

February 6, 2006

Via Hand Delivery

Frank Foote
Director, Regulations and Rulings Division
Alcohol & Tobacco Tax & Trade Bureau
Attn: Notice 53
1310 G Street, N.W.
Washington, DC 20005

Re: TTB Notice Number 53: Use of the Word "Pure" or Its Variants on Labels or in
Advertisements of Alcohol Beverage Products

Dear Mr. Foote:

I write on behalf of The Absolut Spirits Company Inc. ("ASCI") to provide comments on TTB Notice 53, published in the *Federal Register* on December 7, 2005 ("Notice 53").¹ As an importer of vodka and gin, ASCI has a keen interest in the modernization and rationalization of existing regulations governing the labeling and advertising of distilled spirits. We appreciate TTB's interest in revisiting the regulations' current prohibition on the use of the word "pure" in labeling and advertising distilled spirits, 27 C.F.R. §§ 5.42(b)(5), 5.65(a)(8), and thank you for this opportunity to comment on Notice 53.

ASCI and its affiliates honor and respect consumers, and would never knowingly disseminate labels or advertisements that mislead. This overriding philosophy is completely consistent with the repeal of TTB's current regulations concerning the word "pure." Indeed, we believe the repeal of current regulations would align TTB's treatment of "pure" with the treatment of the word when used in connection with beer, wine, non-alcoholic beverages and foods of all types.

We begin with a brief background section, then turn to ASCI's comments. We divide these comments into three sections, addressing: (1) the reasons TTB should repeal existing regulations prohibiting use of the word "pure;" (2) why existing TTB regulations prohibit only use of the word "pure," not variants like "pureness," "purest" and "purity;" and (3) why TTB's existing regulations violate distilled spirit advertisers' First Amendment rights.

¹ 70 Fed. Reg. 72,731 (Dec. 7, 2005).

BACKGROUND

ASCI is the importer of Absolut Vodka, Danzka Vodka, Level Vodka and Plymouth Gin. V&S Vin & Sprit AB (publ) ("V&S"), a Swedish entity owned by the Swedish government, owns all shares in ASCI. V&S and its affiliates produce the distilled spirits imported into the United States by ASCI, including world-famous Absolut Vodka.

V&S has a long history of using the term "pure" to describe Absolut Vodka in communications to consumers around the world. Lars Olsen Smith introduced Absolut Vodka to Sweden in 1879 as "Absolut rent branvin" – "Absolutely pure vodka." Imported into the United States since 1979, Absolut Vodka has become famous for world-class advertising that inspires prominent artists, designers and musicians to create their own interpretations of the Absolut experience. ASCI, its predecessor importers and V&S all seek to comply with all laws and policies governing the labeling and advertising of distilled spirits, and for that reason Absolut Vodka's communications to United States consumers have been modified to accommodate current regulations that prohibit the word "pure" in the labeling and advertising of distilled spirits. Such accommodations hinder marketing efforts and may lead to unnecessary alterations of advertising campaigns.

We now turn to ASCI's specific comments.

COMMENTS

1. TTB Should Repeal Its Existing Regulations Prohibiting Use Of The Word "Pure" In Labeling and Advertising Distilled Spirits.

A. Consumers Understand "Pure" to Mean Free From Adulterants and Harmful Ingredients.

ASCI believes that Sections 5.42(b)(5) and 5.65(a)(8) no longer advance TTB's core mission of providing consumers with adequate information and protecting the public from false and misleading labeling and advertising claims. "Pure" can have many meanings, depending on its context. With respect to foods like distilled spirits, consumers' ordinary understanding of the word "pure" and the views of many federal and state lawmakers and officials all confirm that "pure" means free from adulterants and harmful ingredients. All distilled spirit products legally in the market meet this criteria, and we accordingly urge TTB to end its ban on use of the word "pure" in distilled spirits labeling and advertising by repealing Sections 5.42(b)(5) and 5.65(a)(8).

In the context of food, the ordinary meaning of "pure" means free from adulterants and harmful ingredients. Webster's Dictionary states that "pure food" is "free from dust, dirt or taint." Webster's Ninth New Collegiate Dictionary 956 (1st ed. 1990); *see also* <http://www.m-w.com/dictionary> (search "pure"). The New Columbia Encyclopedia states that the concept of "pure-food" is synonymous with the concept of "food adulteration." The New Columbia

Encyclopedia 2246 (4th ed. 1975). Similarly, Dictionary.com defines "pure" in the context of food as "free from adulterants or impurities." <http://www.dictionary.reference.com> (search "pure"). To most consumers, then, only products containing harmful ingredients or additives are "impure." Likewise, this ordinary understanding is pervasive in the federal regulation of foods and beverages. Indeed, in every context except the labeling and advertising of distilled spirits, the law equates food purity with product safety.

