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Re: Docket No. TTB-2018-007 NPR No. 176: Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages

Comments by Hinman & Carmichael LLP

We recommend one addition to 27 C.F.R. § 4.72 (Standards of Fill for Wine). The authorization of the 250ml standard of fill. This size is not only the most popular size for wine-in-a-can in the United States but worldwide. There are multiple reasons for the recommended addition:

- the growth in using the 250 ml standard of fill,
- the rationale leading to the 1999 ATF Rule-making is identical and should be consistently applied,
- the codification of the aggregate packaging rules currently being used,
- consumer demand and ease of use,
- avoidance of multiple applications that burden the TTB,
- encouragement of temperate consumption,
- lack of consumer confusion,
- demonstrated consumer support for the standard of fill in University studies,
- fair competition between wine and malt beverage products,
- convenience, occasion expansion and portion control,
- exponential growth in wine in a can product offerings, and
- technological growth in canning technology.

The rationale in the 1990 ATF Rulemaking (in which the 500ml size was added) applies. The wine in a can market has seen exponential growth over the past decade and is a trend here to stay rather than just a temporary “fad”. The 250ml can is the most popular and demanded size worldwide for wine in a can.

One of the stated objectives of this Rulemaking is to codify “aggregate packaging” rules never codified in the 1999 Rulemaking on Aggregate Packaging. Applying the aggregate packaging rules to the 250 ml standard of fill has resulted in practical and competitive problems that have inhibited the development of the technology, and in using the standard of fill. The primary purpose of the “aggregate packaging” rules is to avoid consumer confusion with unusual sizes; i.e., sizes like ice cream or dairy creamer containers. The 250ml size is universally accepted for wine in a can. Adding the 250 ml standard will alleviate consumer confusion and the disadvantage wineries face in today’s competitive market. The best way to avoid unfair disadvantage to wineries in this growing market is to add this one size to the Standards of Fill for wine – now, as part of this Rulemaking proceeding.

The United States is the only country in which a winery may not sell a 250ml can as a single, individual purchase. The 250ml can size for wine is universally accepted. Adding the 250ml

size to the Standards of Fill will allow U.S. wineries to fairly compete in the marketplace particularly with malt beverages which have no standard of fill requirements. The 250ml size allows both convenience and portion control for the consumer. The consumer should not be required to purchase multiple cans to purchase just one can. Adding the 250ml size for wine in a can will contribute to sustainability and moderation with portion control.

I. The Last Modification of the Standards of Fill for Wine were made in 1990. This Request is to Add One Size (250ml) to the Standards of Fill for Wine.

A. The 1990 Rulemaking “Standards of Fill for Wine; New 500 Milliliter Size” - the rationale for adding a 250ml Size to the Standards of Fill is identical to the rationale put forward in 1990 for adding a 500ml Size.

Bureau of Alcohol, Tobacco and Firearms (ATF) finalized the Rulemaking “Standards of Fill for Wine; New 500 Milliliter Size” on October 23, 1990.ⁱ The Rulemaking amended the “standards of fill” regulations to authorize a new standard size for wine – 500ml. This was the last time the Standards of Fill for Wine were updated. This Rulemaking modernizes labels and aggregate packaging. Modernizing the Standards of Fill for wine to add the 250ml size, which is the size predominantly used for wine in a can worldwide, is timely and appropriate.

The 1999 arguments supporting adding the new 500ml size equally apply to the arguments to add a 250ml size. Although the TTB has stated it will address “standards of fill” in another proceeding, given the TTB’s proposed new rules on “aggregate packaging” and the time and effort involved for both winemakers and the TTB in the proposed “aggregate packaging” application process, the reasonable action would be for the TTB to address adding a 250ml size to the standards of fill for wine with “aggregate packaging” in this current proceeding.

In the 1990 ATF Rulemaking, the ATF presented a list of reasons why adding the new 500ml standard of fill for wine was appropriate.ⁱⁱ Among these reasons were:

- Distinctive marketing and bottle appearance would prevent confusion among other sizes. This is equally true for a 250ml can. Wine in a can wasn’t even contemplated in the 1990’s but over the last decade, wine in a can has become increasingly popular and the 250ml can first developed in Australia is the size most in demand. One positive about using cans is the ability to create distinctive art and graphics to distinguish the individual cans.
- The smaller size would be appropriate especially for some younger consumers thought to “drink less”. Again, this argument is as relevant for a 250ml can. Studies show Millennials and younger generations are very receptive not only to wine-in-a-can, but to the smaller 250ml size. The 250ml size offers portion control.
- The smaller size promotes moderation in drinking. Again, this is also relevant to the 250ml can size. As the ATF noted: “Wine deteriorates more rapidly in an opened bottle which means that consumers have a greater need to be able to purchase a size that exactly meets their requirements for immediate consumption.”

