

Species/Class	Amount fenbendazole	Indications for use	Limitations	Sponsor
(iii) Rocky mountain big-horn sheep (<i>Ovis c. canadensis</i>).	10 mg/kg/day for 3 days..	For the removal and control of <i>Protostrongylus</i> spp.	Use as complete feed. Prior withdrawal of feed or water is not necessary. Retreatment may be required in 6 weeks. Do not use 14 days before or during the hunting season.	057926

Dated: November 9, 2001.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.

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DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Parts 4, 19, 24, 194, 250 and 251

[T.D. ATF-470 RE: T.D. ATF-398, Notice No. 859, Notice No. 869, T.D. ATF-418, Notice No. 881 and T.D. ATF-430]

RIN 1512-AB71

Hard Cider, Semi-Generic Wine Designations, and Wholesale Liquor Dealers' Signs (97-2523)

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

ACTION: Final rule (Treasury decision).

SUMMARY: This rule finalizes temporary regulations related to semi-generic designations on wine labels and wholesale liquor dealers' signs. This rule also finalizes some of the temporary regulations concerning hard cider, and amends others.

DATES: *Effective date:* January 25, 2002.

Compliance date: Compliance with the amendments to hard cider labeling requirements in 27 CFR 4.21 and 24.257(a) is not mandatory until May 27, 2002.

FOR FURTHER INFORMATION CONTACT: Marjorie D. Ruhf, Regulations Division, 650 Massachusetts Avenue, NW., Washington, DC 20226; (202) 927-8202; or mdruhf@atfhq.atf.treas.gov.

SUPPLEMENTARY INFORMATION:

Background

This final rule implements some of the provisions of the Taxpayer Relief Act of 1997, Pub. L. 105-34, specifically the sections that amended the Internal Revenue Code (26 U.S.C., "the IRC") to:

—Create a wine excise tax category for hard cider (sec. 908),

—List semi-generic designations for wine (sec. 910), and

—Repeal the requirement for wholesale dealers in liquors to post signs (sec. 1415).

The definition of hard cider in Public Law 105-34 was amended by section 6009 of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, as we will discuss later.

On August 21, 1998, ATF issued a temporary rule, T.D. ATF-398 (63 FR 44779), to implement various sections of Public Law 105-34. On the same day, ATF issued a notice of proposed rulemaking, Notice No. 859 (63 FR 44819), inviting comments on this temporary rule for a 60 day period. In response to requests from the industry, ATF reopened the comment period for an additional 30 days on November 6, 1998, by Notice No. 869 (63 FR 59921). We will discuss our proposals, the public comments, and our decisions below.

Temporary Rule, Comments and Decision on Semi-generic Designations

Section 910 of Public Law 105-34 amended 26 U.S.C. 5388 by adding a new subsection (c), Use of semi-generic designations, which generally parallels the language of 27 CFR 4.24 on the same subject, but places the existing list of semi-generic designations outside the discretion of the Secretary.

Since the IRC regulations concerning wine labeling appear in 27 CFR 24.257, we amended that regulation to incorporate the wording of 26 U.S.C. 5388, concerning the use of semi-generic wine designations. Additionally, we incorporated the standards of identity for wines under 27 U.S.C. 205 by reference in this section. Finally, we placed a cross-reference to this new rule in § 4.24.

Since the rules for use of semi-generic designations have been made part of the IRC, the rules apply to all wines, including wines that contain less than 7 percent alcohol by volume and to wines sold only in intrastate commerce.

The use of semi-generic designations on wine labels was the subject of two comments. Peter M. Brody of Ropes & Gray, writing on behalf of the Institut National des Appellations d'Origine (INAO) objected to "entrenching" the

U.S. policy of allowing use of the names champagne, chablis, burgundy and sauternes, on wines made outside France. Jean-Christophe Paille, Counselor for Agriculture of the Ambassade de France aux Etats-Unis, made the same objection. However, these objections were to the underlying statute and not to the regulatory changes made as a result. Therefore, we are adopting the language of the temporary rule in this final regulation.

Temporary Rule, Comments and Decision on Wholesale Dealers' Signs

Section 1415 of Public Law 105-34 repealed the requirement for wholesale dealers in liquor to post signs identifying their premises and made conforming changes to sections of the law which referenced that requirement. In the temporary rule, ATF amended the Liquor Dealers' regulations by removing §§ 194.239 through 194.241, which relate to this requirement. This change received no comments, so we are adopting the language of the temporary rule in this final regulation.

Hard Cider

The Taxpayer Relief Act of 1997, Pub. L. 105-34, was enacted on August 5, 1997. Section 908 added a new tax class (6) for wine, called "hard cider," to 26 U.S.C. 5041 and imposed a new rate of tax on hard cider as follows:

On hard cider [which is a still wine] derived primarily from apples or apple concentrate and water, containing no other fruit product, and containing at least one-half of 1 percent and less than 7 percent alcohol by volume, 22.6 cents per wine gallon.

The phrase in brackets was added by section 6009 of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, enacted July 22, 1998, and effective as if it were part of Pub. L. 105-34.