For many years both federal and state lawmakers have equated "pure foods" with those that do not contain adulterants and harmful ingredients. In 1906, Congress first stepped into the area of food safety regulation by passing the Pure Food and Drugs Act. *See* Pub. L. No. 59-384, 34 Stat. 768 (1906). That statute was the cornerstone of federal regulations of food safety until the passage of the Federal Food, Drug & Cosmetics Act over fifty years later. Similarly, state legislatures around the country have enacted food safety statutes that employ the word "pure" in their title.² Distilled spirits, of course, must meet the same food safety standards imposed on other food products. *See, e.g.*, 52 Fed. Reg. 45,502, 45,503 (Nov. 30, 1987). Thus, distilled spirits are "pure" foods under the standards of numerous statutes. TTB should not give the word a different (and extraordinary) meaning in light of such enactments.

TTB's predecessor also recognized this reasonable understanding of the term "pure." As explained in Notice 53:

During the [1936] hearings, Treasury's Assistant General Counsel, John E. O'Neill, stated that the "ordinary man" regarded the word "pure" as denoting that the product is wholesome, free from adulterants, free from harmful ingredients, and not deleterious to a person's health.

70 Fed. Reg. at 72,732. We believe Mr. O'Neill's observation was correct, particularly in the light of the current understanding of the term.

In informal discussions with TTB over the meaning of Sections 5.42(b)(5) and 5.65(a)(8), certain officials asserted that spirits are not "pure" because they contain molecules of material other than alcohol and water. We believe this contention distorts the plain meaning of "pure." As noted above, the common understanding of "pure" foods and beverages – an understanding adopted by federal and state law – equates purity with a lack of adulteration, not with a single-element test. Moreover, this common-sense meaning of pure is the way the term is used to describe a myriad

² *See, e.g.*, Colo. Rev. Stat. §§ 25-5-401 *et seq.* ("Pure Food and Drug Law"); Conn. Gen. Stat. §§ 21a-13 *et seq.* ("General Provisions. Pure Food and Drugs"); Del. Code Ann. tit. 16, §§ 3301 *et seq.* ("Pure Food and Drugs"); Me. Rev. Stat. Ann. tit. 22, §§ 2151 *et seq.* ("Pure Foods and Drugs Generally"); Mich. Comp. Laws §§ 289.2 *et seq.* ("Pure Foods and Standards" and "Standards of Purity for Food and Drugs"); Neb. Rev. Stat. §§ 81-2,239 *et seq.* ("Pure Food Act"); N.J. Stat. Ann. § 24:5-2 ("pure food and drug law"); Ohio Rev. Code Ann. §§ 3715.01 *et seq.* ("Pure Food and Drug Law"); Vt. Stat. Ann. tit. 18, §§ 4023 *et seq.* ("Pure Foods and Drugs"); W. Va. Code §§ 16-7-1 *et seq.* ("Pure Food and Drugs").

of other products, including water, wine, beer, soft drinks and foods. In light of TTB's own rejection of a single-element meaning when applied to beer and wine, we see no basis for applying such an unusual definition of "pure" to distilled spirits.

In sum, ASCI urges TTB to abandon its current ban on use of the word "pure" by repealing Sections 5.42(b)(5) and 5.65(a)(8). Doing so will align TTB's distilled spirit regulations with the common understanding of "pure" found in dictionaries and in federal and state statutes. Those numerous sources clearly reflect consumers' understanding of what constitutes a "pure" beverage.

B. Repeal of Existing Regulations Would Harmonize the Regulations with Those Applied to Beer and Wine Labeling and Advertising.

TTB applies a different meaning of the word "pure" to evaluate beer and wine claims. It has been the longstanding policy of TTB and its predecessors to permit "pure" claims for beer and wine, presumably so long as the products were not "impure," *i.e.*, were safe and unadulterated. While Notice 53 suggests the possibility of altering this policy as it relates to beer and wine, *see* 70 Fed. Reg. at 72,733, we are not aware that this decades-old policy has caused any consumer confusion to warrant such a change. To the best of our knowledge, TTB and its predecessors have received no complaints about beer and wine labels and advertisements that employ the word "pure" that would justify any policy shift. TTB accordingly should harmonize its policy towards distilled spirits labels and advertisements with its current policy towards beer and wine.