B. The 1990 Rulemaking Concluded Former Objections to Adding the 500ml Size to the Standards of Fill Were No Longer Relevant Based on the Evidence Submitted in Favor of Its Addition.

One of the first arguments raised against adding the 500ml was there was no apparent reason for adding this size because it is close to the authorized 375ml size. The ATF concluded that evidence received about the deterioration of wine in opened bottles, the dining habits of couples who consume wine with a meal, and the alcohol level required for legal intoxication demonstrated a need for the 500ml wine bottle. The fact there was a large consumer demand for the 500ml size and that adding only one size to the Standards of Fill would not greatly alter the present situation all led to the conclusion it was appropriate to add the 500ml. size.ⁱⁱⁱ

The exact same reasons support the addition of the 250ml size: deterioration of wine in an opened bottle or can, dining habits, moderation in drinking, and the large demand for this size.

C. The 250ml Can Size is the Most Popular Size for a Single Serving of Wine in a Can both In the U.S. and Worldwide. Adding this One Size Now While Modernizing Labels And “Aggregate Packaging” Rules Will Greatly Reduce the Necessity of Multiple Applications Required Under the New Proposed “Aggregate Packaging” Rules.

The 250ml size is now the most popular size for a single serving of wine in a can. The simple act of adding this one size to the Standards of Fill for Wine at this juncture will not only greatly reduce the necessity of filing (and review of) multiple applications for “aggregate packaging” but will also greatly enhance marketing wine in a market where the nearest competitor, beer and malt beverages have NO standards of fill and may market any size can individually.

The new trend to package wine in a can is growing and is proving to be a solid marketing choice rather than just a passing trend. Studies show that the most popular size for wine in a can is 250ml. This is the most common size in Australia, Europe, Asia (especially in Japan), Canada and now some South American countries and is sold as individual cans in these markets.^{iv} The United States is the only market where 250ml cans of wine cannot be sold individually but must be packaged as “aggregate packaging”. Adding 250ml to the standards of fill for wine would have the effect of greatly streamlining label approval without the necessity of also applying for “aggregate packaging” approval for a wine size currently the most commonly used and desired by the consumers.

We are not asking for the TTB to address the entire subject of “standards of fill” as part of this Rulemaking but are asking only to add this one size for wine to meet growing demand for convenient, single servings of wine in packaging that can be taken to multiple venues, many of which will not allow glass bottles. The 250ml size has become an industry standard not only in the United States, but worldwide. Adding a 250ml size would greatly relieve all parties from the cumbersome application process seeking approval for aggregate packaging each time a winemaker packages wine in the 250ml can size.

II. TTB Rulemaking Notice 872 Regarding “Aggregate Packaging”.

This Rulemaking also discusses the 1999 ATF Rulemaking Notice No. 872 specifically regarding “aggregate packaging”.^v In this 1999 Rulemaking, the ATF recounted that “aggregate

packaging” was first raised in 1988 when an importer sought permission to import 375 milliliter bags with each bag containing 25 individual pots of 15-milliliters each, like coffee creamer containers. The ATF noted that since that first approval, many types of alcoholic beverages were being placed in a large variety of containers (like containers of ice cream, popsicles, squeeze-package frozen snacks, dairy creamers, or other non-alcohol food products) that are “aggregated” to meet the adopted standards of fill.

A. The Primary Concern in The TTB Rulemaking Notice 872 regarding “Aggregate Packaging” was Unusual Containers Such as those like Ice Cream and Dairy Creamers, Not to Aluminum Cans or Glass Bottles Well-Established in The Marketplace.