In the temporary rule, ATF added a definition of hard cider to the wine regulations and made other changes to the wine production and labeling regulations. In associated Notice Number 859, ATF invited comments on the definition of hard cider established in the temporary rule. We noted there were numerous traditional ways of making fermented cider, some of which

may not fit the definition of hard cider provided in the temporary rule. We invited comments, including citations of standard references on cider making, on whether adjustments to the definition of hard cider are warranted.

The portion of the temporary rule related to cider generated 48 comments on our definition of cider and the labeling rules. In particular, many commenters expressed concern that the labeling rules for hard cider in T.D. ATF-398 did not allow appropriate designation of their products. Therefore, on September 27, 1999, ATF published T.D. ATF-418 (64 FR 51896) postponing the labeling compliance date for the rules in T.D. ATF-398 for one year. At the same time, we published Notice No. 881 (64 FR 51933) to solicit comments on alternative labeling rules. ATF subsequently published T.D. ATF-430 (65 FR 57734) postponing the labeling compliance date until January 31, 2001. Our proposals and the public comments on both the original temporary rule and the later notice related only to labeling will be summarized and discussed below as background for this final rule.

Tax Rate and Credit Information: Temporary Rule, Comments and Decisions

Public Law 105-34 created a new tax rate that applied to hard cider removed

from bond on or after October 1, 1997. This law also amended the small producer's wine tax credit allowed by 26 U.S.C. 5041(c) to provide for a 5.6 cent credit on hard cider removed by small producers. This credit has the effect of reducing the net tax paid on hard cider by a small domestic producer to 17 cents, the equivalent of the lowest tax available to domestic producers for still wine under 14 percent alcohol by volume (\$1.07 tax less \$0.90 credit). As with the full 90 cent credit applicable to other wines, the hard cider credit of 5.6 cents per gallon is reduced by 1 percent (\$.00056 per gallon) for each thousand gallons of wine over 150,000 gallons which are produced in a year. The full tax rate is reached at the 250,000 gallon annual production level. We amended 27 CFR 24.278, which implements the tax credit for small domestic producers, to reflect the change.

Commenter Jeffrey House of California Cider Company, Inc. noted that "Hard cider is marketed like beer and merchandised next to beer. It is fermented like wine but at less than half the volume of alcohol. It is unfair and illogical that a small beer producer is allowed up to 1.8 million gallons before a new tax bracket and a cider mill that produces * * * hard apple/pear cider is only allowed 100,000 before a very substantial tax change."

Mr. House correctly notes that the reduced tax rate for small domestic brewers applies to the first 60,000 31-gallon barrels per year (1.86 million gallons), whereas the small domestic wine producer's tax credit applies only to the first 100,000 gallons per year. Mr. House's comment relates to a distinction that exists in the law, so we are unable to change the regulations. No other comments related directly to either the tax rate or the credit provisions, so we are adopting these provisions in the final rule without any change.

Changes Related To Wine and Flavor Credit: Temporary Rule, Comments and Decisions

In T.D. ATF-398, we rewrote the regulations related to the wine and flavor credit allowed against distilled spirits tax under 26 U.S.C. 5010. We made these changes to clarify that the new still wine category of hard cider was not eligible for the wine and flavor credit. No comments were received on these changes, so they are adopted in the final rule.

Definition of Hard Cider

ATF took the statutory definition of "hard cider" eligible for the new tax rate and placed it in the regulations. We added detail and clarification as follows:

26 U.S.C.5041(b)(6)	Temporary 27 CFR 24.10 "hard cider"
a still wine derived primarily from apples or apple concentrate and water.	(same) primarily from apples or apple concentrate and water (apple juice, or the equivalent amount of concentrate reconstituted to the original brix of the juice prior to concentration, must represent more than 50 percent of the volume of the finished product)
containing no other fruit product	containing no other fruit product nor any artificial product which imparts a fruit flavor other than apple
containing at least one-half of 1 percent and less than 7 percent alcohol by volume.	(same)
(no provision)	having the taste, aroma, and characteristics generally attributed to hard cider, and sold or offered for sale as hard cider and not as a substitute for any other alcohol product.

Each element of the regulatory definition was the subject of comment.

Ten commenters, all distributors of cider and other alcohol beverages, specifically advocated adopting the Washington State definition of cider, which they quoted as:

Hard cider means table wine that contains not less than one-half of one percent of alcohol by volume and not more than seven percent of alcohol by volume and is made from normal alcoholic fermentation of the juice of sound ripe apples and pears. Hard cider includes, but is not limited to flavored, sparkling, or carbonated cider and cider from condensed apple or pear must.

Other commenters addressed only specific elements of the definition. We

will summarize the comments and our decision for each element separately.

