



# BEER INSTITUTE

March 13, 2006

Mr. Francis W. Foote  
Director, Regulations and Rulings Division  
Alcohol and Tobacco Tax and Trade Bureau  
Attn.: Notice No. 53  
P.O. Box 14412  
Washington, D.C. 20044

## Comment on TTB Notice No. 53

Dear Mr. Foote:

On behalf of our membership, the Beer Institute appreciates this opportunity to comment on the Advanced Notice of Proposed Rulemaking titled, "Use of the Word "Pure" or its Variants on Labels or in Advertisements of Alcohol Beverage Products." The Beer Institute represents domestic and international brewers that produce over 90% of the beer and other malt beverages sold in the United States.

The use of an advance notice is appropriate in this situation, as TTB officials have correctly identified and sought comments on several legal and practical questions, which we address below. The Beer Institute is responding only to the questions that concern malt beverages. The following points summarize the Beer Institute's position:

- 1. Notice No. 53 references instances in which the word "pure" may have been used inappropriately on a small number of spirits labels. The Advanced Notice of Proposed Rulemaking does not articulate any other basis for potential consumer confusion with respect to malt beverages, which have been regulated separately and differently from wine and distilled spirits. The Beer Institute does not believe that the circumstances described by the TTB justify a completely new regulation for malt beverages.**
- 2. As a general matter of policy, the regulation of a specific and commonly used word is not a practical means of exercising TTB's well-established authority to protect the public from false or misleading information on labels or in advertising. Rather, the Beer Institute urges TTB to use the enforcement powers already at its disposal to address this issue.**
- 3. The word "pure" and its variants are used in several contexts and have multiple meanings. Any general prohibition or significant limitation on use of such words is likely to be overbroad and an unwarranted restriction on non-misleading and lawful commercial speech.**

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More specific comments to several of the questions posed in Notice No. 53 follow.

- A. *What does the general public consider the word "pure" to mean when used on labels and in advertisements of alcohol beverage products? Does its use convey information to the consumer about the identity and quality of the product? Does its use convey information about the alcohol content of a product?*

The specific situations involving use of the word "pure" that are discussed in Notice No. 53 involve distilled spirits. The Beer Institute is not aware of any analogous issues arising from use of the word "pure" or its variants in malt beverage labeling or advertising, and no parallel regulations exist for malt beverages. Labeling and advertising of distilled spirits and wine have been addressed separately by Congress and by TTB and its predecessor agencies since enactment of the FAA Act and even earlier in 19<sup>th</sup> Century tax statutes.

An informal review of labels and marketing materials currently in use shows that the term "pure" has the following uses:

- References to "pure" beer or other malt beverages;
- References to "pure" water used to brew beer;
- A reference to a "pure" cultured yeast strain used in the brewing process;
- References to "pure" ingredients in descriptions of the selection and processing of agricultural commodities used in the brewing process;
- A reference to "pure" colors in marketing materials designed to highlight attributes of a brand;
- A reference to "pure" music in the title of a brewer's promotional concert series.

As these examples demonstrate, the word "pure" is used in a variety of contexts, ranging from clear puffery to verifiable factual claims that a product is "unmixed with any other matter" or that good manufacturing processes have been used to produce a product "free from dust dirt or taint."<sup>1</sup> A major survey by the Federal Trade Commission included "pure claims" in a category of advertising claims along with the words "natural," "no artificial," and "real." That category of claims appeared in over 26% of all food and

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<sup>1</sup> First and second alternative definitions of "pure" *Webster's New Collegiate Dictionary*, 1980 ed.

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beverage ads surveyed in 1997, and had appeared even more frequently in prior advertising surveys.<sup>2</sup>

Given the common and varied usage in the malt beverage category and the broader marketplace, reasonable consumers should be fully capable, through common sense or simple observation, of assessing the context in which the word "pure" is used and any implications for product identity or quality. As an added measure of protection TTB has unique authority to regulate alcohol beverage labeling and advertising, which would allow agency intervention, if needed.

The absence of published cases or industry guidance concerning use of the word "pure" or its variants in malt beverage labels and advertisements supports an inference that few, if any, complaints about false or misleading information have been received from the public concerning those terms, and that malt beverage industry members have not used the terms in a misleading manner. These considerations and the fact that the word "pure" and its variants have been frequently utilized strongly indicate that a new regulation of the word "pure" or its variants is unnecessary for malt beverage labels and advertisements.

However, if the word "pure" was used in a manner to improperly connote the strength of a malt beverage, TTB possesses adequate authority to address such a usage without an additional regulation. Section I of Notice No. 53 carefully enumerates TTB authority under the Federal Alcohol Administration Act to require advance review and approval of alcohol beverage labels, to ensure that consumers are provided with adequate information concerning the identity and quality of an alcohol beverage, and to protect consumers from false and misleading statements on product labels and in advertisements.<sup>3</sup> Brewers have operated under this statutory and regulatory system for decades. TTB regulations have been updated regularly and supplemented with informal agency guidance. In fact, the formal label revocation process was the result of a thoughtful and collaborative rulemaking proceeding completed in 1999.