In the 1999 Rulemaking, ATF proposed to prohibit all “aggregate packaging”. The ATF’s primary concern was “certain containers are likely to confuse consumers as to the nature of the product, especially those packages that are similar to those that contain ice cream, popsicles, squeeze-package frozen snacks, dairy creamers, or other non-alcohol food products.”^{vi} The ATF explained the concern was twofold: that the wide array of container types are likely to (1) cause consumer confusions as to the quantity and nature of the alcohol beverage and (2) complicate the determination of the appropriate excise tax for the products.^{vii}

At the same time, the ATF stated:

“ATF is not concerned about containers such as aluminum cans or glass bottles that are well-established in the marketplace as both alcohol and non-alcohol beverage containers.”^{viii} (Emphasis added)

The 1999 Rulemaking was never finalized and “aggregate packaging” has been allowed up to present time. In codifying the aggregate packaging rules, we urge the TTB to modernize the Standards of Fill for Wine by adding the 250ml size.

B. The 250ml Can Is Well Established in the Marketplace, Will Not Cause Consumer Confusion and Should Not Be Subject to the Proposed “Aggregate Packaging” Protocol and Application Process.

The TTB states that one purpose of this Rulemaking is to codify rules that would allow continued use of “aggregate packaging” for containers such as those about which the ATF first raised concerns in 1999 - packages like ice cream, popsicles, squeeze-package frozen snacks, dairy creamers, or other non-alcohol food product containers.

A 250ml can for wine will not cause consumer confusion. The facts and data regarding packaging wine in a 250ml solidly support adding 250ml to the standards of fill for wine as part of this 2018-2019 Rulemaking proceeding. The 250ml can now the most common size for wine in a can should not be made subject to the proposed “Aggregate Packaging” rules.

III. Researchers at Texas Tech University’s Recent Study Demonstrates Wine-in-a-Can Is A Strong Growth Segment in The Wine Industry Today and the 250ml Size is the Most Popular and Demanded Size Supporting the Request That the 250ml Size Be Added to the Standards of Fill for Wine as Part of This Proceeding.

Researchers at Texas Tech University, Texas Wine Marketing Research Institute have recently released a new study: “Growth of the Wine-In-A-Can Market” (“the Study”). The researchers note the rapid increase in the number of wineries and brands with wine packaged in cans and state the study is only providing a “snapshot” in time in mid-2018.^x This study is the most thorough analysis of the wine-in-a-can market and the preferred sizes of the packaging.

The Study triangulates data from multiple primary sources and two distinct qualitative surveys. The authors explain in the Introduction that the study “ends by discussing the possibility that packaging wine in cans is a robust trend as opposed to a short-term fad, and documents how within the past three years it has become an expanding alternative category in the wine industry.”^x

A. Technological Advances in Developing Superior Linings for Cans Protecting Wine from Touching the Aluminum Has Allowed the Rapid Growth of The Wine in A Can Market.

A key factor in the growth of wine in a can is the development of a superior can lining that protects the wine from touching the aluminum can. The leader in manufacturing cans for wine is Barokes Wine Company in Australia with their VinSafe™ lining. Ball Corporation in the United States has also developed a proprietary lining. The main difference between the VinSafe™ lining and the Ball Corporation lining is that with VinSafe™ the wine will last from 1 up to 5 years after filling and with the Ball Corporation lining, lasts only about 6 months after filling.

Barokes serves markets worldwide and only manufactures cans for wine in 187ml and 250ml sizes. The Barokes Director of Sales and Marketing states they only manufacture these two sizes because “they fit the convenience, portion control and single serve attributes that they believe consumers of wine-in-a-can value.”^{xi} And of these two sizes, the 250ml is the most commonly used.

B. Denying Wineries, the Ability to Sell Individual Cans of Wine in the 250ml Size Can Most Demanded by the Consumer Places Wineries at a Distinct Competitive Disadvantage to Malt Beverage Manufacturers - -Adding the 250ml Size is a Competitive Requirement.

As the TTB notes throughout the Rulemaking, Malt Beverages (Beer) have no standards of fill. This means that all Malt Beverages and Beer may be sold as individual cans in any size. Further, craft beer is increasingly moving toward packaging in cans.

The Texas Tech Study found that “the benefits of packaging wine in cans parallels the brand development and image perception of craft beer and comparison between the two could be valuable to those involved in either market.”^{xii} The big difference is that Malt Beverages and Beer manufacturers are not tied to any standards of fill but - - under current rules, winemakers may only market the most popular single serving 250ml can of wine in “aggregate packaging”, not as individual cans.

Further, if the 250ml size is not added to the Standards of Fill now, winemakers will be at an additional disadvantage by being required to not only file an additional application for aggregate packaging but also print “not for individual sale” on each 250ml can to obtain an approved COLA for aggregate packaging. The TTB is already requiring winemakers applying for COLA approval for aggregate packaging to do so to obtain approval. The reality is that the cans are then broken out of the aggregate packaging and individually consumed. This defeats the purpose of the packaging regulations.