Consumers routinely see "pure" used in connection with the labeling and advertising of beer and wine. To take one obvious example, the most recent Budweiser campaign uses the word "pure" to describe Budweiser beer. *See* www.budweiser.com (search "Beer, Think Fresh Drink Fresh, The Budweiser Advantage, Pure"). Similarly, even a cursory review of TTB's COLA database reveals many beer and wine labels that employ the word "pure" to describe the finished product.³ Yet in spite of these longstanding and widespread uses of the word pure, we are aware of no popular outcry or even complaint about such labels and advertisements. We see no reason why consumers would react negatively to a description of a distilled spirit as "pure" when they have accepted "pure" beer and wine claims for decades.

³ For beer, *see, e.g.*, TTB COLA ID#s 05140-000-000001 ("Lone Star Light" beer); 04180-003-000070 ("Steinlager" beer); 01047-002-000103 ("Cantillon, Lou Pepe Pure Kriek" beer); 01002-002-000064 ("Taylor, Pure Pilsner Beer"). For wine, *see, e.g.*, TTB COLA ID #s 05285-001-000134 ("Little Valley Vineyard, Pure Decadence" wine); 05305-000-000238 ("Badger Mountain, Pure White" wine); 05305-000-000237 ("Badger Mountain, Pure Red" wine); 04061-000-000067 ("Horizon's Edge Winery, Pure Pleasure Red Table Wine"); 03035-000-000076 ("Cave de Tain Pure Syrah" wine); 03021-003-000019 ("Rush Creek Wines, 100% Pure Strawberry Wine"); 03021-003-000018 ("Rush Creek Wines, 100% Pure Blueberry Wine"); 02324-003-000098 ("Kizakura Pure" sake); 01352-000-000012 ("Charles B. Mitchell Vineyards, Madame Omo's Pure Sunshine" wine).

In sum, extending TTB's rational "pure" beer and wine policy to all alcohol beverage products would harmonize the distilled spirits policy without any threat of consumer deception.

2. Existing TTB Regulations Prohibit *Only* Use of the Word "Pure," not Variants Like "Pureness," "Purest" and "Purity."

As explained above, ASCI urges TTB to repeal Sections 5.42(b)(5) and 5.65(a)(8). If TTB decides not to do so, it can not interpret those regulations broadly to include variants like "pureness," "purest" and "purity." The regulations' plain meaning only prohibits use of the word "pure," not variants. Moreover, given the lack of a public-policy rationale for maintaining the current regulations, TTB certainly should not expand their reach.

The regulations TTB relies upon, 27 C.F.R. §§ 5.42(b)(5) and 5.65(a)(8), are written precisely and narrowly. The regulations state:

[Labeling and advertisements] of distilled spirits shall not contain:

The word "pure" unless:

- (i) It refers to a particular ingredient used in the production of distilled spirits, and is a truthful representation about the ingredient; or
- (ii) It is part of a bona fide name of the permittee or retailer from whom the distilled spirits are bottled; or
- (iii) It is part of the bona fide name of the permittee who bottled the distilled spirits.

Id. The text of the regulations do not prohibit words like pureness, purest or purity. Instead, the regulations very specifically extend only to "the word pure." The plain text of the regulations, which must be the starting point of any interpretation, accordingly do not prohibit any word other than "the word pure." *See, e.g., United States v. Providence Journal Co.*, 485 U.S. 693, 700-01 (1988) (admonishing courts to obey a text's plain meaning).

A review of other TTB labeling and advertising regulations also demonstrates that where the Agency intends to prohibit variants on a term, the regulations do so explicitly. The specificity of Sections 5.42(b)(5) and 5.65(a)(8) stand in marked contrast to the language of other, contemporaneous regulations prohibiting other statements in distilled spirit advertising. For example, Section 5.65(a)(7) prohibits "The words 'bond', 'bonded', 'bottled in bond', 'aged in bond', or phrases containing these *or synonymous terms*[" Similarly, Section 5.65(a)(9) prohibits "The words 'double distilled' or 'triple distilled' *or any similar terms*[" These provisions demonstrate that TTB and its predecessors knew how to draft a regulation broadly to capture terms related to listed words or phrases. The failure of the regulations to do so in Sections 5.42(b)(5) and 5.65(a)(8) accordingly is fatal to an interpretation of those prohibitions

as reaching synonymous or related terms. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (where particular language is included in one section but omitted in another section of the same Act, the omission is presumed to represent a deliberate act). A contrary rule that allows TTB to stretch the interpretation of current regulations to cover words like "purity" would render the broader language in Sections 5.65(a)(7), 5.65(a)(9), and many other provisions of TTB's beer, wine and distilled spirits regulations superfluous and unnecessary. Doing so violates a cardinal rule of interpretation. *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, 140 (1994) (do not interpret a provision to render other provisions of the same statute superfluous).

