nutrient Content Statements in the Labeling and Advertising of Wines, Distilled Spirits, and Malt Beverages, published on the TTB website at <https://www.ttb.gov/images/pdfs/rulings/2013-2.pdf>.

¹⁶ See <https://www.ttb.gov/faqs/alcohol>.

¹⁷ See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1513-AB07> (Serving Facts rulemaking) and <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1513-AB08> (allergen labeling rulemaking).

By letter dated February 24, 2021 (hereinafter referred to as the “2021 letter”), CSPI, the CFA, and the NCL, along with others, urged the Secretary “to direct the TTB to issue a final rule mandating a standardized serving facts label, for all alcoholic beverages,” containing the following elements:

- Serving size;
- Amount of alcohol per serving (in fl. oz. or grams);
- Number of calories per serving;
- Percent alcohol by volume;
- Number of standard drinks per container;
- The definition of a “standard drink” (12 fl. oz. regular beer, 5 fl. oz. of wine, or 1.5 fl. oz. of 80-proof distilled spirits);
- The Dietary Guidelines for Americans’ advice on moderate drinking (to be updated based on any changes in the guidelines over time); and
- An ingredients declaration listing each ingredient by its common or usual name and identifying any major food allergens present in the product.

The letter stated that “TTB should also include in its rule specific requirements for font, minimum size, and color contrast to ensure the readability of the label.”

2022 Report on Competition in the Markets for Beer, Wine and Spirits

On February 9, 2022, the U.S. Department of the Treasury, in consultation with the U.S. Department of Justice and the Federal Trade Commission, released a report on competition in the markets for alcohol beverages. The report, *Competition in the Markets for Beer, Wine, and Spirits*, was issued in response to Executive Order 14036, *Promoting Competition in the American Economy*. One of the findings stated that “[r]egulatory proposals that could serve public health and foster competition by providing information to consumers, such as mandatory allergen, nutrition, and ingredient labeling proposals, have not been implemented.” The report contains several recommendations, including the recommendation that “TTB should revive or initiate rulemaking proposing ingredient labeling and mandatory information on alcohol content, nutritional content, and appropriate serving sizes.”

III. TTB Decision on 2003 Petition

TTB Will Initiate Rulemaking

After carefully reviewing this matter, TTB is hereby granting the 2003 petition to the extent that TTB will initiate new rulemaking on the issues of nutrient content labeling, expanded alcohol content labeling, major food allergen labeling, and ingredient labeling. As reflected in the Spring 2022 Unified Agenda,¹⁸ TTB plans to issue proposed rules on mandatory nutrient and alcohol content labeling¹⁹ and mandatory allergen labeling,²⁰ as well as an ANPRM on mandatory ingredient labeling.²¹ TTB expects to solicit comments on all of the issues raised by the 2003 petition during this rulemaking process.²²

While TTB cannot project with certainty the timetable for issuance of proposed or final rules on these issues, the inclusion of these three rulemakings as active projects in the current Unified Agenda reflects the expectation that TTB will publish notices on all three rulemakings within the next year.²³ It must be stressed that future events could affect this timeframe, including but not limited to unforeseen events regarding TTB's budget or the scheduling of other regulatory actions that could also move the projected timeframe back.

Furthermore, TTB cannot commit to what changes, if any, will ultimately be made to the labeling regulations, because potential amendments will be subject to the rulemaking process mandated by the Administrative Procedure Act (APA), 5 U.S.C. § 553, including the requirement for public notice and comment.

¹⁸ The Introduction to the Unified Agenda explains that “[i]n the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda) agencies report regulatory actions upcoming in the next year. Executive Order 12866 “Regulatory Planning and Review,” signed September 30, 1993 (58 FR 51735), and Office of Management and Budget memoranda implementing section 4 of that Order establish minimum standards for agencies’ agendas, including specific types of information for each entry.” See <https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202204/RiscPreamble.pdf>. The Introduction also explains that “[t]he activities included in the Unified Agenda are, in general, those that will have a regulatory action within the next 12 months. Agencies may choose to include activities that will have a longer timeframe than 12 months. Agency agendas also show actions or reviews completed or withdrawn since the last Unified Agenda.” *Id.*

¹⁹ See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=1513-AC93>.

²⁰ See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=1513-AC94>.

²¹ See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=1513-AC95>.

²² TTB cannot commit to the precise substance of any rulemaking documents that have not yet been published.

