

[BILLING CODE 4810-31-P]

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Parts 4, 5, and 7

Notice No. 872

RIN 1512-AB89

Prohibit Certain Alcohol Beverage Containers and Standards of Fill for Distilled Spirits and Wine (98R-452P)

AGENCY: Bureau of Alcohol, Tobacco and Firearms (ATF), Department of the Treasury.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The Bureau of Alcohol, Tobacco and Firearms proposes to amend regulations to clarify the standards of fill for distilled spirits and wine. ATF also proposes to amend regulations to prohibit certain alcohol beverage containers that are likely to mislead consumers as to the identity or character of the distilled spirits, wine, or malt beverage products or are likely to be confused with other (non-alcohol) food products. ATF proposes these changes to ensure consumer protection and to preclude administrative difficulties and jeopardy to the revenue. These proposed rules prohibit certain types of alcohol beverage containers. ATF is concerned that 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. ATF specifically requests comments on the clarity of this proposed rule and how it may be made easier to understand. ATF also requests alternative approaches to accomplish the objectives outlined in this notice.

DATES: Send your comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES:

Send your comments in writing or via facsimile transmission, electronic mail, or through the ATF internet web site.

Where do I send written comments?

Send written comments to: Chief, Regulations Division, Bureau of Alcohol, Tobacco and Firearms, P.O. Box 50221, Washington, DC 20091-0221

Notice No. 872. You may submit comments by facsimile transmission, e-mail, or by internet. You must follow specific instructions, see the detailed requirements in Supplementary Information – 2. Public Participation – Written Comments.

Where do I send facsimile comments?

Submit comments of not more than three pages by facsimile transmission to (202) 927-8602.

Where do I send electronic mail (e-mail) comments?

Submit e-mail comments to nprm.notice.872@atf.gov.

FOR FURTHER INFORMATION CONTACT:

William H. Foster, Regulations Division, (202) 927-8210, Bureau of Alcohol, Tobacco and Firearms, 650 Massachusetts Avenue, NW, Washington, DC 20226. You may also write questions by e-mail to whfoster@atf.gov. ATF will not accept comments on the proposal that are submitted to this address.

SUPPLEMENTARY INFORMATION:

1. Background

The Bureau of Alcohol, Tobacco and Firearms is concerned that the use of certain containers in the packaging of alcohol beverages presents administrative difficulty for revenue collections and promotes consumer deception as to the contents of the alcohol beverage container. The use of these containers encourages complacency as to the dangers of both the abuse of alcohol beverages by all consumers and the consumption of alcohol beverages by underage persons. Existing regulations provide for standardized fill sizes for distilled spirits and wine. The standard sizes are intended to prevent consumer deception as to the quantity of product purchased and to facilitate the proper calculation of excise tax upon the products.

Some producers have increasingly stretched the limits of these regulations by packaging their products in non-authorized-fill containers that are sold together as a single authorized standard of fill. In practice, these containers are then disbanded by retailers and sold by their individual (non-standard of fill) units. This "aggregate packaging" encourages inappropriate use of alcohol beverages by the novelty of the small sizes that are, in turn, easily concealed. This practice enables retailer and consumer practices to undermine State and local controls which prohibit the possession of open containers of alcohol or prohibit retailers such as bar establishments from possessing on premise any package under certain specified sizes.

Aggregate Fill

The issue of whether the standard of fill requirements may be satisfied by aggregate packaging was raised in 1988, when an importer sought permission to import 375-milliliter bags. Each bag contained 25 individual pots of 15-milliliters each, similar to that of a coffee creamer container. This request was approved, as were subsequent requests for other types of containers. Such products now include distilled spirits products packaged in packs of thirty 25-milliliter test tubes (750-milliliter aggregate fill) and in a carton of plastic sachets, like popsicles. Products are also packaged in small cups similar to ice cream containers, or squeeze packages like popsicles, with others similarly bundled in the aggregate. ATF believes that this wide array of container types is likely to confuse consumers as to the quantity and nature of the alcohol beverage. Likewise, the variety of container sizes contributes to administrative difficulty in determining appropriate excise tax for the products. ATF also now recognizes the likelihood that underage individuals more easily obtain and use aggregate fill products.

Enforcement Problems in States and Local Jurisdictions

ATF's policy of allowing aggregate fills has also resulted in problems with State and local alcohol beverage controls, either by conflicting with State standard of fill provisions or with prohibitions against open containers of alcohol beverages.

For example, some states prohibit "by-the-drink" retailers from possessing on premise packages such as those comprising the aggregate-fill containers. To maintain these packages on retail premises, the retailer must break apart the 750-milliliter aggregate package in order to reach the individual 25-milliliter containers. Once the outer "aggregate fill" carton is broken apart, the retailer would be in violation of State law by possessing a package containing less than the authorized standard of fill on retail premises. Since these products are packaged in a 750-milliliter aggregate standard of fill, questions arise as to whether the State may prohibit such retailers from possessing the products.