What's more, prior rulemakings concerning TTB's "pure" regulations are notably silent on the subject of variants on the word pure. The *Federal Register* contains several discussions of the regulations in connection with a decision by TTB's predecessor, ATF, to permit references to "pure" ingredients. *See* 49 Fed. Reg. 31667 (Aug. 8, 1984); 45 Fed. Reg. 83530 (Dec. 19, 1980). Notably absent from the discussions is any indication that the regulations prohibited words other than pure. In these circumstances, ATF's silence is like "the dog that didn't bark," reinforcing the regulation's narrow scope by not mentioning an interpretation that surely would have surfaced had it been intended. *See, e.g., Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991) (Congressional silence suggests an intent to retain a narrow interpretation).

As noted above, ASCI urges TTB to repeal Sections 5.42(b)(5) and 5.65(a)(8) in their entirety. At the very least, TTB must honor the plain meaning of those regulations and not extent their reach to variants like "pureness," "purest" and "purity."

3. TTB's Existing Regulations Violate Distilled Spirit Advertisers' First Amendment Rights.

We believe the First Amendment to the Constitution compels TTB to take this opportunity to repeal Sections 5.42(b)(5) and 5.65(a)(8). Those regulations, which constitute a blanket ban on commercial speech that, in at least most instances, will be truthful and non-misleading, violates the free speech guarantee of the First Amendment.

The First Amendment protects truthful, non-misleading commercial speech from government interference. *See, e.g., Rubin v. Coors*, 514 U.S. 476 (1995). Claims that potable distilled spirits are "pure" under the common understanding of the term are truthful and non-misleading. Distilled spirits must comply with all "pure" food and drug acts enacted around the country, and lawfully-sold spirits contain no harmful ingredients or adulterants that would render such spirits "impure." As a result, claims of purity with respect to distilled spirits conform with most consumers' understanding of the term pure as meaning an absence of adulterants and harmful ingredients.

The First Amendment requires the government to shoulder the burden of demonstrating that a particular statement or word is misleading. *See Ibanez v. Florida Dep't. of Bus. & Prof'l. Regulation*, 512 U.S. 136, 143-144 (1994) (emphasizing that a government agency cannot rest on

the "bare assertion" that a statement is misleading, but "must build its case on specific evidence"). Every product contains trace elements from its production process. Thus, beers and wines may contain fruity esters and a host of other fermentation byproducts, yet TTB regulations allow such products to be described as "pure." TTB cannot possibly explain why the presence of trace elements in a beverage render a "pure" claim misleading when applied to distilled spirits, but do not render the same claim misleading when applied to beer, wine, or other food products. In the end, then, a court would deem Sections 5.42(b)(5) and 5.65(a)(8) "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." *Greater New Orleans Broadcasting v. United States*, 527 U.S. 173, 189 (1999) (citing *Rubin*, 514 U.S. at 488).

Moreover, the First Amendment demands that the government narrowly-tailor any restrictions on speech and seek less-restrictive alternatives to the outright suppression of speech. *See id.* at 188 (affirming that a statute restricting protected commercial speech is unconstitutional unless "the speech restriction is not more extensive than necessary to serve the interests that support it."). Here, even if TTB could hypothesize a situation where a "pure" claim applied to a distilled spirit might be misleading, it has many alternatives to the complete suppression of such speech. For example, TTB can exercise its authority to pre-approve distilled spirits labels, *see* 27 U.S.C. § 205(e), to make case-by-case determinations of whether a particular claim is misleading. The First Amendment does not permit the "simple" solution of banning all speech.

CONCLUSION

As explained above, ASCI believes the time has come to repeal Sections 5.42(b)(5) and 5.65(a)(8). Lawfully-sold distilled spirits are "pure" within the common understanding of that term when used in the context of food. Moreover, repealing TTB's existing "pure" regulations would harmonize TTB policy towards distilled spirits labeling and advertising with longstanding and successful federal policy towards beer and wine labeling and advertising. Finally, the First Amendment compels TTB to act now to remove from its regulations provisions that are patently offensive to current First Amendment principles.

ASCI appreciates this opportunity to comment on Notice 53.

Sincerely,



Marc Sorini
Counsel to The Absolut Spirits Company Inc.

cc: Lisa Derman
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