"Still"—Temporary Rule, Comments and Decision

First, the regulatory definition specifies that hard cider is a still wine, as stated in 26 U.S.C. 5041(b)(6). The commenters supporting ATF adoption of similar rules to the Washington State definition noted that it allowed carbonation of cider. In addition, e-mail commenter Dan Burick expressed support for a modest amount of carbonation in hard cider, equivalent to the carbonation in microbrews. ATF is precluded from even considering such a change, since the statute limits the application of the hard cider tax rate to

still wine. In this final rule, we continue to specify that hard cider is a still wine. The law defines still wine as wine that contains not more than 0.392 gram of carbon dioxide per hundred milliliters of wine.

"Primarily from Apples"—Temporary Rule, Comments and Decision

We interpreted the statutory phrase "derived primarily from apples or apple concentrate and water" to mean that apple juice, or the equivalent amount of concentrate reconstituted to the original brix of the juice prior to concentration, must represent more than 50 percent of the volume of the finished product. We note the Washington State definition, supported by ten commenters, does not

contain a requirement for a minimum percentage of apple juice, as we did in our temporary rule. When we set a threshold for apple juice content as part of the regulatory definition of hard cider, we did so in an effort to implement the statutory requirement that hard cider be made "primarily from apples." Although one commenter stated that he believed 95% apple juice should be the minimum, we recognize that one traditional method of making hard cider involves diluting apple wine (approximately 12% alcohol) with juice, concentrate and water, or other non-alcoholic ingredients to a final strength of 6 to 7 % alcohol. We also consulted dictionary definitions of the word "primarily", which yielded synonyms such as "mainly" "chiefly," and "for the most part."

Several other commenters objected to any use of concentrate in production of hard cider; however, the statutory definition of hard cider specifically allows the use of concentrate. In all other wine regulations, reconstituted concentrate is treated the same as unconcentrated juice.

Several commenters stated that 50% was too high a requirement for apple juice. Nicholas Bradstock of the UK National Association of Cider Makers, stated that a "parallel exists with beer where the characterising ingredient is malt, but the malt levels may often be at less than 50% of the extract material in beer."

In view of the comments on both sides of the question, we consulted the legislative history. When they introduced S. 475, the bill that eventually became the hard cider tax, Senator James Jeffords of Vermont noted it was "designed to increase opportunities for the apple industry in the United States," and Senator Patrick Leahy of Vermont noted he had "received letters from officials at state agriculture departments from across the nation—Arizona, Connecticut, Georgia, Maine, Massachusetts, New Hampshire, New York, Pennsylvania, Vermont and Virginia—supporting the taxing of draft cider at the beer rate because this change would allow apple farmers in their States to reap the benefits of an expanded culled apple market." That expressed intent, together with the choice of the word "primarily" in the version of the law that was finally enacted, leads us to adopt the definition of "primarily" in the temporary rule, unchanged, in this document.

"Containing No Other Fruit Product" "Temporary Rule, Comments and Decision

The Act defined hard cider as "containing no other fruit product." In the regulatory definition, ATF interpreted that to mean, "containing no other fruit product nor any artificial product which imparts a fruit flavor other than apple." In the accompanying notice, we acknowledged that some cider makers were experimenting with apple ciders flavored with other fruits, much as craft brewers experiment with different ingredients, including fruit. However, the statutory language expressly precludes the addition of any other fruit product to hard cider.

The Washington State definition recommended as a model by ten commenters allows apple or pear juice as a base and includes flavored cider. In addition to those commenters, 21 commenters stated they believed fruit flavors should be allowed in hard cider. One commenter, Cheryl Lau, of Transportation, Inc., submitted letters from Senators James Jeffords and Patrick Leahy of Vermont and Representative Richard Neal of Massachusetts, all of whom sponsored bills to allow cider its own tax rate, and from former Senator Bob Dole. These letters were originally sent to ATF before the issuance of the temporary rule. In response to the publication of the temporary rule and the associated notice, we also received comments concerning flavored cider from Senator Harry Reid of Nevada and Representative Michael D. Crapo of Idaho. These legislators expressed concern that ATF was too restrictive in its interpretation of the statute. They stated that they believed a fermented apple cider could contain a minor amount of some other fruit flavor yet retain its cider character and remain eligible for the hard cider tax rate. Senators Jeffords and Leahy, in the April 23, 1998, letter submitted by Ms. Lau, said they "hope [ATF] will adopt a definition of 'hard cider' which does not bar the addition of post-fermentation fruit flavorings." Representative Crapo expressed concern on behalf of American cidemakers because he believed ATF's regulatory definition of hard cider would favor imports of traditional all-apple cider at the expense of the vitality of the American industry. He notes that the restrictive definition of cider "is at odds with the historical nature of cidemaking in the U.S." He cites the book *The Art of Cider Making* by Paul Correnty, as an example: "Raspberries have always held a special place in the cellars and casks of cidemakers." We

did not receive any comments from legislators expressing the opposite view.

Other commenters who favor allowing fruit flavors in hard cider included cidemakers, distributors, a State legislator (Don Perata of the California Assembly), and a publisher (Thomas E. Dalldorf, Sr. of Celebrator Beer News). Mr. Dalldorf noted the omission of fruit flavored ciders "would adversely affect producers and consumers alike." Some of the producers and distributors commenting on this issue noted that cider has the same alcohol content as beer and is generally marketed in competition with beer. Fruit-flavored beers are taxed at the same rate as conventional beers (\$0.584 per gallon), yet if cider producers add flavors to their cider, their tax would rise from \$0.226 to the "table wine" rate (\$1.07 per gallon).