Also, these containers present conflicts with State and local prohibitions against "open containers." The smaller aggregate-fill containers are more easily concealed. In public areas where alcohol beverages are prohibited these small containers provide a ready means to undermine local enforcement efforts.

ATF Authority for Standards of Fill

The Federal Alcohol Administration Act (27 USC § 205(e)) authorizes the Secretary of the Treasury to regulate the bottle sizes for wine, distilled spirits, and malt beverages. The Internal Revenue Code of 1986 (26 USC § 5301) likewise authorizes regulations regarding the kind and size of containers for distilled spirits. Distilled spirits regulations allow for several standards of fill (27 CFR § 5.47a). Wine regulations also authorize several standards of fill (27 CFR § 4.73). Malt beverage regulations do not currently prescribe standards of fill, but do address net contents statements on labels (27 CFR § 7.27). The purpose of the standards of fill provisions is to prevent a proliferation of bottle sizes and shapes which would inevitably result in consumer confusion and deception with regard to the quantity and net contents of the alcohol beverage package. The uniformity in bottle sizes required by these standards also facilitates the proper calculation of Federal excise tax.

Aggregate packaging practices undermine the standard of fill regulations and the underlying objectives of revenue protection and consumer protection. ATF recognizes such packaging presents the possibility, if not likelihood, that retailers will break apart the outer, labeled package and sell the individual non-standard containers, thereby diminishing any likelihood that consumers will be adequately informed about the quantity, identity, and quality of product they purchase. Also, the individual non-standard containers do not bear the mandatory label requirements, increasing the likelihood of consumer deception as to the identity and quantity of the product. The individual containers do not carry the required government warning statement, so this basic health protection is lost when these aggregate packages are unwrapped. ATF has no authority under the standard of fill provisions to proceed against retailers for breaking apart authorized fill containers for individual sale; however, ATF may proceed against such retailers under the alteration of label provisions.

ATF has encouraged certain safeguards to protect against consumer deception in the event that aggregate packages are broken apart and the single-serving packages are sold individually. These safeguards include: labeling the individual containers as "not for individual sale" and "not for children," sealing the outer container with shrink wrap or other secure methods, and encouraging bottlers to bottle the individual units of the package in authorized standards of fill (such as 50-milliliters). However, ATF believes these safeguards have not proven fully effective to preclude abuse of the standards of fill.

ATF has reconsidered its position on the standard of fill regulations, for the reasons cited above. Although ATF authority exists under the law, existing regulations do not provide an adequate basis to

reject such containers outright. We believe the most effective way of resolving this issue is through rulemaking to define the standards of fill to exclude aggregate fills. We propose to amend regulations to define the standard of fill to apply to the container in direct contact with the alcohol beverage. This measure serves to protect the integrity of the existing standard of fill regulations.

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. Nor does ATF consider this change to preclude the use of certain distinctive containers that might contain separate chambers. For example, a glass container with two separate chambers permanently fused together would be considered a single standard of fill.

ATF Authority to Prohibit Misleading Containers

The Federal Alcohol Administration Act (27 USC § 205(e)) authorizes the Secretary of the Treasury to regulate the packaging of wine, distilled spirits, and malt beverages to prohibit deception of the consumer with respect to alcohol beverage products. Distilled spirits regulations prohibit certain practices deemed to encourage consumer deception (27 CFR § 5.42). Wine and beer regulations also prohibit practices that may lead to consumer deception (27 CFR § 4.39 and 27 CFR § 7.29). The purpose of these provisions is to prevent practices that will result in consumer confusion and deception with regard to the quality and character of the alcohol beverage contained in the package. ATF likewise has authority under the Internal Revenue Code of 1986 to prescribe containers and labeling for alcohol beverages (26 USC § 5368).

Apart from the separate sale of individual units, additional consumer deception issues have arisen from the aggregate packaging concept. In "aggregate packaging," some producers have used unconventional alcohol beverage containers that are misleading as to the identity or character of products as alcohol beverages. Some of these smaller packages resemble products that consumers readily identify as coffee creamers, or children's frozen gelatin confections.

Supermarket shelves offer a variety of products such as yogurt, dairy creamers, ice cream, unfrozen popsicles, gelatins, and other similar products. Alcohol beverages packaged in similar containers either confuse the fact that they contain alcohol beverages or are otherwise novelty-type containers that encourage alcohol consumption by both eligible and underage consumers, trivialize the dangers associated with inappropriate alcohol consumption, or are easily confused with other food products.