²³ The Introduction to the 2022 Spring Unified Agenda explains that “[a]gencies prepared entries for this publication to give the public notice of their plans to review, propose, and issue or withdraw regulations. *They have tried to predict their activities over the next 12 months as accurately as possible, but dates and schedules are subject to change.* Agencies may withdraw some of the regulations now under development, and they may issue or propose other regulations not included in their agendas. Agency actions in the rulemaking process may occur before or after the dates they have listed. The Unified Agenda does not create a legal obligation on agencies to adhere to schedules in this publication or to confine their regulatory activities to those regulations that appear within it.” [Emphasis added.] *Id.*

Pursuant to the plan for regulatory action set forth in the Unified Agenda, before issuing final rules on these issues, TTB plans to draft and publish for public comment two notices of proposed rulemaking and one ANPRM. The rulemaking documents must be reviewed and approved by the Department of the Treasury.²⁴ Furthermore, the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs (OIRA) must review proposed rules that have been designated as "significant" under the authority of a variety of statutes and Executive Orders. Pursuant to Executive Order 12866, the Administrator of OIRA shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in the Executive Order and do not conflict with the policies or actions of another agency. With regard to proposed rules designated as significant regulatory actions,²⁵ OIRA generally has 90 calendar days to review the rulemaking.²⁶ This period of time often involves inter-agency review. Once notices are published for public comment, TTB must provide an adequate time for interested parties to submit their comments, and then must review, analyze, and respond to those comments and any additional information they supply. At that point, depending on its analysis of the issues raised by the comments on the proposed rule, TTB could decide to issue supplemental notices of proposed rulemaking or proceed directly to a final rule. With regard to the ANPRM regarding ingredient labeling, TTB would expect to issue a notice of proposed rulemaking before issuing a final rule. Any final rules proceeding from the rulemakings would have to go through an intra-agency and inter-agency review process before publication.

TTB Will Start the Rulemaking Process Afresh

TTB notes that the 2021 letter requested that TTB issue a final rule that would be largely consistent with the amendments requested in the 2003 petition, but did not ask that TTB seek further public comment. However, the APA, 5 U.S.C. § 553, does not permit TTB to issue such a rule without first engaging in notice and comment rulemaking. As you know, there are several regulatory amendments that were requested in the 2021 letter (such as "standard drink" information, moderate consumption advice, and mandatory ingredient labeling) that were not aired for comment in the 2006 and 2007 proposed rules. Instead, in its prior rulemaking on this issue, TTB specifically stated that it was not proposing to mandate ingredient labeling in this rulemaking; to define or use the term "standard drink" in its regulations; or to require labels to include standard drink or moderate consumption advice on labels. By instituting new rulemaking proceedings, TTB plans to solicit comments on all of the proposals made in the 2003 petition, including those that were specifically excluded

²⁴ See Treasury Order 120-01, <https://home.treasury.gov/about/general-information/orders-and-directives/treasury-order-120-01>, paragraph 7(c) ("With the approval of the Secretary or his designee, the Administrator may issue regulations for the purposes of carrying out the authorities, functions, and duties delegated to him.").

²⁵ The rulemaking actions in question have been listed as "other significant" in the Spring 2022 Unified Agenda.

²⁶ This period may be extended under certain circumstances. Furthermore, with regard to ANPRMs, OIRA has 10 working days to complete its review.

from the 2006 and 2007 notices. As noted previously, TTB is now planning to solicit comments on mandatory ingredient labeling through the issuance of an ANPRM.

Furthermore, with regard to the proposals from the 2003 petition that were aired for comment in the 2006 and 2007 notices of proposed rulemaking, TTB believes that the comments received on those proposals are now stale. It is not clear that the consumers, public health advocates, industry members, trade associations, or other interested parties that submitted comments in 2006 and 2007 would submit the same comments today, and thus the usefulness of those comments is limited. Furthermore, the data on costs associated with the proposed rules are out-of-date.

Accordingly, TTB believes that it is consistent with the APA and in the public interest to publish new notices on these issues, which take into account changes that have occurred in labeling policy, and the experience TTB has gained with voluntary Serving Facts statements, and which solicit new and relevant comments on the issue. As previously noted, some industry members may also have different perspectives on the issue as a result of their own experience in using this type of labeling, and the consumer reaction to labels that include nutrient or expanded alcohol content information on a voluntary basis. Consequently, TTB plans to solicit new comments through new rulemaking proceedings.

Conclusion

TTB trusts that this letter has been responsive to your request. We hope that you will participate in our rulemaking on these issues.

We recognize that the 2003 petition was submitted on behalf of several other individuals and organizations. Rather than respond by letter and/or email to each of those organizations and individuals, TTB will make this response to the 2003 petition available to the public on the TTB website at www.ttb.gov.

Please let us know if you have any further questions.

Sincerely,

Director, Regulations and Rulings Division