Other commenters did not discuss fruit flavors in general, but said they believed some pear juice should be allowed in cider. Jean-Christophe Paille, Counselor for Agriculture of the Ambassade de France aux Etats-Unis, noted that French regulations authorize the use of pear must in apple cider "for purpose of gustative quality." Nicholas Bradstock of the National Association of Cider Makers (NACM, representing UK cider makers) and Jeffrey House of California Cider Company expressed the view that perry (wine derived from pears) should be given equal tax treatment with cider since the two products are so similar. Only one commenter, Brian Black of Black & Fagan Cider Co., supported the complete prohibition on other fruit flavors, saying "wine coolers exist for that category." Representative Neal, in his March 17, 1998, letter to ATF, supported the idea of fruit flavored ciders, but noted the need for a distinction between an eligible product marketed as cider and ineligible products marketed as "a fruit flavored wine cooler which was produced with an apple wine base."

Although the law specified "no other fruit product," ATF interpreted this to mean no artificial fruit flavors, either. Our basis for making that decision was the legislative history of the Taxpayer Relief Act of 1997, Public Law 105-34, contained in the General Explanation of Tax Legislation Enacted in 1997 (the "Blue Book") published by the Joint Committee (JCS-23-97, Government Printing Office ISBN 0-16-055897-2), which said,

Once fermented, eligible hard cider may not be altered by the addition of other fruit juices, flavor, or other ingredient that alters the flavor that results from the fermentation process. Thus, for example, cider fermented

from apples, but which has raspberry flavor added to it prior to bottling and marketing to the public, will not be eligible for the 22.6 cents-per-gallon tax rate.

Further, we do not believe it was Congress's intent to provide a tax incentive for use of artificial ingredients in preference to real ones.

Finally, H.P. Bulmer North America suggested, in its comment, that ATF has the authority to make a *de minimis* rule that would allow a small amount of fruit flavor in hard cider. They cited court cases recognizing administrative discretion inherent in a statutory scheme to allow *de minimis* rules despite the absence of such an allowance in the statute, and to allow a *de minimis* maximum in accordance with congressional intent even when the statute is absolute.

In the present case, ATF does not have discretion to set *de minimis* exceptions to the statutory definition of hard cider, which proscribes the use of any fruit product other than apples. First, the Blue Book reveals Congress' expressed intent to limit the fruit component of hard cider to apples as reflected in its statement that hard cider must be "fermented solely from apples or apple concentrate and water, containing no other fruit product" and that post fermentation processing may not include the addition of other fruit juices or flavors prior to bottling and still be eligible for the 22.6 cents-per-gallon rate. In addition, when Congress revisited the hard cider provisions in Public Law 105-206, the Internal Revenue Service Restructuring and Reform Act, it declined to allow other fruit products despite the fact that this very issue had been raised. These factors present a statutory scheme indicating that Congress intended that hard cider would not be composed of any fruit product other than apples. Finally, we note that the examples cited in the Bulmer comment differ from our situation in that the fruit flavorings, while small as a percentage of the total product, would change the character of the product enough so that the product would be described as, for instance, "raspberry flavored apple cider," and not "apple cider." We are adopting this part of the temporary rule without change.

Other Flavors in Hard Cider

Mr. House expressed concern that his cyser (apple cider mixed with honey) or his mulled cider (flavored with spices) might not be eligible for the hard cider tax rate. Flavoring materials will only affect the tax classification of hard cider if they are derived from or impart the flavor of a fruit other than apple.

Products that are otherwise eligible for the hard cider tax rate may be flavored with honey or spices, to use Mr. House's examples, without affecting the tax. We did not make any regulatory changes related to this question.

Wine Treating Materials

Although we did not address other wine ingredients in the regulatory language of the temporary rule, we asked in the notice if the prohibition on "other fruit products" should be interpreted to restrict use of authorized wine treating materials or sugars that were derived from fruits other than apple. We noted that some wine treating materials, such as tannin or citric acid, may be derived from fruit other than apples. Mr. Daniels of Green Mountain Cidery, Stephen Swift, Export Manager of Matthew Clark Brands, Ltd., Paul Thorpe of E. & J. Gallo Winery and Mr. Bradstock of NACM, expressed support for continued acceptance of citric acid and sugars as wine treating materials and not as fruit additives. Mr. Thorpe noted that, despite their names, "citric" acid and "fructose" sugar may be derived from sources other than fruit. Scott Benson, an independent cider distributor, said he thought if fruit flavored ciders were not eligible for the cider tax rate, then citric acid and fruit derived sugars should not be allowed in cider, either. After reviewing these comments, we have decided not to restrict the use of approved wine treating materials in cider. We believe it would be impractical to make a distinction between fruit derived wine treating materials and the same materials derived from other sources, unless there were other circumstances that indicated the producer was using these materials as flavorings. Used as directed in 27 CFR part 24, authorized wine treating materials would not impart a fruit flavor to wine. However, we note that some ciders are made under approved formulas rather than under the rules for production of natural wine in subparts F and L of part 24. In approving such formulas, ATF may allow the use of wine treating materials at a level beyond the amount necessary to stabilize or adjust the acidity of a natural wine. While there is no limit on the amount of wine treating materials that may be used in a formula wine, hard cider may not contain treating materials in amounts sufficient to impart a fruit flavor other than apple and still be taxed as hard cider. For example, if a cider contained more citric acid than the amount allowed under subpart L, and was labeled as "citrus flavored," the product would be classified for tax purposes as a still wine