Adding the 250ml size to Standards of Fill for Wine would eliminate the extra time and effort required to file for a new COLA for 250ml wines and would greatly enhance wineries’ ability to compete with malt beverages in the marketplace. Failing to add the 250ml size will impede wineries in this growing competitive market.

C. Convenience, Occasion Expansion and Portion Control are Primary Reasons for The Growth in The Wine in a Can Market as a New Wine Category.

The Study identified five main inter-related consumer pull and supplier push drivers for consumers buying wines in cans: 1) convenience, 2) occasion expansion, 3) sustainability and cost savings, 4) quality, and 5) visual image/branding. The most important driver of the wine in cans market appears to be convenience, but it is heavily linked to “Occasion Expansion.”^{xiii}

The Study describes convenience as including opening (no need for a corkscrew), portion control, portability and the ability to try new wines without a large investment. Convenience and “occasion” expansion go together in allowing wine consumers to bring wine to locations where bottles are often prohibited or inconvenient (parks, concerts, camping, boating, beaches, etc.).

Portion control is also important for both consumers and restaurants (which are using wines in a can). Portion control allows for moderate consumption because the consumer need not drink the entire contents of a larger size can (since cans cannot be resealed).

The Study involved two distinct studies of wine consumers of all age groups and experience with wine and concluded: “This study proposes that convenience and occasion expansion trumps wine knowledge and demographic segmentation when it comes to wine-in-a-can awareness, consumption, and purchase practices. The findings suggest that the market for wine-in-cans is not a fad, rather it represents a significant, new wine category.”^{xiv}

D. The Results of a Recent Yet-to-be-Released Texas Tech Survey of Wine in a Can Consumers Show the 250ml Size is Clearly the Most Preferred Size.

Besides the released Study, the authors conducted a more recent follow-up survey of consumers of wine in a can. These results have not yet been released but we were permitted to share this new data in these Comments. In this follow-up survey, consumers of wine-in-a-can were asked which can sizes they preferred. Out of 1,507 respondents, 43.13% preferred the 250ml size and only 21.43% preferred the 375ml size. This is up-to-date important data suggesting strong consumer preference for the 250ml size and provides strong support for adding 250ml to the standards of fill for wine.

IV. The Growth Rate in Sales of Wines-in-a-Can Has Been Exponential Supporting the Request for The TTB to Modernize the Standards of Fill for Wines by adding the Most Popular Size (250ml).

In the December 2018 *Forbes* magazine, the editors included an article entitled “Expect to See Canned Wine Almost Everywhere in 2019”. The article notes that while market data reflects that wines in a can represent only about 2% of the overall market, the overall market is large and the percentage share of wines in cans is growing rapidly. BW 166 LLC, an alcohol market research firm, found that in just one-year (June 2017 – June 2018) sales of canned wine rose 43 percent while overall wine sales in this same period remained relatively flat. By the end of 2018, the canned wine market was nearly a \$50 million business.

Jeff Quackenbush in the North Bay Business Journal confirmed that sales of wine in 250ml cans (hold roughly one to one and one-half pours) have grown from less than \$1 million a year in 2013 to over \$50 million for the 12 months ending in mid-2018. And, the bulk of the dollar and volume share – over 50 percent and 65 percent respectively – is for 250ml cans.^{xv}

In a CNBC report August 31, 2018, it was reported that over the past three years, wines in a can grew from about a dozen brands to now over 100 brands packaging wine in a can and is still growing. The Texas Tech Study lists 107 U.S. wine brands already packaging wine in the 250ml can.

Millennials are a top market for wine in cans: (1) they are receptive to cans, (2) they can buy individual servings, and (3) they are environmentally sustainable because cans are much more likely to be recycled than bottles (bottles have several parts – foil, corks, etc. and cans are all in one part).

The Texas Tech Study noted that perhaps the “most significant finding of this study is the fact that regardless of subjective wine knowledge (low, medium, high), awareness trial/tasting and purchasing practices showed no differences [among the various age groups]. This indicates that current perceptions that assume consumers with high-end wine knowledge will not consider wine-in-cans, may be dramatically faulty.”^{xvi}

V. Consumers Are Familiar with all Types of Beverages in Cans. There Is Enough Distinction between Can Sizes to Avoid Consumer Confusion and Cans Allow Distinctive Marketing Designs.