Container manufacturers advertise that thinwall containers such as those currently used by certain alcohol beverage producers have a number of applications, such as kid's meals containers, sand buckets, candy containers, popcorn containers, ice cream, yogurt, processed cheese, and other similar uses. These containers are readily identified in the marketplace with non-alcohol products. Such packaging for alcohol beverages obscures the identity of the products as containing alcohol. Questions also arise as to the health dangers such misleading packaging might present to those who may be harmed by ingestion of alcohol products, either due to allergy or other health conditions.

ATF proposes to prohibit alcohol beverage containers that are likely to be confused with containers for other products, particularly non-alcohol food products. This change would serve to preclude the use of those containers that are likely to deceive the consumer as to its contents or mislead consumers by trivializing the dangers and risks associated with alcohol consumption.

ATF is also concerned about some containers of certain wines of less than 7 percent alcohol by volume. These containers, while not subject to the labeling requirements of the Federal Alcohol Administration

Act, must bear labels as prescribed by regulations. The difficulty in determining that these are alcohol beverages raises administrative problems for both the government and the industry and retailers involved in the distribution of these products. For tax administration purposes, the type of alcohol beverage must be readily apparent. Regulation of container shapes and sizes protects the revenue by prohibiting generic containers that would otherwise camouflage the illegal removal of non-tax-paid alcohol. Likewise, for wholesalers and retailers who are subject to special tax based on the categories of products they sell and who usually have local licenses that delineate the type of alcohol beverage they can sell, it is important that the markings, branding and labels are not misleading or confusing as to the true character of the alcohol beverage product.

These changes do not affect or prohibit those generic containers, such as aluminum cans, that meet the standards of fill and are labeled sufficiently to identify the product as an alcohol beverage.

These changes would prohibit any container that, through its material and shape, is not readily recognized as conveying an alcohol beverage or any container that is likely to be confused with a non-alcohol product. Through this effort, ATF seeks to standardize the type or appearance of containers that are authorized for use to contain alcohol beverages, so as to protect the consumer by preventing deception as to the identity and quality of the product.

2. Public Participation – Written Comments

Who may comment on this notice?

ATF asks for comments from consumers, industry members, trade associations, public interest and advocacy groups, State and local governments, and all other interested persons. We will carefully consider all comments we receive on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. We will also carefully consider comments we receive after that date if it is practical to do so, but we cannot assure consideration for late comments. ATF specifically requests comments on the clarity of this proposed rule and how it may be made easier to understand.

We are interested in any data or studies that deal with the impact of container design or shapes of containers. ATF particularly solicits public comment on the existence and degree of consumer deception as to the identity and quality of the product in containers which resemble non-alcohol conveyances or children's toys. We request relevant information and data from consumers, industry members, public interest advocacy groups, and all others interested. Also, we are interested in any alternative approaches that achieve the objectives outlined in this notice.

Will ATF keep my comment confidential?

ATF cannot recognize any material in comments as confidential. All comments and materials may be disclosed to the public. If you consider your material to be confidential or inappropriate for disclosure to the public you should not include it in a comment. We may also disclose the name of any person who submits a comment.

Disclosure: who may review the comments ATF receives for this notice?

Any interested person may inspect copies of this notice and all comments. You may inspect these documents during normal business hours in the ATF Reference Library, Room 6480, 650 Massachusetts Avenue, NW, Washington, DC.

How do I send facsimile comments?

You may submit comments of not more than three pages by facsimile transmission to (202) 927-8602. Facsimile comments must:

- be legible
- reference this notice number
- be 8½" x 11" in size
- contain a legible written signature
- be not more than three pages long.

We will not acknowledge receipt of facsimile transmissions. We will treat facsimile transmissions as originals.

How do I send electronic mail (e-mail) comments?

You may submit comments by e-mail by sending the comments to nprm.notice.872@atfhq.atf.treas.gov. You must follow these instructions. E-mail comments must:

- contain your name, mailing address, and e-mail address
- reference this notice number
- be legible when printed on not more than three pages 8½" x 11" in size

We will not acknowledge receipt of e-mail. We will treat e-mail as originals.

1. Regulatory Analyses and Notices

Is this a significant regulatory action as defined by Executive Order 12866?

This is not a significant regulatory action as defined in Executive Order 12866. A regulatory assessment is not required.

Does the Paperwork Reduction Act apply to this proposed rule?

The Paperwork Reduction Act of 1995 (44 USC § 3507) and its implementing regulations (5 CFR Part 1320) do not apply to this notice because ATF is not proposing any requirements to collect information.

How does the Regulatory Flexibility Act apply to this proposed rule?

Pursuant to § 7805(f) of the Internal Revenue Code, ATF has submitted these proposed rules to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Under the Regulatory Flexibility Act (5 USC § 601 et seq.), ATF must consider whether a notice of proposed rulemaking would have a significant economic impact on a substantial number of small entities. The factual basis of this proposal does not create a burden on small entities.