under 14% alcohol by volume rather than a hard cider. As we will discuss in more detail in the background material on labeling, we will allow the use of the term "hard cider" on labels of products that do not belong to the "hard cider" tax class, as long as other information on the label allows us to determine the tax class.

Alcohol Content: Temporary Rule, Comment and Decision

ATF's regulatory definition of hard cider included the phrase "containing at least one-half of 1 percent and less than 7 percent alcohol by volume." This portion of the definition comes directly from the law. Commenter Greg Kushmerek, who identified himself as someone who has made hard cider in the past, noted it would be difficult for a small producer or hobbyist to control fermentation to prevent the cider from exceeding 7% abv. The "less than 7 percent" limit was imposed by statute. Home winemakers may produce any type of wine, subject to the limitations in 24.75, Wine for personal or family use, so they will not be affected by the 7% alcohol limit for hard cider. For commercial producers, the tolerances as to alcohol content already in wine regulations at 24.257 will apply to cider as well. This portion of the definition is adopted without change from the temporary rule.

"Characteristics Generally Attributed To Hard Cider"—Temporary Rule, Comments and Decision

ATF concluded the definition by stating that hard cider must have the taste, aroma and characteristics generally attributed to hard cider, and that it must be sold or offered for sale as hard cider. In its comment, Green Mountain Cidery noted that "there are currently no agreed subjective taste, aroma or characteristic' profiles within the industry for cider." We recognize that hard cider may be made and presented a number of different ways. The limitations were added to insure that products eligible for the hard cider tax rate would not be confused with other types of beverages that are subject to different tax rates, such as malt-based "coolers."

Conclusions on Definition of Hard Cider

Senator Leahy, when he introduced S. 475, said,

Draft cider is one of the oldest categories of alcoholic beverages in North America. Back in Colonial times, nearly every innkeeper served draft cider to his or her patrons during the long winter. In fact, through the 19th Century, beer and draft cider sold equally in the United States.

Recently, draft cider has made a comeback in the United States and around the world. Our tax law, however, unfairly taxes draft cider at a much higher rate than beer despite the two beverages sharing the same alcohol level and consumer market. This tax treatment, I believe, creates an artificial barrier to the growth of draft cider. Our legislation will correct this inequity.

In his comment on the temporary rule, Richard G. Burge of Wyder's Cider said, "We fail to understand how it is that our hard ciders will not only be unable to enjoy the lower tax rate, but will also be completely shut out of the very product category that we helped to establish * * *. We believe the rules should promote the category, not choke it * * *."

The exact wording of the law precludes ATF from making the changes in the definition requested by so many commenters.

Labeling of Hard Cider—Temporary Rule, Revised Notice, Comments and Decision

In T.D. ATF-398, ATF added temporary regulations for labeling hard cider. We changed both the IRC and the Federal Alcohol Administration (FAA) Act labeling rules to require use of the term "hard cider" on products that are taxable as hard cider, and prohibit use of that term on any other wine. We set a compliance date of February 17, 1999 (six months after publication), to allow time for producers to change labels to comply with the temporary rule. In associated Notice No. 859, ATF requested comments on the labeling rules. The comments we received on the labeling portion of our temporary rule indicated that we had imposed an unintended and unnecessary burden.

We learned there are producers who make ciders that are not eligible for the new tax rate, but who have been using the term "hard cider" to describe their products. Their products include apple wines containing 7 percent or more alcohol by volume and ciders that contain less than 7 percent alcohol by volume with other fruit flavors. Since such products are excluded from the definition of hard cider, we said in the temporary rule they were not entitled to be called "hard cider" on labels. The producers and other interested persons expressed concern that the temporary rule would create consumer confusion, since the word "hard" suggests "hard liquor" or higher alcohol content, rather than the meaning we gave it. Some producers of wines eligible for the hard cider tax rate stated they prefer to use a phrase like "draft cider" or "fermented cider" on their labels and in their marketing, for the same reason.