In the 1990 ATF Rulemaking, the ATF presented a list of reasons for adding the new 500ml standard of fill for wine. One of the most important reasons was that distinctive marketing (and bottle appearance) would prevent confusion among other sizes. This conclusion was before packaging wine in cans was even contemplated. But distinctive appearance and differences in sizes for cans is equally true. Attachment A depicts various can sizes. Regardless if the wine is packaged in a “standard” size or a “slim” size 250ml can, the difference in size from other size cans is observable and will not confuse or mislead the consumer.

Further, cans offer much more flexibility to not only include the mandatory labeling, but to also include distinctive art and graphics to make the products stand out on their own.

VI. This Rulemaking to Codify Rules for “Aggregate Packaging” is the Appropriate Proceeding in which to Add the 250ml Size to The Standards of Fill for Wine.

We are not asking the TTB to address the entire subject of “Standards of Fill” but, there is more than enough evidence to support the addition of the 250ml fill standard for wine NOW, in this Proceeding. The addition is appropriate to allow winemakers the ability to sell the most popular and demanded 250ml wine cans as single cans rather than tying wineries to “aggregate packaging”. Limiting wine to “aggregate packaging” hinders competition with other beverages not similarly tied to “aggregate packaging”. This one addition would make a significant difference in marketing wine and convenience for consumers.

In the 1990 ATF Rulemaking adding the 500ml size to the Standards of Fill for Wine, the ATF noted:

“Finally, while ATF remains opposed to ‘size proliferation,’ the addition of merely one size will not greatly alter the present situation, and there are many good reasons for allowing this limited expansion.”^{xvii} (Emphasis added)

We submit this rationale equally applies in this proceeding to add this one new size - 250ml. Adding the 250ml size will clearly help “level the playing field” and allow wineries the opportunity to fairly compete with other alcoholic beverages without similar restrictions. The consuming public is very familiar with beverages in cans and the 250ml size clearly differs from other can sizes.

The data shows a clear demand for a single serving size of wine and adding the 250ml size for wine will not cause consumer confusion, will help to promote moderate consumption and enhance the environment because aluminum cans are recyclable and sustainable.

CONCLUSION

Ample precedent and evidence support the TTB adding the one 250ml size to the Standards of Fill for wine as part of this Rulemaking proceeding. The innovation of special linings for cans that keep wine from touching the aluminum in a can has led to exponential growth in the wine in a can market and worldwide, the most demanded and popular size for wine in a can is the 250ml. This trend will continue and TTB should not adopt rules that disadvantage U.S. winemakers in a competitive market by requiring them to package the 250ml in “aggregate packaging”.

We strongly urge the TTB to not only modernize the labeling and “aggregate packaging” rules, but to also modernize the Standards of Fill for wine by adding this one 250ml size.

COMMENTS ON RULEMAKING NO. 176

ATTACHMENT A



ENDNOTES:

ⁱ T.D. ATF-303; Ref.: Notice No. 699, 55 Federal Register 42710-42713 on October 23, 1990.

ⁱⁱ 55 Federal Register at 42711.

ⁱⁱⁱ *Id.*

^{iv} See, e.g., www.wineinacan.com (Barokes, Australia World Markets). Barokes is the largest supplier of 250ml cans for wine worldwide distributing these cans for wine in 27 international markets. Barokes only produces these cans with VinSafe™ lining in 187ml and 250ml sizes.

^v ATF Rulemaking No. 872, 64 Federal Register 6486-6489, February 9, 1999.

^{vi} *Id.* at p.6486

^{vii} *Id.* at p.6486

^{viii} *Id.* at p.6487

^{ix} Texas Tech University, Texas Wine Marketing Research Institute, “Growth of the Wine-In-A-Can Market” by Helena A. Williams PhD with assistance from Robert Williams PhD and Matthew Bauman, August 2018. www.depts.ttu.edu/hs/texaswine

^x *Id.* at p.3

^{xi} *Id.* at p.8

^{xii} *Id.* at p.38

^{xiii} *Id.* at p.21

^{xiv} *Id.* at p.29

^{xv} Jeff Quackenbush, North Bay Business Journal, September 12, 2018.

^{xvi} Texas Tech Study at p.37

^{xvii} T.D. ATF-303; Ref.: Notice No. 699, 55 Federal Register at 42712.