**B. *TTB considers variants of the word "pure" such as "pureness," "purest," and "purity" to fall within the purview of the pure regulations. Are these variants misleading and, if so, should TTB amend the regulations to prohibit their use? Should TTB limit the scope of the pure regulations to the word "pure" only?***

The Beer Institute believes that TTB should not apply the current pure regulation to malt beverages. As outlined above and as set out in detail in Notice No. 53, the Federal Alcohol Administration Act and existing TTB labeling regulations provide an adequate basis for agency officials to seek changes or initiate enforcement action where the use of

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<sup>2</sup>Ippolito, Pauline M. and Pappalardo, Janis K., *Advertising, Nutrition and Health Evidence from Food Advertising 1977-1997*, Federal Trade Commission Bureau of Economics Staff Report, September 2002, pp. 58-59.

<sup>3</sup>27 U.S.C. § 205 (e) and (f).

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a particular word on a label or in advertising *for malt beverages* is likely to mislead consumers.

The best way that the use of a specific term can be analyzed is in the context of a concrete situation, where evidence can be collected to make a formal determination that a particular label or advertisement is inconsistent with the FAA Act or TTB regulations. In fact, in the setting of countless informal interactions with TTB, malt beverage industry members have demonstrated a willingness to quickly address agency concerns or to provide evidence substantiating a particular product claim or other statement.

The challenges in drafting a regulation around the word “pure” are multiplied by attempting to include variants of such a commonly used word. The word “purity” has a unique use in brewing that dates back over 500 years to enactment of purity laws, such as the Reinheitsgebot, the best known Germanic purity law enacted in Bavaria in 1516. These laws restricted the ingredients that can be used to make beer. (“Rein” means clean or pure; “-heit” means “-ness”; so “Reinheit” means “cleanliness” or “purity”.) Later versions of the local law were incorporated into German statutes that remained in place until the 1980s. Dozens of references to that law are included in advertisements and marketing materials of domestic and international brewers.

Another example of a variant of the word “pure” is provided in a factual description of the filtering process used in brewing indicating that filters remove **impurities** in the beer that could harm the taste.

The Beer Institute urges TTB not to amend its regulations to prohibit the use of variants of the word “pure” for malt beverages for the reasons articulated.

**G. *Should TTB prohibit the use of the word “pure” and its variants on labels and in advertisements for malt beverages and wine products? Why or why not?***

TTB should not prohibit the use of the word “pure” or its variants on labels and in advertisements for malt beverages. The practical and legal issues raised above are also responsive to this question.

The Federal Alcohol Administration Act, the Internal Revenue Code, and innumerable federal regulations recognize the clear differences among beer, wine, and spirits and treat each category separately in addressing labeling, advertising, production, distribution, taxation, and other areas where Congress has chosen to enact legislation affecting commerce in alcohol beverages. The fact that federal regulations governing use of the word “pure” and its variants date back to the 1930s is not unique given the basic differences among beer, wine, and spirits, which are also reflected in state regulatory systems. Any new, parallel regulation of the word “pure” and its variants for malt beverages would affect many approved labels as well as numerous advertising and

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marketing materials in use and would likely result in a legal challenge based on the commercial free speech rights of brewers.

Broadly limiting use of a single, commonly used, descriptive word and its variants, would require TTB to develop evidence and a sound rationale that would support agency action to ban or generally restrict their use. Otherwise, such a regulation would be subject to First Amendment challenges. The Beer Institute respectfully urges TTB not to undertake such an effort in the absence of any indication that the word "pure" is being used inappropriately by malt beverage manufacturers.

### **Conclusion**

The Beer Institute strongly believes that TTB should refrain from promulgating regulations prohibiting or restricting use of the word "pure" and its variants on malt beverage labels and in advertisements. No problematic malt beverage labels or advertisements were discussed in Notice No. 53, and any regulation in this area would likely lead to unnecessary administrative activity or litigation.

TTB should continue to use its existing statutory authority to make judgments and take appropriate actions in specific cases where agency officials see the use of a particular term as false, misleading, or otherwise in violation of federal law or regulations. In such instances, agency officials should seek information from a manufacturer to substantiate a claim. If warranted by credible evidence, TTB can seek changes to labels using the existing, considered administrative review and revocation processes. In dealing with advertising issues within TTB's jurisdiction, agency officials should first address the matter with the appropriate industry member and proceed with enforcement actions if appropriate. Given the narrow and spirits-specific nature of concern raised in the Advance Notice, TTB's existing enforcement options, the many, varied meanings and uses of the term "pure," and the considerations required by the First Amendment, the Beer Institute urges the TTB to conclude that further regulation of malt beverages on this point is neither warranted nor necessary.

Respectfully submitted,



Arthur J. DeCelle  
Vice President and  
General Counsel

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