ATF based the requirement in the temporary rule on 26 U.S.C. 5368(b), which gives the Secretary of the Treasury general authority to issue labeling regulations that require evidence of compliance with tax rules. The Secretary of the Treasury also has authority under the FAA Act, 27 U.S.C. 205(e), to prescribe regulations to insure that wines with 7 percent alcohol by volume or more are labeled or marked to " * * * provide the consumer with adequate information as to the identity and quality of the products * * *"

When we drafted the hard cider labeling sections of the temporary rule, we did not intend to cause a hardship for the industry or consumers. We intended to maintain the current system of identifying the tax class of wine by information on the label. The function of ATF's marking requirement is to insure proper identification of the wine for tax purposes, and to inform consumers of the identity of the product. From the comments, we saw that the term "hard cider" has broader meaning in the industry and among consumers than the definition given in the regulations.

In light of these comments, we reviewed our need for tax identification on the labels of wines. Although much of our work takes place on wine premises where supplemental information is available to establish the tax rate of a given lot of wine, we believe there are times when we must be able to tell the tax rate by looking at the label alone. However, we believed it would be possible to meet our tax identification needs and still allow greater flexibility for the industry. On September 27, 1999, we issued T.D. ATF-418 (64 FR 51896) to postpone the effective date of the cider labeling rules until September 27, 2000, and associated Notice No. 881 (64 FR 51933) proposing alternative labeling rules and requesting public comments.

Specifically, we proposed to remove the amendment we made to § 4.21(e)(5) of the FAA Act wine labeling regulations. Part 4 only applies to wines that contain 7%–24% alcohol by volume. As amended, that section prohibited the use of the term "hard cider" on any wine with 7% or more alcohol by volume. We intended to avoid confusion between these higher alcohol wines and wines in the new hard cider tax class by this prohibition. After reviewing the comments, we find this precaution unnecessary. We believe, since hard cider with 7% or more alcohol by volume will be marked with the alcohol content, it will be easy to distinguish the product from a lower-alcohol hard cider eligible for the hard

cider tax rate. Therefore, we will allow use of the term "hard cider" on products over 7% alcohol by volume. Second, we are amending the IRC marking requirements in part 24. When the new tax class of hard cider was established, we amended the labeling rules to substitute the phrase "hard cider" for the word "wine" to identify the tax class. On IRC wine labels, no single item of information gives the tax class. On conventional wines, the word "wine" and the alcohol content (modified by the word "carbonated" or "sparkling" if either applies) identify the tax class.

For products under 7% alcohol by volume, we want to differentiate between ciders which are eligible for the hard cider tax rate and those which are taxable as still wine containing not more than 14% alcohol by volume. Some producers have marketed eligible products as "draft cider," "fermented cider" or "apple cider" and do not wish to use the term "hard cider" on labels. Some producers have marketed mixed-fruit ciders or low-alcohol ciders that are otherwise excluded from the current definition of hard cider under the name "hard cider" and do not wish to rename their products.

Other commenters asked questions that indicated labeling requirements were not clear in the temporary rule:

—Does ATF require that the words "hard cider" must be inserted in the brand name?

—Where on the label must the required information appear?

—What size type should be used for the required information?

—Do the FAA Act labeling rules and standards of fill apply to hard cider?

To address these concerns, we proposed several changes to 27 CFR 24.257. First, we proposed to adopt the minimum and maximum type size requirements of 27 CFR 4.38 because they are already in use by the wine industry for higher alcohol products. We did not propose to specify placement of information required in § 24.257. Products with 7 percent or more alcohol by volume will still be subject to the FAA Act rules covering placement.

We proposed to remove the requirement that the word "wine" or the words "carbonated wine" must be "part of the brand name or in a phrase in direct conjunction with the brand name." Information on the kind of wine may be anywhere on the label. We also proposed to add some alternative labeling terms to reflect the industry practice of calling products "cider" instead of "wine" on these labels. We did not propose to require or restrict the

use of words such as “draft”, “fermented” or “hard” to identify products in the tax class of hard cider. We proposed, where the words on the label leave doubt as to the tax class, that cider makers must include a reference to the tax class by section of the law. For example, hard cider must contain more than 50 percent apple juice. If a cider contains less than 50 percent apple juice, it is taxed as a still wine under 14 percent alcohol by volume, but it may still be called cider. In order to make it clear that this cider is taxed at \$1.07 instead of \$0.226, we will require that the label show “tax class 5041(b)(1) IRC” or an equivalent phrase. This wording is similar to the wording of 27 CFR 25.242, on marking nontaxable cereal beverages. We requested industry and consumer comments on these proposals.

In response to Notice No. 881, ATF received four comments. Roger Daniels of Green Mountain Cider wrote to support the proposed changes, but objected to use of specific examples in the proposed rule that used the temporary rule’s definition of hard cider, which they believe should be changed. Since we have not changed the definition, we have retained the examples. Mr. Daniels also reiterated his request that we clarify when FAA Act labeling rules apply and when they do not. We have amended the final rule to include this information. We have also added a reference to the Health Warning Statement, which is required for any alcohol beverage over ½ percent alcohol, including cider. Richard G. Burge of Wyder’s Cider supported our proposal to allow more open use of the word cider, but objected to our proposal that the tax class should be added to the label. He said the added tax information “is not meaningful to the consumer and can be confusing.” Mr. Bradstock of NACM said: “Ciders qualifying as Hard Cider for tax purposes might be described in other terms, * * * and if the tax class is not clear from the manner of labelling [sic] then this might be confirmed by quoting the tax class on the label * * * with or without a supplementary declaration of hard cider.” Stephen Swift of Matthew Clark Brands, Ltd., a cider maker from the U.K., wrote to express support for the NACM comment.