- It will not impose, or otherwise cause, a significant increase in recordkeeping or other compliance burdens on a substantial number of small entities.
- It will not have significant secondary or incidental effects on a substantial number of small

entities.

This proposal strengthens existing regulations that prohibit the use of unauthorized container sizes and that protect consumers from being misled about the identity, quality, or quantity of the product. ATF believes that because this proposal addresses only deceptive or confusing packaging, and not the products themselves, it will not burden sales or otherwise impose costs on distributors or retailers of alcoholic beverage products.

Accordingly, ATF certifies this proposed rule will not have a significant impact on a substantial number of small entities. ATF is not required to conduct an initial regulatory flexibility analysis.

Drafting Information: who wrote this notice?

William H. Foster, Regulations Division, Bureau of Alcohol, Tobacco and Firearms wrote this notice.

List of Subjects

27 CFR Part 4

Advertising, consumer protection, customs duties and inspections, imports, labeling, packaging and containers, and wine.

27 CFR Part 5

Advertising, consumer protection, customs duties and inspections, imports, labeling, liquors, and packaging and containers.

27 CFR Part 7

Advertising, beer, consumer protection, customs duties and inspection, imports, and labeling.

Authority and Issuance

For the reasons discussed in the preamble, ATF proposes to amend 27 CFR Parts 4, 5, and 7, as follows.

Part 4 – Labeling and advertising of wine

Paragraph 1. The authority citation for 27 CFR Part 4 is amended to read as follows:

AUTHORITY: 26 USC § 5368 and 27 USC § 205, unless otherwise noted.

Paragraph 2. ATF amends § 4.39 by inserting a new paragraph (n) to prohibit misleading containers, to read as follows:

§ 4.39 Prohibited practices.

* * * * *

(n) *Misleading bottles or containers.* Any container of wine (as defined in § 24.10 of this chapter) that,

by virtue of the material from which it is composed or by its shape or design, or that by its ordinary and customary use is likely to mislead the consumer as to the alcohol character of the product, is prohibited. Such containers that are likely to be identified or perceived by consumers as conveying a non-alcohol product will be considered misleading, unless the Director determines that the information on the label adequately dispels any misleading impression.

Paragraph 3. ATF amends § 4.73 by inserting a new paragraph (d) to provide that the standards of fill authorized by paragraph (a) may not be satisfied by an aggregation of multiple containers into a single unit, to read as follows:

§ 4.73 Metric standards of fill.

* * * * *

(d) The standards of fill prescribed in paragraph (a) apply to the container in direct contact with the wine and may not be satisfied by an aggregation of multiple containers into a single unit.

Part 5 – Labeling and advertising of distilled spirits

Paragraph 4. The authority citation for 27 CFR Part 5 continues to read as follows:

AUTHORITY: 26 USC §§ 5301, 7805, 27 USC § 205.

Paragraph 5. ATF amends § 5.42 by inserting a new paragraph (c) to prohibit misleading containers, to read as follows:

§ 5.42 Prohibited practices.

* * * * *

(c) *Misleading bottles or containers.* Any container that, by virtue of the material from which it is composed or by its shape or design, or that by its ordinary and customary use is likely to mislead the consumer as to the alcohol character of the product, is prohibited. Containers that are likely to be identified or perceived by consumers as conveying a non-alcohol product will be considered misleading, unless the Director determines that the information on the label adequately dispels any misleading impression.

Paragraph 6. ATF amends §5.47a by inserting a new subparagraph (3) under paragraph (a) to provide that the standards of fill authorized by paragraph (a) may not be satisfied by an aggregation of multiple containers into a single unit, to read as follows:

§ 5.47a Metric standards of fill (distilled spirits bottled after December 31, 1979).

* * * * *

(3) The standards of fill prescribed in paragraphs (a)(1) and (a)(2) apply to the container in direct contact with the distilled spirits and may not be satisfied by an aggregation of multiple smaller containers into a single unit.

Part 7 – Labeling and advertising of malt beverages

Paragraph 7. The authority citation for 27 CFR Part 7 continues to read as follows:

AUTHORITY: 27 USC § 205.

Paragraph 8. ATF amends § 7.29 by inserting a new subparagraph (i) to prohibit misleading containers, to read as follows:

§ 7.29 Prohibited practices.

* * * * *

(i) *Misleading bottles or containers.* Any container that, by virtue of the material from which it is composed or by its shape or design, or that by its ordinary and customary use is likely to mislead the consumer as to the alcohol character of the product, is prohibited.

Containers that are likely to be identified or perceived by consumers as conveying a non-alcohol product will be considered misleading, unless the Director determines that the information on the label adequately dispels any misleading impression.

Signed:

Director

Approved:

Deputy Assistant Secretary (Regulatory, Tariff and Trade Enforcement)