All the commenters supported ATF’s proposal to allow more flexibility in naming hard cider and related products. Three of the four also accepted ATF’s suggestion to supplement the product name with the IRC quote when the name and alcohol content alone do not give enough information to establish the tax class.

In response to Mr. Burge’s objection to the use of the IRC cite as tax class identification, it is our responsibility under the Internal Revenue Code to identify taxable commodities and collect the tax. We have revised the requirement for the law cite to emphasize that it only applies in cases where it is impossible to identify the tax class from existing label information. In the notice, we requested suggestions for other ways of identifying the tax class, and received no suggestions. We have decided to adopt the proposed changes in this final rule with the revisions noted.

Conforming Changes on Hard Cider

We amended the definition of “eligible wine” that appears in parts 19, 250 and 251 to clarify that wine in the new tax category of hard cider is not eligible for wine and flavor credit if used in a distilled spirits product. We did not receive any comments on this change, so amendments to 27 CFR 19.11, 250.11 and 251.11 in the temporary rule are adopted in this final rule without change.

Transition to New Rules

While the labeling changes in this final rule are effective 60 days after publication in the **Federal Register** for new labels, we recognize that it is not practical to enforce the new requirements immediately for products already on the market. Therefore, we will allow a six-month period to change labels as necessary. The new requirements will become mandatory six months after publication in the **Federal Register**.

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. Moreover, any revenue effects of this rulemaking on small businesses flow directly from the underlying statute. Likewise, any secondary or incidental effects, and any reporting, recordkeeping, or other compliance burdens flow directly from the statute. Pursuant to 26 U.S.C. 7805(f), the temporary regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business. That office did not comment on the regulation.

Nine commenters mentioned potential economic harm coming from the exclusion of fruit flavored ciders from the tax category “hard cider.” As noted earlier, we believe the wording of the statute does not allow for any other

interpretation, thus, any economic effects flow directly from the statute.

Executive Order 12866

It has been determined that this temporary rule is not a significant regulatory action as defined by Executive Order 12866. Therefore, a regulatory assessment is not required.

Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) and its implementing regulations, 5 CFR part 1320, do not apply to this final rule because no new collection of information is contained in these regulations. Some of the amended regulatory sections contain collections of information that were previously approved by the Office of Management and Budget (OMB). Although these sections are being amended, the changes are not substantive or material.

Drafting Information

Marjorie Ruhf, of the Regulations Division, Bureau of Alcohol, Tobacco and Firearms, drafted this document. Other personnel of ATF and the Treasury Department participated in developing the document.

List of Subjects

27 CFR Part 4

Advertising, Consumer protection, Customs duties and inspection, Imports, Labeling, Packaging and containers, Wine.

27 CFR Part 24

Administrative practice and procedure, Authority delegations, Claims, Electronic fund transfers, Excise taxes, Exports, Food additives, Fruit juices, Labeling, Liquors, Packaging and containers, Reporting and recordkeeping requirements, Research, Scientific equipment, Spices and flavoring, Surety bonds, Taxpaid wine bottling house, Transportation, Vinegar, Warehouses, Wine.

Authority and Issuance

Accordingly, the temporary rule amending chapter I of title 27, Code of Federal Regulations, which was published at 63 FR 44779, August 21, 1998, is adopted as a final rule with the following changes:

PART 4—LABELING AND ADVERTISING OF WINE

Par. 1. The authority citation for 27 CFR part 4 continues to read as follows:

Authority: 27 U.S.C. 205, unless otherwise noted.

Par. 2. Section 4.21 is amended by revising the third sentence of paragraph (e)(5) to read as follows:

§ 4.21 The standards of identity.

* * * * *

(e) Class 5; fruit wine * * *
(5) * * * Fruit wines which are derived wholly (except for sugar, water, or added alcohol) from apples or pears may be designated "cider" and "perry," respectively, and shall be so designated if lacking in vinous taste, aroma, and characteristics. * * *

* * * * *

PART 24—WINE

Par. 3. The authority citation for 27 CFR part 24 continues to read as follows:

Authority: 5 U.S.C. 552(a); 26 U.S.C. 5001, 5008, 5041, 5042, 5044, 5061, 5062, 5081, 5111-5113, 5121, 5122, 5142, 5143, 5173, 5206, 5214, 5215, 5351, 5353, 5354, 5356, 5357, 5361, 5362, 5364-5373, 5381-5388, 5391, 5392, 5511, 5551, 5552, 5661, 5662, 5684, 6065, 6091, 6109, 6301, 6302, 6311, 6651, 6676, 7011, 7302, 7342, 7502, 7503, 7606, 7805, 7851; 31 U.S.C. 9301, 9303, 9304, 9306.

Par. 4. Section 24.4 is amended by adding a reference to part 16 between the references to parts 9 and 18, to read as follows:

§ 24.4 Related Regulations.

* * * * *

27 CFR Part 16—Alcoholic Beverage Health Warning Statement

* * * * *

Par. 5. Section 24.257 is amended by revising paragraph (a) to read as follows:

§ 24.257 Labeling wine containers.

(a) The proprietor must label each bottle or other container of beverage wine prior to removal for consumption or sale. The minimum type size for information required by this section is: 2 millimeters for containers of more than 187 milliliters and 1 millimeter for containers of 187 milliliters or less. The maximum type size for alcohol content statements is 3 millimeters unless the container is larger than 5 liters. The label must be securely affixed and show:

(1) The name and address of the wine premises where bottled or packed;

(2) The brand name, if different from above;

(3) The alcohol content as percent by volume or the alcohol content stated in accordance with 27 CFR part 4. For wine with less than 7 percent alcohol by volume stated on the label there is allowed an alcohol content tolerance of plus or minus .75 percent by volume; and

(4) The kind of wine, shown as follows:

(i) If the wine contains 7 percent or more alcohol by volume and must have label approval under 27 CFR part 4, the kind of wine is the class, type, or other designation provided in that part.

(ii) If the wine has an exemption from label approval, an adequate statement of composition may be used instead of the class and type in 27 CFR part 4.

(iii) If the wine contains less than 7 percent alcohol by volume, an adequate statement of composition may be used instead of the class and type in 27 CFR part 4. The rules in 27 CFR part 4 pertaining to label approval and standards of fill do not apply to wine under 7 percent alcohol by volume. The rules in 27 CFR part 16 requiring a Health Warning Statement do apply to all wines over 1/2 percent alcohol. Except for the rules noted in this section, labeling of wines under 7 percent alcohol is under the jurisdiction of the Food and Drug Administration.

(iv) The statement of composition must include enough information to identify the tax class when viewed with the alcohol content. First, the wine should be identified by the word "wine," "mead," "cider" or "perry," as applicable. If the wine contains more than 0.392 grams of carbon dioxide per 100 milliliters, the word "sparkling" or "carbonated," as applicable, must be included in the statement of composition. If the statement of composition leaves doubt as to the tax class of the wine, the wine must be marked "tax class 5041(b)(1) IRC" or an equivalent phrase. For example, a still wine marked "wine" and "16 percent alcohol by volume" is adequately marked to identify its tax class as 5041(b)(2). A still wine marked "hard cider" and "9 percent alcohol by volume" is adequately marked to identify its tax class as 5041(b)(1). A still wine marked "raspberry hard cider" and "9 percent alcohol by volume" is adequately marked to identify its tax class as 5041(b)(1). A still wine eligible for the hard cider tax rate marked "cider" or "hard cider" and "6 percent alcohol by volume" is adequately marked to identify its tax class as 5041(b)(6). However, if a still wine that is not eligible for the hard cider tax rate is marked "cider" or "hard cider" and "6 percent alcohol by volume" it is not adequately marked to identify its tax class as 5041(b)(1), so the tax class must be shown.

(5) The net content of the container unless the net content is permanently marked on the container as provided in 27 CFR part 4.

* * * * *

Signed: July 13, 2001.

Bradley A. Buckles, Director.

Approved: October 26, 2001.

Timothy E. Skud,

Acting Deputy Assistant Secretary (Regulatory, Tariff and Trade Enforcement).

[FR Doc. 01-29361 Filed 11-23-01; 8:45 am]

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POSTAL SERVICE

39 CFR Part 111

Domestic Mail Manual Changes to Allow Co-Packaging of Automation Rate and Presorted Rate Flats

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This final rule provides a new preparation option that allows mailers to place flat-size automation rate mailpieces together in packages with flat-size Presorted rate mailpieces of the same mail class. This new option is called "co-packaging" and will be available beginning March 31, 2002 for use with First-Class Mail, Periodicals, or Standard Mail.

EFFECTIVE DATE: March 31, 2002.

FOR FURTHER INFORMATION CONTACT: Jane Stefaniak, 703-292-3548; or Cheryl Beller, 202-268-5166.

SUPPLEMENTARY INFORMATION: In this rulemaking, the Postal Service announces the adoption of a new preparation option named "co-packaging," which was initially proposed in a Federal Register notice dated August 28, 2001. The new co-packaging preparation option will allow mailers to combine flat-sized automation rate pieces and flat-sized Presorted rate pieces of the same mail class within the same package.

As information, this rule is an outgrowth of two related preparation standards the Postal Service previously adopted. The first of those two standards was adopted on January 7, 2001. It provided new preparation standards in Domestic Mail Manual (DMM) M910 that required mailers of Periodicals nonletters, and permitted mailers of First-Class Mail and Standard Mail flats, to co-sack (Periodicals and Standard Mail) or co-tray (First-Class Mail) packages of automation rate mail with packages of Presorted rate mail. The second of those two previously adopted standards was published on May 24, 2001 (66 FR 28659), and required mailers to begin co-traying First-Class Mail flats and co-sacking